THE LEGAL REGULATION OF INFANT ABANDONMENT IN SOUTH AFRICA

by

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I. ABSTRACT

South Africa has seen a surge in infant abandonment over the last decade. News reports indicate that infants are abandoned in places such as open fields, dustbins and pit latrines, which often lead to their deaths. The current South African law criminalises the act of child abandonment but provides no safe alternative for women who are desperate and have no other recourse but to abandon. A number of countries provide a safe alternative to unsafe infant abandonment for mothers who find themselves without any other option. Germany, has three alternatives to unsafe infant abandonment. Firstly, baby safes were Germany's starting point, a method not legally regulated but which was developed to save the lives of infants. Secondly, Germany attempted to legally regulate a safe method of infant relinquishment by implementing anonymous birth laws and lastly confidential birth laws were established to "perfect" safe infant relinquishment by dealing with the last challenge posed by these systems, which is assuring the child of a future right to knowledge of his or her origins. Further, all fifty states in the US have developed baby safe haven laws in an attempt to curb unsafe infant abandonment and to safeguard the lives of infants. The implementation of a safe method of infant relinquishment comes with its challenges, one such challenge is the rights of fathers. Although fathers' rights cannot be guaranteed when an infant is anonymously relinquished by the mother, the putative father registry is an existing method employed in the US to provide some form of protection to unmarried fathers. When an infant is relinquished through one of the methods mentioned, except in the instance of confidential birth, identifying information of both mother and father are not provided and this poses a further challenge in guaranteeing the child's right to knowledge of his or her origins. The infringement of the child's right to knowledge of his or her origins is weighed against the child's right to life as the ultimate aim of these safe methods of relinquishment is to preserve the life of the child. Finally, legislation is proposed for the implementation of baby safes or baby safe haven laws.

II. KEYWORDS

Abandonment

Abandoned

Babies

Children

Safe alternatives

Baby safes

Confidential birth

Anonymous birth

Baby boxes

Babyklappen

Origins

Putative fathers

Fathers' rights

Right to knowledge of one's origins

Right to life

Safe relinquishment

Baby safe havens

Baby safe haven laws

Exposure

Infanticide

Concealment of birth

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PART ONE: INTRODUCTION AND HISTORICAL OVERVIEW

CHAPTER 1: INTRODUCTION

1.1 THE CONTEXT

The motivation behind this thesis is to investigate the possibility of legal, safe solutions to unsafe infant abandonment in South Africa. South African law currently has no legal, safe option for desperate mothers who want to abandon their infants. In 2010 it was estimated that 3500 babies were abandoned, 200 of these were abandoned in Soweto and Johannesburg monthly and only 60 were found alive.[1] Further, news broadcasters are increasingly reporting on the discovery of abandoned infants in storm drains, toilets and open fields, few of which survive.[2] Academic debate has also been stimulated by the South African Law Reform

[1] Blackie (National Adoption Coalition of South Africa Fact Sheet on child abandonment research in South Africa) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014.

[2] Naidoo "Newborn found dumped in Port Shepstone" 15 March 2019 *South Coast Herald* available at https://southcoastherald.co.za/346430/newborn-found-dumped/; Goldswain "Baby boy abandoned in Black Hill" 15 March 2019 *Witbank News* available at https://witbanknews.co.za/124638/baby-boy-abandoned-black-hill/; Singh "Durban workers find dumped foetus while unblocking sewer" 15 March 2019 *Times Live* available at https://www.timeslive.co.za/news/south-africa/2019-03-15-breaking--baby-thrown-into-drain-in-durban/?fbclid=IwAR3DtkDvWUPCWPIOJFr-L0E4hyDeFMv42I-opxUQaagjMxG6DxC7L932tyc, this foetus was discovered on the 15th of March 2019; Baillache "Baby's body discovered in Doonside" 12 March 2019 *South Coast Sun* available at https://southcoastsun.co.za/137213/babys-body-discovered doonside/?fbclid=IwAR10A5eMLBhrog0dAXmLRJyzWGzdvOcEhKuvfWNaPPYt3DuyeTh4UH4TCkM#.Xleu8YWRCoQ.hootsuite, the foetus was discovered on the 12th of March; Mphelane "Newborn baby found dumped next to a passage in Meadowlands Zone 4" 11 March 2019 *Soweto Urban* available at

Commission that embarked on research investigating the possibility of establishing baby safe haven laws as implemented in the United States or by making use of the various options Germany provides for the safe relinquishment of infants.[3]

1.2 SCOPE

The focus of this research is on infant abandonment in South Africa and matters connected thereto such as the rights of fathers; the child's right to knowledge of his or her origins; and adoption and abortion as alternatives to infant abandonment. The abandonment of older children fall outside of the scope of this study and will therefore not be dealt with. Furthermore, adoption and abortion will only be dealt with in the limited sense as alternatives to infant abandonment.

1.3 RELEVANCE AND IMPORTANCE

The current South African law in the area of infant abandonment is purely reactive, in that it deals with the crime of abandonment through imprisonment or a fine but it fails to provide a safe alternative.[4] This reactive approach is illustrated by the various sections of acts. For instance, section 305(3)(*b*) of the Children's Act 38 of 2005 provides that child abandonment is an offence punishable with a fine or three years imprisonment. Further, section 113 of the

https://sowetourban.co.za/57559/newborn-baby-found-dumped-next-passage-meadowlands-zone-4/; Masilela "Body of a baby found near Birch Road" 7 March 2019 *Benoni City Times* available at https://benonicitytimes.co.za/338802/body-of-baby-found-near-birch-road/; Matsena "Newborn baby found in plastic bag, north police search for mother" 15 March 2019 *Pretoria North Rekord* available at https://rekordnorth.co.za/146791/north-newborn-baby-found-dumped-police-search-mother/.

[3] This in their issue paper 32, Project 140 published on 20 May 2017. This issue paper was prepared to start debate and elicit responses from the public on the child's right to knowledge of its origins and how baby hatches or other systems will either infringe on the child's right or alternatively ensure the child's safety.

[4] See s 113 of the General Law Amendment Act 46 of 1935; also see ss 258 and 239 of the Criminal Procedure Act 51 of 1977.

General Law Amendment Act provides for the crime of concealment of birth. Lastly, the Criminal Procedure Act provides for the offence of infanticide and for the exposure of an infant.[5] These sections punish an action in light of such action causing harm to the victim, which is the infant. Despite these provisions' purpose in serving as a deterrent against the commission of these crimes, they fail at prevention. This research is thus aimed at providing a solution to the problem of unsafe infant abandonment in South Africa. In determining the appropriate solution an investigation will be conducted into two specific jurisdictions, that of the United States of America and Germany. Firstly, all the states in the United States have adopted baby safe haven laws. The laws of each state have their own unique provisions, as well as their own shortcomings, and thus serve as an important comparative jurisdiction in determining whether a safe haven law would be suited to South Africa and the challenges which are associated therewith. Lastly, Germany has established three systems in order to curb infant abandonment namely: baby safes, anonymous birth and confidential birth laws. Thus both jurisdictions under review have unique approaches as potential solutions to the problem of unsafe infant abandonment in South Africa. It is significant that the U.S and Germany do not employ the same solutions in respect of infant abandonment, thus giving this study a wide ambit in respect of possible solutions as opposed to reviewing jurisdictions that have a similar or the same approach. This research will therefore propose an amendment to the Children's Act 38 of 2005 by the insertion of new provisions as well as the amendment of certain existing provisions.[6]

1.4 RESEARCH QUESTION AND OBJECTIVES

[5] ss 258 and 239.
[6] See Conclusion chapter 8 see para 8.3.3.9; 8.3.5 and 8.3.6.

Research question: Which methods may be implemented to regulate safe infant abandonment in South Africa?

Objectives: The objective that this research is aiming to achieve is to establish which method employed by the jurisdictions under review is the appropriate one to implement in South Africa in order to curb unsafe infant abandonment. Laws from another country cannot simply be transplanted into South African law. Thus, in seeking to achieve this objective, this thesis will deal with all the challenges generally associated with the implementation of systems which allow the safe relinquishment of infants. These challenges can be formulated as follows. Firstly, does safe relinquishment infringe upon the child's right to knowledge of his or her origins? Here, this thesis asks the question whether such a right to knowledge of one's origins exists in South African law? If so, what is it comprised of? And finally, how does this right weigh against the competing right to life? Secondly, with the safe relinquishment of an infant the rights of the unmarried father is called into question. Does he have any rights in respect of the child? If so, what are his rights? How can his rights be better safeguarded in instances of safe relinquishment?

1.5 OVERVIEW OF STRUCTURE

Chapter one introduces the topic and sets out the research objectives.

Chapter two deals with both the history of South African law generally, in particular the history of the law relating to infant abandonment – establishing a link between South African law, Roman-Dutch law and English law. The origins and development of South African law is essential in order to understand what influenced the law and how far the law has come since its inception in the realm of infant abandonment. South African common law consists of Roman-

Dutch law. Roman-Dutch law is influenced by Roman law, therefore the history of infant abandonment in Roman times is assessed by examining the Roman family. During Roman times there existed various forms of infant abandonment such as the sale of children;[7] fostering; substitution; and, lastly, exposure. Today, the exposure of infants is the main form of abandonment practiced, with infants being dumped in the open veld, drains, toilets and rubbish dumps. The sale of children in the form of child-trafficking is an ongoing issue. Fostering is no longer regarded as abandonment as children may be relinquished by their parents to the foster care system, however, this does not exclude the fact that many abandoned children are placed in foster homes. It is unknown whether substitution still occurs. During Roman times the exposure of infants was completely forbidden as a capital crime in 374 AD. Criminalising abandonment is also the approach adopted in South African law, thus the law is merely reactive by forbidding the act, but providing no safe alternative to desperate parents.[8]

Furthermore, with the merging of Roman law with Dutch law the Roman-Dutch family is also assessed. According to Roman-Dutch law the power of the *paterfamilias* was severely curtailed as "power" over children rested with both parents.[9] Fathers were not allowed to sell their children, and this it is assumed applied to mothers as well. Furthermore, Roman-Dutch law distinguished between severely deformed children, which could be exposed, and those children which bore the shape of humankind and could thus not be exposed.[10] Fostering in Roman-Dutch law was a method of adoption and not definitively a form of abandonment – this juxtaposed to the position during Roman times.[11] The creation of the crime of parricide and its

[7] Which is today known as child trafficking.
[8] See chapter 2 par 2.3.4. The existing safe alternatives of adoption and abortion as well as their shortcomings are discussed in chapter 7 para 7.5.1 and 7.5.2.
[9] See chapter 2 historical component par 2.2.
[10] See par 2.6.2 of chapter 2.
[11] See para 2.3.2 and 2.6.3 of chapter 2 historical component.

severe form of punishment— namely the sack, which was not adopted in Roman-Dutch law but saw its application in Roman law, is also dealt with.[12] Lastly, the influence of English law in the realm of infant abandonment cannot be ignored as various pieces of South African legislation were based on its English counterparts.[13] Infant abandonment and infanticide in English law and in the current South African legal framework is dealt with in chapter 7 as an introduction to the South African legal framework of infant abandonment, showing the impact of English law on South African law concerning infant abandonment.[14]

Chapter three starts the comparative study with an analysis of the laws of Germany. The German Basic law influenced the South African Constitution to a great extent. One such example is the inviolability of human dignity in both constitutions and thus it is fitting to study German law and the various methods Germany has put in place to curb unsafe infant abandonment.[15] Furthermore, Germany was one of the first countries to develop fully-fledged systems to curb unsafe infant abandonment. Germany has developed three methods to curb unsafe infant abandonment, namely, baby safes,[16] anonymous birth[17] and confidential birth laws.[18] The reasons behind infant abandonment in Germany are similar to those motivating abandonment in South Africa. A picture is painted of desperate women without any option but to abandon their infants. This chapter considers these three methods to determine their impact on German law, their effectiveness in saving the lives of newborns, and to determine whether these laws can assist in changing the current South

[12] See par 2.7 of chapter 2 historical component.
[13] See chapter 7 par 7.2.
[14] See chapter 7 par 7.2.
[15] For more on the similarities and differences between German law and South African law see Lorenzmeier "The German Constitution and international law: some remarks on the comparison with the openness of the South African Constitution" in Hugo and Möller (eds) *Transnational Impacts on Law: Perspectives from South Africa and Germany* (2017) 295-303.
[16] See chapter 3 German law par 3.2.
[17] See chapter 3 German law par 3.3.
[18] See chapter 3 German law par 3.5.

African law by providing a viable solution to the problem of unsafe infant abandonment. The manner in which the laws of Germany are compared to the laws of the US are different due to the fact that these laws are different in nature and form. The US has baby safe haven laws whereas Germany has various options available to women choosing to relinquish their infants, some of which are laws and others which are informal practices. This fact calls for a different approach to the analysis of the laws of each country.

Chapter four continues the comparative study by analysing the laws of the United States. The U.S alongside Germany, is one of the first countries to develop a fully-fledged solution to unsafe infant abandonment. Each state has its own unique baby safe haven law. Baby safe haven laws are distinct from the methods used in Germany and thus provide an essential comparative approach as one of the possible solutions to unsafe infant abandonment in South Africa. In this chapter the laws of Texas,[19] California[20] and Nebraska[21] are investigated. Texas was the first state to enact baby safe haven laws and thereby set the benchmark for the implementation of these laws in the other states. In development of these laws, the rights of putative fathers are important and are safeguarded by what is known in most states as a putative father registry. California is an example of a state without a putative father registry but one that provides protection to putative fathers through other pieces of legislation. California's approach to baby safe haven laws is therefore scrutinised in more detail. Lastly, the state of Nebraska is analysed, having initially omitted certain crucial requirements in implementing baby safe haven laws. The laws of the state of Nebraska highlights the importance of giving

[19] See chapter 4 US law par 4.2.
[20] See chapter 4 US law par 4.3.
[21] See chapter 4 US law par 4.4.

due consideration to each requirement and obtaining insight from the laws of the other states to prevent a lacuna that could have devastating consequences.[22]

Chapter five considers the first of two identified challenges in implementing a safe method of infant relinquishment. When a child is relinquished to a baby safe haven or through one of the other methods of safe relinquishment under investigation, the child will not have knowledge of who his or her biological parents are as such information is not recorded in the birth registration of the child and, even if such information is preserved elsewhere, the child has to request access to the information and such access may be refused if the mother's life is in danger.[23] The lack of knowing who his or her biological parents are may thus infringe on the child's right to knowledge of his or her origins, however despite this, these safe methods of relinquishment are utilised to protect the child's right to life in section 11 of the Constitution of the Republic of South Africa, 1996. As a first step in this chapter, an investigation is conducted to determine whether the right to knowledge of one's origins exists in terms of the South African Constitution and this is done by examining the various rights and the subject-matter which these rights encompass.[24] The following rights are examined: section 12 — "the right to freedom and security of the person";[25] section 18 — "the right to freedom of association";[26] section 10 — "the right to human dignity";[27] section 28(1)(*a*) — "the right to a name and nationality from birth";[28] section 28(1)(*b*) — "the right to family and parental care"[29] and lastly section 28(2) — the "best interests of the child".[30] Once it is determined that the right

[22] One of the devastating consequences that resulted in Nebraska was the abandonment of teenagers, this due to the legislature's failure in stipulating a maximum age limit; see par 4.4 of chapter 4.
[23] See the discussion on confidential birth in chapter 3 par 3.5.
[24] See par 5.3 of chapter 5 the Right to Knowledge of One's Origins versus the Right to Life.
[25] See par 5.3.2.1 of chapter 5.
[26] See par 5.3.2.2 of chapter 5.
[27] See par 5.3.2.3 of chapter 5.
[28] See par 5.3.2.4 of chapter 5.
[29] See par 5.3.2.5 of chapter 5.
[30] See par 5.3.2.6 of chapter 5.

to knowledge of one's origins exists, the limitation of this right by the right to life is then measured against the section 36 limitation clause.[31] It is then determined whether such "limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"[32] and whether such limitation serves a legitimate purpose. A further consideration in this chapter is the mother's right to remain anonymous in relinquishing her infant safely namely her "right to privacy" as guaranteed in section 14 of the Constitution.[33] This is an important aspect as most of the systems used to curb unsafe infant abandonment are formulated around anonymity – in fact anonymity is seen as a driving factor for the success of these laws. In this respect the limitation of the mother's right to privacy is explored in light of the section 36 limitation clause to determine whether such "limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"[34] or whether the infringement of this right is in fact overbroad, having far-reaching implications.[35] Ultimately, this chapter is aimed at determining whether the child's right to knowledge of his or her origins is inviolable or whether it indeed has its limits in the face of the "right to life" and "the right to privacy".

Chapter six addresses the second and last identified challenge in implementing a safe method of infant relinquishment. When a child is relinquished through one of the methods for safe relinquishment under investigation, very often the unmarried father has no knowledge of the child's existence or of the child's subsequent relinquishment. Furthermore, if the unmarried father knows of the child's existence he often does not consent to the child's relinquishment. Thus navigating the rights of unmarried fathers to their children proves challenging in view of

[31] See par 5.4 of chapter 5.
[32] s 36 of the Constitution of the Republic of South Africa.
[33] See par 5.4 of chapter 5.
[34] s 36 of the Constitution of the Republic of South Africa.
[35] See par 5.4.2 of chapter 5.

the conflicting rights of mothers to make decisions regarding reproduction.[36] This chapter investigates the extent of the rights of unmarried fathers in South African law by examining the position prior to[37] and after the introduction[38] of the Children's Act 38 of 2005. It also extrapolates a method employed in the United States that better safeguards fathers' rights through the use of a putative father registry.[39] The aim of this chapter is to determine whether the putative father registry is a viable solution to ensure the protection of the rights of unmarried fathers in the safe relinquishment of infants.

Chapter seven investigates the approach adopted by South African law to infant abandonment. With no safe alternative to unsafe infant abandonment, South African law criminalises the act of child abandonment.[40] This chapter commences by providing an overview of the history of infant abandonment and infanticide from Roman law to English law. Both abandonment and infanticide are dealt with because in some cases abandonment can be aimed at committing infanticide and in others abandonment is aimed at securing a better life for the newborn child. This overview provides a necessary build up to the South African law and illustrates how South Africa borrowed many of the laws pertaining to concealment of birth and other acts from its English counterpart.[41] The influence of English law is fully expounded upon to lay the groundwork for the legislation currently in force. Furthermore, a charge of concealment of birth as contained in the General Law Amendment Act 46 of 1935, section 113, is invoked if a mother attempts to conceal the body of an infant.[42] This crime does not cover the act of

[36] See s 12 of the Constitution, the right to bodily and psychological integrity in par 7.5.1 of chapter 7 where it is submitted that this right should extend to the decision of the woman to give the child up for adoption.
[37] See par 6.2 of chapter 6.
[38] See par 6.3 of chapter 6.
[39] See par 6.4 of chapter 6.
[40] See s 305(3)(*b*) of the Children's Act 38 of 2005.
[41] See par 7.2, 7.2.1 and 7.2.2 of chapter 7.
[42] See par 7.3 of chapter 7.

exposure of an infant because the elements of this crime involves "concealing" the child's body as opposed to disposing of the child in an open field, toilet or alongside the road.[43] It also does not cover abandoning a child that is still alive. However, a discussion of this crime is included because it may happen that an infant's body is so severely decomposed that it cannot be determined whether the infant was alive at the time of abandonment or not, in these instances the police will most often open a case of concealment of birth.[44] Furthermore, the crimes of exposure and infanticide in terms of the Criminal Procedure Act 51 of 1977 are discussed as possible grounds of liability when exposing an infant.

Proposing the implementation of a safe method of infant relinquishment must be considered in light of the existing alternatives currently legally recognised in terms of the South African law. There exists two such alternatives, namely, adoption[45] and abortion.[46] Both of these alternatives, and their weaknesses, that women utilise as viable alternatives are also scrutinised. Importantly, this chapter will discuss the Children's Amendment Bill of 2018 and 2019.[47] The 2019 Bill excludes some changes initially proposed by the 2018 Bill and thus both deserve contemplation. This chapter will only focus on the changes as proposed by these Bills as they pertain to abandoned and orphaned children as well as to adoption as an alternative to abandonment. Furthermore, this chapter looks beyond the laws of South Africa to Africa, where Namibia recently enacted safe haven laws.[48] The enactment of safe haven laws in Namibia is a significant move on the part of its legislature. Until recently, Namibia's laws pertaining to children has emulated the South African approach. In this regard consider the fact

[43] These methods could be seen as concealing the birth of a child, it would depend on the circumstances of the case as discussed in chapter 7 par 7.3.
[44] See par 7.3 of chapter 7.
[45] See par 7.5.1 of chapter 7.
[46] See par 7.5.2 of chapter 7.
[47] See par 7.4.2 of chapter 7.
[48] See par 7.6 of chapter 7.

that the Namibian Children's Act 33 of 1960 was inherited from South Africa.[49] Namibia, however, has now taken the lead with the implementation of safe haven laws. Upon a closer inspection of its safe haven laws the Namibian legislature's deliberate exclusion of certain crucial aspects indicate the complexity of the considerations in implementing these laws. Finally, the purpose of this chapter is to fully expound on South African law and its shortcomings in the realm of infant abandonment, highlighting the need for a safe alternative to unsafe infant abandonment through consideration of existing alternatives that prove to be inadequate and through the consideration of laws adopted in Africa enacted to deal with the same pressing issue of unsafe infant abandonment.

Chapter 8 concludes the study of safe alternatives to unsafe infant abandonment by making various recommendations in view of the findings unearthed in the above chapters.

[49] Caplan "The Draft Child Care and Protection Act Issues for Public Debate Booklet 2" no year specified 2; Caplan "Revision of Namibia's Draft Child Care and Protection Act Final Report" 2010 (Public Participation in Law Reform).

CHAPTER 2: A HISTORICAL OVERVIEW OF THE DEVELOPMENT OF SOUTH AFRICAN LAW WITH A SPECIFIC FOCUS ON THE ABANDONMENT OF INFANTS

2.1 INTRODUCTION

In order to better understand the South African law and its origins, it is important to consider the history and conception of Roman law and Roman-Dutch law. The history and conception of Roman law is also vital for an appreciation of the Roman family, discussed below, and the context in which such a family functioned. It provides insight into the circumstances under which abandonment occurred, the laws that governed such abandonment and the factors that led to such acts of abandonment. Roman law advanced over a period of twelve centuries. Roman law diminished at the same time as the diminishing of the Western Roman Empire. Roman law formed the basis of most Western European legal systems,[1] while in the South Africa's legal system, as an uncodified system, Roman law still forms one of the authoritative sources of law. The constitutional history of Rome may be divided into the following periods: the period of the Kings (753-510 BC); the period of the Republic (510-27 BC); the Principate (27 BC-284 AD) and the Dominate (284-565 AD).[2] These periods are not discussed in detail. Instead, the survival of Roman law and its eventual merging with Dutch law is explored. Finally, how Roman-Dutch law and English came to be the common law of South Africa is discussed.

Today there are two large families of legal systems in the Western World.[3] One based on English law known as the common law system and the other based on Roman law known as the civil law system.[4] The main difference between the civil and common law systems is the

[1] Tuck *A Critical Analysis of the Impact of Changing Trends in Legislation on the Management of Family Businesses* (Masters Dissertation Port Elizabeth Technikon November 2003) par 2.2.
[2] For an in-depth discussion on these periods and the history refer to Edwards *The History of South African Law An Outline* (1996 reprint 1998) 4; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 16; Thomas *Introduction to Roman Law* (1986) 1; Tellegen-Couperus *A Short History of Roman Law* (1993) 3-140.
[3] Hahlo and Kahn *The South African Legal System and its Background* (1968) 520; Thomas *Introduction to Roman Law* (1986) 1.
[4] According to Hahlo and Kahn it is important to note that not all legal systems stem from Roman law or common law e.g. Scandinavian countries, *The South African Legal System and its Background* (1968) 520.

effect that Roman law has had on these systems.[5] Roman law forms the structure of the civil system, while English law forms the structure of the common law system. It may therefore be said that South Africa has a mixed or hybrid legal system – a unique blend which embraces elements of both legal systems. Despite having a mixed or hybrid system, South Africa, like Germany and France, has a strong civil law influence and forms part of the civil law family.[6] As a result, the focus in this chapter will be on Roman law and Roman-Dutch law. English law will only be briefly referred to in this chapter. English law will, however, be discussed in more detail in chapter 7 as English law has had considerable influence on South African legislation. The importance of laying a proper foundation for an in-depth understanding of infant abandonment as it is currently dealt with in South African law is illustrated by the differences and similarities between the Roman law and the South African law governing infant abandonment, which is discussed in chapter 7. The same is true for Roman-Dutch law. The different approaches employed in regulating infant abandonment in Roman law and Roman-Dutch law is indicative of a changing society, in other words a change in morals and the norms of society from what was once acceptable to what no longer is.

The shift from a discussion of the Roman family to the Roman-Dutch family will illustrate how the law developed from ancient days to what we currently have today. One clear example of this shift is paternal power, which is unearthed in Roman legal texts and involved the father's power or the grandfather's power or his *patria potestas* as the head of the family versus parental power, which is applicable in Roman-Dutch law. In terms of Roman-Dutch law parental power, as will be illustrated below, bestowed power to both mother and father over their children.

[5] Hahlo and Kahn *The South African Legal System and its Background* (1968) 520-521; Thomas *Introduction to Roman Law* (1986) 1.
[6] Hahlo and Kahn *The South African Legal System and its Background* (1968) 520-521.

The abandonment of children in Roman law was commonly known as exposure or *expositio*.[7] The exposure of children was seen as an alternative to infanticide with the aim of that child being picked up and reared by another.[8] Infanticide is defined as "the killing of an infant within the first year of its life" and neonaticide is "the crime of killing an infant within the first twenty-four hours of life".[9] This however, was not the only form of abandonment exercised in Roman times; the other forms include substitution, oblation, fostering and the sale of children. The first foundling wheels were introduced by Pope Innocent III in Italy in 1198.[10] Foundling wheels were the ancient form of what we have today and what is more commonly known as a baby safe. Infant abandonment was common during this period, pregnancies outside of marriage resulted in religious and social condemnation and isolation of the mother and her family.[11] Poverty also caused a mother to believe that giving her child to the state would provide the child with a better home.[12] Driven by necessity the Italians realised that they needed a way to protect these abandoned infants while simultaneously protecting the identity of the mothers.[13] As a result a device was installed on the outside of the walls of churches or convents that went by various names such as the "la ruota dei proietti" — the wheel of the abandoned; "ruota dei trovatelli" — the foundling wheel and "ruota degli esposti" — the wheel of the exposed.[14] The wheel was a circular structure similar to a rotating door. The cylinder would rotate until the opening was inside the building then a bell would be rung alerting the person inside.[15] No one

[7] Boswell "Expositio and Oblatio: The Abandonment of Children and the Ancient and Medieval Family" 89 1 1984 *The American Historical Review* 10-33.
[8] Boswell "Expositio and Oblatio: The Abandonment of Children and the Ancient and Medieval Family" 89 1 1984 *The American Historical Review* 10-33.
[9] Putkonen, Weizmann-Henelius, Collander, Santtila, Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 12 January 2007 *Archives of Women's Mental Health* 15; For a look at the German law's historical approach to infanticide see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 46-47.
[10] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 2-3.
[11] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 2-3.
[12] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 2-3.
[13] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 2-3.
[14] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 2-3.
[15] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 2-3.

inside the building was able to see the person abandoning the child.[16] Foundling hospitals and orphanages also took on this practice. Foundlings were named by either by the receiver, the priest baptising the child or by the civil official registering the event.[17] Both the given first and last names of foundlings were recorded unlike with ordinary birth or baptism where only the first name was recorded because the child took the surname of the father automatically.[18] When foundling wheels were just developed the foundlings were given last names with a stigma of being abandoned or exposed, names such as *esposto* (exposed) or *abandonnata* (abandoned) but in the 1700's laws were passed prohibiting this practice.[19] The Italians distinguished between orphans and foundlings, with orphans, the parents could be identified but with foundlings, they could not.[20] The reasons listed for women making use of these foundling wheels include but are not limited to illegitimate children born from prostitutes; adulterers; sexual violence against women as well as sexual violence within the family.[21] The foundling establishment opened in Mainz, Germany in 1811 under the Napoleonic Decree of 1811 and was closed again in 1815.[22] Within only three years after its introduction, 516 children were exposed.[23] In the nine years following the closure of the foundling wheels only seven children

[16] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 2-3.
[17] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 4; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe*' (2009) 58.
[18] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 4; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 58.
[19] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 4; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 58.
[20] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 5; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 58.
[21] Giasolli *Early Italian History and the Birth of the Giasolli Name* (2016) 5; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 58.
[22] Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 56-57.
[23] Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 56-57.

were found.[24] For comparison in the years prior to the establishment of the foundling wheels (1799 to 1811) only 30 children were found.[25] Although this called the purposefulness of the foundling wheels in preventing child mortality into question, infanticide is a possible alternative method women may have used when foundling wheels were no longer available and that could explain the very few children found abandoned in the subsequent years.[26] The value in mentioning the German foundling system will become clearer in the chapters to follow where this thesis explores the German legal position in respect of baby safes, anonymous birth as well as confidential birth laws.

In Roman-Dutch law we see the act of abandonment, whether or not it leads to the death of the infant, being treated as the crime of parricide. South African legislation specifically regulates the crime of concealment of birth in terms of the General Law Amendment Act 46 of 1935, section 113 and infanticide through the Criminal Procedure Act 51 of 1977, section 239 which relates to the killing of a newly born infant.[27] The method in which Roman law and Roman-Dutch law developed and the manner in which the abandonment of infants was regulated at a period when laws developed as and when the need arose, is essential in gaining a proper perspective. This perspective not only assists in the understanding of current South African law but also in the development of the current law in order to better protect abandoned infants.

[24] Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 56-57.
[25] Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 56-57.
[26] Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 56-57.
[27] Judicial Matters Amendment Act 66 of 2008 amended s 113 of the General Law Amendment Act 45 of 1935. The crime of concealment of birth is defined as the killing of a newly born infant; Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous than previously thought — neonaticides in Finland 1980-2000" 12 January 2007 *Archives of Women's Mental Health* 15; according to Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 the risk of a child being killed by its mother within the first 24 hours of its birth is highest if the mother is young, at 524; more on these pieces of legislation is discussed in chapter 7.

2.2 ROMAN LAW, ITS HISTORY AND RECEPTION

2.2.1 The pre-reception of Roman law

This process had commenced early in the fifth century and was a primitive and irregular reception.[28] The extension of Roman law also saw its decline.[29] The reception of Roman law firstly means "the adoption of Roman law as a system in the German Reich and its feudal dependencies, of which Holland was one, during the fifteenth and sixteenth centuries" and secondly it also refers to the history of Roman law in Western Europe.[30] Southern France and Spain accepted The *Lex Romana Visigothorum or Breviarium* of A.D. 506 (based on the Codex Theodosianus of A.D. 438 and the post-Theodosian novels), as the main source of common law.[31] This compilation only contained those portions of Roman law that were relevant to the needs of the sixth century.[32] The infiltration of Roman law did not stop there as many of the provisions of the *Breviarium* found their way into the early *stadrechten* of Germany and the Netherlands and as a result, the *Breviarium* played a key role in preserving Roman law north of the Alps.[33] From the seventh to the tenth century Roman law was "becoming more and more vulgarized and barbarized".[34] Clerics and monks used Roman law and many of the early writings of the Church.[35] The eleventh century saw the return to Roman law in the wake of trade revival.[36] The scientific study of Roman texts resumed in northern Italy and southern

[28] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 33.
[29] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 13.
[30] Hahlo and Kahn *The South African Legal System and its Background* (1968) 485.
[31] *Lex Romana Visigothorum or Breviarium* of A.D. 506 (based on the Codex Theodosianus of A.D. 438); Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 196.
[32] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 14; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 197.
[33] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 14; Hahlo and Kahn *The South African Legal System and its Background* (1968) 486.
[34] Jones in *Historical Introduction to the Theory of Law* (1940) 12; Hahlo and Kahn *The South African Legal System and its Background* (1968) 487.
[35] Hahlo and Kahn *The South African Legal System and its Background* (1968) 487; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 196-199.
[36] Hahlo and Kahn *The South African Legal System and its Background* (1968) 487; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 196-199.

France as interest mounted in the books of Justinian.[37] Various law schools studying Roman law were established.[38] Feudalism resulted in hundreds of feudal principalities each one with its own law. No uniform legal system therefore existed and a multiplicity of jurisdictions became common practice. This in turn resulted in the fragmentary adoption of Roman law into the native customary law.[39]

During the late eleventh century to the middle of the thirteenth century scholars known as the glossators,[40] exhumed the *Corpus Juris* of Justinian and "restored the heritage of Roman law to Europe".[41] The task of the glossators was to understand and explain the *Corpus Iuris*, to make it clearer and more systematic.[42] The glossators were criticised for not fully considering their own laws, they dealt with the *Corpus Juris* as if it were the only authoritative text.[43] Despite such criticism they managed to restore Roman law in its purist form to the Western World.[44] The law became a science through the glossators.[45] The post glossators were responsible for linking the *Corpus Juris* with the law of their time — Germanic customary law and canon law, *stad en landrechten* and contemporary needs and conditions.[46] These post-

[37] Hahlo and Kahn *The South African Legal System and its Background* (1968) 487; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 246.
[38] Hahlo and Kahn *The South African Legal System and its Background* (1968) 488; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 246.
[39] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 15, 33; Hahlo and Kahn *The South African Legal System and its Background* (1968) 489; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 258-260.
[40] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 17; Hahlo and Kahn *The South African Legal System and its Background* (1968) 489-492; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 50.
[41] Hahlo and Kahn *The South African Legal System and its Background* (1968) 489; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 51.
[42] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 17; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 50-51.
[43] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 19; Hahlo and Kahn *The South African Legal System and its Background* (1968) 491; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 249.
[44] Hahlo and Kahn *The South African Legal System and its Background* (1968) 492; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 51.
[45] For more information on the work of the glossators see Edwards *The History of South African Law: An Outline* (1996) 17-18; also see Hahlo and Kahn *The South African Legal System and its Background* (1968) 489-492.
[46] Hahlo and Kahn *The South African Legal System and its Background* (1968) 493; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 251.

glossators were also not immune from criticism and were criticised by the humanists for their verbosity.[47] Their aim was to build a rational system of law. They used Roman law to establish new ideas and thereby made it useable by society.[48]

Humanism was a response to academicism.[49] The humanists refused the work of the glossators and the post-glossators and looked to the original texts.[50] They referred to the *Corpus Juris* as a historical document.[51] Their goal was to go back to the original context.[52] They considered that the study of law should be according to a rational plan and not fragmentary and in this, they preferred the classical law of Roman times to the law of Justinian.[53]

2.2.2 The early reception of Roman law

There was an increasing influence of Roman doctrine during the thirteenth and fourteenth centuries. Roman law was applied more frequently in academic debates and the version of the *Corpus Iuris* as simplified by the humanists[54] was used to replace the other sources of Roman

[47] Hahlo and Kahn *The South African Legal System and its Background* (1968) 495; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 56.
[48] Hahlo and Kahn *The South African Legal System and its Background* (1968) 493; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 56; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 252.
[49] Hahlo and Kahn *The South African Legal System and its Background* (1968) 496; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 56; according to Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 247, 277; Scholasticism was based on logic and its chief assumption was that truth was discoverable if pursued in terms of the norms of formal logic.
[50] Hahlo and Kahn *The South African Legal System and its Background* (1968) 496; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 56; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 277.
[51] Hahlo and Kahn *The South African Legal System and its Background* (1968) 496; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 56; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 277.
[52] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 46; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 56; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 277.
[53] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 47; Hahlo and Kahn *The South African Legal System and its Background* (1968) 497-498; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 56; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 277.
[54] According to Edwards the humanists' insistence on systematisation was largely responsible for this improvement see Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 49; Hahlo and Kahn *The South African Legal System and its Background* (1968) 499.

law such as the *Breviarium*.[55] In the late thirteenth century the spread of Roman law was thanks to the *officiales* and the *legistae*.[56] *Officiales* handled the administrative matters of the church and also had judicial functions.[57] They guarded against Roman law interference by including renunciation clauses into legal documents as a precaution against possible hindrance by a Roman law remedy.[58] The *legistae* were trained jurists who helped the development of Roman law along by the drafting of legal documents.[59] The church was dominant over the peasant class in Friesland and this resulted in the reception of Roman law there.[60] Therefore, the clergy, in their written collections of Frisian customary law, used Romanist terminology and systematisation and applied Romano-canonical procedure when acting as judges.[61] Thus, a total reception took place in Friesland which was completed by the end of the fifteenth century.[62]

The pre-reception and early reception of Roman law illustrates the history and survival of Roman law throughout the ages. Roman law developed from the customs of a small village state.[63] It is a picture of law "on the move" and under the influence of various factors.[64] In this same way, the Roman family developed and the rights of the *paterfamilias* under the influence of various factors, evolved from complete power to the same powers as the modern day law provides. An overview of the Roman family unit is given below.

[55] Hahlo and Kahn *The South African Legal System and its Background* (1968) 499.
[56] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 37; Hahlo and Kahn *The South African Legal System and its Background* (1968) 484-517.
[57] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 37; Hahlo and Kahn *The South African Legal System and its Background* (1968) 484-517.
[58] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 37; Hahlo and Kahn *The South African Legal System and its Background* (1968) 484-517.
[59] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 38; Hahlo and Kahn *The South African Legal System and its Background* (1968) 484-517.
[60] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 38; Hahlo and Kahn *The South African Legal System and its Background* (1968) 484-517.
[61] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 38; Hahlo and Kahn *The South African Legal System and its Background* (1968) 484-517.
[62] Hahlo and Kahn *The South African Legal System and its Background* (1968) 515.
[63] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 4.
[64] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 5.

2.3 THE ROMAN FAMILY

Roman family law derives from statutes and the Edict of the urban praetor.[65] However, most of Roman family law is as a result of what was created by the jurists themselves as they were never limited by these sources.[66] Originally Rome was a small agricultural community and the *gens* (clan) consisting of a number of related families was the most important grouping within a community.[67] In time, the importance of the small group referred to as the *familia* grew.[68] Family ties played an important role.[69] According to Gardner, there were almost infinite possibilities of differences in the make-up of individual family groups, and these could undergo considerable alterations, from the point of view of an individual, within his or her lifetime.[70] Ideally, however, the *familia,* which provided the configuration for Roman law consisted of an adult male Roman, the *paterfamilias*, lawfully married, with children born to him and his wife or wives together with the children of his sons, from generation to generation.[71] The term *familia* included daughters-in-law, grandchildren, slaves and all those who were subject to the power of the *paterfamilias*.[72] In terms of Roman law the age of puberty for boys was fourteen and for girls was twelve, however this did not mean he or she was free from the *paterfamilias'*

[65] Frier and McGinn *A Casebook on Roman Family Law* (2004) vi preface; Rawson *The Family in Ancient Rome* (1986) 1-57.
[66] Frier and McGinn *A Casebook on Roman Family Law* (2004) vi; Rawson *The Family in Ancient Rome* (1986) 1-57.
[67] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 5; Kaser *Roman Private Law* (1984) 76.
[68] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 5; Frier and McGinn *A Casebook on Roman Family Law* (2004) 18; Rawson *The Family in Ancient Rome* (1986) 8.
[69] Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 87; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189.
[70] Gardner *Family and Familia in Roman Law and Life* (1998) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19.
[71] Gardner *Family and Familia in Roman Law and Life* (1998) 1; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) (digitally printed version 2007) 101-102; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19.
[72] According to Rawson *The Family in Ancient Rome* (1986) 1-57 he was the oldest surviving male ascendant; Muirhead *Historical Introduction to the Private Law of Rome* (1916) 22-23; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) (digitally printed version 2007) 101; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19-20.

control.[73] The authority or legal power[74] held by the *paterfamilias* was referred to as the *patria potestas*;[75] women however, were under the *manus* of their husbands.[76] Within Roman law, the authority of the *paterfamilias* was absolute,[77] he was virtually autonomous.[78] Children in Rome were treated like highly valued slaves; their freedom was in the hands of the head of the household.[79] The *paterfamilias* was "king" and "priest" of his household, he had the final say,[80] he also had "the right of life and death (*jus vitae necisque*)".[81] A child's misconduct could result

[73] Wessels *History of the Roman-Dutch Law* (1908 reprint 2015) 418.
[74] Gardner *Family and Familia in Roman Law and Life* (1998) 2; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189.
[75] Kaser *Roman Private Law* (1984) 75; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189; The position in Germany is of particular importance. In the next chapter I will deal with Germany's baby safes, anonymous birth procedures, and confidential birth laws. The historical position in Germany is dealt with in Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe*' (2009) 25-26, the Institute of the Germanic kin is important in the context of childhood. Behind it lies an instrument which had similar effects to the Roman *patria potestas*. It was characterised by the father's right to determine the fate of his newborn child by accepting the child, exposing or killing the child. This right was not unlimited and was extinguished the moment the newborn acquired a right to life. Lustration was a kind of baptism whereby the child was accepted into the family and into the legal community. It usually took place on the eighth day after birth. If death occurred after lustration or food intake (after the mother gives the child milk or honey) it was regarded as relation murder. In Germanic law this was regarded as a particularly serious crime, which had to be specifically condemned and completely unjustifiable and unpardonable. As with the Romans, the right of the Germans to expose and kill their own offspring was exclusively the right of the father, since the mother herself was under the Munt of her husband. She could not determine the life or death of her child. On the whole, however the Germans were rarely exposed.
[76] This is if *potestas* is interpreted in its narrower sense. Amos *The History and Principles of the Civil Law of Rome: An Aid to the Study of Scientific and Comparative Juris prudence* (1989) 258; Reference made to the wife being "in manu" meant that she fell under the legal control of her husband, she had no property of her own and lacked independent power of legal action; Gardner *Family and Familia in Roman Law and Life* (1998) 6; A wife could also marry *sine manus* and remain under the power of her father see fn 79.
[77] See Saller "Familia, domus and the Roman Conception of Family" 38 1984 *Phoenix* 336-355 where the *domus* which represented the wealth and power of the father is discussed in detail; Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 9 87.
[78] Gardner *Family and Familia in Roman Law and Life* (1998) 2.
[79] Boswell *The Kindness of Strangers* (1988) 119; Muirhead *Historical Introduction to the Private Law of Rome* (1916) 26.
[80] "The *patria potestas* included all rights of custody or ownership over the body, name, sale, trade, labour, education, emancipation and religion; the power of corporal punishment, exposure of new-born babies, chastisement and originally death"; see Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 241; Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 88.
[81] This power had some restrictions during the infancy of the child, Muirhead *Historical Introduction to the Private Law of Rome* (1916) 27; Kaser *Roman Private Law* (1984) 305; Borkowski and Du Plessis *Text Book on Roman Law* (2015) 114; Wilkinson "Classical Approaches to Population and Family Planning" Vol. 4 No. 3 Sep 1978 *Population and Development Review* 439-455, 449; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 118; Kathryn and Moseley "The History of Infanticide in Western Society" 1986 1 *ISSUE IN L. & MED.* 345, 349; Boswell "Expositio and oblatio: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (1998) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19; *Muirhead Historical Introduction to the Private Law of Rome* (1916) 26.

in banishment, slavery or death.[82] The father also had the power to sell his children as slaves or he could choose to abandon them, however these powers were only exercised in exceptional circumstances and after approval from a council of the family.[83] The *paterfamilias* ran his household without interference from the Roman Empire and his authority was respected by the state.[84] However, the *patria potestas* of the father was long obsolete before it was declared void by Constantine in 318/319 AD and it only continued to exist as a symbol of the father's power and not as an actual practice in the Roman society.[85] It was only later that the Law of the Twelve Tables allowed the father the right to put his severely deformed infant to death through drowning.[86]

The *patria potestas* continued for as long as the head of the family was alive and the father could claim the return of any persons who were unlawfully removed from his possession.[87] Upon the death of the *paterfamilias*, only the immediate children of the *pater* became *sui juris* since grandchildren simply passed into the *potestas* of their own fathers if living.[88] Later law punished the father for abandoning a child by removing his power.[89] Initially, the power of the head of the family only fell on legitimate children and all other descendants to the exclusion of

[82] Muirhead *Historical Introduction to the Private Law of Rome* (1916) 27.
[83] Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 88; Boswell *The Kindness of Strangers* (1988) 59; according to Frier and McGinn *A Casebook on Roman Family Law* (2004) 191 this council of the family also referred to as a *consilium* was an informal council consisting of relatives and close friends whose functions seem to have been to delay action until cooler heads prevailed.
[84] Schulz *Classical Roman Law* (1951) 150; Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 87-88.
[85] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 J.C.9.17.1 (1973); Frier and McGinn *A Casebook on Roman Family Law* (2004) 191.
[86] *The Law of the Twelve Tables* Table IV Law 3, available at http://www.constitution.org/sps/sps01_1.htm accessed 2016-10-19; Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 254; Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 345.
[87] Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 241; such persons were referred to as *alieni iuris,* Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 88.
[88] "*Sui juris*" means independent or of his own right**,** Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 259; This clearly shows that grandfathers held the *patria potestas* over their families.
[89] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 6 J.C.1.4.13 (1973); Scott, *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 J.C.11.40.6 (1973); Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 260.

illegitimate children.[90] However, later through legitimation, illegitimate children could be brought under the *patria potestas*.[91] Generally, legitimate children belonged to their father's family and illegitimate children belonged to their mother's family.[92] The Roman family unit could be disrupted[93] although adult children remained under the paternal power as long as their *paterfamilias* lived,[94] they could disrupt the family unit through *emancipatio*,[95] *adoptio*[96] and daughters falling under the *manus* of their husbands.[97]

The latter years of the Roman Empire saw the abolishment of the *ius vitae necisque* and by AD 374, the killing of an infant was considered murder.[98] The first legislative restriction on the father's rights is contained in the Constitution of Valentinian and Valens[99], which limited the

[90] Kaser *Roman Private Law* (1984) 75.
[91] Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 242. Constantine enacted the first law that decreed that children born outside of marriage can become legitimate by the subsequent marriage of their parents.
[92] In other words illegitimate children did not bare the father's family name, Rawson *The Family in Ancient Rome* (1986) 8.
[93] Gardner *Family and Familia in Roman Law and Life* (1998) 4.
[94] If the *paterfamilias* died his sons and daughters and grandchildren (by a pre-deceased son) instantly became their own masters (*sui juris*) whereas grandchildren by a surviving son simply passed from the potestas of their grandfather to that of their father, Muirhead *Historical Introduction to the Private Law of Rome* (1916) 30.
[95] For more information on emancipation which falls outside of the scope of this study please see Gardner *Family and Familia in Roman Law and Life* (1998); through release of paternal power Kaser *Roman Private Law* (1984) 75; One of the principal ways of terminating the *patria potestas* originated in the Law of the Twelve Tables which provided that a father who sold his son three times lost his power over him Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 95; Both sons and daughters on emancipation ceased to be of the family of the *paterfamilias* who had emancipated them Muirhead *Historical Introduction to the Private Law of Rome* (1916) 22.
[96] Passing into another family as children *in potestate*. Kaser *Roman Private* (1984) 75; A person who was an *alieni iuris* (under the full or partial legal authority of another) passed from the *patria potestas* of one *paterfamilias* to that of another, Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 93.
[97] A daughter who married passed into the *patria potestas* of her husband or if he was himself subject to *patria potestas* she passed into the *patria potestas* of his *paterfamilias* Spiro *Law of Parent and Child* (1985) 1; The passage of the wife into her husband's hand or power if the husband was his own *paterfamilias.* Muirhead *Historical Introduction to the Private Law of Rome* (1916) 25; for further information on these specific legal acts see Kaser *Roman Private Law* (1984) 75; see Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 95; also see Muirhead *Historical Introduction to the Private Law of Rome* (1916) 22; A woman could be married in *manus* (where she came under her husband's authority) or *sine manus* (which was the most common form of marriage where the wife did not come under the husband's complete authority) for more information on the forms of marriage that brought women under the *manus* of their husbands, see Rawson *The Family in Ancient Rome* (1986) 19-22.
[98] Hadrian punished a father who had killed a son with deportation. Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.9.5 (1985); Buckland *A Textbook of Roman Law From Augustus to Justinian* (1963) (digitally printed version 2007) 103.
[99] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 1973 J.C.8.52.2.

extent of domestic chastisement and provided that those who exceeded the bounds were to be handed over to public justice.[100] As a result, by the time of Justinian a father was only allowed to exercise reasonable chastisement.[101] Constantine ruled it to be parricide[102] to kill a son.[103] It was also decided to take the life of a grown-up child (unless it was a daughter caught in the act of adultery) amounted to murder.[104]

Old Roman practices involved rigid discipline in the household and that discipline was made effective through the power awarded to the head of the household.[105] As time went on the nature of the father's absolute power was modified.[106] The power originally held by the father, which enabled him to put the child to death versus the restriction of that power by defining these acts as murder, illustrates the curtailment of his power as time progressed.

2.4 THE ABANDONMENT OF INFANTS

The Roman government formulated laws to enforce public obligations to the state or to facilitate civil litigation regarding status, property or damages.[107] No legislation existed that required Romans to keep any of the children born to them and parents who abandoned their

[100] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol.6 1973 J.C.8.52.2.
[101] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol.7 1973 J.C.9.15.1; Pharr *The Theodosian Code* Th. 9.13.1. (2012).
[102] Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.9.1 (1985). No mention is made of a father who kills his children in this section, it only refers to the mother who kills her children. Eventually in D.48.9.5 reference to a father who kills his son for adultery is mentioned; Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 1973 J.C.9.17.1 this section refers to "anyone" who kills their son or daughter; Parricide was interpreted mostly to refer to the killing of one's father although it was interpreted more widely by Constantine to include the killing of children; Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1241 [On the Pompeian Law on Parricides Bk. 48, tit. 9].
[103] Thomas *The Institutes of Justinian* (1975) 27.
[104] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 J.C.9.17.1 (1973); Radin "The exposure of infants in Roman law and practice" 1925 *The Classical Journal* 339; Muirhead *Historical Introduction to the Private Law of Rome* (1916) 377; Frier and McGinn *A Casebook on Roman Family Law* (2004) 191; Here no mention is made of sons caught in the act of adultery with the father's wife, however it is presumed that sons are excluded as they fall within the group of protected persons that form part of the restrictive requirements in this instance, Frier and McGinn *A Casebook on Roman Family Law* (2004) 112.
[105] Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 255-256.
[106] Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) 255-256.
[107] Boswell *The Kindness of Strangers* (1988) 58.

children were initially not held accountable for exposing their children.[108] Originally, the *patria potestas* entitled the *paterfamilias*, to decide whether he should rear the child, presented to him.[109] This was initially the case where a child was welcomed into the family of the *paterfamilias* at an official ceremony held straight after the birth; the infant was placed at the father's feet and if he took the infant into his arms that child was considered a member of his family.[110] This was no longer the practice during the Roman Empire and was replaced with the father acknowledging the child as his own or otherwise exposing the child.[111] Eventually, the exposure of an infant was preferred as opposed to killing or abandoning the infant, which was only allowed to be done by the *paterfamilias* shortly after birth.[112] Furthermore, according to Bennett a father was allowed to *expose* that child at once only after showing it to his neighbours.[113] If the father failed to abide by these restrictions, he would forfeit half of his estate and submit the other half to undefined penalties.[114] As the law developed, fathers' rights over their children were more restricted, this is particularly evident when the exposure of a newborn child was totally forbidden by the constitution of Valentinian of 374 AD.[115] It stated the following:

[108] Boswell *The Kindness of Strangers* (1988) 58.
[109] Muirhead *Historical Introduction to the Private Law of Rome* (1916) 26; Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* in 347 states that there is no documented case in which a father refused to raise his child. He therefore finds this practice to be purely formal.
[110] Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) digitally printed version 2007 102-103; Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 180; Dixon *The Roman Family* (1992) 101.
[111] Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) (digitally printed version 2007) 102-103; Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 180.
[112] *Lex duodecim tabularum* was compiled as the first systematic codification of the law in 451 to 450 BC, Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 6; according to Dionysius, Romulus placed a limitation on the father's power that while he might expose a new-born infant that was grievously deformed he was not allowed to kill it although Cicero attributed this limitation to the Twelve Tables, Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 343; Muirhead *Historical Introduction to the Private Law of Rome* (1916) 109; Frier and McGinn *A Casebook on Roman Family Law* (2004) 194.
[113] Muirhead *Historical Introduction to the Private Law of Rome* (1916) 26; Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 343; Frier and McGinn *A Casebook on Roman Family Law* (2004) 194.
[114] Muirhead *Historical Introduction to the Private Law of Rome* (1916) 26; Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 343.
[115] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 6. J.C.8.52.2.

> "[A]nyone who thinks that he can abandon his child shall be subjected to the penalty prescribed by law and no right is given to these masters or patrons to recover children who have been abandoned…for no one can say that a child whom he has left to perish belongs to him."

If a father was faced with extreme poverty and unable to support the child, he could sell his child as a slave.[116] Thus, despite being prohibited, abandonment continued due to poverty. However, no evidence exists to show that the poor were more likely to expose their children than the wealthy.[117] Further, there is no clear evidence that girls were abandoned more than boys, although the fact that daughters could not pass on their family name and were more unlikely to follow their fathers' example than boys could have served as a motivation.[118] According to Boswell, family planning was a motivation to abandonment[119] they abandoned children because, in their view, they had no choice and had no education or access to the modes of prenatal family limitation that were available to those in the West.[120] Many Roman families held the view that in order to control their family size they had to do so after birth.[121] This view was challenged by Riddle who stated that there was evidence of the existence of oral contraceptives and abortifacients in Roman antiquity.[122] However, the effectiveness of these oral contraceptives and abortifacients is disputed.[123]

[116] Scott *Corpus Juris Civilis* The Civil Law Justinian/Scott, The Code of Justinian Vol. 7 J.C.4.43.2 (1973); Muirhead *Historical Introduction to the Private Law of Rome* (1916) 377; Dixon *The Roman Family* (1992) 122.
[117] Boswell *The Kindness of Strangers* (1988) 104.
[118] Rawson *The Family in Ancient Rome* (1986) 18; According to Boswell laws regulating the sale or abandonment of children evince no special concern with girls *The Kindness of Strangers* (1988) 101.
[119] Boswell *The Kindness of Strangers* (1988) 106; According to Dixon *The Roman Family* (1992) 122 exposure was a general means of family limitation. The poor were often incapable of supporting more children and apparently aborted them or more likely exposed them at birth.
[120] Boswell *The Kindness of Strangers* (1988) 106.
[121] "A desire to limit the family to two or three children and the dread or reality of adverse circumstances were common reasons for abandonment" in Boswell *The Kindness of Strangers* (1988) 109, 136; Although this is a contested opinion in Harris "Child-exposure in the Roman empire" 1994 *The Journal of Roman Studies* 2 who mentions Riddle's arguments in favour of the presence and effectiveness of oral contraceptives and abortifacients in Roman antiquity Riddle *Contraception and Abortion from the Ancient World to the Renaissance* (1994); Also see Dixon *The Roman Family* (1992) 122 where mention is made of the fact that contraceptives were known although its efficacy was questioned among the Romans.
[122] Although this is a contested opinion in Harris "Child-exposure in the Roman empire" 1994 *The Journal of Roman Studies* 2 who mentions Riddle's arguments in favour of the presence and effectiveness of oral contraceptives and abortifacients in Roman antiquity Riddle *Contraception and Abortion from the Ancient World to the Renaissance* (1994).
[123] For more on this see Riddle *Contraception and Abortion from the Ancient World to the Renaissance* (1994).

Another common reason for abandonment was incestuous relationships that were restricted legally and as a result, some would try to abandon children born from such relationships as quickly as possible.[124] Exposed children were mainly made slaves.[125] According to Boswell, little evidence exists of infanticide in Rome and the constant references to abandonment[126] make it reasonable to infer that the unwanted babies would be abandoned rather than killed.[127] This opinion is to a certain extent contested by Rawson who affirms that infanticide was indeed practiced, as it has been in most known societies at every cultural level.[128] Boswell goes on to state that the small size of Roman families without contraception and infanticide and no dramatically diminishing population was indicative of the fact that people were resorting to abandonment.[129] Dixon, on the other hand, attributes the diminishing population to the decision by the Romans not to have children mainly due to economic reasons.[130]

In the sixth century, a new policy was developed declaring that all abandoned children are free.[131] No foundlings could be raised in any form of slavery.[132] This policy dealt with the personal status of foundlings as well as the fact that natal parents could not reclaim abandoned children and reduce them to slavery as opposed to declaring abandonment illegal. In the same way, those who found abandoned children could not use them as slaves. The effect of this law

[124] Dixon *The Roman Family* (1992) 91; Boswell *The Kindness of Strangers* (1988) 107.
[125] Dixon *The Roman Family* (1992) 128, 129; Boswell *The Kindness of Strangers* (1988) 125.
[126] In plays and literary works, Radin "The exposure of Infants in Roman law and practice" 1925 *The Classical Journal* 343.
[127] Boswell *The Kindness of Strangers* (1988) 133, abandonment was preferable to killing children 136.
[128] Rawson *The Family in Ancient Rome* (1986) 172.
[129] Boswell *The Kindness of Strangers* (1988) 133 draws an inference that a majority of women who had reared more than one child had also abandoned at least one and that the rate of abandonment was 20% to 40% of urban children at Rome during the first three centuries of the Christian era.
[130] Dixon *The Roman Family* (1992) 119-122; Her view is supported by Rawson *The Family in Ancient Rome* (1986) 170 who says that there was a certain reluctance or inability to reproduce which is implied by governments of the early empire who had to encourage people to bear and rear children.
[131] Not just those born free and reduced to unfree status by finders see Scott, *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 J.C.18.52(51).3 (1973); Boswell *The Kindness of Strangers* (1988) 191.
[132] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 J.C.18.52(51).3 (1973); Boswell *The Kindness of Strangers* (1988) 191.

was that all abandoned children were now regarded as free.[133] Practically, whether this law could be enforced was doubtful since no one could prove that a slave was indeed a child that was abandoned.

The *paterfamilias*' exercise of authority went from being unrestrained in the earliest times, although this was not regularly exercised fully, to the gradual imposition of limits in the Empire. Eventually during the time of Justinian the *paterfamilias* had not much more legal power than a modern head of a family and in later years both parents were expected to give children moral training and oversee their formal education.[134] The various methods employed in the abandonment of children include the outright sale of infants; fostering; oblation; the substitution of infants and the most common form was the exposing of infants in a public place.[135] Each of these methods is dealt with separately below.

2.4.1 The sale of children

In the ancient world, selling a person meant making that person a slave and therefore abandoning him or her to a life of slavery.[136] The Law of the Twelve Tables provides that if a father sells his son three times, the latter shall be free from paternal authority.[137] This was often practiced by men giving their children to their creditors for security for their loans and in other instances; it was regarded as a form of emancipation.[138] This practice continued even though

[133] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 J.C.18.52(51).3 (1973); Boswell *The Kindness of Strangers* (1988) 190, 191.
[134] Thomas *The Institutes of Justinian* (1975) 27; Dixon *The Roman Family* (1992) 122, 131 the right of the father that vested him with absolute control over his children only gave way gradually to the changing ideology of Christianity.
[135] Boswell *The Kindness of Strangers* (1988) 110 and 111.
[136] Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) (digitally printed version 2007) 103; Boswell *The Kindness of Strangers* (1988) 67; Dixon *The Roman Family* (1992) 91.
[137] *The Law of the Twelve Tables* Table IV Law 2 http://www.constitution.org/sps/sps01_1.htm accessed on 2016-11-09.
[138] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.4.43.1 and J.C.4.10.12 (1973); Muirhead *Historical Introduction to the Private Law of Rome* (1916) 109.

creditors who accepted these children were expelled.[139] The power to sell children into real slavery was obsolete before the Empire and the power to sell into civil bondage to creditors was obsolete before Gaius.[140] Despite it being declared obsolete, parents were still doing it.

Eventually the father's right of sale was restricted to young children and permitted only when he was in great poverty and unable to maintain them.[141] The sale of children was a form of abandonment exercised by Roman parents.[142] Finally, in 294 AD, Diocletian declared that parents could not pawn, sell or give away their own offspring nor could children be forced into slavery to pay their parents' debts.[143] Thus if a father sold his children due to extreme poverty, the sale was valid if he owed the purchaser a service and the purchaser could declare the child free.[144] If the child was freed by the purchaser then the purchaser had to compensate the father for the "loss".[145] The aim was not to prohibit the actual act of abandonment but it was rather aimed at preventing the wrongful enslavement of free citizens and their offspring.[146]

Despite Diocletian's declaration according to a Theban law, poor parents could still sell their children to the lowest bidder and the child would become the slave of the purchaser.[147] The

[139] Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 2 D.20.3.5. (1985).
[140] Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) (digitally printed version 2007) 103.
[141] Pharr *The Theodosian Code* Th.3.3.1 (2012); Muirhead *Historical Introduction to the Private Law of Rome* (1916) 313; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) (digitally printed version 2007) 103.
[142] According to the Law of the Twelve Tables a father lost paternal authority over his son after the third sale. The reasons for sale of children stayed the same to the High Middle ages. Children were sold to maintain a manageable family size and to produce extra income. Issues of property and inheritance were the primary economic motivation for abandonment, Boswell *The Kindness of Strangers* (1988) 256.
[143] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.4.10.12 (1973); Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.4.43.1 (1973); Boswell *The Kindness of Strangers* (1988) 67.
[144] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 (1973).
[145] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.4.43.1, 4.43.2. (1973).
[146] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.7.16.1 (1973); Boswell *The Kindness of Strangers* (1988) 67.
[147] Wilson *Aelian Historical Miscellany* (Varia Historia) (1997) 2.7; Boswell *The Kindness of Strangers* (1988) 68.

Jurist Paulus insisted that a child retained his or her freeborn status despite being sold.[148] In practice, these radical powers were only exercised in exceptional circumstances and only after a council of the family approved it.[149] Throughout the third century, the law intervened in cases of abandonment only to preserve their lineage or paternal authority.[150] Regardless of the restrictions the sale of freeborn children continued.

2.4.2 The relinquishment of children to fostering

This was regarded as a legal form of abandonment commonly practiced under Roman law. It was defined as infants given to someone else for rearing or nourishing. This was done at a small fee set by law and fostering was only permitted for children younger than ten.[151] Fostering was seen as the proper way of fulfilling parental duties because the child was brought up in a household specifically appointed by his biological family.[152]

2.4.3 Substitution

Substitution was the act of replacing one child with another or the wife ordering her servant to source a child because she is barren. It was banned in Rome and its prevention was controlled by many laws. These laws specified all the procedures that had to be followed if a woman alleged that she was pregnant after her husband had died (to have an heir to his estate) or denied that she was pregnant after divorce (due to bitterness or anger).[153] Some of these procedures

[148] Boswell *The Kindness of Strangers* (1988) 69; According to Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 88 fn 45 if a Roman father sold, pledged or otherwise disposed of a child in Rome, he/she did not become slaves but were considered to be in *mancipio* in respect of the purchaser, pledgee or person to whom they had been alienated.
[149] Van Zyl *History and Principles of Roman Private Law* (1989 reprint 1991) 88.
[150] Boswell *The Kindness of Strangers* (1988) 69.
[151] The small fee was one *solidus* per year until the child reached the age of ten, Provisions of a Visigothic code (Germanic Code), also note children older than ten were not allowed to be given to someone else. LV 4.4.3; Boswell *The Kindness of Strangers* (1988) 206; An example of fostering may be found in Rawson *The Family in Ancient Rome* (1986) 172.
[152] Boswell *The Kindness of Strangers* (1988) 208.
[153] Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 2 D.25.4.1.10. (1985).

included that she had to be examined by midwives; the woman had to notify the parties interested or their representatives thirty days before she expected to give birth, so that they could send people to observe the delivery if they wished; the room where the woman was to give birth only had one entrance, if there were more they had to be boarded over on either side; whenever anyone entered the room they had to be searched by the three freeborn men and three freeborn women with two companions each that guard the door, this was to prevent anyone from bringing an infant into the room.[154] After birth, the child was examined twice a month for three months, once a month for six months, and every other month after that.[155] All of the above was in an effort to prevent substitution. Children could not be substituted to preserve the family name, however only affected members of a family could claim and prescription did not apply.[156] The relevant punishment for substitution was the death penalty.[157] This is illustrative of the unfavourable view held towards the practice of substitution. Substitution was a form of abandonment because it entailed the provision of a child to another who could not have children of her own and in effect amounted to one woman abandoning her own offspring to another woman in secret.

2.4.4 The exposure of infants

When a parent exposed their infant the aim was not always to preserve the life of the infant. Children who were born alive but whose biological parents did not want to care for them or who could not care for them might be exposed either to die or with the aim of being rescued.[158]

[154] For more information on all the requirements see Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 2 D.25.4.1.10. (1985).
[155] Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 2 D.25.4.1.10. (1985).
[156] Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.10.19.1; D.48.10.30.1 (1985); Boswell *The Kindness of Strangers* (1988) 74 and 114.
[157] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol. 7 J.C.9.22.1. (1973).
[158] What the intention of the parent was i.e. to kill the infant or to have the infant rescued was dependent on whether the infant was exposed in a public place such as doorsteps, temples, cross roads or in a more secluded place like a rubbish-heap or in a forest. Rawson *The Family in Ancient Rome* (1986) 172.

Exposed infants would be abandoned with some token or sign[159] that would enable the family to identify the child and be reconciled with the child later. Exposure consisted of various acts such as just leaving the infant in a certain place, transporting the infant to a particular venue or the exposer handing the child over to someone waiting to claim the child.[160] Dixon provides that exposure was more commonly practiced by the poor who exposed children they were unable to rear.[161] Constantine declared that those who willingly and knowingly cast newborn slaves or children out of their homes could not bring any action to recover them.[162] This had the effect of declaring that abandoned children no longer had any connection to their biological parents, that the power of the head of the household was now unenforceable and that those who reared the abandoned children were given superior and absolute rights to them.[163] The motivation behind this edict was to create legal certainty with regard to who holds right to these children[164] because the abandonment of children happened frequently in Rome.[165] However, Emperor Justinian abolished this declaration by Constantine by declaring that newborn children could in all cases be claimed back.[166] Thereafter the exposure of infants was directly

[159] Boswell *The Kindness of Strangers* (1988) 111-126. A token could be a ring, ribbon, painting, article of clothing or the material with which a baby was wrapped. It served as a sentimental gesture of leaving something from the family with the child; Rawson *The Family in Ancient Rome* (1986) 172.
[160] Boswell *The Kindness of Strangers* (1988) 122; According to Boswell some people paid to nurse abandoned children they intended to keep as slaves 112; According to Rawson *The Family in Ancient Rome* (1986) 172 exposure was not illegal but the law was increasingly unsympathetic to it.
[161] Dixon *The Roman Family* (1992) 109.
[162] Pharr *The Theodosian Code* Th.5.9.1 (2012).
[163] Boswell *The Kindness of Strangers* (1988) 71; The opposite is argued by Rawson in *Marriage, Divorce, and Children in Ancient Rome* (1991) 27 who says even if a father exposed a child at birth, this did not automatically absolve him of the responsibilities of paternity or the right of *patria potestas*, it merely rendered it dormant. I am of the opinion that this was indeed the case but only after Justinian declared that newborn children could in all cases be claimed back, prior to that, parental rights were indeed terminated due to the decree by Constantine [Pharr *The Theodosian Code* Th.5.9.1 (2012)].
[164] Boswell *The Kindness of Strangers* (1988) 72.
[165] Boswell *The Kindness of Strangers* (1988) 79, 88, 99, 100.
[166] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.4.43.2 (1973); Thomas *The Institutes of Justinian* (1975) 15.

forbidden by a constitution of Valentinian in 374 AD.[167] An exposer could be found guilty of murder.[168]

The father's right to put to death those that fell under his power could undoubtedly have extended to the exposure of an infant as there was a great probability of death upon exposure but, mothers as well as strangers could also be the perpetrators of this crime. Prior to Valentinian, Romulus made exposure possible if the child was born deformed, this was in accordance with the law of the Twelve Tables, but was only possible after the father had shown the child to at least five neighbours all of whom had to agree that exposure was appropriate in that instance.[169]

Exposure of a newborn child did not fall within the scope of prohibitions under the Law of the Twelve Tables although it later became the preferred choice as opposed to the killing of a severely deformed child.[170] The act of exposure remained tolerated and, according to Justinian, an abandoned child could be brought up as a freeborn person.[171] This was a reversal by an earlier decision of Constantine that ruled exposed freeborn children could be retained and

[167] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.8.52.2 (1973); Radin "The exposure of infants in Roman law and practice" 1925 *The Classical Journal* 339; Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 2 D.25.3.4 (1985); Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 351.

[168] Paul does not specifically speak about the father but refers generally to "a person", which includes a mother, nurse or stranger. Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 2 D.25.3.4 (1985); Radin "The exposure of infants in Roman law and practice" 1925 *The Classical Journal* 340.

[169] Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 343.

[170] Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 343.

[171] Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.8.51 (1973); Kaser *Roman Private Law* (1984) 306; Thomas *The Institutes of Justinian* (1975) 27 although the exposure of infants was forbidden in the fourth century, it would appear to have continued since Justinian himself legislated on the matter; Prior to Justinian's enactment such foundlings started off as having slave status although free born children could recover their free born status later if they could provide proof of it. Rawson *The Family in Ancient Rome* (1986) 172; *Corpus Iuris Canonici* Decret Greg Lib V Tit XI cap I; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; In practice this was very difficult to regulate prior to Justinian's enactment. Such foundlings started off as having slave status although free born children could recover their free born status later if they could provide proof of it. Providing proof of freeborn status was the real challenge, see Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.8.51 (1973); Kaser *Roman Private Law* (1984) 306.

reared as slaves and there was no avenue of recovery of the child by his or her parents.[172] Justinian eventually declared that the exposure of infants was a capital crime in 374 AD.[173] If a child was abandoned by a slave without the master's knowledge that child could be reclaimed at a third of the price.[174] However, this was not the case if the master was aware of the exposure of the child.[175]

All these forms of abandonment were carried out equally by husband and wife and sometimes by strangers who were following instructions. Roman law paints a picture of children being treated very harshly and their protection only later being realised. As time went on an increase in the legal regulation of abandonment occurred, sometimes with one-step back and another forward, as in the instance of Constantine and Justinian, regarding the freeborn status of children sold into slavery. Nevertheless, one thing is certain: the Romans were not afraid to adjust legislation according to the needs of their time. Notably, adoption is not included in the list of forms of abandonment because it concerned property entitlement as opposed to the getting rid of a family member.[176] Furthermore, oblation — the gifting of a child to a monastery or nunnery, is also not included as one of the forms of abandonment although some authors state that it was tantamount to child selling and thus a form of abandonment.[177] This theory was subsequently disproved and oblation was regarded as a gift from a family to God; it was viewed as a "deeply spiritual sacrifice" performed more generally by wealthy families instead of being a solution for the poor and desperate.[178] The effect that Roman law had on the Dutch law and family life will be discussed below.

[172] Pharr *The Theodosian Code* Th.5.9.1, 5.9.2. (2012).
[173] Scott *Corpus Juris Civilis, The Civil Law Justinian/Scott, The Code of Justinian* I-IX Vol. 6 J.C.8.52.2.
[174] Boswell *The Kindness of Strangers* (1988) 206.
[175] Boswell *The Kindness of Strangers* (1988) 206.
[176] Gardner *Family and Familia in Roman Law and Life* (1998) 116.
[177] De Jong "In Samuel's image: child oblation in the early medieval West" 1996 *Monograph* 5-14; Brubaker and Tougher *Approaches to the Byzantine Family* (2016) 119-120.
[178] De Jong "In Samuel's image: child oblation in the early medieval West" 1996 *Monograph* 5-14; Brubaker and Tougher *Approaches to the Byzantine Family* (2016) 119-120.

2.5 THE BIRTH OF ROMAN-DUTCH LAW[179]

Roman-Dutch law was the result of the union between the law of Holland and Roman law.[180] Where local laws and customs failed to provide an answer the judges of the prince's high court in Holland referred to Roman law.[181] By the first half of the fifteenth century, they began to reconstruct the customary law in the light of the "written laws".[182] Bottelgier's *Somme Ruyraele*, which acquired much from Roman law, had significant impact in Holland.[183] The reception in Holland can be summarised as follows: In the thirteenth century, the first traces of Roman law influences were found in the use of Latin phrases in charters and the grant of privileges to towns.[184] The fourteenth century saw the slow infiltration of Roman law, which was promoted by the lawyers.[185] The fifteenth century saw rapid infiltration, which was encouraged by the new territorial high courts, but underwent major resistance by the lower judiciary.[186] Eventually a broad reception of Roman law occurred in the sixteenth century.[187] The first official footprint of Roman law was evident in 1462 in section 42 of the Instructions of the *Hof van Holland*, which provided that in the event of a default of appearance by a party the proceedings should be conducted in accordance with Roman law.[188] Van Leeuwen wrote

[179] Hahlo and Kahn *The South African Legal System and its Background* (1968) 514; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[180] Hahlo and Kahn *The South African Legal System and its Background* (1968) 514; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[181] Hahlo and Kahn *The South African Legal System and its Background* (1968) 515; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[182] Hahlo and Kahn *The South African Legal System and its Background* (1968) 515; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[183] Hahlo and Kahn *The South African Legal System and its Background* (1968) 515; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[184] Wessels *History of Roman-Dutch Law* (1908 reprint 2015) 124; Gilissen "Romeins Recht en Inheems Gewwonterecht in de Zuidelijke Nederlanden" 18 1955 *THRHR* 97, 138; Hahlo and Kahn *The South African Legal System and its Background* (1968) 515; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[185] Hahlo and Kahn *The South African Legal System and its Background* (1968) 515; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[186] Hahlo and Kahn *The South African Legal System and its Background* (1968) 515; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 43-45.
[187] Hahlo and Kahn *The South African Legal System and its Background* (1968) 515.
[188] Instructions of the *Hof van Holland* s 42; Hahlo and Kahn *The South African Legal System and its Background* (1968) 516.

that Roman law must be referred to wherever customs or indigenous statutes are silent.[189] This was decided not because Roman law was superior, as alluded to by various authors, but according to Edwards, because it was regarded as valid law.[190] Roman law was applied only where it was relevant and appropriate.[191] A clause referring to Roman law as the subsidiary common-law system was entered into the codified customs of the Netherlandish territories' towns and country districts, despite it playing a greater role.[192] Justinian's texts were received in their glossed form.[193] The first treatise written on Roman-Dutch law was by Hugo De Groot (1583-1645) who wrote *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, to Roman law he added customary law as found in cases and other sources.[194]

2.6 THE FAMILY UNDER ROMAN-DUTCH LAW INFLUENCE

Now that it is clear how Roman-Dutch law came to be, the Roman-Dutch family will be discussed. In Roman-Dutch law, the age of majority was twenty-five years old.[195] Both mother and father were vested with parental authority over these minors[196] however, the mother's position was inferior to that of the father.[197] No form of *patria potestas* in terms of Roman law

[189] Hahlo and Kahn *The South African Legal System and its Background* (1968) 516; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 58.
[190] Hahlo and Kahn *The South African Legal System and its Background* (1968) 516 fn 91; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 38-43.
[191] Hahlo and Kahn *The South African Legal System and its Background* (1968) 516; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 38-43.
[192] Hahlo and Kahn *The South African Legal System and its Background* (1968) 516; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 38-43.
[193] Hahlo and Kahn *The South African Legal System and its Background* (1968) 516; Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 38-43.
[194] Edwards *The History of South African Law: An Outline* (1996) 53.
[195] Voet Vol. 1 4.4.1; Wessels *History of Roman-Dutch Law* (1908 reprint 2015) 419–420 for an in-depth discussion of this aspect.
[196] Parents were often referred to as the natural guardians of their children. For further information on guardians see Wessels *History of the Roman Dutch Law* (1908 reprint 2015) 417; Spiro *Law of Parent and Child* (1985) 4.
[197] Van der Linden *Institutes of Holland* (1904) 1.4.1 (Van der Linden); Kruger *Judicial Interference with Parental Authority: A Comparative Analysis of Child Protection Measures* (LLD Thesis University of South Africa 2009) 48; Spiro *Law of Parent and Child* (1985) 3.

existed in Roman-Dutch law.[198] The term used was parental power or *ouerlike gesag* or *mag*.[199] This parental power consisted of the following: parents had to raise and educate their children;[200] reasonable discipline was permitted in the case of improper behavior and upon divorce the court would determine under whose care the children were to remain;[201] parents were to administer the property of their children;[202] no marriage could be contracted by children without the consent of their parents;[203] children were represented in court by their parents;[204] and parents were, after their death, entitled to provide for the guardianship of their children.[205] Parents were further also under a duty to support their children even after reaching the age of majority, provided they were unable to support themselves.[206] The contrary also applied, if parents were unable to support themselves an obligation rested on the children after reaching the age of majority to look after their parents.[207] The one duty owed by children to their parents was obedience even after attaining the age of majority.[208]

Parental power could be acquired in three ways: Firstly, by legitimation of illegitimate children; secondly, by subsequent marriage of the parents; but not by the adoption of the child

[198] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.6.3 (Grotius); Van Leeuwen *Het Roomsch Hollandsch Recht* (HRHR) 1.13.1; Van der Linden *Institutes of Holland* (1904) 1.4.1 (Van der Linden); Wessels *History of Roman-Dutch Law* (1908 reprint 2015) 417; Spiro *Law of Parent and Child* (1985) 3.
[199] Van Leeuwen *HRHR* 1.13.1 (power of parents); Van der Linden *Institutes of Holland* (1904) 1.4.1 (power of parents over their children); Spiro *Law of Parent and Child* (1985) 3.
[200] Voet Vol. 4 25.3.4; The mother must maintain the children if the father is unsure that he is the biological father or if he is needy or dead Voet Vol. 4 25.3.6; Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.6.1; Van der Linden *Institutes of Holland* (1904) 1.4.1.
[201] Van Leeuwen *HRHR* 1.15.6; Spiro *Law of Parent and Child* (1985) 4.
[202] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.6.1; Van der Linden *Institutes of Holland* (1904) 1.4.1; Spiro *Law of Parent and Child* (1985) 4.
[203] Van Leeuwen *HRHR* 1.13.1; Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.5.14 -1.5.16 provides that the consent of both parents was required; Voet Vol. 4 23.4.13; Van der Linden *Institutes of Holland* (1904) 1.3.2, 1.4.1; Spiro *Law of Parent and Child* (1985) 4.
[204] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.6.1; Spiro *Law of Parent and Child* (1985) 4.
[205] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.3.8, 1.7.9; Voet Vol. 4 27.2.1; Van der Linden *Institutes of Holland* (1904) 1.4.1.
[206] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.6.1, 1.6.4.
[207] Voet Vol. 4 25.3.8; Spiro *Law of Parent and Child* (1985) 5.
[208] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.6.1; 1.6.4.

as adoption did not exist in Roman-Dutch law.[209] Lastly, on the death of one parent, the surviving spouse retained their parental power over the child and this was also the case where the mother survived the father.[210] The surviving spouse was assisted by a testamentary or by an appointed guardian.[211] Similar to the approach in Roman law an illegitimate child was in the power of the mother since "eene moeder maakt geen bastaard".[212] Parental power ceased when the child got married or when the child attained the age of majority,[213] unlike the position in Roman law where marriage and attaining the age of majority did not necessarily result in the termination of *paternal* power. According to Roman-Dutch law, parental power also ceased by an order of court; upon the death of the parents; when the son was emancipated; entering a public office or priesthood; or the placing of the father under curatorship.[214] Unlike Roman law, Roman-Dutch law states that the grandson is only subject to the power of his father and not his grandfather; this is the case even after the father dies.[215]

2.7 THE ABANDONMENT OF INFANTS IN TERMS OF ROMAN-DUTCH LAW

2.7.1 Substitution of offspring

The substitution of offspring is differentiated from common and pupillary substitution. Common and pupillary substitution according to Roman-Dutch law is the institution of a second or further heir to take the place of an earlier heir who fails.[216] In terms of Roman-Dutch

[209] Van der Linden *Institutes of Holland* (1904) 1.4.2. Van der Linden states that in the case of children born from incest or adultery, legitimation would seldom be granted except for cogent reasons; In Voet Vol. 1 1.6.4 adoption is included, but Voet here is speaking of how paternal power was *generally* acquired in Roman law not in Roman-Dutch law; Spiro *Law of Parent and Child* (1985) 62.
[210] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.7.8; Van der Linden *Institutes of Holland* (1904) 1.4.1; Wessels *History of Roman-Dutch Law* (1908 reprint 2015) 422.
[211] Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.7.8, 1.7.10.
[212] "As she begets no bastard" Van der Linden *Institutes of Holland* (1904) 1.4.2; Spiro *Law of Parent and Child* (1985) 3; Lee *An Introduction to Roman-Dutch Law* (1931) 34.
[213] Voet Vol. 1 1.7.9-1.7.15; Van der Linden *Institutes of Holland* (1904) 1.4.3; Grotius *Inleiding tot de Hollandsche Rechtsgeleerdtheyt* (1952) 1.6.4; Spiro *Law of Parent and Child* (1985) 3.
[214] Voet Vol. 1 1.7.9-1.7.15; Lee *An Introduction to Roman-Dutch Law* (1931) 42.
[215] Voet Vol. 1 1.6.3.
[216] Voet Vol. 4 28.6.1.

law, one who substitutes offspring will be charged with the crime of falsity.[217] The substitution of offspring involved obtaining a child illegally and happened when parties suffered from infertility.[218] The terms of the praetor's edict to prevent substitution in Roman-Dutch law were the same as those applied in Roman law. No substitution was allowed to continue the family line or to have heirs to inherit.[219] All of the formalities that had to be followed by women in confirming or denying pregnancy remained the same as under Roman law.[220] Voet did point out that these formalities should be exercised in accordance with the local customs of the country concerned.[221] If the woman neglected some of these formalities intentionally, the child was denied the possession of goods.[222] However, if the woman neglected some of these formalities through the lack of knowledge, "artlessness" or "country manners" the child was not denied the possession of the goods.[223]

2.7.2 Exposure

Voet states that the effects of paternal power were done away with by the customs of most nations, but if certain aspects of it remained, those were shared with the mother.[224] According to Roman law, fathers were allowed to kill deformed children[225] in accordance with the law of The Twelve Tables. However, later Romans preferred to expose severely deformed offspring rather than to kill them.[226] In Roman-Dutch law Voet states that a deformity, with the offspring still resembling the shape of a human and which amounts to either increased or diminished

[217] Voet Vol. 7 48.10.6.
[218] Voet Vol. 7 48.10.6.
[219] Voet Vol. 4 25.4.3.
[220] see 2.4.3 substitution.
[221] Voet Vol. 4 25.4.3.
[222] Voet Vol. 4 25.4.4.
[223] Voet Vol. 4 25.4.4.
[224] Voet Vol. 1 1.6.3; *Calitz v Calitz* 1939 A.D. 56, 61.
[225] *The Law of the Twelve Tables* Table IV Law 3, available at http://www.constitution.org/sps/sps01_1.htm accessed 2016-12-06.
[226] Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 343.

function or number of limbs, will not disqualify him or her as being considered a child.[227] However, the situation is different if the infant does not resemble a human being. According to Voet, "such creatures had not therefore to be reared, but rather to be strangled on the public authorisation of the magistrates".[228] These children were regarded as monsters and believed to be without a human soul.[229] They could not be indiscriminately killed, otherwise mothers would be charged with homicide.[230] Mothers had to wait a few years to establish whether these deformed offspring were supplied with intelligence before being able to kill them.[231]

Unwanted children born because of incestuous or adulterous relationships were abandoned by Roman citizens by exposure and a father had no duty to maintain any illegitimate children. This position was very different from that adopted by Roman-Dutch law where a father was responsible to maintain not only lawful children (sons and daughters) but also those born outside of marriage or because of incest or adultery.[232] Thus, a father under Roman-Dutch law could not choose to expose these children because of their status. In sum, Van der Linden stated that if a child was exposed (*te vondeling leggen*) and such exposure was aimed at killing the child, then it was regarded as murder and the death penalty was applied.[233] In instances where

[227] Voet Vol. 1 1.6.13.
[228] Voet Vol. 1 1.6.13; Grotius *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (1939) 1 3 5; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185; Voet *Commentarius ad Pandectas* 1 6 13 (see Gane *The Selective Voet Being the Commentary on the Pandects* (1955)); Moorman agreed with Voet see Moorman 2 3 1, 2 6 9, 2 6 14, 2 6 16 and 2 6 19; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[229] Voet Vol. 1 1.6.13; Killing anyone with a human soul was regarded as murder see Matthaeus 48 5 6; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[230] Voet Vol. 1 1.6.13; Also see Van der Linden *Koopmans Handboek* (1806) 2 5 2; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[231] Voet Vol. 1 1.6.13.
[232] This was based on the principle that those who have done no wrong seem to deserve no punishment, Voet 25.3.5.
[233] Van der Linden 2 5 12; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185; These acts were covered under the crime of crimen expositionis infantis; Burchell and Milton *Principles of Criminal Law* (2007) 673; Hunt and Milton *South African Criminal Law and Procedure* (1990) 366; Snyman *Criminal Law* (2014) 444; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.

the aim of exposure was not to kill the child (*onvoorzigtige doodslag*) then less severe punishment would apply.[234]

2.7.3 The relinquishment of children to fostering

Roman-Dutch law, similar to Roman law, did not recognise adoption.[235] This does not mean that adoption did not occur; when it occurred, the persons adopted were not regarded as children but rather as fosterlings.[236] These fosterlings did not inherit from the adoptive father.[237] From this, it may be deduced that fostering was also not a recognised practice although it could be stated that the Roman-Dutch method of adoption being *de facto* rather than *de jure* adoption,[238] resembled an informal method of fostering. It cannot definitively be stated that giving a child up to foster care was a form of child abandonment.

2.7.4 Sale

According to Roman law, a father could sell his child when faced with extreme poverty.[239] Roman-Dutch law, however, did not have the same approach, as a father could not sell his child in the case of impoverishment.[240]

In most respects, Roman-Dutch law evolved from the primitive Roman law to establish what was regarded in society as more morally acceptable. Roman-Dutch law used the Roman law as a framework or point of departure, sometimes departing a great deal from the Roman law, such as prohibiting fathers from selling their children when facing extreme poverty and other times

[234] Van der Linden 2 5 12-13; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[235] Voet Vol. 1 1.7.7; Ferreira *The Origin of Adoption in South Africa* 13 2007 *Fundamina* 2-10, 4.
[236] Voet Vol. 1 1.7.7.
[237] Spiro "Adoption and the conflict of laws" 16 1983 *CILSA* 242.
[238] Benet *The Character of Adoption* (1976) 22.
[239] Pharr *The Theodosian Code* Th.3.3.1. (2012).
[240] Voet Vol. 1 1.6.3.

returning to the more primitive application of Roman law such as with the killing of deformed children.

2.8 AN ANALYSIS OF THE CRIME OF PARRICIDE FROM ROMAN LAW TO ROMAN-DUTCH LAW

Exposure may sometimes lead to infanticide, which was defined as the killing of an infant committed with wrongful intent by the parent.[241] The Pompeian Law, passed by *Pompey the Great*, initially limited parricide to the killing of one's father[242] but this meaning was extended the killing of a father, or mother, grandfather or grandmother and children.[243] At this juncture, it is important to revisit the fact that according to Roman law the *paterfamilias* could kill his children as part of the exercise of his *patria potestas*.[244] However, according to the later Pompeian law, it was certain that a father who had a child in his power falls foul of the law if he killed it.[245] More specifically the crime of killing one's children was referred to as infanticide (if such child was an infant) which formed part of the crime of parricide (which is more broadly defined as the homicide of other blood relations).[246] Four requirements had to be satisfied for criminal liability for infanticide. The requirements were as follows: firstly, the birth had taken

[241] This definition is as extracted from the Pompeian law on parricides. All of the provisions regarding infanticide as a form of parricide also apply to the father regardless of whether he was a part of the plan of the mother or acted independently. It also applied to any other accomplices as stated in Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.9.6, D.48.9.1 (1985); Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1295; Appendix to tit. 9, a 111. [Tit. 7 a 9 in the new Code].

[242] According to Cornelian Law, parricide was restricted to the killing of one's parents. This was extended by Pompeian Law to include the killing of all those relatives by blood or by marriage as listed in Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.9.1 (1985); Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1243.

[243] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1241, 1243. [Bk. 48 tit. 9]; Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.9.6. (1985).

[244] *The Law of the Twelve Tables* Table IV Law 1, available at http://www.constitution.org/sps/sps01_1.htm accessed 2016-12-09.

[245] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1247.

[246] Van der Linden *Institutes of Holland* (1904) 2.5.12.

place; secondly, the child was born alive; thirdly, the child was killed intentionally or negligently[247] and fourthly the crime was committed.[248]

Only three of the more challenging requirements will be briefly discussed.[249] The second requirement provides the child must have been born alive. This requirement proved challenging, as it was not always certain whether the child was born alive.[250] In this regard, a lung test was conducted. The lungs of the infant were placed on water and if they sank then the child was not born alive, as it was taken as a sure sign that the child had not breathed, however if the lungs floated this was taken as evidence of life and breathing, although it was not deemed as conclusive evidence of life.[251] Other signs of life such as the crying of the infant and the events as told by the mother were also be taken into account. In respect of the third requirement, Van der Keessel states that it is doubtful whether a distinction can be made between direct and indirect intent to kill a newly born infant. The vulnerability of an infant determines that any form of harm carries with it an intention to kill that infant.[252] The fourth and final requirement does not only refer to *commissio* but also to *omissio*.[253] If a mother failed to administer the necessary care, without which the infant could not survive, then she was held to have satisfied the fourth requirement for infanticide and the ordinary capital penalty was applicable.[254]

[247] The crime of infanticide can be committed intentionally or negligently by not washing the child and allowing it to be suffocated by its impurities; by withholding nourishment from it or by not tying up its navel string; Van der Linden *Institutes of Holland* (1904) 2.5.12.
[248] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1255 [Bk. 48 tit. 9]; Van der Linden *Institutes of Holland* (1904) 2.5.12.
[249] The first requirement is not discussed as it was easy to prove that actual birth had taken place and required no expert knowledge.
[250] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1257 [Bk. 48 tit. 9].
[251] The lung test had to be applied as it provided some evidence which, however, was stronger in favour of the innocence of the accused woman and weaker against her. Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1257 [Bk. 48 tit. 9]; Van der Linden *Institutes of Holland* (1904) 2.5.12.
[252] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1259 [Bk. 48 tit. 9].
[253] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1259 [Bk. 48 tit. 9].
[254] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1259 [Bk. 48 tit. 9].

Clandestine birth was defined as a mother, knowing that she was bearing a child, gave birth to the child in secret[255] far removed from all witnesses and subsequently caused the death of the infant. It was the act of giving birth in secret. Clandestine birth formed part of the crime of infanticide and was therefore dealt with in the same way.[256] Concealment of pregnancy, which was regarded as distinct from clandestine birth, was only punished if the woman withheld the information of the pregnancy from those who were entitled to know, it could then be said that such a woman was concealing the pregnancy to commit infanticide.[257] The penalty for completed infanticide was hanging,[258] however if the infant survived the life of the mother was spared.[259] If it could not be established with certainty that the infant lived after birth the punishment that was more accepted was imprisonment or expulsion, either jointly or separately, for a period not exceeding ten years.[260] By these definitions, the distinction between clandestine birth and concealment of pregnancy is not clear and it is assumed that concealment of pregnancy occurred even though it was discovered that the woman was pregnant prior to giving birth but in her actions she indicated an intention to conceal such fact with the end purpose of committing infanticide. On the contrary, in clandestine birth, the woman managed to hide the fact of the pregnancy and gave birth in secret and this too would ultimately lead to the commission of infanticide. In other words, with concealment of pregnancy, the woman's attempts to conceal the pregnancy failed but with clandestine birth, her plans succeeded and

[255] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1259; Appendix to tit. 9, a 106 [Tit. 7 a 4 in the new code].
[256] A mother who, without any intent to commit infanticide, conceals her pregnancy and the pains of parturition and who by design gives birth in a solitary place, but a place which is dangerous to the life of the infant, for instance in some field under open skies, shall whether the infant died or lives be punished with imprisonment or banishment jointly or separately not exceeding one year. Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1297; a 112. [Tit. 7, a 10 in the new Code].
[257] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1265 [Bk. 48 tit. 9].
[258] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1295; Appendix to tit. 9 a 108 [Tit. 7 a 6 in the new code].
[259] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1295; Appendix to tit. 9 a 109 [Tit. 7 a 7 in the new code].
[260] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1295; Appendix to tit. 9 a 110 [Tit. 7 a 8 in the new code].

she gave birth in secret and committed infanticide. According to South African law, the crime of concealment of birth contained in section 113 of the General Law Amendment Act 46 of 1935[261] refers to the disposing of the body of a newborn, whether or not it can be proved that the newborn had died at the time of disposal. This requires disposal[262] and excludes the woman who merely "attempted" to conceal her pregnancy and the birth. As a result, concealment of birth in terms of South African law leans more toward the ancient Roman-Dutch law definition of clandestine birth where the actual birth was in secret and resulted in the commission of infanticide.[263]

Continuing with the crime of parricide, the law of the Twelve Tables made express provision for parricide, and it was the first to introduce the punishment of the sack. This form of punishment was initially only prescribed for those who killed a parent, however, as mentioned above, *Pompey the Great* extended the punishment of the sack to all those who had intentionally killed either a parent or children or one of the other blood relations specified.[264] Punishment of the sack referred to the perpetrator being placed in a sack sewn up along with a poultry cock, an ape, a viper and a dog.[265] This sack would be cast into the sea or river, depending on the geographical location.[266] It largely fell into disuse if the sea was not very close by, the perpetrator would then be sent to fight with the beasts or the perpetrator was burned alive.[267]

[261] As amended by the Judicial Matters Amendment Act 66 of 2008.

[262] *S v Molefe* (A240/12) [2012] ZAGPPHC 52; 2012 2 SACR 574 (GNP) (3 April 2012).

[263] This is discussed in detail in chapter 7.

[264] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1243 [Bk. 48 tit. 9]; Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.9.9. (1985).

[265] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1271 [Bk. 48 tit. 9]; Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 D.48.9.9. (1985).

[266] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1271 [Bk. 48 tit. 9].

[267] Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1273. [Bk. 48 tit. 9].

The punishment of the sack was used among Romans and was regarded as a very severe form of punishment for parricides according to Roman-Dutch law.[268] As a result, in Roman-Dutch law, this form of punishment was not implemented but intentional parricides were punished by being "broken on the wheel", which was where the perpetrator's bones were broken and where there was no direct intent to kill, parricides were punished by hanging or decapitation.[269] Female infanticides were strangled and if the death was caused negligently, they were subjected to imprisonment.[270] The specification of different punishment for female infanticides, indicates that this crime was not only committed by females. Various factors played a role in determining the punishment in instances of abortion (which was also regarded as a form of infanticide)[271] these factors included the age of the foetus; whether it showed any signs of life and whether the mother acted under the influence of others.[272] Usually the punishment administered was corporal punishment.[273] In the instance of exposure of a newborn (included under the crime of infanticide) if the intention was to cause the infant's death then the punishment was death; but if the intention was not apparent then a special punishment such as imprisonment, corporal punishment or expulsion was inflicted.[274]

Parricide as examined from Roman to Roman-Dutch law illustrates that infanticide is not a new phenomenon and has occurred throughout the centuries, the only aspect that has changed is the

[268] Van der Linden *Institutes of Holland* (1904) 2.5.13.
[269] Van der Linden *Institutes of Holland* (1904) 2.5.13.
[270] Van der Linden *Institutes of Holland* (1904) 2.5.13; Leeuwen 4 34 3; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[271] Infanticide could also be committed upon those who are still in their mother's womb, if by violence or by procuring abortion the birth of the child is prevented. Van der Linden *Institutes of Holland* (1904) 2.5.12 and 2.5.13.
[272] Van der Linden *Institutes of Holland* (1904) 2.5.13.
[273] Van der Linden *Institutes of Holland* (1904) 2.5.13.
[274] Van der Linden *Institutes of Holland* (1904) 2.5.13; see also Van der Linden *Institutes of Holland* (1806) 2.5.12 which deals with murder where there was intention to cause the death of the newborn and homicide by negligence where there was no such intention.

punishment prescribed for this offence.[275] In terms of South African law, the punishment prescribed for concealment of birth is the imposition of a fine or to imprisonment, not exceeding three years and for infanticide a mother could be charged with murder.[276]

To understand the current South African law governing the abandonment of children properly, it is necessary to establish how South African law was formed. This is done by first understanding the introduction of Roman-Dutch law to South Africa and secondly by understanding the infiltration of English law. These two legal systems form the basis of South African common law.

2.9 THE DEVELOPMENT OF SOUTH AFRICAN COMMON LAW

2.9.1 The reception of Roman-Dutch law at the Cape

In 1652 Jan van Riebeeck, an employee of the *Vereenigde Geoctroyeerde Oost-Indische Compagnie* (VOC) occupied the Cape of Good Hope as a refreshment station for use by the trading empire more commonly known as the Dutch East India Company.[277] This is how Roman-Dutch law infiltrated South Africa. The Dutch East India Company, which held powers as delegated to it by the central organ of the United Netherlands known as the States-General, was responsible for the maintenance of law and order in overseas dependencies.[278] A local

[275] According to the South African child death review pilot conducted between 1 January 2014 and 31 December 2014 neonaticide (which they extended to the killing of a child within the first 28 days of life) to be at a rate of 19.6 per 100,000 live births, and for infanticide which is the killing of a child under one year to be 27.7 per 100,000 live births. Infanticide or neonaticide can result from exposure of the child, neglect or physically killing the child; see Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 12 January 2007 *Archives of Women's Mental Health* 15 where neonaticide is regarded as the crime of killing an infant within the first 24 hours of life; according to Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 the risk of a child being killed by its mother within the first 24 hours of its birth is highest if the mother is young, at 524.
[276] General Law Amendment Act 46 of 1935 s 113(1).
[277] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 66; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[278] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 66; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.

agency was appointed to administer the Company's possessions and this agency was known as the Governor-General-in-Council at Batavia.[279] The Cape was merely one of the *buitencomptoiren* (foreign stations) of the Company's *hoofdcomptoir* at Batavia and was responsible to the Governor-General-in-Council at Batavia.[280] The main source of law during Van Riebeeck's time was the *Artyckelbrief*, which set out the rules and regulations governing the employees of the Company, who were engaged in duties in overseas territories.[281] In 1734 the *Raad van Justitie*,[282] fell under the lieutenant-governor and not the governor however this did not mean that the governor was excluded judicially.[283] The governor was chief executive at the Cape and he carried a veto power in all matters affecting administration.[284] He confirmed sentences passed by the *Raad van Justitie* but was responsible solely to the Directorate of Holland, who had executive control of the Company and was therefore not an officer of the *Raad.*[285] The *Raad van Justitie* consisted of laymen and not lawyers and this continued until the end of the seventeenth century.[286] Only later were more qualified men appointed.[287]

The various sources of law used by the *Raad van Justitie* included: legislation;[288] various institutional writers and their opinions (such as De Groot, Merula, Wassenaar and Van den

[279] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 66; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[280] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 66; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[281] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 67; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[282] This was the highest court see Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 67; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 67.
[283] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 67; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[284] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 67.
[285] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 67; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[286] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 67; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[287] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 68; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.
[288] Such legislation was issued by the States-General (the supreme governing body of overseas possessions); the Directorate of XVII which had legislative powers under the charter; the States of Holland also had legislative power, although the competence of this body to legislate was questioned; the Governor-General-in-Council at Batavia which was subject to the Batavian authority and were sent *placaaten* issued by the Batavian Authority for

Berg) were referred to;[289] judicial decisions also played a role as one of the sources of law, although the extent of its role cannot be confirmed because no *stare decisis* rule existed at the time and judges did not provide reasons for their decisions;[290] and observed customs became a more positive form of law because of an increase in the population and also because of the lapse of time.[291]

At the end of the eighteenth century, the conduct of law at the Cape was unsophisticated and due to the *placaaten*, Roman-Dutch substantive law remained unchanged.[292] Thus it may be deduced that the Roman-Dutch treatment of infant abandonment was adopted by the Cape with the occupation of the Dutch East India Company prior to the infiltration of English law. However, cognisance must be taken of the fact that observed customs at the Cape amongst its own inhabitants were increasingly regarded as a form of law and this may have changed the way in which infant abandonment was ultimately treated.

2.9.2 The reception of English law at the Cape

In 1795, Great Britain defeated the Company (who initially would not yield to British presence) through a task force.[293] The *Raad van Justitie* changed to the Court of Justice and was empowered until the Articles of Capitulation and a Proclamation of 24 July 1797 to administer

approval. Governor-in-Council at the Cape which was subject to veto of Batavia or the Directorate XVII issued *plaacaten* which were affixed like posters to the wall of a public place; see Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 68-72; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.

[289] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 72; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* Springer (2015) 271.

[290] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 73; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.

[291] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 73; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.

[292] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 73-74; Mousourakis *Roman Law and the Origins of the Civil Law Traditions* (2015) 271.

[293] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 76-83.

the Roman-Dutch law in both civil and criminal courts.[294] Thus the first British occupation did not influence the law applicable at the Cape at the time.[295] The Cape was again dominated by the British in 1806, but once again Roman-Dutch law survived as the Cape's legal system and only minor changes such as the implementation of English procedure, were introduced.[296] There were however signs of change in the law applicable at the Cape after 1820.[297] Some of these signs included: English replaced Dutch as the official language of the Cape Colony and all proceedings in all courts were to be conducted in English from 1 January 1827.[298]

In 1828, the rule of *stare decisis* was introduced by the Cape Supreme Court (that replaced the Council of Justice).[299] Advocates were appointed from members of the English, Scottish and Irish Inns of court or from graduates of English and Irish universities.[300] From the ranks of these advocates came the Judges.[301] There was a gradual assimilation of the law of the Colony to the law of England.[302] A greater emphasis was placed on English law; the Cape received the whole of the English Companies Act, the English law of negotiable instruments and the English law dealing with parliamentary conventions.[303] Furthermore in the realm of child abandonment and infanticide, the Cape also adopted various acts modelled on the English acts. The first

[294] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 76-83; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[295] Also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 44.
[296] Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (1999) 95; also see Meintjies-Van der Walt, Singh and Du Preez et al. *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[297] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 76-83; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[298] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 76-83; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[299] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 79, 82; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[300] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 80; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[301] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 80; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[302] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 80; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.
[303] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 83; also see Meintjies-Van der Walt, Singh and Du Preez et al *Introduction to South African law Fresh Perspectives* (2008) 23-49.

English statute dealing directly with the concealment of birth was established in 1623 and it set in motion the development of what was the Offences Against the Person Act of 1861. This set the benchmark for the South African law on concealment of birth, namely Ordinance 10 of 1845.[304] The British Parliament in 1872 also created the Infant Life Protection Act to curb the number of infant deaths that were occurring in houses that provided care for children in exchange for money.[305] This too was emulated in South African law by the enactment of the Infant Life Protection Act in both the Western Cape and Transvaal provinces.[306] Finally Britain created the Infanticide Act of 1922, which was repealed by the Infanticide Act of 1938 and South Africa, once again learning from its British counterpart, adopted this crime into its law under section 239 of the Criminal Procedure Act 51 of 1977.[307]

2.9.3 The legal development of South African common law

Legal development continued as settlers moved outside the Cape into Natal. Natal practised Roman-Dutch law in terms of Cape Ordinance 12 of 1845 despite there being evident bias towards English law.[308] After the Great Trek, the Boers settled in the Transvaal and the Orange Free State but were still subject to English law influence. Each territory developed its own system of law.[309] In 1910, the Union of South Africa was formed and this was largely influenced by the ruling Roman-Dutch law that was applied in all four colonies at the time. Therefore it may be stated that, although Roman-Dutch law was regarded as the law of the various territories and even considered the law after the Union was achieved, it is evident that English law influence was great and seemed to fill various *lacunae* found in Roman-Dutch

[304] Which was eventually replaced by the General Law Amendment Act 46 of 1935, see par 7.3 of chapter 7.
[305] See chapter 7 par 7.3.
[306] See par 7.2.4 of chapter 7, which provides that the Infant Life Protection Acts were eventually consolidated to become the Children's Protection Act 35 of 1913, and this was later repealed by the Children's Act 31 of 1937.
[307] Para 7.3 of chapter 7.
[308] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 84.
[309] The Transvaal implemented the Thirty-Three Articles of 1844 which was a move towards an independent legal system and the Orange Free State decided that Roman-Dutch law would be the basic law of the state; see Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 85.

law.[310] The influence of English law will be discussed more extensively in chapter 7 where South African law is analysed in more detail.

2.10 CONCLUSION

In this chapter, the development of the South African common law was analysed. Being a hybrid system of law it was necessary to deal with the development and history of Roman law as well as to focus in on the Roman family law. Roman family law provided a necessary insight into the concept of abandonment dealt with in this study. There were various forms of child abandonment in Roman times, many of which still feature today. Examples of some forms of abandonment still experienced today are exposure, fostering (although today it is not seen as abandonment to give your child up to the foster care system) and the sale of children (which in its modern day form is comparable to child trafficking).

The second part of this chapter dealt with the reception of Roman law into the law of the Netherlands, which consequently formed Roman-Dutch law, another arm of South Africa's common law. Roman-Dutch family and law were analysed, dealing with the forms of abandonment that existed in terms of Roman-Dutch law. These forms differed from Roman law in various ways. Firstly, Roman-Dutch law did not allow fathers to sell their children even when experiencing extreme poverty. Secondly, the father was liable to maintain all children whether natural, lawful, incestuous or those born as a result of an adulterous relationship. In Roman law a father, experiencing extreme poverty could sell his children and he was only responsible for legitimate offspring and not those born out of wedlock or because of adultery or incest. He also exercised the right of life and death over his children, something not granted in terms of Roman-Dutch law. Thirdly, adoption was not recognised in terms of Roman-Dutch

[310] Edwards *The History of South African Law: An Outline* (1996 reprint 1998) 89.

law and as a result, *de facto* adoptions resembling fostering would take place that would not grant any rights in terms of the father's estate to the child fostered. Because it was not legally recognised, it is difficult to establish whether parents actually paid the foster parent for looking after their child, as it was done in terms of Roman law.

The punishment for the abandonment of infants was dealt with as the broader crime of parricide, depending on the circumstances that prevailed after the act. The sophistication of the law from Roman times to its merger with Dutch law is illustrated in the manner in which this crime was legislated upon.

Finally, many English law principles were applied at the Cape, some of which for a long time dominated the legal system amidst a pushing back for the preserving of Roman-Dutch law. There is no doubt that English law has exerted considerable influence and changed South African law in certain respects. This chapter has thus laid the foundation and point of reference for the reader to establish the origins of the South African law. More particularly the abandonment of infants and the commission of infanticide will be dealt with in chapter 7, which deals with South African legislation governing the abandonment of infants and related matters. That chapter will deal with the abandonment of infants and the commission of infanticide in English law, with an overview reminding the reader of Roman law and Roman-Dutch law, thus laying a foundation for a discussion more focused on the current South African law on infant abandonment and infanticide. That chapter will also highlight the extent of the influence of English law in the area of the abandonment of infants and infanticide in South Africa. However, prior to embarking on the South African law perspective this thesis will now comparatively analyse the laws of Germany and the United States and their respective approaches to this long-existing practice of infant abandonment.

PART TWO: THE LEGAL REGULATION OF INFANT ABANDONMENT: A COMPARATIVE STUDY OF THE LAWS OF GERMANY AND THE UNITED STATES OF AMERICA

CHAPTER 3: A STUDY OF THE LAWS OF GERMANY

3.1 GERMANY

3.1.1 Introduction

This chapter investigates the laws and systems in place in Germany to prevent infant abandonment. Germany has three systems in place, namely baby safes, anonymous birth and confidential birth; it is for that reason that this jurisdiction has been chosen, as it could provide an answer to unsafe infant abandonment in South Africa. This chapter analyses the effects of the various systems in place on the existing laws of Germany. Finally, all three systems are assessed in order to determine whether they achieve their intended purpose.

The Moses-project was introduced in August 1999 in Bavaria by the Social Service of Catholic Women or *Sozialdienst katholischer Frauen* (hereinafter referred to as the SkF).[1] Prior to the establishment of the anonymous birth system, the focus was on the personal relinquishment of new born infants from the mother to the volunteer.[2] In the year 2000 the Catholic Church withdrew from the SkF, and this resulted in the exclusion of mandatory counselling in instances of abortion.[3] And as a consequence the SkF lost its state recognition for its advisory centers.[4] The *Donum Vitae* association in Bavaria, Germany, took over the sponsorship office for

[1] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 26; The exact number of baby safes or facilities offering anonymous birth today in Germany is hard to establish Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 15; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 10, available at www.comparazionedirittocivile.it; Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 14; Rupp, Wiesnet and Kleine "'Anonyme Geburt'— Das 'Moses-Projekt' in Bayern" 2007 *Staatsinstitut für Familienforschung an der Universität Bamberg (ifb)* 36.

[2] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 26; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 15; see also Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 14.

[3] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 26; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe*' (2009) 15; see also Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 14.

[4] The affected counselling centres then took on a new role by providing facilities for anonymous birth and baby safes.

pregnant women on 1 January 2001.[5] However, since 1999, a variety of denominational and other independent sector institutions, such as hospitals have provided for the anonymous relinquishment of infants.[6] The aim of these services is to ensure the welfare of pregnant women, children and young people.[7] One form of anonymous infant relinquishment that exists is anonymous birth. Here, the woman leaves the child behind after giving birth in a hospital without identifying herself.[8] Another form of infant relinquishment recognised in Germany is the use of baby safes, also referred to as baby hatches or *babyklappen*, baby drops, baby nests, baby cradles or baby baskets.[9] These are safes found in walls of hidden parts of buildings, usually hospitals and consists of window-like hatches with heated beds for babies inside.[10] Once the infant is placed inside, a short amount of time is provided for the mother to leave unobserved, thereafter an alarm is triggered for staff to collect the infant.[11] *Babyklappen* were embraced by the churches, but there was no legal framework to regulate its existence.[12] Baby safes and laws governing anonymous birth were not meant to replace the existing forms of

[5] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 27.

[6] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 27; Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 7.

[7] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 7.

[8] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 9; "'Anonym' Bedeutung verwendet dass die Herkunft des Kindes und die Personalien seiner Mutter und seines Vaters, soweit er bekannt ist, im Geburtseintrag beim Standesamt und im Adoptionsverfahren nicht dokumentiert werden, so dass insbesondere dem Kind seine Herkunft und liebliche Familie unbekannt bleiben." ("Anonymous" means that the origins of the child and the identities of its mother and father are unknown, are not documented in the birth registry in the registry office and in the adoption procedure so that child will remain unknown to his family); Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 6.

[9] Als Synonyme kommen auch die Ausdrucke "Babyfenster", "Babykorb", Aktion Moses-Babyklappe", Moses-Babyfenster", "Babynest", "Babytur", "Babyhilfe" und Projekt Findelbaby"; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 5; see Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 14 providing that SterniPark Association in Hamburg set up the first baby safes in April 2000.

[10] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 8; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vertretbar?* (2010) 6.

[11] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 8; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vertretbar?* (2010) 6.

[12] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 11.

assistance available to families but were meant to add to these facilities.[13] They were directed at women who were not reached by the officially available forms of assistance.[14] These forms of assistance provided for under the *Sozialgesetzbuch* VIII (SGB VIII) include the provision of housing for single mothers or fathers caring for children under the age of six and for elderly siblings, for as long as they require support for the care and upbringing of the child.[15] Other forms of assistance include: education or employment; necessary maintenance and medical assistance.[16] Childcare is another option if the parent who is the primary carer of the child fails to perform this task for health or other persuasive reasons.[17] In this instance, assistance is rendered to the other parent of the child living in the household if the parent cannot care for the child due to work-related absence,[18]or if added support is necessary for the child's well-being[19] or for the provision of day-care facilities.[20] Additional assistance may be available under the various provisions that govern "maternity and maternity benefits, parental benefits, parental leave, and child's benefit," placement in foster families, pre-adoptive care and finally "placements for adoption".[21]

[13] Some of the existing services under current law include family, child and youth welfare services offered by independent-sector and public institutions under the provisions of SGB VIII Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 15; As seen in Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 10, available at www.comparazionedirittocivile.it, where the author points out that although Germany opted for Confidential birth in 2014, anonymous birth is still being practiced. The author further points out that with anonymous birth, a child born in this way has no access to genetic information because caregivers are forbidden to ask for any information from the birth mother.

[14] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 15.

[15] s 19(1)(1) SGB VIII; s 19(1)(2) SGB VIII; Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.

[16] s 19(1)(3) SGB VIII; Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.

[17] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.

[18] s 20(1)(1) SGB VIII; Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.

[19] s 20(1)(2) SGB VIII; Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.

[20] s 20(1)(3) SGB VIII; Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.

[21] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.

An important component of these forms of assistance include the availability of counselling under the *Schwangerschaftskonfliktgesetz* (SchKG— Conflicted Pregnancy Act).[22] This act provides that pregnant women are legally entitled to anonymous counselling and according to the *Deutscher Ethikrat* access to counselling is available through an array of services for persons in need and it may be taken up confidentially even without using a form of anonymous relinquishment.[23] A pregnant woman may also opt to put her child up for adoption in terms of the Adoption laws.[24] Regarding adoption, women are provided with the maximum degree of confidentiality in extreme cases where her life or the child's life is in danger; this was possible even before the establishment of baby safes or anonymous birth.[25] The fact that babies were still abandoned despite the existence of these facilities indicates that either there was no awareness of the existence of these alternatives or that these alternatives were not meeting the needs of abandoning mothers namely, confidentiality, guidance and the guarantee of no prosecution.

In response to all the services (excluding baby safes and anonymous birth) listed above, it is evident that none provide what is actually sought by the mother, which is anonymity. The mother chooses to remain anonymous because of the shame attached to the pregnancy. Adoption does not guarantee absolute confidentiality except in extreme cases where the life of the mother or the child is in danger.[26] Proving that there is a danger to her or her child's life,

[22] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 15.
[23] s 6(2) SchKG; Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 16.
[24] Act on the mediation of child acceptance and the prohibition of mediation of substitute maternity allowances Adoptionsvermittlungsgesetz – AdVermiG; Act on adoption as a child and amending other provisions Adoptionsgesetz – AdG.
[25] Herpich-Behrens *Die Auswirkungen der anonymen Angebote auf die Arbeit der Adoptionsvermittlungsstellen und die Erkenntnisse aus den aufgeklärten Fällen anonymer Kindesabgaben in Berlin* (2008) Öffentliche Anhörung des Deutschen Ethikrates zum Thema "Anonyme Geburt/Babyklappe" am 23.10.2008 in Berlin, available at http://www.ethikrat.org/der_files/Referat_Herpich-Behrens_Auswirkungen_der_anonymen_Angebote_auf_die_Arbeit_der_Adoptionsvermittlungsstellen_2008-10-23.pdf 2, last accessed 2019-11-28.
[26] Herpich-Behrens *Die Auswirkungen der anonymen Angebote auf die Arbeit der Adoptionsvermittlungsstellen und die Erkenntnisse aus den aufgeklärten Fällen anonymer Kindesabgaben in Berlin* (2008) Öffentliche

however, may be challenging. Thus "shame" will not be reason enough to guarantee the mother confidentiality in adoption. In addition, adoption is in itself a process that requires participation from the mother and social workers and keeping it confidential will be very difficult. Furthermore, this thesis suggests that the provision of housing, education, employment, maintenance, medical assistance, child-care and day-care facilities all speak to the fact that the mother is compelled to keep the child, while women in situations of distress do not seek an option to keep the child but instead seek to relinquish the child to someone that will care for the child.

Providers of baby safes and facilities for anonymous birth see the installation of these as aimed at protecting life by preventing the killing and unsafe abandonment of newborn babies.[27] According to the German federal government, between June 2001 and 2007 143 children were left abandoned in baby safes; this number did not take into account the number of infants abandoned in the 34 baby safes in North-Rhine Westphalia and Bavaria.[28] Sternipark[29] concluded that 219 infants were abandoned in Germany in 2009 in baby safes or by means of anonymous birth,[30] however between 2000 and 2015 in Hamburg alone where Project Findelbaby has been established, 48 babies were relinquished through anonymous birth, with

Anhörung des Deutschen Ethikrates zum Thema "Anonyme Geburt/Babyklappe" am 23.10.2008 in Berlin, available at http://www.ethikrat.org/der_files/Referat_Herpich-Behrens_Auswirkungen_der_anonymen_Angebote_auf_die_Arbeit_der_Adoptionsvermittlungsstellen_2008-10-23.pdf 2.

[27] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 15.

[28] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 18; Deutscher Ethikrat, Wortprotokoll vom 26.06.2008 3.

[29] An association created to assist mothers in need, see http://www.sternipark.de/index.php?id=7 last accessed on 2019-11-28.

[30] SterniPark Ubersicht Babyklappen Deutschlandweit 2009, available at http://www.sternipark.de/fileadmin/content/Babyklappen_in_Deutschland.pdf; In this regard see SterniPark "15 Jahre Babyklappe Wir haben unser Ziel erreicht. Das Projekt Findelbaby des SterniPark schaut auf fünfzehn Jahre Babyklappe zurück", available at http://www.sternipark.de/fileadmin/content/PDF_Upload/Findelbaby/Pressemitteilung_SterniPark_-_15_Jahre_Babyklappe__-_Wir_haben_unser_Ziel_erreicht.pdf dated 8 April 2015 last accessed on 2019-10-23.

the numbers showing a decline over the years, and 14 of these babies were reunited with their mothers.[31] In 2002, 2004 and 2006 there were no representative surveys conducted.[32]

3.1.2 Background

The Moses-Projekt was initiated in August 1999 and formed the first facility for the anonymous relinquishment of infants.[33] The first baby safe was set up by the SterniPark Association in April 2000[34] in Hamburg and also provided amenities for the taking place of anonymous birth under the *Projekt Findelbaby* (foundling baby project).[35] The foundling baby project introduced the toll free emergency number, which resulted in the first baby being deposited in the baby safe in May 2000.[36] Pregnant women were also provided with counselling via the toll free emergency number.[37] In respect of anonymous birth the first one took place also in the

[31] SterniPark "15 Jahre Babyklappe Wir haben unser Ziel erreicht. Das Projekt Findelbaby des SterniPark schaut auf fünfzehn Jahre Babyklappe zurück", available at http://www.sternipark.de/fileadmin/content/PDF_Upload/Findelbaby/Pressemitteilung_SterniPark_-_15_Jahre_Babyklappe__-_Wir_haben_unser_Ziel_erreicht.pdf dated 8 April 2015 last accessed on 2019-10-23.

[32] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 18; for more statistics see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 16.

[33] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 14.

[34] SterniPark is in existence since 1990. It is an independent sponsor of the Youth Welfare Office (Jugendhilfe) in Hamburg and Schleswig-Holstein; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 28; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 217; Some institutions in Germany allow a personal handover of the child see Coutinho and Krell in Deutsches Jugendinstitut (ed) *Anonyme Geburt und Babyklappen in Deutschland – Fallzahlen, Angebote, Kontexte* (2011) 27, 28 and 81 et seq. available at www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf last accessed on 2019-11-10.

[35] Bayrisches Staatsministerium fur Arbeit und Sozialordnung, Familie und Frauen (ed) *"Anonyme Geburt" – Das "Moses-Projekt" in Bayern. Eine Machbarkeitsstudie* Bamberg (BStMAS) (2007) 15; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 28; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 217.

[36] Bayrisches Staatsministerium fur Arbeit und Sozialordnung, Familie und Frauen (ed) *"Anonyme Geburt" – Das "Moses-Projekt" in Bayern. Eine Machbarkeitsstudie.* Bamberg (BStMAS) (2007) 15; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 28; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 217.

[37] Bayrisches Staatsministerium fur Arbeit und Sozialordnung, Familie und Frauen (ed) *"Anonyme Geburt" – Das "Moses-Projekt" in Bayern. Eine Machbarkeitsstudie.* Bamberg. (BStMAS) (2007) 15; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 28;

year 2000 in a Flensburg Hospital.[38] Anonymous birth focuses on reducing the rate of child exposure or child mortality, while also assisting the mother and simultaneously preventing the mother from being prosecuted for abandonment.[39]

In the year 2008 there were more or less 90 baby safes and 130 clinics offering anonymous birth.[40] According to a 2004 survey the most frequent reasons for the establishment of baby safes were reports of the abandonment and killing of newborn babies; public or political pressure; the need to provide an alternative option[41] and the reports of other providers of baby safes.[42] A 2009 report indicates that mothers of all social classes make use of these facilities.[43] The reasons for the use of these methods include, but are not limited to, domestic violence situations; single parenthood; the inability to cope with another child; judgment from family members which is inextricably linked to shame; financial challenges; rape; fear of prejudice or intolerance as a result of placing a child up for adoption; children of extra-marital paternity; drug and alcohol abuse; unwanted pregnancies; fear of measures under "aliens legislation"; illegal residence without health insurance; fear of losing her job and long periods of

Budzikiewicz and Vonk "Legal motherhood and parental responsibility A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 217.

[38] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 28.

[39] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 28, 29.

[40] Sternipark "Projekt Findelbaby. Zehn Jahre Babyklappe – Pressemitteilung" 08.04.10 http://www.sternipark.de/fieladmin/content/pdf_upload/Pressemitteilung_10_Jahre_Babyklappe_08_04_2010.pdf (19.05.2010); Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 18.

[41] To supplement the existing officially available forms of assistance, to reach women who could not be reached by the officially available forms of assistance. Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 15, 16; Some of the official current forms of assistance include counselling and help for pregnant women, one way is under the Schwangerschaftskonfliktgesetz (SchKG – Conflict Pregnancy Act). Other forms of assistance also include anonymous counselling; maternity and maternity benefits; parental benefits; parental leave; child benefit and placement for adoption (incognito adoption or open forms of adoption).

[42] Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 290; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 15, 16.

[43] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 19.

unemployment.[44] Both the use of baby safes and anonymous birth are illegal however no sanctions are imposed for making use of these systems.[45] The specific crime of child abandonment is not covered by the *Strafgesetzbuch* (StGB) however, section 171 deals with the violation of the duty of care and education which may be interpreted in view of abandonment. This section provides "anyone who grossly violates his duty of care or education to a person under the age of sixteen and thereby puts the person at risk of being seriously damaged in his physical or psychological development, to lead a criminal life or to pursue prostitution, is punished with imprisonment of up to three years or fined".[46] In a similar way section 170 provides that "anyone who withdraws from a legal maintenance obligation, so that the life needs of the dependent would be endangered without the help of others, shall be

[44] Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 307; Bayrisches Staatsministerium fur Arbeit und Sozialordnung, Familie und Frauen (ed) *"Anonyme Geburt" – Das "Moses-Projekt" in Bayern. Eine Machbarkeitsstudie.* Bamberg (BStMAS) (2007) 49; Reis, RV 'The Right to Know One's Genetic Origins: Portuguese Solutions in a Comparative Perspective' (2008) 16 European Review of Private Law, Issue 5, pp. 779–799; Herpich-Behrens *Die Auswirkungen der anonymen Angebote auf die Arbeit der Adoptionsvermittlungsstellen und die Erkenntnisse aus den aufgeklärten Fällen anonymer Kindesabgaben in Berlin* (2008) Öffentliche Anhörung des Deutschen Ethikrates zum Thema "Anonyme Geburt/Babyklappe" am 23.10.2008 in Berlin, available at http://www.ethikrat.org/der_files/Referat_Herpich-Behrens_Auswirkungen_der_anonymen_Angebote_auf_die_Arbeit_der_Adoptionsvermittlungsstellen_2008-10-23.pdf 20, last accessed 2019-11-28. Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 19-20; According to Fact Sheet on Child Abandonment Research in South Africa by National Adoption Coalition of South Africa 20 May 2014 based on Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* Master's Thesis University of Witwatersrand March 2014, some of the leading causes of child abandonment in South Africa are similar to those in Germany and include: restrictive legislation, poverty, mass urbanisation, high levels of violence this includes gender based violence such as rape, extreme gender inequality, high levels of HIV/AIDS and diminishing family support.

[45] Hepting refers to these practices as a "rechtlichen Grauzone", a legal grey area in "Babyklappe und anonyme Geburt" 2001 48 *FamRZ* 1573, 1575; A similar situation is experienced in South Africa where baby safe operators operate "illegally" in terms of legislation such as the Children's Act s 305(3)(*b*) and the General Law Amendment Act 46 of 1935 s 113 as amended by the Judicial Matters Amendment Act 66 of 2008; Baby safes are not statutorily regulated there only exists non-mandatory recommendations on the minimum standards that need to be employed for baby-boxes which were developed by the German Association for Public and Private Welfare "Empfehlungen des Deutschen Vereins zu den Mindeststandards von Babykleppen" 11 June 2013 available at www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf also available at www.deutscherverein.de/05-empfehlungen/empfehlungen_archiv/2013/DV-4-13-Mindeststandards-von-Babyklappen and also further discussed at www.dijuf.de see Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 219. Despite the existence of these minimum standards, there is no evidence that they are being observed.

[46] Strafgesetzbuch; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 113.

punished with up to three years imprisonment or to a fine".[47] Thus, the parent or guardian who abandons their child violates his or her legal maintenance obligation by endangering the life of the child and would be liable to a fine or imprisonment of three years. Section 170(2) goes on to provide that someone who is obliged to provide maintenance to a pregnant woman and does not do so and thereby causes the woman to have an abortion shall be liable to a fine or imprisonment of five years.[48] In South Africa very often a pregnant woman is abandoned by her partner once he finds out that she is pregnant and therefore such a provision would create a measure of accountability for fathers who are responsible for the pregnant woman and will serve as a deterrent to those who abandon her in her time of need.[49]

This thesis agrees with the German approach, however the implementation of this would prove challenging with regard to locating the alleged fathers and also deciding whether to hold the father or the family (grandparents) responsible for the maintenance of the pregnant woman. Furthermore, how will it be proved that the woman procured an abortion because those who were responsible for her maintenance failed to maintain her as opposed to choosing this option out of her own free will? Although this section does not provide for the situation where the mother is forced to abandon her child, one can assume because it falls within the broader scope of deprivation of maintenance that the same punishment would apply. Specifically, the act of child abandonment is not punished according to German law and thus is in terms of section 1 of the StGB there can be no punishment without law; an act can only be punished if the criminal

[47] Strafgesetzbuch; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 113.
[48] Strafgesetzbuch; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 113.
[49] See Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand March 2014) 50. This is also the case where the pregnant woman is rejected by her family as a result of the pregnancy.

liability was determined by law before the act was committed.[50] The act of child abandonment is addressed indirectly by section 169 of the StGB, which deals with civil status falsification. In terms of this section anyone who suppresses or misrepresents another person's civil status as against a competent civil authority is punishable by imprisonment of up to two years or to a fine.[51] In South Africa, the act of child abandonment is an offence in terms of section 305(3)(*b*) of the Children's Act 38 of 2005 which is liable to a fine or imprisonment not exceeding ten years[52] and if committed more than once to a fine or imprisonment not exceeding twenty years.[53]

In Germany, central to the issue of child abandonment is the fact that state guardianship and national supervision can only serve as an effective means of child protection if child protection agencies are aware of the existence of a child. Therefore, reporting obligations are enforced by the threat of administrative penalties.[54] The assignment of a child to his parents by the right of descent governed in sections 1591 and 1592 of the *Bürgerliches Gesetzbuch* (BGB) is also compromised in abandonment cases because of the fact that the father and sometimes the mother's identity is unknown.[55] Furthermore, the bond between parents and children is covered by article 6 of the *Grundgesetz für die Bundesrepublik Deutschland* (GG – Constitution of the Republic of Germany) and article 6(2) specifically provides that care and education of children is the natural right of parents and a duty primarily incumbent on them and that the state watches over their activity.

[50] Criminal Code (StGB) as promulgated on 13 November 1998 Federal Law Gazette I p. 945 p. 3322 Translation by the Federal Ministry of Justice. General Part Chapter One The Criminal Law Title One Area of Applicability s 1.
[51] Strafgesetzbuch; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 113.
[52] s 305(6) of the Children's Act 38 of 2005.
[53] s 305(7) of the Children's Act 38 of 2005.
[54] Strafgesetzbuch; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 113.
[55] Strafgesetzbuch; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 113.

According to Hepting the use of anonymous birth is preferred to that of baby safes in Germany due to the fact that giving birth in a clinic ensures the participation of doctors or midwives and therefore reduces the chance of health risks for both mother and child.[56] Furthermore, with anonymous birth the mother is in that instance personally approachable and her identity, at least outward physical appearance, can be recorded and registered whilst safeguarding her anonymity.[57] This is viewed as favourable for the possible future reunion between mother and child.[58] In the midst of criticism from Germany's ethics committee and condemnation from the United Nations, Chancellor Angela Merkel's government has enacted legislation to find another solution that proposes the use of a system of confidential birth instead.[59] The practices of baby safes and anonymous birth will be dealt with separately below. Finally, Germany's solution to the above mentioned "illegal" practices — the concept of confidential birth – will also be discussed.[60]

3.2 BABY SAFES

A baby safe is positioned in an outside wall in "a window-like hatch" with a bed for the baby, that is heated, inside[61] and is often found in walls of charitable institutions. It makes it possible

[56] Hepting "Babyklappe und anonyme Geburt" 23 2001 *FamRZ* 1573, 1575.
[57] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 6; Hepting "Babyklappe und anonyme Geburt" 23 2001 *FamRZ* 1575.
[58] Hepting "Babyklappe und anonyme Geburt" 23 2001 *FamRZ* 1575.
[59] Germany also suffered pressure from the UN Committee on the Rights of the Child to better safeguard the child's right to knowledge of his or her origins. In this respect see chapter 5 on the child's right to knowledge of origins versus his or her right to life.
[60] See fn 3.5 below.
[61] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 8, 9; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 14; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 7, 8; Werner "Anonyme Abgabe des Neugeborenen— die Babyklappe" 10 2010 *Der Gynäkologe* 813-818; Lehmann "Verlassen von Vater und Mutter Kinder aus der Babyklappe" 12 2007 *Der Gynäkologe* 1009-1016; Dochow "Babyklappe und anonyme Geburt: ein Beitrag zum Schutz des (ungeborenen) Lebens?" 2003 *Seminarbeit* 68.

for the mother to leave completely unidentified.[62] After a short amount of time, an alarm alerts someone on the otherside of the wall that a baby has been deposited in the safe.[63] Some of the baby safes provide literature to the mother or relinquishing person informing him or her of available counselling and emergency telephone numbers.[64] An information leaflet also informs the mother that she may reveal her identity at any time.[65] Once the child is collected from the safe he or she is immediately taken for medical examination and if found to be healthy, the child may as soon as the next day be placed in a foster family.[66] After a certain period, the child will be released for adoption if the mother or the father[67] has not come forward and requested

[62] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 5, 14; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 7, 8.

[63] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 8, 9; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 14; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 7, 8.

[64] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 8, 9; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 15; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 7, 8; see chapter 8 the conclusion chapter where a suggestion is made to leave literature and other information for the biological mother upon relinquishing her infant in a safe.

[65] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 18; In addition, identification aids are frequently provided and left on the warm bed located inside the baby safe, such as stamp pads for hand and foot prints, puzzle pieces or letters with code numbers. Few operators also place a letter to the mother in the baby flap or writing materials so that they can be used by the donor to write a personal message to the child. For the identification of the mother or the father in the event of a child's recovery, some operators also carry out genetic investigations; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 15; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 7, 8.

[66] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 5, 14; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 315, in the Kuhn survey, 74% of 38 operators indicated that the appointment of a guardian [for the foundling] was initiated immediately upon receipt of the child; For the procedure that is followed once a baby is placed in a baby safe in South Africa, see reference to Nadene Grabham from the Door of Hope Children's Mission in chapter 8, the conclusion chapter.

[67] According to Wiesner-Berg in *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 84-87, the possibility that the paternity of a man at the time of anonymous delivery has already been determined by the courts in terms of s 1600d BGB must in many cases be ruled out, however the paternity suit can be filed shortly before the child is born. By contrast, it can occur that a married woman relinquishes her child anonymously whereby the legal fatherhood of the husband is relieved de facto of its effectiveness. The same applies to what Wiesner-Berg refers to as a theoretical case where a biological father recognised his paternity according to s 1592 BGB in conjunction with s 1594 before anonymous delivery; here too the anonymous delivery through either safes, anonymous birth or anonymous relinquishment of the child defeats the recognition of legal paternity. Wiesner-Berg goes on to state that it occurs more often that at the time of anonymous delivery through any of the above-mentioned methods

the return of their child.[68] According to Kuhn, it has been established that the majority of people who make use of baby safes choose to stay anonymous.[69] Furthermore, Kuhn found that only 14% of baby safe operators expected abuse of these safes whereas 86% did not fear abuse or misuse.[70] However, although a vast majority of operators do not fear misuse of these safes a brief summary of some of these fears will be highlighted to account for the 14% that disagree. One of the fears in the use of baby safes is the infringement of fathers' rights in respect of the relinquished child.[71] A further problem occurs if the conventional adoption procedure is not followed immediately, the child then ends up institutionalised for his or her entire childhood

there is neither legal fatherhood due to marriage nor due to recognition by the father in terms of s 1592 BGB. In this instance the anonymous delivery of the child either already prevents the biological father from becoming generally aware of the child's existence, whether or not he can provide for the child, or the father who does know about the child can recognise his paternity and take responsibility for the child. However, due to the anonymity guaranteed by the providers of anonymous birth, baby safes or anonymous relinquishment, the father will usually be unable to find out where his child was taken. It is therefore conceivable that the father will only learn about the existence of his child after the adoption process is completed, which is why, according to Wiesner-Berg, it is hardly possible to obtain the position of the legal father in this instance. Based on this it can be stated that the relationship between the father and the child is in many cases already thwarted, even before it has begun, because the child has no possibility of knowing who his/her biological father is. The anonymously delivered child is thus at least temporarily in many cases not only factually but also legally fatherless. Nor can this situation be justified by the fact that many fathers show no interest anyway in anonymous children. However, according to Wiesner-Berg, it is possible, although less likely, that a mother relinquishes her child anonymously although the birth father before anonymous relinquishment has expressed interest in taking responsibility for his child; For information on the culpability of the father see Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 83; Hadžimanović "Confidential and anonymous birth in national laws – Useful and Compatible with the UN Convention on the Rights of the Child?" *Gennaio* 2018 10, available at www.comparazionedirittocivile.it.

[68] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 5, 15.

[69] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 15; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 310.

[70] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 323.

[71] The issue of unmarried fathers' rights is dealt with in chapter 6 see also fn 107 in chapter 6 where s 1594 IV BGB concerning fathers' rights is discussed; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 366-367; This fear in connection with the use of baby safes is also experienced in countries such as the US where safeguards such as the putative father registry have been develop to ensure fathers' rights are protected. Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J Marshall L Rev* 1033; see also Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" 2017 *THRHR* 253-266.

and this, according to Benner, will lead to increased criminal activities.[72] The possibility of child trafficking[73] and the lack of employing the DNA testing method by all baby safe operators, could lead to erroneously placing the child with a person who is not the parent.[74] The operators concede that with the use of these safes, the mother does not receive the necessary medical care and, in addition, that the group of women targeted by these safes are not reached because baby safes are not widely known to the public.[75] Subsequent contact with the mother is extremely difficult and the relinquishment of older, disabled or dead children could also occur.[76] In Hamburg, three severely handicapped children were abandoned in these safes.[77] The question is whether the relinquishment of older and disabled children in a safe serves the best interests of the child? This thesis suggests that opening up the usage of these safes so widely could lead to abuse, however, if a severely handicapped child is placed in a safe it may be in that child's best interests to be relinquished to safety as opposed to the alternative which is neglect and abuse. It is submitted that the best interests of a child necessitates the use of baby safes and therefore supercedes the risk of possible abuse. Lastly, the possibility exists that a child who has been abused, raped, or trafficked, will be placed in a baby safe and this will allow the perpetrator to escape liability.[78] The possibility of abuse does

[72] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16; Hamper *Babyklappe und anonyme Geburt, Zur ethischen und rechtlichen Problematik unter besonderer Berucksichtigung der Rolle von Arztinnen und Artzten* (2010) 48.

[73] Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 208-209.

[74] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16; see the approach in the state of California, in this regard see California Health and Safety Code s 1255.7(b)(1); further see par 4.3.1 of chapter 4 US law where this is discussed.

[75] Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 322; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16.

[76] The relinquishment of older and disabled children is a legitimate fear as was seen in Nebraska in the USA and will be dealt with in chapter 4, however, no reports exist on dead children being deposited in these safes. Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 322-323; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16.

[77] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 201.

[78] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 17.

exist. However, it is important to bear in mind the importance of these safes in saving the lives of infants and determine whether the risk of any of the mentioned forms of abuse outweighs the risk of death of even one infant. According to Kuhn baby safes as a last resort had to be created and the anonymity provided by these safes is an important factor to gain the trust of women.[79] More than two-thirds of baby safe operators in Germany agree that there should be nationwide implementation of baby safes, however, 50% of operators state that anonymous birth provides more meaningful help to women in emergency situations than baby safes.[80] This will be discussed below.

3.3 ANONYMOUS BIRTH[81]

The first anonymous birth was carried out in December 2000 with the support of Sternipark.[82] The primary goal of anonymous birth, similar to baby safes, is to preserve the life of the

[79] Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 317; see Freeman and Margaria "Who and what is a Mother? Maternity, responsibility and liberty" Vol 13 (2012) *Theoretical Inquiries in Law* 153, 158 who discusses the French system of anonymous birth, which was instituted to prevent the occurrence of infanticide, abandonment, abortion, and unsupervised delivery of babies. Furthermore, according to French law parenting is a choice and a woman cannot be forced to perform parental function against her will, the birth-giver can choose whether to become a mother of the newborn baby; also see Lefaucheur "The French 'tradition' of anonymous birth: the lines of argument" 18 2004 *International Journal of Law, Policy and the Family* 319-342; further see Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343-354; furthermore see Bonnet "Adoption at birth: prevention against abandonment or neonaticide" 17 1993 *Child Abuse and Neglect* 501, 505.

[80] Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 318-319.

[81] In Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 9 brief reference is made to the anonymous surrender or relinquishment of an infant. This involves the handing over of a child to an employee of the institution at a location previously agreed upon via the emergency telephone at a particular time. For this purpose, the employee is equipped with a backpack, which contains various documents, such as written information for the mother, paper to take a transcript of the meeting, baby clothes and an instant photo camera. This however, is not included herein as separate form of legal relinquishment; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-156; Coutinho and Krell in Deutsches Jugendinstitut (ed) *Anonyme Geburt und Babyklappen in Deutschland – Fallzahlen, Angebote, Kontexte* (2011) 27, 28 and 81 et seq. available at www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf last accessed on 2019-11-10; Rupp, Wiesnet and Kleine "'Anonyme Geburt'— Das 'Moses-Projekt' in Bayern" 2007 *Staatsinstitut für Familienforschung an der Universität Bamberg (ifb)* 15.

[82] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 19; See also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 9; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005)

newborn infant and was seen as an supplement or alternative to the use of the baby safes.[83] In some instances, anonymous birth is also seen as an alternative to abortion.[84] It allows women to give birth anonymously, free of charge and is practiced by 130 German hospitals[85] despite a law stipulating that midwives must register the mother's name.[86] Some hospitals, or other independent-sector institutions, allow pregnant women to be medically assisted while giving birth anonymously and thereafter to relinquish the child to the care of hospital staff.[87] In this way, the medical needs of both the mother and the child are attended to.[88] Women are also

148; Rupp, Wiesnet and Kleine "'Anonyme Geburt' — Das 'Moses-Projekt' in Bayern" 2007 *Staatsinstitut für Familienforschung an der Universität Bamberg (ifb)* 15.

[83] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 19; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 9; Rupp, Wiesnet and Kleine "'Anonyme Geburt'— Das 'Moses-Projekt' in Bayern" 2007 *Staatsinstitut für Familienforschung an der Universität Bamberg (ifb)* 15, 19.

[84] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 19; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173, 163; See also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 9; Rupp, Wiesnet and Kleine "'Anonyme Geburt' — Das 'Moses-Projekt' in Bayern" 2007 *Staatsinstitut für Familienforschung an der Universität Bamberg (ifb)* 15, 19.

[85] Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 13; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 9; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173; also see Coutinho and Krell in Deutsches Jugendinstitut (ed) *Anonyme Geburt und Babyklappen in Deutschland – Fallzahlen, Angebote, Kontexte* (2011) 24, 25 and 113 et seq. available at www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf last accessed on 2019-11-10; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 112, 119; Rupp, Wiesnet and Kleine "'Anonyme Geburt' — Das 'Moses-Projekt' in Bayern" 2007 *Staatsinstitut für Familienforschung an der Universität Bamberg (ifb)* 15, 19.

[86] s 20(1) PStG; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 9.

[87] Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 9; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" 13 2012 *Theoretical Inquiries in Law* 153, 157 provides that in "England a woman who gives birth cannot refuse legal motherhood. She is not allowed to oppose the registration of her name on the birth certificate nor is she able to legally abandon her baby". This however, does not mean that babies are not abandoned. The remedy used by English law for unwanted motherhood is abortion. The authors also make mention of the Belgian system of "discreet" birth, created because many women were going to France to give birth anonymously. Discreet birth allows the child access to its genetic origins.

[88] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 20; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173.

counselled and if necessary provided with housing support.[89] Once the child is handed over, the mother is said to have relinquished her parental rights to the child and the child enters the "system" where adoptive parents are sought for the child.[90] The target groups envisaged by the clinics for anonymous birth include desperate women in distress; women who have the intention to kill or abandon their infants; pregnant women who wish to procure an abortion; those who would give birth without assistance; those in denial about their pregnancies; those who wish to remain anonymous; and those without hope for a better alternative.[91] According to Kuhn, due to the lack of awareness surrounding anonymous birth it is difficult to determine whether these targeted groups of women are reached – 70% of clinics reported to have insufficient information to assess the effectiveness of anonymous birth.[92] In instances of anonymous birth the child has no knowledge of his or her origins because the identities of both biological parents are not recorded in the entry of birth at the registry office.[93] Between the years 2000 and 2008 a total of 22 women elected to make use of anonymous birth at the St.

[89] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 20; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 330.

[90] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 20; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 330.

[91] Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 336-355; Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 20; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 21, the target groups for anonymous birth are similar to those of baby safes, in the first place women in need are targeted; secondly women who are in danger of abandoning their newly born infant or who have the intention to kill their infant. In the same way, however, foreigners, illegals, young pregnant women in vocational training and drug addicts also belong to the target group. A woman may want to keep the pregnancy a secret for fear of their partner or for fear the youth office will not support the older children anymore. Some situations include instances where the woman is already a single mother and cannot afford to take care of another child; or the father of the child is not the woman's husband or the woman is already separated from the child's father and she does not want the child anymore. The spectrum of women is very broad.

[92] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 21; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 337.

[93] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 8; In Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 9, 86; See chapter 5 on the child's right to knowledge of his or her origins versus his or her right to life for more on the implications of having no knowledge of one's origins.

Anna Hospital in Herne, Germany.[94] Of these 22 women, four chose to give up their anonymity after counselling.[95] Over a nine-year period in Hamburg 320 babies were born anonymously.[96] The Allensbach Institute conducted a survey in 2012 of 25 women who opted to give birth anonymously in Hamburg, Germany.[97] According to this survey, 89% of these 25 women viewed anonymous birth as an essential method of assistance and 11% indicated that anonymous birth is essential in a desperate situation.[98] Only 5% of the women decided to remain completely anonymous and of importance is that two-thirds of the women decided to raise their children based on the advice and assistance made available at SterniPark.[99] Economic factors also play a role in the number of babies relinquished anonymously.[100]

[94] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 25.

[95] Neuerburg "Praktische Erfahrungen mit anonymen Geburten und Babyklappen aus der Sicht der Anbieter. Öffentliche Anhörung des Deutschen Ethikrates zum Thema 'Anonyme Geburt/Babyklappe' am 23.10.2008 in Berlin" 2008, available at http://www.ethikrat.org/der_files/Praesentation_Neuerburg_Anonyme_Geburt_u_Babyklappen_aus_der_Sicht_der_Anbieter_2008-10-23.pdf (last accessed 2019-09-17) 16; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 25.

[96]SterniPark (ed) "Die Babyklappe klappt auch im neunten Jahr. Pressemitteilung vom 16.12.2008" 2008, available at http://www.sternipark.de/fileadmin/user_upload/PR_Artikel/Pressemitteilung_9_Jahre_Projekt_Findelbaby.pdf (last accessed 2019-11-28); Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 25.

[97] Institut für Demoskopie Allensbach "Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden" 2012, available at http://www.sternipark.de/fileadmin/content/6227_Allensbach_Bericht_SterniPark_Anonyme_Geburt.pdf, 77-107; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 15, 16, available at www.comparazionedirittocivile.it, where the author contrasts it with the fact that of the 95 women who chose to give birth confidentially in Germany, only 5 decided to keep the child.

[98] Institut für Demoskopie Allensbach "Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden" 2012, available at http://www.sternipark.de/fileadmin/content/6227_Allensbach_Bericht_SterniPark_Anonyme_Geburt.pdf, 77-107; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 15, 16, available at www.comparazionedirittocivile.it.

[99] Institut für Demoskopie Allensbach "Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden" 2012, available at http://www.sternipark.de/fileadmin/content/6227_Allensbach_Bericht_SterniPark_Anonyme_Geburt.pdf, 77-107; See Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 15, 16, available at www.comparazionedirittocivile.it.

[100] Haak "Das Krankenhaus Waldfriede meldet einen rasanten Anstieg bei anonymen Geburten: Jede Woche ein Krisenbaby" 12.03.09 *Berliner Zeitung* accessed on 2018-04-04, available at http://www.berliner-zeitung.de/das-krankenhaus-waldfriede-meldet-einen-rasanten-anstieg-bei-anonymen-geburten-jede-woche-ein-krisenbaby-15557946 2009; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 26; A report entitled "Evaluation zu den Auswirkungen aller Maßnahmen und Hilfsangebote, die auf Grund des Gesetzes zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt ergriffen wurden" Bundesministerium für Familie, Senioren, Frauen und Jugend 2017 indicates that 41,9% of women choose to use confidential birth instead of anonymous birth. This trend analysis could be motivated by two factors: firstly it

Although changing the mother's mind is an objective of anonymous birth, it is not always possible.[101]

3.3.1 The procedure governing anonymous birth[102]

Anonymous birth is similar to normal birth in a hospital, the only difference is that a woman is not required to disclose her identity.[103] A medical consultation is required where the mother will provide instructions in the event of her death and information on her social history.[104] She also receives care and psychological counselling in the post-partum period.[105] The time at which a woman first makes contact with the hospital varies. 37% of women only go to the hospital when they are already experiencing contractions.[106] However, according to Kuhn, an approximately equally large group of 35% of mothers are already looking for the clinic a few weeks before the birth date, in order to discuss the procedure and to have medical check-ups.[107] The mother may leave immediately after giving birth, depending on her health condition.[108] At this point in time, the same procedure applies as if the child was delivered in a baby safe, the

could indicate a decline in the stigma attached to unwanted pregnancies through the willingness of women to come forward and leave some information or secondly it could be motivated by the costs carried by the state if confidential birth is used.

[101] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 29.

[102] This procedure is based on the one followed in Herne, Germany and is outlined in Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 29; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173.

[103] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173.

[104] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173.

[105] Kuhn concludes that in 37% of cases mediation was also offered at counselling facilities, Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 330; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22.

[106] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 341.

[107] Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 341; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22.

[108] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22.

infant first receives medical care and thereafter is placed into the care of a family.[109] The youth welfare office (which is sometimes involved in organising temporary care) assists the SkF[110] or the hospital's social worker in placing the newborn baby with a family.[111] A woman has eight weeks within which to change her mind and to request the return of her child, however she may change her mind any time before the adoption.[112] The child will be approved for adoption after eight weeks, if the mother has not reclaimed the child.[113] The registry office is

[109] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Hamper *Babyklappe und anonyme Geburt, Zur thischen und rechtlichen Problematik unter besonderer Berucksichtigung der Rolle von Arztinnen und Arzten* (2010) 21; According to Nadene Grabham Operations Director of the Door of Hope Children's Mission in South Africa the following procedure takes place when a baby is left in a baby box. The baby is left in a baby box any time of the day and night. The baby box is on the same property as the baby house so staff will immediately remove the baby from the baby box (staff is alerted by an alarm that is triggered once a baby is placed inside) and do a health check and take photos, weight and measurement and make notes of any marks etc. on the baby's body. They will take the baby's temperature and vital signs. If all is not well they take the baby to emergencies at a Johannesburg hospital. If all is well, they bath and feed the baby. Within 24 hours they refer the case to their child protection agency such as Abba, Impilo or Child Welfare who will apply at the Children's Court to appoint the Door of Hope as the legal guardian as a Child and Youth Care Centre (CYCC). Due to the fact that they are a CYCC babies are registered in the name of the Door of Hope. They will also place an advertisement in the local newspaper which will run for 3 months. A case of abandonment is opened at the local police station by the child protection agency, however, sometimes the Door of Hope's own social worker will open a case in this respect. If no response is received on the advertisement and no information is received, the police case will be closed and the baby becomes legally adoptable. If information is left with the baby in baby box such as a clinic card etc., the social worker will investigate and follow up on any information relating to the mother to try to find her. About 95% of the time no information is left or the clinic card is left but the page with the mother's details is ripped out. If a name and surname is left with the baby they will use that, if no name and surname is found they will choose a name and surname for the baby. If the police itself brings a baby that was dropped in an unsafe location then in that instance a case of abandonment has already been opened and the police already arrive with a case number.

[110] Catholic Women's Welfare Service Deutscher Ethikrat Anonymous Relinquishment of Infants: Tackling the Problem" 2009 14.

[111] See Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 10 in some cases the child remains in hospital for several weeks before being transferred to an appropriate adoptive family; According to Swientek *Ausgesetz, verklappt, anonymisiert Deutschlands neue Findelkinder* (2007) 155, a child born anonymously may sometimes stay in the hospital for several weeks until the right family is found.

[112] Adoption is only finalised by a local court after a year, Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 29; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 23; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 10; According to Swientek *Ausgesetz, verklappt, anonymisiert Deutschlands neue Findelkinder* (2007) 155, this eight week period for a child waiting in a foster home can be a disaster for a very young child; See chapter 8 par 8.3.3.4 where a suggestion of 60 days is made in line with the German model but also in line with South African law in terms of the Children's Act where a mother has 60 days within which to withdraw her consent to an adoption, s 233(8) of the Children's Act 38 of 2005.

[113] In 1% of cases, the children were approved for regular adoption, in 29% of cases the woman took the child back and in 56% of cases complete permanent anonymity was exercised. In comparison to the use of baby safes where 83% chose to stay permanently anonymous, one may form the conclusion that with anonymous birth more women are willing to reveal their identities and or resume their parental responsibilities by taking back their children, Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 347; The reason for this according to Benner could be the long-term contact maintained through the provision of counselling to the mother and the ability to influence and advise the mother, Benner

notified of the anonymous birth.[114] Basic information about the pregnant woman, why she has decided to give birth anonymously and information concerning the father are all answered by the woman through a questionnaire.[115] In Berlin, the youth welfare office requires that each anonymously relinquished child be reported.[116] A guardian that will conduct investigations into the child's background will be assigned to an anonymously relinquished child.[117] Agents from the youth welfare office criticise anonymous birth, stating that mothers need counselling and not anonymity.[118] According to this office, these services are not reaching the targeted groups of women and therefore is defeating its aim.[119] The youth welfare office's adoption agency

Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar? (2010) 23; see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) 12 it is questionable how the operators take action if the mother decides to live with her child within this period. Since anonymous childbirth was carried out, a genetic test had to be carried out in order to ensure that the child is in fact the child of the mother. However, genetic testing is not required by all operators of safes or providers of anonymous birth. In other cases submitting the made hand or foot print suffices. Upon the return of the child to the mother the youth welfare office and guardianship court is not involved, it is however submitted that they should be involved in order to determine the fitness of the mother to care for the child; See also Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 16, available at www.comparazionedirittocivile.it, where the author shows that more women reveal their identities in instances of anonymous birth.

[114] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 29; This is not a prerequisite with confidential birth either, the fact that she is requested, indicates that she has a choice to decline the provision of this information; see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) in fn 55 regarding the rights of the father.

[115] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 29; This is not a prerequisite with confidential birth either, the fact that she is requested indicates that she has a choice to decline the provision of this information; see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von 'Babyklappe', 'anonymer Geburt' und 'anonymer Ubergabe'* (2009) in fn 55 regarding the rights of the father.

[116] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 30.

[117] According to Kuhn 46% of 39 hospitals are responsible for the appointment of a guardian for a child directly after birth. At 8% of hospitals, infants only receive guardians when adoptive parents have been secured. At 68% of 40 clinics after the birth of the child immediate notification is given to the youth office. 5% will only be accepted by the youth office when the period of reflection of the anonymous woman has expired; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 350; Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 30; In South Africa a social worker conducts an investigation into the child's background; see chapter 7 for the South African law approach to infant abandonment.

[118] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 30; Herpich-Behrens and Die Sicht des Landesjugendamtes Berlin "Was brauchen Mütter in höchster Not wirklich?" Wacker (ed) *Babyklappe und anonyme Geburt – ohne Alternative?* (2007) 145-159, 153.

[119] Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 31.

states that women who choose to give up their children believe baby safes and anonymous birth are legal alternatives and thus neglect to turn to the other available forms of assistance first.[120] Swientek provides that the psychological make-up of women who made use of anonymous methods of relinquishment is more problematic than those who did not.[121]

> "The more free a woman is to decide, the more alternatives she has to choose from, the more open the process is and the more access the mother has to information, the better she will be able to cope with the loss of her child. She will have played an active part in deciding and have been able to accept responsibility. Her guilt feelings are also thereby reduced. Women who remained anonymous were plainly so oppressed that they were unable to choose."[122]

Swientek also states that as a result of anonymous relinquishment a woman will have "less opportunity to talk about her decision, as the giving up of her anonymity constitutes an additional problem".[123] This thesis disagrees with Swientek, on the basis that women who make use of anonymous birth are provided with continuous counselling, contact and support. In addition, there is a possibility for these women to be housed both prior to and after the birth of their children.[124] At this accommodation, she may choose to live with or without her child for a while and then with the support of a facility the woman may choose how to proceed.[125] Therefore, to suggest that the mother is not provided with an opportunity to talk, would be to

[120] Herpich-Behrens and Die Sicht des Landesjugendamtes Berlin "Was brauchen Mütter in höchster Not wirklich?" Wacker (ed) *Babyklappe und anonyme Geburt – ohne Alternative?* (2007) 145-159, 149 f; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 31.

[121] Swientek "Lebenszeitfolgen bei Müttern, die ihre Kinder abgeben", in Wacker (ed) *Babyklappe und anonyme Geburt – ohne Alternative?* (2007) 117-127, 122 [translated by Slotkin].

[122] Swientek "Lebenszeitfolgen bei Müttern, die ihre Kinder abgeben", in Wacker (ed) *Babyklappe und anonyme Geburt – ohne Alternative?* (2007) 117-127, 122 [translated by Slotkin].

[123] Swientek "Lebenszeitfolgen bei Müttern, die ihre Kinder abgeben", in Wacker (ed) *Babyklappe und anonyme Geburt – ohne Alternative?* (2007) 117-127, 122 [translated by Slotkin].

[124] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 23; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 330.

[125] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 23; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 330; This may be too expensive to implement in South Africa. To provide every women with accommodation whilst she decides whether to keep the child or not would mean that possibly thousands of women will require housing; see chapter 7 on South African law to see how South Africa currently deals with child abandonment and then see chapter 8 for possible recommendations.

ignore the systems in place which should guide her into making the best decision for the child as well as for herself. If the right of women to choose anonymous birth were to be removed, this would leave women with fewer choices. Nothing prohibits the provision of counselling after the birth and anonymous relinquishment of the child, which is currently done in Herne, to support the mother in dealing with her decision. The real purpose of these methods is not only to assist the mother but also to ensure that infants are not abandoned in harsh conditions that could lead to their deaths.[126] This point is overlooked by Swientek in making the above statement. Furthermore, the same fears that exist for baby safes also exist with the use of anonymous birth. One of which is children not knowing their origins.[127] According to the *Deutscher Ethikrat* children whose origins are anonymised are robbed of the possibility of knowing their roots and this has adverse consequences which they will experience for the rest of their lives.[128]

3.4 THE EFFECT OF THE USE OF BABY SAFES AND ANONYMOUS BIRTH ON THE LAWS OF GERMANY PRIOR TO THE INTRODUCTION OF CONFIDENTIAL BIRTH LAWS

[126] Rosenberg "The illegality of baby safes as a hindrance to women who want to relinquish their parental rights" October 2015 *Athens Journal of Law* 201, 203.

[127] The right to knowledge of one's origins will be dealt with in chapter 5; Wiemann "Adoptionsfolgen für abgebende Eltern und Adoptivkinder aus psychologischer Sicht. Öffentliche Anhörung des Deutschen Ethikrates zum Thema "Anonyme Geburt/Babyklappe" am 23.10.2008 in Berlin" 2008, available at http://www.ethikrat.org/der_files/Praesentation_Wiemann_Adoptionsfolgen_aus_psychologischer_Sicht_2008-10-23.pdf, 46; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 33; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 24; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 357; also see Hepting "Babyklappe und anonyme Geburt" 2001 Heft 23 *FamRZ* at 1576-1577 where the author points out that German law only has a general Persönlichkeitsrecht in terms of section 2 I i. V of the BVerfG read with the right to life in section 1 I of the GG and that although the right to know one's origins is recognised in terms of the UN Convention on the Rights of the Child it may be limited in terms of national law and also points out that the right to life of the child has been determined to be fundamental and thus concrete safeguards to protect this right had to be developed.

[128] This argument was refuted by Golombok and Jadva in chapter 5 — the right to knowledge of one's origins versus the right to life par 5.1.2.1; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 34; for more on the argument on the child's right to know his or her origins see chapter 5 the right to knowledge of origins versus the right to life.

3.4.1 Family law[129]

There is no such thing as parentlessness in German family law. This in terms of article 1591 of the BGB, in terms of which the woman who gave birth to the child is deemed to be the child's mother and no form of acknowledgment is necessary. Furthermore, similar to South African law, "the father is deemed to be the man who is married to the mother at the time of the birth[130] or who has acknowledged his paternity or whose paternity has been established in judicial proceedings".[131] In German law there can be no legal withdrawal from the family by either the mother or the father.[132] The relationship between the biological parents and a child can be annulled only by statutory adoption proceedings but despite these proceedings the biological parents remain as substitutive parents in the event that the adoption has to be revoked.[133] Although these rights are intact in instances of adoption, legal relations between the parents and the child cannot be exercised and enforced in instances of anonymous relinquishment because the identity of the parents are unknown, in the same way with the use of baby safes no legal relationship between the child and his or her biological parents can be enforced. The child's parentage-based family rights, such as his or her right to parental care, to maintenance and his or her inheritance rights are all rendered void.[134]

[129] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 35; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 31.

[130] In South African law the presumption is summed up in the term *pater es quem nuptiae demonstrant* see Robinson, Horsten, Human and Mould *Introduction to the South African Law of Persons* (2015) 108.

[131] s 1592 BGB, and in these two instances such an order will have retroactive effect from the time of birth; s 26 of the Children's Act 38 of 2005 provides for instances in which a person who is not married to the mother of a child may claim paternity; also see s 36 of the Children's Act which provides for the presumption of paternity of children born out of wedlock; also see s 21 where an unmarried father may acquire parental responsibilities and rights if he fulfils these requirements.

[132] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 35.

[133] If there is no father in adoption proceedings, the man who establishes that he is co-habiting with the mother at the time of conception is deemed to be the father, a 1747(1) 2 read with article 1600d BGB; a 1741 ff., 1752 BGB and a 1764(3) BGB; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.

[134] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 31.

3.4.2 The law governing civil status[135]

The Registrar must be notified within one week of the birth of each child.[136] This is in order to document the child's parentage and family-law relationships.[137] This is also in order to allow the youth welfare office and the Family Court to fulfil their obligations towards a child upon becoming aware of the child's existence.[138] According to the state an unregistered child does not exist.[139] Therefore, anonymously relinquishing a child is opposed to the notification requirements provided by the *Personenstandsgesetz* or the Act on Civil Status (PStG).[140] This Act sets the formal requirements for the establishment and alteration of the civil status.[141] In terms of section 19(1) and 19(2) of the PStG each parent, if entitled to custody, is required to give notice to the registry office of the birth of the child.[142] If the parents are unable to give notice then anyone else who either has knowledge of the birth or who was present at the birth is required to give notice of that birth.[143] If the woman gives birth at a hospital or maternity institution, the head of the institution remains responsible for notification[144] and in this instance each parent or persons who have knowledge of the birth must provide information which

[135] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[136] s 18 to 20 PStG as amended on 1 January 2009; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32; In terms of South African law the birth of the child must be registered within 30 days from the date of birth in terms of s 9(1) of the Births and Deaths Registration Act 51 of 1992; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[137] s 18 to 20 PStG as amended on 1 January 2009; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[138] s 18 to 20 PStG as amended on 1 January 2009; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[139] s 18 to 20 PStG as amended on 1 January 2009; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[140] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[141] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 31; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[142] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[143] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.
[144] s 20(1) PStG (amended version 1 January 2009); Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32.

cannot be provided by the hospital or maternity institution.[145] In the register of birth, the following information must be recorded: the first name and surname of the child; the exact time of birth; the gender of the newborn and the first names and surnames of the parents.[146] This information must also be entered when a dead baby is born.[147] Providers of baby safes and anonymous birth institutions do not have to notify the registry office if they do not have personal knowledge of the birth or if they were not present when the child was born (such as when a baby safe is used) and if they do not fall within the category of persons listed in section 19(2) of the PStG.[148] They do however have an obligation in terms of section 24 of the PStG, which is separate from having actual knowledge of the birth, and it provides if anyone finds a newborn child he or she must inform the local authority thereof no later than the following day.[149] Legitimate civilian status will be granted to a newborn child left without any recognisable kinship if there is no proof to the contrary that the newborn is in fact a child of a German citizen.[150]

[145] s 20 (3) PStG (amended version 1 January 2009); Doctors, nurses, midwives, staff or members of the conflicted pregnancy counselling centers cannot invoke professional confidentiality obligations as disclosure is not deemed unauthorised in terms of a 203 StGB; Teubel *Geboren und Weggegeben. Rechtliche Analyse der Babyklappen und anonymen Geburt* (2009) 40; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.

[146] s 21(1) PStG; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32.

[147] s 21(2) PStG; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32.

[148] Amended version of 1 January 2009; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36.

[149] s 24 PStG, this is referred to as the foundling clause and it reads as follows: (1) Anyone who finds a newborn child must indicate this no later than the following day to the municipal authority. The latter shall make the necessary investigations and shall immediately notify the competent administrative authority of the results. (2) The competent administrative authority shall, after hearing the health certificate, establish the presumed place and date of birth and determine the child's first names and family names. On their written order the birth shall be recorded in the register of births of the office competent for the established place of birth. If the place of birth is abroad, the place where the child was found is responsible for the certification; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 37; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32; Berkl "Das Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt – unter besonderer Berücksichtigung der personenstandsrechtlichen Konsequenzen" 2014 *StAZ* 65, 72.

[150] s 4(2) Staatsangehörigkeitsgesetz or Nationality Act (StAG) this section applies mutatis mutandis to a child born confidentially in terms of s 25(1) of the Pregnancy Conflict Act; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32.

Should there be a failure to report the birth of a child or the discovery of a foundling or the furnishing of incorrect information occurs, then an administrative fine may be imposed in terms of section 70 of the PStG. Even if a doctor has previously assured the mother anonymity he or she is obliged to report the birth in terms of sections 18 and 19 of the PStG. This is illustrative of the importance of the reporting obligation and its superiority over the doctor and patient confidentiality oath and the right to refuse to testify in terms of section 53(3) of the Criminal Procedure Code or *Strafprozeßordnung* (StPO).[151] Failure to report a birth to the registry office also results in the imposition of criminal sanction in terms of section 169(1) of the StGB and a periodic penalty payment to secure notification is levied.[152] An entry into the birth register may be protected and access thereto denied for a period of three years if there is a perceived threat to the person's health or life or any other reason deemed worthy of protection.[153] From the above it is clear that anonymous birth takes place despite a myriad of laws that function against it. However, in most cases of anonymous birth, notification either does not take place or is delayed and children only become known once adoption proceedings are initiated.[154] In some

[151] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 33; A disclosure of the information is thus not a violation of s 203 StGB (*Strafgesetzbuch* or Criminal Code) which stipulates that a person such as a doctor who discloses confidential information may be punished with imprisonment of up to one year or to a fine.

[152] Also see s 169(1) StGB reads as follows: Any person who misrepresents a child or incorrectly identifies or opposes the status of another person against a competent authority to maintain registers of persons or to establish the status of the person shall be punished with imprisonment for up to two years or with a fine. (2) The attempt is punishable. For a full discussion on s 169 StGB see Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 59-66; also see s 18 PStG provides the birth must be recorded at the civil registry office in which jurisdiction it is born; s 19 PStG provides that parents and guardians or anyone present at the birth or who is informed of the birth is obligated to report the birth of the child; s 20 PStG provides that where the birth takes place in a hospital the hospital is obliged to report the birth; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 38; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 118.

[153] s 64(1) PStG. However the entry may be inspected under a court order; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 34; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47.

[154] Deutscher Bundestag 16 Wahlperiode Drucksache 16/7220 Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Lenke, Piltz, Laurischk, weiterer Abgeordneter und der Fraktion der FDP – Drucksache 16/5489 – 2007 10-12, 25, 32-33.

Federal *Länder*[155] the youth welfare offices have agreed with anonymous birth institutions to report each anonymously relinquished child to them immediately.[156]

3.4.3 Criminal law[157]

Upon the anonymous relinquishment of a child the parents may face criminal prosecution based on the following grounds: suppression of civil status information;[158] failure to discharge the

[155] Federal states.

[156] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 39; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 32.

[157] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 39; see Elbel, *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 59-85 for a full discussion on the criminal liability of the mother.

[158] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 39; s 169 StGB provides: "(1) Any person who misrepresents a child or incorrectly indicates or opposes the status of another person against a competent authority for the management of registers or the identification of the civil status shall be punished with imprisonment for up to two years or with a fine. (2) The attempt is punishable." When a newborn is placed in a baby safe only persons subject to the provisions of s 19 PStG are considered to be criminal offenders. Notice of the birth of the child must be given to the registered office in the district in which the child is born in terms of s 18 PStG. s 19 PStG provides see fn 127. When the mother gives birth alone without the assistance of a third party only she will be punishable under s 169 (1) StGB for the suppression of civil status. However, in this instance the mother may have acted without fault and thus it would amount to an excusable emergency in terms of s 35(1) of the StGB. s 35(1) provides: "(1) person who commits in a current, otherwise preventable danger to life, limb or freedom of an unlawful act to avert the danger of themselves, a family member or other person close to him, is without guilt." In terms of this section the mother is excused if she tried to avoid danger of life and body to herself and the newborn. Further, in terms of s 20 StGB, which deals with invalidity due to mental disorders: "Without guilt, who is incapable of seeing the injustice of the act, or of acting according to this insight, on account of a morbid mental disturbance, of a profound disturbance of consciousness, or of weakness, or of a heavy other mental disposition." There are two opposing views on the criminality of baby safe operators according to Benner and Teubel. The first relates to the criminality of baby safe operators in terms of the suppression of civilian status in terms of s 169(1) StGB. The second more common view is that baby safe operators cannot be held criminally liable as they do not know the family circumstances of the child and therefore the civil status cannot be oppressed. According to this, the operators of baby safes are justified in the benefit of the newborn because of emergency aid if they avert the concrete danger of the child and make an allegation of anonymity in the external relationship only in order to maintain at least internally the contact with the mother in the interests of the child. With anonymous birth the question arises about the staff of the clinic, more specifically the manager of the clinic and whether he or she will be liable for suppression of civilian status in terms of s 169(1) StGB if he or she does not provide notice of the birth. This also applies if the identity of the mother is not known. In this instance there is no justification in terms of s 34 StGB: "(1) A person who commits a deed in a present, not otherwise perishable danger to life, body, liberty, honor, property or other legal property in order to avert danger from himself or another shall not be unlawful if, the legal rights concerned, and the degree of threats to which they are exposed, significantly affects the protected interest. (2) However, this is only so far as the act is an appropriate means of averting the danger. The clinic must do everything in its power to know the mother's name. A doctor can be freed from his duty of secrecy in order to determine the status of a person through his knowledge. The woman herself does not commit a criminal offense if she does not reveal her identity in the hospital; The mother cannot be found guilty of exposure in terms of s 221(1) of the StGB if she makes use of a baby safe or the option of anonymous birth in a hospital. The reason for this is because the baby is not left in a dangerous or helpless situation; For more on s 169 StGB see Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 65; also see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von*

obligation of maintenance;[159] failure to discharge the obligation of care;[160] removal of minors, if the mother removes the child from the father or vice versa, by giving the child away anonymously.[161] Neither the mother nor the baby safe operator or provider of anonymous birth facilities will be guilty of the offense of child-trafficking according to section 236 of the StGB.[162] This is because the mother is not acting for remuneration or the purpose of

"Babyklappe", "anonymer Geburt" und "anonymer Übergabe" (2009) 174, 216; Mielitz *Anonyme Kindesabgabe: Babyklappe, anonyme Übergabe und anonyme Geburt zwischen Abwehr und Schutzgewährrecht* (2006) 116-117, 118; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 118.

[159] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 39; s 170 StGB reads as follows: "(1) Any person who withdraws from a statutory obligation to provide maintenance so that the survivor's life is endangered or would be endangered without the help of others will be punished with imprisonment for up to three years or with a fine. (2) Any person who is obliged to provide maintenance to a pregnant woman and who withholds such maintenance and causes the termination of the pregnancy will be punished with imprisonment for up to five years or with a fine"; Neuheuser "Erfahrungen und Rechtspraxis zu anonymen Geburten und Babyklappen aus der Sicht strafrechtlicher Ermittlungen" 2008 *Öffentliche Anhörung des Deutschen Ethikrates zum Thema "Anonyme Geburt/Babyklappe" am 23.10.2008 in Berlin*, available at http://www.ethikrat.org/der_files/Praesentation_Neuheuser_Anonyme_Geburt_u_Babyklappen_aus_strafrechtl_Sicht_2008-10-23.pdf 29; also see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von "Babyklappe", "anonymer Geburt" und "anonymer Übergabe"* (2009) 180-187; Beulke "Ist die 'Babyklappe' noch zu retten?", in Putzke et al (ed) *Strafrecht zwischen System und Telos* (2008) 605-625 at 605 ff; also see s 1601 BGB: "Relatives in a straight line are bound to provide each other with maintenance."; The maintenance obligation starts at the moment of birth and only stops when the child is adopted in terms of s 1755(1) BGB and in turn adoption is only possible eight weeks after birth according to s 1747(2) BGB that provides consent for adoption may only be given after this period. Therefore, during this time the parents retain their maintenance obligations; See also s 1603 of BGB; For more on s 170 StGB see Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 67; Mielitz *Anonyme Kindesabgabe: Babyklappe, anonyme Übergabe und anonyme Geburt zwischen Abwehr und Schutzgewährrecht* (2006) 114-115.

[160] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 39; s 171 StGB reads as follows: Anyone who seriously violates his / her duty to provide care or education to a person under the age of sixteen years, thereby putting the children at risk of being severely injured in their physical or psychological development, carrying out a criminal life change or pursuing prostitution, shall be punished with imprisonment of up to three years or with a fine; For more on s 171 StGB see Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 75; also see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von "Babyklappe", "anonymer Geburt" und "anonymer Übergabe"* (2009) 188, 214; Mielitz *Anonyme Kindesabgabe: Babyklappe, anonyme Übergabe und anonyme Geburt zwischen Abwehr und Schutzgewährrecht* (2006) 112-113, 118.

[161] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 39; s 235 StGB: "(1) Five years of imprisonment or a fine will be imposed on anyone who removes a child under 18 years of age with force or delicate evil." The criminality of the providers of anonymous child charges is countered by a non-factual consent of the delivering mother, assuming that she is the sole parent in the case of the law, and that the child's anonymous surrender actually corresponds to her will; for more on s 235 StGB see Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 79; also see Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von "Babyklappe", "anonymer Geburt" und "anonymer Übergabe"* (2009) 190, 214, 219.

[162] Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 80; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 37.

enrichment.[163] The members of a recognised Pregnancy Conflict Advisory Board have a right to refuse to give evidence in criminal proceedings over information given to them in terms of the SchKG.[164] A minor without parental care and without any information pertaining to his or her family will receive a guardian in terms of section 1773 of the BGB, which will be assigned by the youth welfare office in terms of section 42 SGB VIII after being heard by the family court.[165] The youth welfare offices and youth welfare service are subject to the criminal law provisions on confidentiality.[166] They have to preserve confidentiality and ensure the protection of information.[167] This also applies to the employees of a Pregnancy Conflict Counseling Center.[168] Information transfer is only possible by a court decision to execute criminal proceedings.[169] In the case of children and youth welfare regulations section 61 of the Social Security Statute Book (SGB VIII), transmission of social data is inadmissible, there is no obligation to provide information or evidence, nor do they require the submission of documents.[170] It is also not permissible to share information about the mother and the child to acquaintances or relatives of the woman.[171] In Germany, criminal investigations against mothers have been cancelled either because there is no way of identifying the mother, or because she can be assumed to be in desperate need.[172] Differing opinions exist whether a

[163] Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 80; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 37.
[164] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 38.
[165] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 38; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 118.
[166] s 203 StGB; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 39.
[167] s 35 SGB I.
[168] s 203 StGB.
[169] s 73 SGB X.
[170] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 39; In terms of South African law The Protection of Personal Information Act 4 of 2013 governs the handling of personal information and data.
[171] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 39.
[172] Neuheuser "Erfahrungen und Rechtspraxis zu anonymen Geburten und Babyklappen aus der Sicht strafrechtlicher Ermittlungen" 2008 *Öffentliche Anhörung des Deutschen Ethikrates zum Thema "Anonyme Geburt/Babyklappe" am 23.10.2008 in Berlin*, available at http://www.ethikrat.org/der_files/Praesentation

criminal offence is committed by those that provide baby safes or by those that provide facilities that enable women to give birth anonymously.[173] Some authorities hold the view that because baby safes and anonymous birth facilities are helping women in need, no law is broken, while others hold the view that the law is in fact being broken.[174] The preferred opinion is the former. This thesis suggests that, without the provision of the relevant facilities for the anonymous relinquishment of infants, it would lead to unsafe infant abandonment, which could result in infant deaths.[175]

3.4.4 Adoption laws[176]

Adoption is governed by sections 1741 to 1766 of the BGB as well as the Adoptions Transfer Act (*Adoptionsvermittlungsgesetz— AdVermiG*).[177] If parents want to give their child up for adoption they can contact an adoption agency. Adoption can be anonymous and in this instance the identity of the parents remains completely confidential.[178] In principle, parental consent is required for the release of a child for adoption.[179] Consent may only be granted eight weeks

_Neuheuser_Anonyme_Geburt_u_Babyklappen_aus_strafrechtl_Sicht_2008-10-23.pdf (last accessed 2019-09-17) 30.

[173] Mielitz *Anonyme Kindesabgabe: Babyklappe, anonyme Übergabe und anonyme Geburt zwischen Abwehr und Schutzgewährrecht* (2006) 120; Elbel *Rechtliche Bewertung anonymer Geburt und Kindesabgabe unter besonderer Berücksichtigung der grundrechtlichen Abwehrrechts und Schutzpflichtendogmatik* (2007) 80; Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von "Babyklappe", "anonymer Geburt" und "anonymer Übergabe"* (2009) 216; Beulke "Ist die 'Babyklappe' noch zu retten?", in Putzke et al (ed) *Strafrecht zwischen System und Telos* (2008) 605-625, 605 ff; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 40.

[174] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 40.

[175] Although it has been stated that the number of newborn babies killed and abandoned since the introduction of anonymous relinquishment facilities in Germany had not decreased, this may however be attributed to the fact that there is a lack of public awareness of the existence of this system. Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 23. It should be borne in mind that not all cases are reported.

[176] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 43.

[177] In South Africa adoptions are governed by the Children's Act 38 of 2005 chapter 15 ss 228 to 253; also see chapter 7 for more on adoption in South Africa, specifically with regard to the changes proposed by the Children's Amendment Bill of 2019 and for a discussion on the consent requirement in adoption if the mother of the child is a minor.

[178] s 1758 BGB.

[179] s 1750(1) and s 1747(1) BGB.

after the birth of a child according to section 1747(2) of the BGB.[180] The requirement of parental consent poses an obvious problem in instances of anonymous birth or the use of baby safes where the mother's consent is unobtainable. This problem has been resolved by section 1747(4) of the BGB that provides:

> "(4)(1)The consent of a parent is not required if he is permanently unable to make an explanation or his stay is permanently unknown. (2)The stay of the mother of a child born confidentially in accordance with Article 25 (1) of the Pregnant Conflict Act is deemed to be permanently unknown until the family court provides the necessary particulars for the birth of her child."[181]

When a child is placed for adoption without the necessary parental consent, the adoption may be cancelled in terms of section 1760 of the BGB. However, this does not apply to the instance covered in section 1747(4) of the BGB as mentioned above.[182] Should the adoption be cancelled the natural relationship between the child and the biological parents is revived.[183] Consent to adoption may not be given until the child is eight weeks old[184] and is effective even when the consenting person does not know who the adopting parents will be.[185] However, in instances of anonymous relinquishment, news reports indicate that infants that are abandoned

[180] As previously stated in fn 97, 98 and 133; According to s 230(3)(*c*) of the South African Children's Act 38 of 2005 a child is considered adoptable if that child has been abandoned. s 233(8) indicates that a person who consented to the adoption of the child may withdraw their consent within 60 days, thus indicating that there is no waiting period of eight weeks as in German law before consent to adoption may be given but on the contrary consent may be given immediately with the assurance that it can be withdrawn within 60 days. Importantly, in the instance of child abandonment, the consent of the parent or guardian of the child to the adoption of the child is dispensed with in terms of s 236(1)(*b*).

[181] Translated quote www.buzer.de, last accessed 2018-03-29; This echoes the provisions of the South African Children's Act 38 of 2005 s 236(1)(*b*) which also states that the consent to adoption of the parent or guardian is dispensed with if the "whereabouts of that parent or guardian cannot be established or if the identity of that parent or guardian is unknown".

[182] For the position of the father see fn 58.

[183] s 1764(3) BGB.

[184] s 1747(2)(1) BGB; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 20, available at www.comparazionedirittocivile.it.

[185] s 1747(2)(2) BGB; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 20, available at www.comparazionedirittocivile.it.

in Germany are in most cases between 24 hours and 30 hours old,[186] therefore parents are prematurely consenting to the adoption of the child. As a result, it is assumed that mothers may in this instance change their minds within the same period of eight weeks after relinquishing their infant anonymously.[187] Even so, there are no provisions, on how children deposited in these safes are to be returned to women or parents and how the identities of the mother or parents are to be confirmed.[188]

3.5 CONFIDENTIAL BIRTH[189]

According to Schwedler,[190] the use of baby safes in Germany has been controversial and has seen no decline in infant mortality.[191] The German legislature decided to establish confidential birth as a legally regulated alternative to baby safes and anonymous birth. Prior to the development of confidential birth, the use of baby safes was not legally secured and there

[186] See http://www.thelocal.de/20130601/50041 accessed 2014-11-24.
[187] Similarly, to South African law s 233(8) of the Children's Act 2005 provides that a person referred to in subsection (1) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final.
[188] Out of a total of 52 children, 7 were returned in Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 310; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 21. According to the Ethikrat the leading form of verification is not DNA testing instead the identity of the mother would be confirmed by clues left in the baby safe or "of witness statements on the pregnancy, or alternatively on the basis of the mother's credibility". Sometimes the youth welfare office would "confirm the mother's capacity to raise the child before returning him" or her but this is not a practice followed in majority of the cases.
[189] Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 268-284; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vertretbar?* (2010) 47; for a comparison on the French system of anonymous birth versus Germany's confidential birth laws see Hadžimanović "Confidential and anonymous birth in national laws – Useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 20-21, available at www.comparazionedirittocivile.it; also see Lefaucheur "The French 'tradition' of anonymous birth: the lines of argument" 18 2004 *International Journal of Law, Policy and the Family* 319-342; Further see Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to Introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343-354; Furthermore see Bonnet "Adoption at birth: prevention against abandonment or neonaticide" 17 1993 *Child Abuse and Neglect* 501, 505; Decision and Recommendation Report by the Committee for Family, Seniors, Women and Children, 13th Committee Deutscher Bundestag 17, Wahlperiode Drucksache 17/13774.
[190] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195.
[191] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195.

existed no uniform criteria for the use of these safes throughout the country.[192] The legislature passed the *Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt* (SchwHiAusbauG — Law for the Expansion of the Aid for Pregnant Women and the Regulation of Confidential Birth) on 7 June 2013,[193] baby safes and anonymous birth practices however still exist. Schwedler continues that the actual goal behind the use of baby safes and anonymous birth, which is the prevention of infant mortality, was not being achieved.[194] Despite this observation by Schwedler, the dissenting statement of the German Ethics Council indicates that "the possibility cannot be ruled out that the lives and health of children threatened with abandonment in extreme situations of distress may actually be saved by the provisions of facilities for anonymous infant relinquishment".[195] Before the new law enforcing confidential birth was established, certain existing provisions resulted in a conflict between that which was practiced and the law that was in force at the time. One such conflict occurred in section 16 of the PStG[196] which provided that each birth must be reported with the names of the parents to the registry. Section 18, 19 and 21 further stipulated that details of the parents, the physicians,

[192] Some of the missing criteria included the question as to who was allowed to operate a baby safe; which training standard the staff of the institution has to undergo and to which extent there needs to be co-operation with a youth office. Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 17; German Association for Public and Private Welfare "Empfehlungen des Deutschen Vereins zu den Mindeststandards von Babyklappen" 11 June 2013, available at www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf, also available at www.deutscherverein.de/05-empfehlungen/empfehlungen_archiv/2013/DV-4-13-Mindeststandards-von-Babyklappen and also further discussed at www.dijuf.de; see Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 219. Despite the existence of these minimum standards, there is no evidence that they are being observed.

[193] Gesetzes zum Ausbau der Hilfen fur Schwangere and zur Regelung der vertraulichen Geburt (SchwHiAusbauG) Federal Law Gazette (Bundesgesetzblatt) Part I, Vol. 53, 3 September 2013, 3458-3462; Schwedler "Die vertrauliche Geburt- EinMeilenstein fur Schwangere in Not?" 5 2014 *NZFam* 194.

[194] Schwedler "Die vertrauliche Geburt- EinMeilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193; See also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 218 where the authors state that no official record is available but existing non-offical data indicates no decrease in infant abandonment.

[195] Deutscher Ethikrat "Anonymous relinquishment of infants: tackling the problem" 2009 97.

[196] Personal Status Act; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 114.

the midwives and the heads of the respective birth clinics must be reported.[197] The omission of this disclosure was considered an administrative offense according to section 70 of the PStG or as a criminal offense according to section 169 of the StGB.[198] Now, according to section 21(2a) of the PStG the first and last names of the parents are no longer required in the register of births and the obligation for all parties involved to prescribe this information is also dispensed with.[199] Another conflict exists with regard to section 1773(1) and (2) of the BGB[200] that provides a guardian is to be appointed immediately in respect of children who are not under parental care or whose family status cannot be ascertained.[201] This challenge is overcome when the baby safe operators themselves immediately assume guardianship of the abandoned child prior to handing the child over to the authorities after eight weeks.[202] As a result the child is not left guardian-less for that period.[203]

[197] Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 36-47; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193.

[198] Criminal Code or Penal Code; Deutscher Ethikrat *Anonymous Relinquishment of Infants: Tackling the Problem* (2009) 36-47; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193.

[199] As amended by a 3 of the SchwHiAusbauG. Subsection (2a) reads as follows: "In the case of a Confidential Birth pursuant to section 25 (1) of the Pregnancy Conflict Act, only the particulars prescribed in Paragraph 1 (1) to (3) shall be included. The competent administrative authority shall determine the child's first names and family names"; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47.

[200] s 1773 of the German Civil Code reads as follows: "(1) A minor is given a guardian if he is not subject to parental custody or if the parents are not entitled to represent the minor either in matters affecting the person or in matters affecting property. (2) A minor is also given a guardian if his personal status cannot be determined"; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 20, available at www.comparazionedirittocivile.it where the author points out that cooperation of the legal guardian of a child or a foster parent of a child is necessary if the mother wants access to the child but did not provide sufficient information at the time of birth. In this respect also see s 1791c sentence I BGB; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 118.

[201] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47; Schwedler "Die vertrauliche Geburt- EinMeilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-194.

[202] This in terms of article 1791a of the BGB; In a similar fashion, when an infant is abandoned in South Africa, a Child and Youth Care Centre (CYCC) will be appointed as the child's legal guardian by the Children's Court; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47; Schwedler "Die vertrauliche Geburt- EinMeilenstein fur Schwangere in Not?" 5 2014 *NZFam* 194.

[203] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 194; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47.

Through the inclusion of section 1747(4) BGB the location of a mother of a confidentially born infant will be recorded as unknown and for the purposes of the adoption of the child in terms of section 1747(1) BGB the consent of the mother is not necessary.[204] Section 1674a BGB provides "the mother's parental custody is suspended for a child delivered by confidential birth pursuant to section 25(1) of the SchKG".[205] If she wishes to keep the child, her parental custody will be restored if she has provided the court with sufficient information in terms of the child's register of birth.[206] The purpose of this regulation is to avoid a juxtaposition of parental care of the mother and guardianship given to a guardian immediately after birth and also because without sufficient information to link the mother to the child it would be impossible for the court to restore parental care to the mother as the court would not have sufficient certainty as to who the mother is.[207] According to the section 25(1) SchKG,[208] confidential birth is a practice in which the pregnant woman does not initially disclose her identity. In implementing the laws on confidential birth, numerous other laws had to be amended to fall in line with the

[204] ss (4) "The consent of one parent is not necessary if he is permanently not in a position to make a declaration or his abode is permanently unknown. The abode of a mother who has delivered her child by confidential birth pursuant to section 25 (1) of the Law on Conflicts in Pregnancies [Schwangerschaftskonfliktgesetz] is deemed permanently unknown until she has provided the family court with the information required to enter the child's birth in the register". Subsection (1) provides that for "the adoption of a child, the consent of the parents is necessary"; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 194, 195; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47.

[205] Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 229, the mother's parental authority is not completely terminated until adoption of the child. She also retains her right of contact with the child. Furthermore a claim for maintenance against the mother could arise in terms of section 1601 of the German Civil Code. If the child is not adopted he or she will be an heir of the mother's estate after the mother's death in terms of section 1924 German Civil Code and if disinherited by the mother, the confidentially born child has a claim against the heir/s for a compulsory portion of the estate in terms of section 2303(1) of the German Civil Code; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 194.

[206] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47.

[207] s 1773 I BGB; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 118.

[208] Law to Prevent and Manage Conflicts of Pregnancy, also known as the Pregnancy Conflict Act; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195.

provisions of the *SchwHiAusbauG*. In terms of section 4(2) of the *Staatsangehörigkeitsgesetz* or Nationality Act (StAG) a foundling child is regarded as a German citizen until the contrary is proved. To this provision, the presumption that the child is a German citizen was included to apply to a child born confidentially.[209] In terms of section 10 of the PStG which deals with the notification and provision of information in the civil registry subsection 4 was included to stipulate that there is no obligation to provide information and to provide evidence for a confidential birth conducted according to section 25(1) of the SchKG.[210] Prior to this addition, an obligation existed to report the birth of every child.[211] Further, subsection 2 was added to section 18 of the PStG.[212] In terms of section 18 notification of the birth of the child must be sent to the registry office in the area in which the child was born,[213] now subsection 2 makes provision for confidential birth and provides that the pseudonym of the mother and the chosen names for the child are to be communicated to the registry office, this also in terms of section 25(1) of the SchKG.[214] Section 21 of the PStG, which deals with registration of the birth in the birth register provides that the following information must be recorded in the birth register in terms of subsection 1(1) to 1(4): the child's first and second names; place, date, time of birth; the sex of the child; the first names and family names of the parents at the request of a parent his legal affiliation to a religious community.[215] Thereafter, paragraph 2a was added to specify the information necessary in the instance of confidential birth and it stipulates that only 1(1) to (3) would be necessary in the instance of confidential birth. In other words, it would not be necessary to record the information required in terms of section 1(4) that requires the first names and family names of the parents. Section 2a also provides that the first names and

[209] Amendments by a 1 of the SchwHiAusbauG (dated 28 August 2013) valid from 1 May 2014.
[210] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195.
[211] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195.
[212] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195.
[213] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 193-195.
[214] Amendments by a 3 of the SchwHiAusbauG (dated 28 August 2013) valid from 1 May 2014.
[215] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 36-47.

surname of the child will be determined by the competent administrative authority.[216] According to the *Personenstandsverordnung* (PStV) the registry office that certifies the birth has to notify the family court in terms of section 57(1)(4) if:

> "(a) the child is born after the death of his father;
> (b) he is a foundling child or a minor whose age cannot to be ascertained; or
> (c) child from a confidential birth in accordance with section 25(1) of the Pregnancy Conflict Act."[217]

In terms of section 57(1)(7) PStV the Federal Office for Family and Civil Society Tasks must also be notified if the child was born confidentially in terms of section 25(1) of the SchKG. The same provision is repeated under section 57(4)(5) of the PStV. To comply with the notification requirements as laid down in section 57(1) to (5) the registry office may transmit a list of information, one of which includes the pseudonym of the mother where the birth was a confidential birth in terms of section 25(1) of the SchKG, this in terms of section 57(6)(20) of the PStV. The registry office has to communicate the birth of a child who was born confidentially in terms of section 25(1) of the SchKG to the family court. This has to be done in terms of section 168a(1) of the Act on the Procedure in Family Matters and Matters of Voluntary Jurisdiction (FamFG).[218] This act applies to the proceedings in family matters and matters of voluntary jurisdiction assigned to the courts by Federal law.[219]

[216] Amendments by a 3 SchwHiAusbauG (dated 28 August 2013) valid from 1 May 2014.
[217] Amended by a 4 of SchwHiAusbauG (dated 28 August 2013) and valid from 1 May 2014 translated by me. Translated quote from http://www.buzer.de accessed on 2018-03-29.
[218] Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit also referred to as FamFG.
[219] s 1674a BGB (German Civil Code); see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 19, available at www.comparazionedirittocivile.it, where the author explains that "a mother's custody is suspended for as long as she fails to provide the information required for the entry of the child's birth in the register". She only has right of access to the child in terms of s 1684 I of the BGB.

With regard to the issue of consent to adoption by the parents of the child, a father's consent is not required if he is permanently unable to make an explanation or his address or whereabouts is permanently unknown.[220] Until the family court provides the necessary particulars for the child's birth, the address of the mother of a child born confidentially shall be deemed to be permanently unknown.[221] The SchKG was designed to help women who face conflict pregnancy situations.[222] This act allows both men and women to request advice on sex "education, contraception and family planning as well as" in all matters directly or indirectly affecting a pregnancy.[223] Such matters include advice on the cost of pregnancy check-ups and the cost of delivery; social and economic assistance for pregnant women, this includes financial services to assist pregnant women in finding housing and or employment; the methods for carrying out an abortion, the physical and psychological consequences and the associated risks of an abortion; and the legal and psychological aspects related to adoption.[224] The right to counselling also includes follow-up care after an abortion or after childbirth.[225] A comprehensive, open-minded counselling session is to be conducted with the woman who does not want to reveal her identity and who chooses to give her child up after birth.[226] As a result, women will be better informed of the consequences of staying anonymous or choosing to care for their child.[227] Counselling offices are spread out over various *Länder*[228] and are situated

[220] s 1747(4) BGB (German Civil Code); The situation where the father was unaware of the pregnancy and birth is not addressed by the German law; see chapter 6 for the rights of fathers in these situations.
[221] s 1747(4) BGB (German Civil Code).
[222] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 47.
[223] s 2(1) Pregnancy Conflict Act; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 47.
[224] s 2(2)(1)-(8) Pregnancy Conflict Act; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 47.
[225] s 2(3) Pregnancy Conflict Act; Refer to Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* at 18, available at www.comparazionedirittocivile.it, where the author questions the non-freedom given to the woman in having to submit to these counselling sessions; Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 47.
[226] s 2(4) Pregnancy Conflict Act.
[227] s 2(4)(2) Pregnancy Conflict Act.
[228] Federal states.

close to residences for easy access.[229] The *Länder*[230] shall ensure that at least one counsellor is appointed in an area for every 40 000 inhabitants, or a corresponding number of part-time employees are available.[231] Conflict pregnancy counselling according to section 5(1) of the SchKG and section 219(1) of the StGB is designed to protect unborn life,[232] and is free for pregnant women and those persons referred to in section 6(3)(3).[233] Section 9 of the SchKG lays down certain requirements for pregnancy counselling centres and counselling must be conducted in terms of sections 5 and 6. In terms of section 12(1) of the SchKG no person is obligated to participate in pregnancy termination, however this shall not apply if termination of the pregnancy is necessary to prevent the risk of death or serious injury to the woman's health.[234] A fine up to the value of 5000 euros may be imposed for an administrative offence where the advice is given contrary to section 2a (1) or (2),[235] or contrary to how a termination of pregnancy should be conducted in terms of section 13(1)[236], or lastly if in terms of section 18(1)[237] no information concerning abortions was provided.

3.5.1 The procedure governing confidential birth

[229] s 3 Pregnancy Conflict Act.
[230] Federal states.
[231] s 4(1) Pregnancy Conflict Act.
[232] s 219(1) Criminal Code.
[233] s 6(4) of Pregnancy Conflict Act. s 6(3)(3) lists other persons as producers and close relatives. "Producer" or "der Erzeuger" are said to refer to the father of the unborn child.
[234] s 12(2) Pregnancy Conflict Act.
[235] (1) If after the results of the prenatal diagnostic measures there are urgent reasons for the assumption that the physical or mental health of the child is harmed, the doctor or the pregnant woman will consult with the physician who has experience with this health damage in the case of born children. Consultation is in a generally understandable form and it includes an in-depth discussion of possible medical, psychological and social issues as well as ways to support physical and psychological stress. (2) The written determination of diagnosis may not be made before three days after the notification of the diagnosis. This does not apply if the pregnancy has to be discontinued in order to avoid a present significant risk to the life or limb of the pregnant woman; Federal Ministry for Family Affairs, Senior Citizens, Women and Youth s 218 of the German Criminal Code at 13 and 14 by Bundeministerium August 2014.
[236] A pregnancy termination may only be carried out in a facility in which the necessary after treatment is also ensured; Benefits in terms of section 20 are paid out in the case of the safe termination of pregnancies by the statutory health insurance fund to the physician and doctors involved; The Länder in terms of s 22 shall reimburse the statutory health insurance funds for the costs arising from this; Federal Ministry for Family Affairs, Senior Citizens, Women and Youth S 218 of the German Criminal Code at 13 and 14 by Bundeministerium August 2014.
[237] The owners of medical practices and the heads of hospitals are obliged to provide information where within two years before the end of the quarter abortions were conducted.

A prerequisite for confidential birth is a consultation with the woman.[238] According to section 25(1) of the SchKG a pregnant woman who is advised in accordance with section 2(4),[239] who does not want to give up her identity, must be informed that a confidential birth is possible.[240] Confidential birth is a delivery in which the pregnant woman does not reveal her identity and instead provides the information according to section 26(2),[241] such information amounts to a proof of origin and shall be placed in a sealed envelope to prevent any unintentional opening.[242] The primary aim of the consultation is to enable the pregnant woman to have medical care and to provide help so that she can decide to live with the child should that be her desire.[243] The consultation shall include in particular:[244]

> "1. The information on the course of the proceedings and the legal consequences of a confidential birth;
>
> 2. The information on the rights of the child; the importance of knowing the origin of mother and father for the development of the child;

[238] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.

[239] s 2(4) SchKG provides a detailed, open-minded counselling session is to be offered to pregnant women who do not want to give up their identities and who want to give up their child after birth, to deal with the psychosocial conflict situation. The content of the consultation is as follows: 1. Appropriate aid to address the situation and to make decisions, and 2. Ways that allow the pregnant woman to abandon the task of anonymity or a life with the child; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.

[240] s 25(1)(1) SchKG; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.

[241] s 26(2) SchKG provides the advisory body shall provide proof of the child's origin. For this purpose, she records the first names and the family names of the pregnant women, their date of birth and their address, and checks these details by means of a valid identification card which is suitable for identifying the identity of the pregnant woman. Translated quote from http://www.buzer.de/gesetz/6462/index.htm accessed on 2018-03-29; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.

[242] s 26(2) SchKG http://www.buzer.de/gesetz/6462/index.htm accessed on 29 March 2018; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.

[243] s 25(2)(1) SchKG; See Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 24, available at www.comparazionedirittocivile.it , who views this consultation as coercion.

[244] s 25(2)(2) SchKG par 1-6.

3. The information about the rights of the father;[245]

4. The presentation of the usual course and conclusion of an adoption procedure;

5. The information on how a woman can assert her rights in respect of her child after a confidential birth under abandonment of her anonymity, as well as

6. The information on the procedure according to sections 31 and 32."

The importance of the child's knowledge of the origin of his or her mother and father[246] in terms of section 25(2)(2) is intended to promote the willingness of the pregnant woman to provide the child with as comprehensive as possible information of his or her background.[247] Consultation and monitoring shall be carried out in cooperation with the adoption agency.[248] If the woman rejects confidential birth she must be advised that anonymous advice and assistance is available to her at any time.[249] However, should the pregnant woman choose confidential birth, such procedure will be regulated by section 26 of the SchKG.[250] This section provides that if a pregnant woman chooses confidential birth she has to provide a pseudonym under which the confidential birth will be conducted and one or more female and one or more male names for the child.[251] According to 26(2) the advisory body also known as the counselling office will require proof of the child's origin and therefore will request the true identity of the

[245] In this respect see fn 224 for more on the rights of the father.
[246] See fn 55 for information on the rights of the father; Further see section 25(3) of SchKG; see also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221.
[247] s 25(3) SchKG; For more on the child's right to knowledge of its origins see chapter 5; see also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221.
[248] s 25(4) SchKG.
[249] s 25(5) SchKG.
[250] s 26(1) paragraph 1 and 2 SchKG; see also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.
[250] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, 24, available at www.comparazionedirittocivile.it, for criticism on this; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223.
[251] s 26(1) para 1 and 2 SchKG; see also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.

woman (first name and surname) as well as the date of birth and address of the woman.[252] This information is checked against the woman's valid identification card.[253] Section 26(3) paragraph 1 to 5 states that the following information will be reflected on top of the sealed envelope in which the proof of origin is contained: the fact that it contains a proof of origin;[254] the pseudonym chosen by the pregnant woman; the place of birth and date of birth of the child; the name and address of the obstetrician and the address of the advisory board.

After the birth of the child, the proof of origin is sent in a sealed envelope by the counselling office to the Federal Office for Family and Civil Society Tasks and is kept there.[255] The name of the child as reported by the registry in terms of section 26(7), shall be recorded on the envelope by the Federal Office for Family and Civil Society Tasks.[256] Prior to the birth, the counselling office refers the woman, who has opted to make use of confidential birth, to a medical practitioner able to provide obstetrics for the purposes of giving birth.[257] The chosen

[252] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, 24, available at www.comparazionedirittocivile.it; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223.

[253] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, 24, available at www.comparazionedirittocivile.it; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223.

[254] Also see Schröder "Confidential birth a chance for mother and child" in *BZgA Forum Sexuality Education and Family Planning*, available at https://www.fachdialognetz.de/fileadmin/pfm/formUploads/files/13327008.pdf?cv=1 last accessed 2019-12-06.

[255] s 27(1) SchKG; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223 where the authors point out that a copy of the record is not made, which means if the only version gets lost, the child has no possibility of finding out who his or her mother is. For more on the criticism on this see Berkl "Das Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt – unter besonderer Berücksichtigung der personenstandsrechtlichen Konsequenzen" 2014 *StAZ* 65, 72.

[256] s 27(2) SchKG; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223.

[257] s 26(4) SchKG; Berkl "Das Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt – unter besonderer Berücksichtigung der personenstandsrechtlichen Konsequenzen" 2014 *StAZ* 65-73.

names for the child shall also be provided to the relevant medical practitioner.[258] Further, information shall also be communicated to the *Jugendamt* (youth welfare office) by the counselling office, this information includes the pseudonym of the pregnant woman; the expected date of birth and the institution responsible for the obstetrics.[259]

The federal government pays the costs of the birth pre- and after-care.[260] The costs are borne in terms of the benefits of statutory health insurance during pregnancy and maternity.[261] All persons who provided services to the mother may claim the costs of these services back from the federation.[262] If the mother gives up her anonymity after birth then such costs may be recovered from the health insurance.[263]

After the birth of the child the head of obstetrics where the child was born must notify the counselling office of the date of birth and the place of birth of the child.[264] The registry office shares the pseudonym of the mother together with the name of the child with the Federal Office for Family and Civil Society Tasks.[265] Only the counselling centre will have the true identity of the mother.[266] The process of confidential birth is regarded as an effective method to ensure anonymity of the mother, which enables the mother to feel secure in seeking out medical

[258] s 26(4) SchKG; Berkl "Das Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt – unter besonderer Berücksichtigung der personenstandsrechtlichen Konsequenzen" 2014 *StAZ* 65-73.
[259] s 26(5) para 1-3; Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; Obstetrics includes the branch of medicine and surgery concerned with childbirth and midwifery.
[260] s 34(1) par 1 SchKG; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 221-222.
[261] s 34(1) SchKG.
[262] s 34(2) SchKG.
[263] s 34(3) SchKG.
[264] s 26(6) SchKG.
[265] s 26(7) SchKG.
[266] Schwedler "Die vertrauliche Geburt – Ein Meilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, 24, available at www.comparazionedirittocivile.it, for criticism on this; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223.

assistance and therefore guarantees the safety of the infant.[267] This is disputed by Hadžimanović who asserts that confidential birth does the opposite, instead of making the mother feel secure it causes the mother anxiety that her information could be used incorrectly and thereby jeopardising her anonymity.[268] One objective that confidential birth does seem to achieve is, although *not guaranteeing* the child's right to knowledge of its origins, it atleast provides the child with the *possibility* of knowing where he or she comes from.

The mother is not obliged to disclose the name of the presumed father; she is however, during counselling advised of the father's rights in respect of the child.[269] Both before and after the

[267] See Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 24, available at www.comparazionedirittocivile.it, who disagrees with this assertion.

[268] See Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 24, available at www.comparazionedirittocivile.it, who disagrees with this assertion.

[269] s 25(2)(3) SchKG; German law regulates fathers' rights as follows: the family court may award sole custody to the child's father (his parental authority is not suspended) in terms of s 1678 II BGB if this is in the child's interest and there is no prospect that the reason for the suspension of the mother's parental rights will be lifted, this may be done in two instances. First, if the child's parents are not married but the father issued a prenatal recognition statement (in terms of s 1594 IV BGB, recognition may occur prior to birth of the child) that was agreed to by the mother in terms of s 1595 I BGB, or if paternity was established by the court in terms of s 1600 d BGB. In both instances he will have rights of access in terms of s 1684 I BGB. This is only applicable to biological fathers that are also legal fathers in terms of s 1686a BGB. The rights of access of grandparents and siblings is dependent on the existence of a legal bond between them and the child and whether this access would be in the best interests of the child in terms of s 1685 BGB. Once the family court becomes aware of the birth, it will order guardianship over the child in terms of s 1773 BGB. This is done if the child is not under parental authority such as with abandonment in the form of confidential birth or if the parents are not entitled to represent the minor in matters of the person or property. Furthermore, a minor will also be assigned a guardian if it cannot be determined whether he was born in or outside of marriage. This is the case only if the father's fatherhood could not be motivated so that he is not entitled to custody or if his right to custody is revoked or suspended in terms of s 1674 BGB. The factors the court takes into account in selecting the guardians are: the will of the parents; the personal ties of the child, the child's "kinship" or "affinity", as well as the child's religious confession, all in terms of s 1779 II BGB. During the selection process of finding guardians for the child, the relatives may be heard in terms of s 1779 III S.1 BGB (if it will not lead to significant delays). Grandparents or other relatives may be appointed as guardians. Despite all of the above, the mother's right to anonymity is still guaranteed and respected. See Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, available at www.comparazionedirittocivile.it; See also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 227-228 where the authors point out that in general the father will be unable to exercise his rights because he is unaware of the pregnancy and the mother is not required to leave identifying information about the father and even if she does it is not placed on the record of origin but will be separately handed to the adoption agency instead. The child will be able to obtain this information in terms of s 9b(2) AdVermiG or through a corresponding right against the Federal Office of Family Affairs and Civil Society Functions; Wolf "Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und anonyme Geburten durch Gesetz zu legalisieren" 9 (3) 2003 *NZFam* 118.

birth of the child the mother is offered counselling,[270] this also applies if no proof of origin has been established.[271] If counselling of the woman results in a decision to keep the child then the counselling office shall inform the mother of the services offered to parents in the local geographical region and provide the mother with guidance in using these services.[272] Continuous help is provided for the mother to work through her challenges.[273] The provision of counselling is a necessary service, the ultimate aim is to reunite the family but also to ensure the health of both mother and child.[274] The mother's psychological health is ensured through counselling and the possibility of reunification is also created through counselling.[275] However, even if a mother chooses not to take up the responsibility of rearing her child through reunification, sending a mother away that has been counselled on how to deal with her decision means there is less chance of her changing her mind; less chance of the situation re-occuring and less chance of her leaving mentally distressed and unwell as a result of what she did.[276]

[270] s 29(2) and (3); s 30(1); s 2(4) SchKG provides: A detailed, open-minded counselling session is to be offered to pregnant women who do not want to give up their identity and who want to give up their child after birth, to deal with the psychosocial conflict situation. The content of the consultation is as follows: 1. Appropriate aid to address the situation and to make decisions, and 2.Ways that allow the pregnant woman to follow through with anonymity or a life with the child. Further see also section 25(2) and (3) of SchKG, which is mentioned above.
[271] s 30(1) par 2 SchKG.
[272] s 30(2) SchKG.
[273] s 30(2) SchKG; These challenges involve both her psychological (mental well-being) and social challenges (family and community situation).
[274] Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; See also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223; also see the Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 57.
[274] s 31(2) par 3 SchKG; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.
[275] Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.
[276] Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

When the child reaches the age of 16, the child has a right to inspect the proof of origin or to demand copies in terms of a right of access, from the Federal Office of Family and Civil Society Tasks in terms of section 31(1) of the SchKG.[277] The mother may explain the reasons why she does not want the child to have access to the proof of origin document to the counselling centre.[278] In turn, the counselling centre will assist the mother and come up with ways to prevent her identity from being exposed; however, the mother will be informed that the child can assert his or her right of access to justice.[279] If the mother remains insistent about not revealing her identity to the child, she may appoint someone who, in the case of a family court procedure, asserts the rights of the mother in its own name.[280] The child's right of recourse is to the family court if the Federal office for Family and Civil Society Tasks refuses the child access to his or her proof of origin in accordance with section 31(4).[281] This is the child's

[277] Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; See also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223; also see the Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 57.

[277] s 31(2) par 3 SchKG; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it last accessed 2020-02-03; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

[278] s 31(2) SchKG; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; see also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223; also see the Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 57.

[279] s 31(2) par 3 SchKG; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; See Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

[280] s 31(3) or represents the mother's interests in the name of a procedural officer; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

[281] s 32(1) SchKG; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it last accessed 2020-02-03; See Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* at 541-542; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223.

entitlement to assert his or her right of access to the information in a family legal procedure.[282] The family court will weigh up the mother's interests against the child's right to knowledge of his or her origins.[283] If no interests are declared by the mother then refusal of the child's access to the proof of origin document will not be warranted.[284] The parties to these proceedings are the child; the Federal Office for Family and Civil Society Tasks and the procedural officer appointed in terms of section 31(3).[285] These proceedings are free of charge. The mother may present her case personally, in which case the other parties will be absent whilst the mother presents her case.[286] The other parties are informed of the case that was presented by the mother without her identity being revealed.[287] The decision of the family court has legal force and effect.[288] If the child's application is rejected, the child may submit an application to the family court at the earliest three years after the decision.[289] According to Hadžimanovic, confidential

[282] See Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542, where the author points out that in Germany "The right of the child to know his origin is not opposed to any right of the mother to give birth in anonymity, because the former is seen as a prevailing right of the person, prevailing over the latter. The German legal system is the only one in which the right to know one's origin has acquired such an unrestricted rank". This thesis does not agree with the author that the right to knowledge of the child's origins has an unrestricted rank in German law. It can be clearly seen in the text that the mother's right to refuse the child access to such information carries considerable weight if not more weight than the child's right to access. This is illustrated by the fact that the mother may refuse the child access and the child will have to approach the court to challenge such decision with no actual guarantee that access to information on his or her origins will be granted. We are however, reminded of the assertion by Judge Greve in *Odièvre v France* at 86 who held that it is in the best interests of the child to be born in a safe environment, without putting either the child or the mother's life in jeopardy, regardless of the future repercussions. In response to the system of anonymous birth Judge Greve held: "The primary interest of the child is to be born and born under circumstances where its health is not unnecessarily put at risk by birth in circumstances in which its mother tries to secure secrecy even when that means that she will be deprived of professional assistance when in labour."

[283] s 32(1) par 2 SchKG; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it; Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 223; See also Deutscher Ethikrat *Anonymous relinquishment of infants: tackling the problem* (2009) 57-58.

[284] s 32(4) SchKG; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 18, available at www.comparazionedirittocivile.it.

[285] s 32(3)(1) para 1-3 SchKG.

[286] s 32(3)(2) SchKG; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

[287] s 32(3)(4) SchKG; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

[288] s 32(3)(2) SchKG; See Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

[289] s 32(5) SchKG; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542; Budzikiewicz and Vonk "Legal motherhood and parental responsibility:

birth fails to provide the women concerned with a break from reality, because they "have to reveal their identity before the confidential birth".[290] This, according to the author, creates pressure because women carry the knowledge that their details may be revealed to the child in future or their information may be used in a way that will leave their current family or children vulnerable.[291] This thesis agrees with the author that, ultimately, the anonymity of the mother must be respected in order for the right to life to be safeguarded.[292] Thus, the method employed is important for the achievement of the intended purpose. If the method, that is confidential birth, does not meet the need of the mother, which is anonymity, then she will not make use of this system and may opt to unsafely abandon instead.[293]

3.6 CONCLUSION

The study of German law concerning child abandonment shows three available forms of assistance, namely baby safes, anonymous birth and confidential birth laws. The abandonment of infants continued despite the availability of counselling and adoption. Baby safes are not legally regulated in terms of German law, although certain minimum standards for these safes

A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015*European Journal of Law Reform* 223.

[290] Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 24 fn 136, available at www.comparazionedirittocivile.it., points out that the UN Committee on the Rights of the Child require state parties to replace anonymous birth with confidential birth. See United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Concluding observations on the fifth periodic report of France adopted by the Committee at its seventy-first session (11-29 January 2016), 29 January 2016, CRC/C/FRA/CO/5, Civil rights and freedoms (aa 7, 8, and 13-17), Right to know and be cared for by parents: "33. The Committee reiterates its recommendations to take all appropriate measures to fully enforce the child's right to know his/her biological parents and siblings and urges it to adopt the necessary measures for all information about parent(s) to be registered and filed, in order to allow the child to know, to the extent possible and at the appropriate time, his or her parents (CRC/C/FRA/CO/4, par 44). The Committee also recommends that the State party consider removing the requirement of the biological mother's consent to reveal her identity and to increase its efforts to address the root causes leading parents to choose to use confidential birth."

[291] See Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 24, available at www.comparazionedirittocivile.it.

[292] See chapter 5 on the right to life versus the right to knowledge of one's origins where the importance of the mother's right to privacy is also discussed.

[293] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 7, 15.

have been drafted by the German Association for Public and Private Welfare.[294] Its attraction is the absolute anonymity experienced by mothers who make use of it. Anonymous birth was the German legislature's attempt at legally regulating abandonment and simultaneously providing mothers with the necessary medical care that they were not getting by making use of baby safes. One of the major flaws of anonymous birth is the public's lack of awareness of its existence. An advantage of anonymous birth is its assistance to women in desperate need, both medically as well as psychologically.[295] Promisingly, two-thirds of women decided to raise their children and only 5% decided to remain completely anonymous when using anonymous birth. Despite this, Schwedler is of the opinion that the goal behind the use of baby safes and anonymous birth was not being achieved. Under the influence of the UN Committee on the Rights of the Child, as well as the fact that the child's right to know his or her parentage is highly valued in Germany,[296] confidential birth laws were finally established, taking the focus off the child's right to life and placing it firmly on the child's right to knowledge of its origins. This is evidenced by the fact that the only difference between anonymous birth and confidential birth laws is the acquisition of the mother's identifying information and storing that information until the child requests it at the age of 16. Hadžimanović questions the effectiveness of

[294] German Association for Public and Private Welfare "Empfehlungen des Deutschen Vereins zu den Mindeststandards von Babyklappen" 11 June 2013, available at www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf, also available at www.deutscherverein.de/05-empfehlungen/empfehlungen_archiv/2013/DV-4-13-Mindeststandards-von-Babyklappen and also further discussed at www.dijuf.de; see Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 219; Despite the existence of these minimum standards, there is no evidence that they are being observed.

[295] See par 3.3 above.

[296] Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 226; see also Reis, RV 'The Right to Know One's Genetic Origins: Portuguese Solutions in a Comparative Perspective' (2008) 16 European Review of Private Law, Issue 5, pp. 779–799 781-782, which highlights that in Europe, German doctrine and jurisprudence is to thank for the acknowledgement by the law of that aspect (reffering to knowledge of origins) of the regulation of human personality. In 1976 Kleineke wrote "Das Recht auf Kenntnis der eigenen Abstammung" and this culminated in the development of the right to know one's genetic origins founded "on the general personality right (allgemeine Persönlichkeitsrecht) which was enshrined as the right to free development of the right to personality (Recht auf die freie Entfaltung seiner Persönlichkeit, a 2(1) Grundgesetz) combined with the principle of the dignity of the human person (Menschenwürde, a 1(1) Grundgesetz)" see 781 and 782 .

confidential birth, she states that requiring the biological mother to disclose her identity will cause her stress (with the knowledge that her identity might be accessed in future or even misused in the present) and thus this legislation completely misses its intended purpose.[297] This opinion is also shared by the authors Budzikiewicz and Vonk who state that, considering the emotional and physical state in which these women find themselves, it is doubtful whether they will make use of such a procedure where so many role players are involved whilst uncomplicated alternatives such as baby safes and anonymous birth exists.[298] This thesis agrees with the authors and, in addition, refers to the statement of Kuhn,[299] that "anonymity is what gains the mother's trust, without it, she will not make use of the system and the child will most likely be abandoned in an unsafe environment that could lead to his or her death". Furthermore, with confidential birth the mother may still choose not to have her identity revealed when the child requests access thereto at the age of 16.[300] Thus, confidential birth does not *guarantee* the child a right to know his or her origins but merely provides the child with the *possibility* of knowing. Thus, its effectiveness in ensuring the child's right to knowledge of his or her origins and thereby upholding the highly valued right in German law, is debatable. In summary, the advantage of a baby safe is the absolute anonymnity for the mother, the disadvantage is that she is medically and psychologically unassisted. Anonymous birth provides both medical and psychological assistance but the public's insufficient knowledge of this system renders it ineffective. However, it continues to exist and, with the public's increased awareness, may be

[297] Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 10, available at www.comparazionedirittocivile.it.
[298] Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 225-226.
[299] Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 317.
[300] However, as pointed out by the authors, the requirements are strict and the mother must show real harm before her identity will continue to be protected. These strict requirements may serve as a deterrent to women and they may choose to give birth anonymously instead. See Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 226.

a preferred alternative to a woman in lieu of the complexity of the procedure involved in confidential birth and the possibility that without a valid reason, the child may discover her identity at the appropriate age. Lastly, confidential birth, developed to satisfy the UN Committee on the Rights of the Child, in an attempt to secure the child's right to knowledge of his or her origins, fails at the very nucleus of why women use these systems — that is anonymity.

In the next chapter the safe haven laws of the United States of America will be explored as another possible viable solution to the problem of unsafe infant abandonment.

List of Abbreviations in order of appearance in text

SkF — Sozialdienst katholischer Frauen

SGB VIII — Sozialgesetzbuch VIII

SchKG — Schwangerschaftskonfliktgesetz

StGB — Strafgesetzbuch

BGB — Bürgerliches Gesetzbuch

GG — Grundgesetz für die Bundesrepublik Deutschland

PStG — Personenstandsgesetz

StPO — Strafprozeßordnung

AdVermiG — Adoptionsvermittlungsgesetz

StAG — Staatsangehörigkeitsgesetz

SchwHiAusbauG — Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt

PStV — Personenstandsverordnung

FamFG — Das Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit

CHAPTER 4: A STUDY OF THE LAWS OF THE UNITED STATES OF AMERICA

CHAPTER 4: A STUDY OF THE LAWS OF THE UNITED STATES OF AMERICA

4.1 USA

4.1.1 Introduction

The US only has one option, namely baby safe haven laws, for the safe relinquishment of infants. This is contrary to the approach in Germany, where there are three options available for the safe relinquishment of infants. These options include anonymous birth, baby safes and confidential birth, which has been legislated to do away with the former two.[1] Some of the differences between baby safes and safe havens are that various places are considered to be safe haven providers (such as emergency medical services providers, churches, fire stations, and hospitals)[2] and infants may be dropped off at any of the designated providers while a baby safe is simply a box-like structure placed in a wall where infants may be relinquished. In this chapter, safe haven laws of three states in the US are explored. South Africa's abandonment provisions are contained in a single statute namely the Children's Act 38 of 2005, whereas the definition of abandonment and how it is legislated upon in the US varies from state to state. Each state has its own defined safe haven providers and its own rules in terms of prosecution, namely whether a parent will have complete immunity from prosecution or whether he or she will merely have an affirmative defense.[3] The requirements for the termination or relinquishment of parental rights are also different as well as the extent to which the state will go to locate the father or allow the father to assert his rights. The laws of three states will be

[1] See para 3.2, 3.3 and 3.5 of chapter 3 German law.

[2] See Lacci "Statistically speaking: can safe haven legislation succeed without education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88; Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 2002-2003 *Children's Legal Rights Journal* 18.

[3] See Lacci "Statistically speaking: can safe haven legislation succeed without education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88 where the author points out that one half of the states with safe haven laws will not prosecute parents who wish to relinquish their unharmed infants, the remainder of the states attach criminal liability to baby abandonment. However, the states that attach criminal liability do provide an affirmative defense to parents if they abandoned their infants at a designated safe haven provider; also see Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 2002-2003 *Children's Legal Rights Journal* 18; Cesario "Nurses' attitudes and knowledge of their roles in newborn abandonment" Vol. 12 No.2 2003 *The Journal of Perinatal Education* 33.

considered in order to provide a broader overview of the nature and characteristics of these laws in the US generally. In the study of the laws of these three states, the following aspects will be addressed: firstly, who designated safe haven providers are. These differ from state to state, which could lead to the problem that a parent from one state may assume that, for example, a fire station is a designated infant care provider in another state and thus erroneously drop the infant at this location, ultimately not enjoying the protection afforded in terms of the safe haven laws. Secondly, the termination or relinquishment of birth parents' rights which "leads to the final and irrevocable severance of the parent-child bond".[4] According to the US Supreme Court, an order terminating parental rights denies parents "physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child".[5] A higher standard of proof namely clear and convincing evidence, is required in termination proceedings.[6] Federal law has been developed to regulate the termination of parental rights namely the Adoption and Safe Families Act of 1997 (hereinafter referred to as ASFA),[7] however, states implement these federal laws to varying degrees and these federal laws function in conjunction with state laws.[8] In terms of ASFA the abandonment of a child is seen as an aggravating

[4] Vesneski "State law and the termination of parental rights" Vol. 49 No. 2 2011 *Family Court Review* 364-378 364; Freundlich "Expediting termination of parental rights: solving a problem or sowing seeds of a new predicament?" 28 1999 *Capital University Law Review* 97-110.

[5] Vesneski "State law and the termination of parental rights" Vol. 49 No. 2 2011 *Family Court Review* 364-378 at 364; *Santosky v Kramer* 1982 455 US 749; Freundlich "Expediting termination of parental rights: solving a problem or sowing seeds of a new predicament?" 28 1999 *Capital University Law Review* 97-110.

[6] See *Santosky v Kramer* 1982 455 US 769; Okun "Termination of parental rights" 6 2005 *The Georgetown Journal of Gender and the Law* 761-771, 761; see Lee and Thue "Unpacking the package theory: why California's statutory scheme for terminating parental rights in dependent child proceedings violates the due process rights of parents as defined by the United States Supreme Court in *Santosky v Kramer*" 13 2009 *UC Davis Journal of Juvenile Law and Policy* 143, 161.

[7] Okun "Termination of parental rights" 6 2005 *The Georgetown Journal of Gender and the Law* 761-771, 762; According to Okun at 762 the purpose of ASFA was to decrease the amount of time that children spent in the foster care system and to more efficiently place them with adoptive parents or in a comparable permanent placement. For more on this see Young and Lee "Responding to the lament of invisible children: achieving meaningful permanency for foster children" 72 2003 *J.KAN. B.A.* 46, 47-48. Briefly the process of termination involves the state holding a permanency hearing within twelve months of a child entering the foster care system, after the state files a petition to terminate parental rights it must at the same time identify, recruit, process, and approve a qualified adoptive family for the child this according to 45 C.F.R. s 1356.21(i)(3) 2005. "Termination of the parent-child relationship is sought when the child has been in foster care for a minimum of 15 out of 22 months and the child has been abandoned…" for more information on termination see Okun 763.

[8] Okun "Termination of parental rights" 6 2005 *The Georgetown Journal of Gender and the Law* 761-771, 764; For more on this Act see Lowry "Putting teeth into ASFA: the need for statutory minimum standards" 26 (11)

circumstance that will lead to the fast-track termination of parental rights[9] and this is also applied in all of the other states and the District of Columbia.[10] Although the ASFA criteria for the termination of parental rights only amounts to eight in total, states have added their own criteria in terms of state laws.[11] Texas has 18 criteria for the termination of parental rights; California and Nebraska both have 13.[12] Abandonment in terms of ASFA is defined as children who have been deserted, instances where a parent's whereabouts are unknown, or relinquishment of an infant to a fire station or similar "safe haven" soon after birth.[13] Involuntary termination occurs when the child is abandoned,[14] whereas voluntary termination occurs where the parents file a petition with the court to terminate their parental rights.[15] A few common features of safe haven laws exist, some of which are essential to the proper functioning of the safe haven law in the various states. Firstly, it is important for the state law to establish

2004 *Children and Youth Services Review* 1021-1031; also see Stein "The Adoption and Safe Families Act: creating a false dichotomy between parents' and children's rights" 81 (6) 2000 *Families in Society* 586-592; Further see National Conference of State Legislatures 1999 Analysis of state legislation enacted in response to the Adoption and Safe Families Act, P.L. 105-89 available at http://www.ncsl.org/programs/cyf/asfa.htm.

[9] In the instance of fast-track termination the state is not required to make reasonable efforts in reunifying children and parents and may directly file a petition to terminate parental rights; see Vesneski "State Law and the Termination of Parental Rights" Family Court Review Vol. 49 No. 2 April 2011 364- 378, 366.

[10] Vesneski "State law and the termination of parental rights" Vol. 49 No. 2 2011 *Family Court Review* 364-378, 368; also see Crozen "Telltale termination case" 31 2009 *Family Advocate* 13, 12-15; Okun "Termination of Parental Rights" 6 2005 *The Georgetown Journal of Gender and the Law* 761-771, 765.

[11] Vesneski "State law and the termination of parental rights" Vol. 49 No. 2 2011 *Family Court Review* 364-378 at 368; also see Crozen "Telltale termination case" 31 2009 *Family Advocate* 13, 12-15; Okun "Termination of parental rights" 6 2005 *The Georgetown Journal of Gender and the Law* 761-771 at 765.

[12] Vesneski "State law and the termination of parental rights" Vol. 49 No. 2 2011 *Family Court Review* 364-378, 367; for the long list of criteria employed in each state see Vesneski at 368 Table 3: Frequency of Termination Criteria Across the States; for more on the termination of parental rights see Freundlich "Expediting termination of parental rights: solving a problem or sowing seeds of a new predicament?" 28 1999 *Capital University Law Review* 97-110; also see Hand "Preventing undue terminations: a critical evaluation of the length-of-time-out-of-custody ground for termination of parental rights" 71 (5) 1996 *NYU Law Review* 1251-1300.

[13] Vesneski "State law and the termination of parental rights" Vol. 49 No. 2 2011 *Family Court Review* 364-378, 368; Lowry "Putting teeth into ASFA: the need for statutory minimum standards" 26 (11) 2004 *Children and Youth Services Review* 1021-1031; also see Stein "The Adoption and Safe Families Act: creating a false dichotomy between parents' and children's rights" 81 (6) 2000 *Families in Society* 586-592; further see National Conference of State Legislatures 1999 Analysis of state legislation enacted in response to the Adoption and Safe Families Act, P.L. 105-89 available at http://www.ncsl.org/programs/cyf/asfa.htm.

[14] For exceptions to involuntary termination in this instance see Okun "Termination of parental rights" 6 2005 *The Georgetown Journal of Gender and the Law* 761-771, 763; These exceptions are according to 45 U.S.C. Section 675(5)(E) Westlaw through P.L. 109-2.

[15] Okun "Termination of parental rights" 6 2005 *The Georgetown Journal of Gender and the Law* 761-771, 768; Some states like Texas allow parents to file for termination of parental rights before the birth of the child; see Texas Family Code ANN. S 161.005.

an appropriate age limit for the children that are abandoned; secondly, the mother requires anonymity, this is said to be the motivating factor behind the use of safe havens by mothers, without which mothers may be compelled to unsafely abandon or to commit neonaticide.[16] Thirdly, in some states the use of safe havens are restricted to mothers, while in others both mothers and fathers can make use of safe havens. Lastly, guidance is provided on the implementation of these laws. In other words, providing assistance to staff receiving the infants on the steps to follow thereafter and assistance to mothers on what to do should they change their minds.[17]

Texas was the first state to enact a law protecting infants, which was approved and signed into law in 1999.[18] Other states used the safe haven laws of Texas as a model for drafting their own infant abandonment legislation.[19] However, each state that enacted safe haven legislation tailored it to suit its own specific requirements such as adapting the age requirements, increasing the number of locations where an infant may be relinquished and excluding the liability of certain persons.[20] California's safe haven legislation was implemented by the state

[16] Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 317.

[17] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771, 782-786; see Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 768 where the author states that the appropriate age limit is essential for safe haven laws, it's what sets these laws apart from other laws in that it is not meant to accept babies generally but is meant specifically for newborns; see further Cooper "Note, fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev*. 877, 881-882 where the author states that the primary limitation imposed by all states is an age limit.

[18] These laws were referred to as the Baby Moses laws Carrubba Background paper 01-3 A study of infant abandonment legislation December 2000 II "B. Overview of Texas Law"; see also Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192; Cesario "Nurses' attitudes and knowledge of their roles in newborn abandonment" Vol. 12 No.2 2003 *The Journal of Perinatal Education* 32.

[19] Carrubba Background paper 01-3 A study of infant abandonment legislation December 2000 II "C. Comparison of other state legislation" https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP01-03.pdf last accessed 2020-02-03; see also Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192.

[20] Carrubba Background paper 01-3 A study of infant abandonment legislation December 2000 II "C. Comparison of other state legislation" https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP01-03.pdf last accessed 2020-02-03; Stewart "Surrendered and abused: An inquiry into the inclusiveness of California's Safe Surrender Law" (10) 2011 *Whittier Journal of Child and Family Advocacy* 291-315, 291.

legislature in 2001,[21] which legalizes the safe abandonment of infants. This thesis examines the law of California because it has no putative father registry, instead it has various legislative provisions in place that protect putative fathers. The third and final state's safe haven laws that will be analysed is that of Nebraska. Nebraska's safe haven laws, prior to its amendment in a 2008 special session, permitted children of any age to be legally surrendered.[22] This soon resulted in an influx of teen abandonments, many teens brought from outside the state itself.[23] Fortunately, this was rectified and now Nebraska's safe haven legislation only allows for children 30 days or younger to be abandoned. The analysis of these states provide a broad overview of the functioning of the safe haven laws and its varying specifications and requirements in each state. Texas, the state where safe haven laws first started and the blueprint from which other states implemented these laws is important as a starting point; California as having no putative father registry and lastly Nebraska where the implementation of these laws at first went wrong due to the state's failure to specify the age limitations of children that may be abandoned.

The purpose behind this chapter is to investigate other solutions to unsafe infant abandonment in South Africa by considering the laws of various states in the US. The weaknesses as well as the strengths of these laws will be explored and used in determining how a law affording adequate protection to infants should be drafted and implemented. The states under consideration provide a detailed understanding of the do's and don'ts in respect of the drafting and implementation of a similar law in South Africa. An investigation of these laws will also

[21] Stewart "Surrendered and abused: an inquiry into the inclusiveness of California's Safe Surrender Law" (10) 2011 *Whittier Journal of Child and Family Advocacy* 291-315, 291.
[22] Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854, 834; Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771, 777, 794.
[23] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771, 777, 794; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

highlight certain aspects that cannot be legally regulated and in those instances the best interests of the child has to take precedence.

4.1.2 Background

In the US, nationwide statistics reflect the increase in abandonments. These statistics, much like the case in South Africa, are deficient because many abandonments go undetected.[24] However, it was estimated that between 100 and 350 of the four million infants born alive each year are discarded.[25] The US Department of Health and Human Services conducted an informal news study and cited 65 cases of abandonment in 1991, of which eight infants were found dead.[26] This number increased to 105 in 1998, of which 33 infants were found dead.[27] In 1998 in Texas thirteen newborns were unsafely abandoned and three of them were found dead.[28] The prominent rise in newborn deaths provided a warning that the means of prevention employed

[24] An Act Relating to the Emergency Possession of and Termination of the Parent Child Relationship of Certain Abandoned Children: Hearing on H.B. 706 before the House Comm. on Juvenile Justice and Family Issues, 2001 Leg., 77th Sess. (Tex. 2001), available at http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=77R&Bill=HB706.

[25] See Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192; Choo "Safe haven laws for unwanted infants may be unwise" 14 May 2001 *Women's E-News*, at https://womensenews.org/2001/05/safe-haven-laws-unwanted-infants-may-be-unwise/ (last accessed 2018-01-18).

[26] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192; Athans "Saving abandoned lives: community programs seek to keep mothers from discarding their newborns" Austin AM.-Statesman, Jan 16 2000 at A2 available at 2000 WL 3362664; Fletcher, Dumping of 13 babies Alarms Houston, Orange County Reg., Dec 30 1999 at A25, available at 1999 WL 30113329.

[27] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192; Athans "Saving abandoned lives: community programs seek to keep mothers from discarding their newborns" Austin AM.-Statesman, Jan 16 2000 at A2 available at 2000 WL 3362664; Fletcher, Dumping of 13 babies Alarms Houston, Orange County Reg., Dec 30 1999 at A25, available at 1999 WL 30113329.

[28] Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 775; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 352; also see Yardley "A flurry of baby abandonment leaves Houston wondering why" 26 Dec 1999 *N.Y. Times*, s 1 at 14; Some sources say a dozen babies see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*; Cesario also refers to thirteen newborns being abandoned see Cesario "Nurses' attitudes and knowledge of their roles in newborn abandonment" Vol. 12 No.2 2003 *The Journal of Perinatal Education* 32.

at that time in the US were insufficient.[29] When the 1998 abandonments were taking place the legislation in place throughout the US took a reactive approach by criminalising abandonments.[30] Dr John Richardson of Cook Children's Hospital, assisted by his niece Judge Deborah Richardson, decided to intervene due to the distressing rate of infant abandonment.[31] They approached Texas state representative Geanie Morrison who went on to author Texas' safe haven legislation and eventually had it approved by the legislature.[32] This law was aimed at saving the lives of infants by allowing the parent to legally abandon the newborn with an emergency medical services provider.[33] House Bill 3423 was the starting point for the introduction of safe haven legislation not only in the state of Texas but ultimately in other states

[29] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" 2002 Vol. 12 *Texas Journal of Women and the Law* 167-192; Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 775; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 352; also see Yardley "A flurry of baby abandonment leaves Houston wondering why" 26 Dec 1999 *N.Y. Times* section 1 at 14; see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*; Cesario "Nurses' attitudes and knowledge of their roles in newborn abandonment" Vol. 12 No. 2 2003 *The Journal of Perinatal Education* 32.

[30] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" 2002 Vol. 12 *Texas Journal of Women and the Law* 167-192; Texas Penal Code Act of 1985, 69th Leg., R.S., ch. 791, s 1, 1985 Tex. Gen. Laws 1052 (amended with Safe Haven provisions in 1999 and 2001). Current version at TEX. PENAL CODE ANN. s 22.041 (Vernon Supp. 2001); This is the current position in South Africa where child abandonment is dealt with reactively through criminalization found in s 305(3)(*b*) of the Children's Act 38 of 2005 and such person is, in terms of s 305(6), liable to a fine or imprisonment up to ten years or both to a fine and imprisonment; Furthermore, the General Law Amendment Act 46 of 1935 s 113 provides for the crime of concealment of birth and s 239 of the Criminal Procedure Act 51 of 1977, deals with the crime of infanticide.

[31] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 172; Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 775.

[32] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 172; Tex. H.B. 3423, 76th Leg., R.S. (1999); However it is of interest to note that a year prior to Texas passing its safe haven legislation, a discretionary pilot program was introduced by the District Attorney of Mobile, Alabama who launched the concept of a Secret Safe Place for Newborns after a mother and grandmother was convicted to 25 years imprisonment after drowning an hour old infant in a toilet. According to Sanger prosecutorial discretion became countywide policy: anonymity and immunity was granted in exchange for relinquishing the infant unharmed. Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 774.

[33] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 171-172; House Comm. on Juvenile, Justice and Family Issues, Bill analysis, Tex. H.B. 3423 76th Leg., R.S. (1999).

as well.[34] It was signed by then Governor George W. Bush on 19 June 1999 and took effect on 1 September 1999.[35]

Before the enactment of this law, a mother could be charged with abandonment, regardless of her intention. This was illustrated in the matter of *Herbst vs The State of Texas*[36] where the court convicted a fifteen-year-old who abandoned her baby at the side of the road. She however kept the baby in her sights while calling emergency providers from a nearby convenience store.[37] Furthermore, before this law it was illegal for an emergency medical provider to take custody of an abandoned child.[38] After providing the child with the necessary medical care the child would have to be relinquished immediately to the Department of Protective and Regulatory Services (DPRS).[39]

Morrison established the Baby Moses Project in order to increase awareness about this new law, and it became a resource center for sharing safe haven information across state lines.[40] The exact nature and details of the Texas' safe haven legislation is discussed in the sections to follow.[41] Texas' safe haven legislation received attention across the US as other states

[34] Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 352, 353; Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 775; Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 172.

[35] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 172; H.J. of Tex., 76th Leg., R.S. 4410 (1999); Tex. H.B. 3423, 76th Leg., R.S. (1999).

[36] 941 S.W. 2d 371, 372-373, 380.

[37] 941 S.W. 2d 371, 372-373, 380; Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 172.

[38] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 173-

[39] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 173-174; Texas House Bill 3423, 76th Leg., R.S. (1999) [House Comm. On Juv. Just. And Fam. Issues, Bill Analysis, Tex. H.B. 3423].

[40] Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 775.

[41] See par 4.2.

examined the provisions as a possible solution. By August of 2002 forty states adopted their own versions of the safe haven laws and currently all 50 states have adopted these laws. Following the implementation of these laws across the US, the US Congress passed House Resolution 465,[42] which requires all states to maintain records of infant mortality statistics.[43] This resolution also acknowledged Texas' safe haven legislation as an innovative model program in saving the lives of newborns.[44] This is very different to the approach in South Africa, where statistics on infant mortality rates are not kept and independent institutes who gather these statistics only do so in a limited area.[45] Further, House Resolution 465 brought national recognition in the US to the problem of infant abandonment and death.[46] A number of representatives co-sponsored the Safe Haven Support Act of 2001 (H.R. 2018), which was to authorise states' use of funds provided in terms of block grants under Temporary Assistance for Needy Families (TANF) in order to support infant safe haven programs, but unfortunately this piece of legislation was not enacted by Congress.[47]

4.2 BABY SAFE HAVEN LAWS IN TEXAS

4.2.1 Designated safe haven providers

House Bill 3423 allowed emergency medical service providers, which included emergency room personnel and paramedics, to accept abandoned infants.[48] The intention behind this was

[42] Congressional Record H.R. Res. 465, 106th Cong., 106 CONG. REC. H1958 (2000) (enacted).
[43] H.R. Res. 465, 106th Cong., 106 CONG. REC. H2026 and H2021 (2000) (enacted). It received overwhelming support and was enacted just five days after introduction.
[44] H.R. Res. 465, 106th Cong., 106 CONG. REC. H2026 and H2021 (2000) (enacted) this provided that statistics should be kept of the number of newborn babies abandoned in public places.
[45] Mathews, Martin, Coetzee, Scott, Naidoo, Brijmohun and Quarrie "Child Death Review Pilot conducted in 2014" 106 (9) 2016 *S Afr Med J* 851-852.
[46] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 175.
[47] H.R. 2018 — 107th Congress: Safe Havens Support Act of 2001. https://www.govtrack.us/congress/bills/107/hr2018 (last accessed 2019-09-30); Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 175.
[48] See also Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 175.

to provide instant medical care to the abandoned infants, especially because the majority of infants abandoned did not have the necessary prenatal care.[49] However, this gave rise to potential problems such as young mothers being too afraid to hand their infants over to the emergency medical services; no psychological support provided by the emergency medical services personnel to assist mothers; and lastly, emergency medical service providers were concerned with assuming liability after taking possession of abandoned infants.[50] House Bill 706[51] was introduced to rectify the potential problems which were not addressed by House Bill 3423. These issues were dealt with by enlarging permanency placement with a designated emergency medical services provider, hospital or a licensed child-placing agency and thereby providing protection of mothers who chose this safer option of relinquishment.[52] It assists designated service providers by clearly defining their roles, duties and by limiting their legal liability.[53] House Bill 706 amended the Texas Family Code section 262.302 to provide the following:[54]

[49] Gaffney "Texas passed a law to keep babies from being left in dumpsters. But few knew about the statute" 16 March 2000 *Lubbock Avalanche-J*, available at http://www.lubbockonline.com.

[50] Garrett "Infant-Abandonment Bills clear legislative committees: They aim to set up safe havens as a way to cut down on the number of deaths of unwanted babies" 26 April 2000 *Press-Enterprise* at A (examining similar legislation in California and reporting that, "the hospital industry…remains nervous about its liability…") in H. Rept. 106-1053 - ACTIVITIES of the HOUSE COMMITTEE ON GOVERNMENT REFORM ONE HUNDRED SIXTH CONGRESS FIRST AND SECOND SESSIONS 1999-2000 (Pursuant to House Rule XI, 1(d)); Teichroeb "Several Hospitals agree to take newborns— no questions asked" 6 June 2001 *Seattle Post-Intelligencer* at A1 (reporting on the hospital industry's reaction to Safe Haven legislation in Oregon and reporting that "some hospitals were worried about legal liability") at https://www.seattlepi.com/local/article/Abandoned-babies-now-family-1075439.php, accessed 2019-11-28.

[51] Emergency Possession of and Termination of the Parent-Child Relationship of Certain Abandoned Children, 77th Leg., R.S., ch. 809, 2001 Tex. Gen. Laws 1589 (codified as amendment to TEX. FAMILY CODE s 161.001, 262.105-.307, and 263.405 and TEX. PENAL CODE s 22.041).

[52] Emergency Possession of and Termination of the Parent-Child Relationship of Certain Abandoned Children, 77th Leg., R.S., ch. 809, 2001 Tex. Gen. Laws 1589 (codified as amendment to TEX. FAMILY CODE s 161.001, 262.105-.307, and 263.405 and TEX. PENAL CODE s 22.041); see also Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 175.

[53] Emergency Possession of and Termination of the Parent-Child Relationship of Certain Abandoned Children, 77th Leg., R.S., ch. 809, 2001 Tex. Gen. Laws 1589 (codified as amendment to TEX. FAMILY CODE s 161.001, 262.105-.307, and 263.405 and TEX. PENAL CODE s 22.041); see also Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 175.

[54] Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 881 where the author points out that a majority of states limit those who may leave a baby to the child's parents, Texas being one of them.

"§ 262.302. Accepting Possession of Certain Abandoned Children

(a) A designated emergency infant care provider shall, without a court order, take possession of a child who appears to be 60 days old or younger if the child is voluntarily delivered to the provider by the child's parent and the parent did not express an intent to return for the child.

(b) A designated emergency infant care provider who takes possession of a child under this section has no legal duty to detain or pursue the parent and may not do so unless the child appears to have been abused or neglected. The designated emergency infant care provider has no legal duty to ascertain the parent's identity and the parent may remain anonymous. However, the parent may be given a form for voluntary disclosure of the child's medical facts and history.

(c) A designated emergency infant care provider who takes possession of a child under this section shall perform any act necessary to protect the physical health or safety of the child. The designated emergency infant care provider is not liable for damages related to the provider's taking possession of, examining, or treating the child, except for damages related to the provider's negligence."

This thesis submits that House Bill 706 fails to address the shame and fear experienced by young mothers in having to relinquish their infants to someone thereby exposing their shame and not making provision for their desire to remain unknown. It is further submitted that absolute anonymity is better provided through the use of baby safes, which do not require face to face contact with any person and thus avoids the mother's reluctance due to feelings of shame and fear. Moving on to the provisions of House Bill 706, importantly subsection (a) provides the age limitation for abandoned babies and this age is set at 60 days old or younger. Although the age requirement is stipulated, an accurate determination of the age of the child cannot be made upon relinquishment. Such determination is only made upon subsequent medical assessment, the question is then what the consequences will be if the child is in fact older than 60 days, for both the mother and the designated emergency medical services provider? Subsection (b) frees the emergency medical services provider from the legal duty to

track the parent or to prevent them from leaving after relinquishment and such a duty only exists if the child shows signs of abuse or neglect. It is presumed that this subsection may apply in the instance where the child is older than 60 days but shows no signs of neglect and abuse, entailing that the emergency medical services provider has no legal duty to track the parent because the child appears older than 60 days.[55] Further, the emergency medical services provider does not have to determine the parents' identities. This lifts the burden previously imposed on these providers and in turn provides the parent with the assurance that his or her identity is protected. This addresses the fear of the woman in respect of maintaining anonymity to a certain degree, however, she still has to make face to face contact with the person she relinquishes her child to. It is submitted that this is one of the weaknesses of these laws. Emergency medical service providers are also not liable upon assuming possession of the child for the care of the child and will only be liable in the instance where they have acted negligently, this in terms of section 262.302(c). The Texas Family Code section 262.301 clearly defines who a designated infant care provider is. It provides as follows:

"(1) "Designated emergency infant care provider" means:

(A) an emergency medical services provider;

(B) a hospital;

(C) a freestanding emergency medical care facility licensed under Chapter 254, Health and Safety Code; or

(D) a child-placing agency licensed by the Department of Family and Protective Services under Chapter 42, Human Resources Code, that:

(i) agrees to act as a designated emergency infant care provider under this subchapter; and

[55] See also Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L*. 115.

(ii) has on staff a person who is licensed as a registered nurse under Chapter 301, Occupations Code, or who provides emergency medical services under Chapter 773, Health and Safety Code, and who will examine and provide emergency medical services to a child taken into possession by the agency under this subchapter.

(2) "Emergency medical services provider" has the meaning assigned that term by Section 773.003, Health and Safety Code."

Each designated emergency infant care provider shall post a notice stating that it is a designated emergency infant care provider and that it accepts abandoned infants.[56] This notice must be placed in a clearly visible location.[57] This increases awareness of the existence of these laws. In terms of section 262.301(1)(D) a child may be placed with a licensed child-placing agency. A child-placing agency licensed by the Department of Family and Protective Services performs a wide-range of services and it is therefore advantageous to be able to place a child in their care.[58] Examples of these services include "parenting services"; "health services"; "post adoption services", "life skills for teens and services for families in crises".[59] The mother, if she requests, may also be guided on options other than abandonment.[60] This solves the issue of mothers not receiving psychological support through the use of safe havens, however, if the

[56] Texas Family Code s 262.306.
[57] Texas Family Code s 262.306.
[58] An Act Relating to the Emergency Possession of and Termination of the Parent Child Relationship of Certain Abandoned Children: Hearing on H.B. 706 Before the House Comm. on Juvenile Justice & Family Issues, 2001 Leg., 77th Sess. (Tex. 2001), available at http://www.house.state.tx.us/house/commit/archive/c340.htm testimony of Texas Rep. Geanie Morrison, sponsor of H.B. 706; Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 179.
[59] An Act Relating to the Emergency Possession of and Termination of the Parent Child Relationship of Certain Abandoned Children: Hearing on H.B. 706 Before the House Comm. on Juvenile Justice & Family Issues, 2001 Leg., 77th Sess. (Tex. 2001), available at http://www.house.state.tx.us/house/commit/archive/c340.htm testimony of Texas Rep. Geanie Morrison, sponsor of H.B. 706; Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 179.
[60] An Act Relating to the Emergency Possession of and Termination of the Parent Child Relationship of Certain Abandoned Children: Hearing on H.B. 706 Before the House Comm. on Juvenile Justice & Family Issues, 2001 Leg., 77th Sess. (Tex. 2001), available at http://www.house.state.tx.us/house/commit/archive/c340.htm testimony of Texas Rep. Geanie Morrison, sponsor of H.B. 706; Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 179.

mother does not relinquish the child to such an agency, she will not have the option of counselling available to her. In terms of section 262.303(a) the emergency medical services provider is obliged to notify the Department of Family and Protective services of possession of the abandoned child not later than the first close of business day after the day on which the designated infant care provider takes possession of the abandoned child. Subsection (b) stipulates that the "department shall assume the care, control, and custody of the child immediately on receipt of notice under subsection (a)". Section 262.304 states that "a child for whom the Department of Family and Protective Services assumes care, control, and custody under section 262.303 shall be treated as a child taken into possession without a court order, and the department shall take action as required by section 262.105[61] with regard to the child". After the child has been taken into the care of the department it "shall report the child to appropriate state and local law enforcement agencies as a potential missing child".[62] Further, an investigation will then follow to determine whether the child is missing.[63] The costs of

[61] Texas Family Code § 262.105. "Filing Petition After Taking Possession of Child in Emergency
(a) When a child is taken into possession without a court order, the person taking the child into possession, without unnecessary delay, shall:
(1) file a suit affecting the parent-child relationship;
(2) request the court to appoint an attorney ad litem for the child; and
(3) request an initial hearing to be held by no later than the first business day after the date the child is taken into possession.
(b) An original suit filed by a governmental entity after taking possession of a child under Section 262.104 must be supported by an affidavit stating facts sufficient to satisfy a person of ordinary prudence and caution that:
(1) based on the affiant's personal knowledge or on information furnished by another person corroborated by the affiant's personal knowledge, one of the following circumstances existed at the time the child was taken into possession:
(A) there was an immediate danger to the physical health or safety of the child;
(B) the child was the victim of sexual abuse or of trafficking under Section 20A.02 or 20A.03, Penal Code;
(C) the parent or person who had possession of the child was using a controlled substance as defined by Chapter 481, Health and Safety Code, and the use constituted an immediate danger to the physical health or safety of the child; or
(D) the parent or person who had possession of the child permitted the child to remain on premises used for the manufacture of methamphetamine; and
(2) based on the affiant's personal knowledge:
(A) continuation of the child in the home would have been contrary to the child's welfare;
(B) there was no time, consistent with the physical health or safety of the child, for a full adversary hearing under Subchapter C; and
(C) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child."
[62] Texas Family Code s 262.305(a).
[63] Texas Family Code s 262.305(b).

taking possession of the child and acting as an emergency infant care provider shall be borne by the Department of Family and Protective Services in terms of section 262.307. In the same way the emergency infant care provider is not obliged to ascertain the identity of the parents, so too the Department of Family and Protective Services has no duty to conduct a search for the relatives of the child.[64]

4.2.2 Termination or relinquishment of birth parents' rights

Texas House Bill 3423 became effective on 1 September 1999 and is titled "An act relating to the emergency possession of and termination of the parent-child relationship of certain abandoned children". However, due to criticism on the grounds that the legislation was vague and permissive[65] House Bill 3423 was amended in June 2001 with the passage of House Bill 706, which strengthened the safe haven regime.[66] This House Bill proposed changes to section 161.001 of the Texas Family Code. The following changes relate to the termination or relinquishment, as can be seen in (K), of birth parents' rights in abandonment cases. These laws are extensive, covering every possible scenario surrounding abandonment and includes aspects that would not necessarily be regarded as abandonment, such as failing to enroll the child in a

[64] Texas Family Code s 262.309.

[65] Choo "Safe haven laws for unwanted infants may be unwise" 14 May 2001 *Women's E-News* at https://womensenews.org/2001/05/safe-haven-laws-unwanted-infants-may-be-unwise/ (last accessed 2018-01-19); Collier "Havens for abandoned babies occupy tricky terrain" 18 Feb 2001 *Chicago Trib* at C1 http://www.adoptionnation.com/chicago_trib_02-18-01.htm (examining Safe Haven Laws generally in anticipation of similar legislation in Illinois and expressing fears that "politicians, in a rush to adopt popular laws that promise to save babies' lives, are inadvertently creating a plethora of problems due to poorly designed and inadequately studied programs"); Beaven "Texas law to curb baby abandonment guides Indiana plan" 20 Feb 2000 *Indianapolis Star*, available at https://indystar.newspapers.com/search/#query=Texas+law+to+curb+baby+abandonment last accessed 2020-02-03.

[66] Choo "Safe haven laws for unwanted infants may be unwise" 14 May 2001 *Women's E-News* at https://womensenews.org/2001/05/safe-haven-laws-unwanted-infants-may-be-unwise/ (last accessed 2018-01-19); Collier "Havens for abandoned babies occupy tricky terrain" 18 Feb 2001 *Chicago Trib* at C1 https://www.chicagotribune.com/news/ct-xpm-2001-02-18-0102180530-story.html last accessed 2020-02-03; Beaven "texas law to curb baby abandonment guides Indiana plan" 20 Feb 2000 *Indianapolis Star*, available at https://indystar.newspapers.com/search/#query=Texas+law+to+curb+baby+abandonment last accessed 2020-02-03.

school in terms of (J)(i). These provisions give a court the power to terminate the parent-child relationship permanently on one of the listed grounds. Chapter 161.001(c), (d) and (e) of the Family Code also provides certain exclusionary provisions that do not allow the court to terminate the birth parents' rights in certain instances. Paragraph (H) is an interesting provision that provides for the termination of the parent-child relationship of the father if he abandons the mother during pregnancy and through birth, it also describes what this abandonment entails.

"Section 161.001. Involuntary termination of parent-child relationship.

(b) the court may order termination of the parent-child relationship if the court finds by clear and convincing evidence (1) that the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of

abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Chapter 264;

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Education Code; or

(ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;

(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections (however for our purposes only subsection x is relevant):

…(x) Section 22.041 (abandoning or endangering child);

(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;

(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services or an authorized agency for not less than six months; and

(i) the department has made reasonable efforts to return the child to the parent;

(ii) the parent has not regularly visited or maintained significant contact with the child; and

(iii) the parent has demonstrated an inability to provide the child with a safe environment;

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code (i-ii);

(Q) knowingly engaged in criminal conduct that results in the parent's:

(i) conviction of an offense; and

(ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;

(R) been the cause of the child being born addicted to alcohol or controlled substance, other than a controlled substance legally obtained by prescription;

(S) voluntarily delivered the child to an emergency infant care provider under section 262.302 without expressing an intent to return for the child; and

(T) been convicted of (i)-(iv);

(U) has been placed under community supervision…;

(2) that termination is in the best interests of the child.

(c) A court may not make a finding under Subsection (b) and order termination of the parent-child relationship based on evidence that the parent:

(1) homeschooled the child;

(2) is economically disadvantaged;

(3) has been charged with a nonviolent misdemeanor offense other than:

(A) an offense under Title 5, Penal Code;

(B) an offense under Title 6, Penal Code; or

(C) an offense that involves family violence, as defined by Section 71.004 of this code;

(4) provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169, Occupations Code; or

(5) declined immunization for the child for reasons of conscience, including a religious belief.

(d) A court may not order termination under Subsection (b)(1)(O) based on the failure by the parent to comply with a specific provision of a court order if a parent proves by a preponderance of evidence that:

(1) the parent was unable to comply with specific provisions of the court order; and

(2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent.

(e) This section does not prohibit the Department of Family and Protective Services from offering evidence described by Subsection (c) as part of an action to terminate the parent-child relationship under this subchapter."

This section also demonstrates that abandonment is a ground for termination of parental rights in the state of Texas.[67] In comparison to section 161.001.(b)(1)(F), section 236(1)(d) of the South African Children's Acts 38 of 2005 provides that "the consent of the parent or guardian of a child to the adoption of the child is not necessary if that parent or guardian has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months". Furthermore, section 305(4) of the Children's Act provides that "a person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the

[67] Sankaran "When child protective services comes knocking" Vol. 31 Issue 3 (Winter 2009) *Family Advocate* 8-12; Crozen "The telltale termination case" Vol. 31 Issue 3 (Winter 2009) *Family Advocate* 13-15; Okun "Termination of parental rights" (6) 2005 *The Georgetown Journal of Gender and the Law* 761, 764.

child with adequate food, clothing, lodging and medical assistance". However, this latter section of the Children's Act does not provide a time period for the failure of this parent. Although these provisions deal with forms of abandonment it does not clearly state that the parent/s parental responsibilities or rights are terminated such as stipulated in the Texas law.

4.2.3 Immunity from prosecution or affirmative defense

Immunity from prosecution entails the situation where the parent is not prosecuted for choosing to abandon the child safely. The parent is guaranteed complete immunity from prosecution and in this way feels more inclined to make use of safe havens to abandon the child. An affirmative defense occurs where the parent is not completely immune from prosecution and only has a defense that he or she safely relinquished the child. This defense is against prosecution on the basis of abandonment or neglect and such prosecution will take place should the authorities decide that the child shows signs of abuse or neglect. At first the Texas House Bill 3423 did not provide complete immunity from prosecution, it only provided an affirmative defense.[68] However, members of the public perceived it as providing complete immunity from prosecution, which created confusion and concern for mothers that were motivated to relinquish because of this immunity.[69] Texas House Bill 706 rectified this situation by completely excluding prosecution and no longer only providing an affirmative defense.[70] The amended section of the Texas Penal Code reads as follows:

> "§22.041. Abandoning or Endangering Child

[68] Texas Penal Code s 22.041(h); Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 137; Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 178.

[69] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 178; See Texas House Bill 706 ANALYSIS Part III.A where the issue of false advertising is discussed.

[70] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 178.

(a) In this section, “abandon” means to leave a child in any place without providing reasonable and necessary care for the child, under circumstances under which no reasonable, similarly situated adult would leave a child of that age and ability.

(b) A person commits an offense if, having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm.

(c) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment.

(c-1) For purposes of Subsection (c), it is presumed that a person engaged in conduct that places a child in imminent danger of death, bodily injury, or physical or mental impairment if:

(1) the person manufactured, possessed, or in any way introduced into the body of any person the controlled substance methamphetamine in the presence of the child;

(2) the person’s conduct related to the proximity or accessibility of the controlled substance methamphetamine to the child and an analysis of a specimen of the child’s blood, urine, or other bodily substance indicates the presence of methamphetamine in the child's body; or

(3) the person injected, ingested, inhaled, or otherwise introduced a controlled substance listed in Penalty Group 1, Section 481.102, Health and Safety Code, into the human body when the person was not in lawful possession of the substance as defined by Section 481.002(24) of that code.

(d) Except as provided by Subsection (e), an offense under Subsection (b) is:

(1) a state jail felony if the actor abandoned the child with intent to return for the child; or

(2) a felony of the third degree if the actor abandoned the child without intent to return for the child.

(e) An offense under Subsection (b) is a felony of the second degree if the actor abandons the child under circumstances that a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment.

(f) An offense under Subsection (c) is a state jail felony.

(g) It is a defense to prosecution under Subsection (c) that the act or omission enables the child to practice for or participate in an organized athletic event and that appropriate safety equipment and procedures are employed in the event.

(h) It is an exception to the application of this section that the actor voluntarily delivered the child to a designated emergency infant care provider under Section 262.302, Family Code."

The result of the amendment is that the parent may voluntarily relinquish the child knowing that he or she will not face prosecution if the child is relinquished in terms of the provisions of section 262.302 of the Family Code. Section 262.302 provides that the emergency infant care provider only has to pursue the parent or parents to determine their identity if the child shows signs of abuse or neglect. This section does not specify what the emergency infant care provider must do with the parent's information or whether the parent must be detained if the child shows signs of abuse or neglect. However, section 22.041 does provide the conditions in terms of which complete immunity from prosecution will apply. If the parent should abandon the child under the circumstances described in (a)-(g) then complete immunity from prosecution will not apply. Complete immunity from prosecution, in terms of subsection (h) only applies if the parent voluntarily delivers the child to a designated emergency infant care provider *without the child showing signs of abuse or neglect.* In terms of South African law the Children's Act 38 of 2005 section 305(3)(a) states that a person is guilty of an offence if that parent, person or care-giver "abuses or deliberately neglects the child" and in terms of subsection 6 such a person

will be liable to a fine or imprisonment of up to ten years or to both, and if committed more than once such a person may face imprisonment of up to twenty years.[71]

4.2.4 Confidentiality

According to Dreyer, the lure of the safe haven notion is the guarantee of anonymity.[72] "If a mother were inclined to openly give up her baby, she could simply take advantage of traditional adoption alternatives."[73] However, with this not being the case, mothers who make use of the safe haven option do so on the assurance that their information is kept confidential.[74] The following section of the Texas Family Code on confidentiality provides:

> "§ 262.308. Confidentiality
>
> (a) All identifying information, documentation, or other records regarding a person who voluntarily delivers a child to a designated emergency infant care provider under this subchapter is confidential and not subject to release to any individual or entity except as provided by Subsection (b).
>
> (b) Any pleading or other document filed with a court under this subchapter is confidential, is not public information for purposes of Chapter 552, Government Code, and may not be released to a person other than to a party in a suit regarding the child, the party's attorney, or an attorney ad litem or guardian ad litem appointed in the suit.

[71] s 305(7) of the Children's Act 38 of 2005.

[72] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 180; Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 883-884 where the author points out that it is the granting of anonymity that creates a due process issue for fathers, since it then becomes impossible to locate and contact the father once a child is anonymously abandoned; see Raum and Skaare "Encouraging abandonment: the trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D.L. Rev.* 511, 527-28 where the authors discuss the forms of anonymity provisions i.e. there are states where no mention is made of either anonymity or identification of parents, other state laws exist where it expressly provides for anonymity but places the responsibility to remain anonymous on the parents and the final group prohibits safe haven providers from asking certain questions; Choo "Safe haven laws for unwanted infants may be unwise" 14 May 2001 *Women's E-News*, available at https://womensenews.org/2001/05/safe-haven-laws-unwanted-infants-may-be-unwise/ accessed 2018-01-19.

[73] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 180.

[74] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 180.

(c) In a suit concerning a child for whom the Department of Family and Protective Services assumes care, control, and custody under this subchapter, the court shall close the hearing to the public unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public.

(d) Unless the disclosure, receipt, or use is permitted by this section, a person commits an offense if the person knowingly discloses, receives, uses, or permits the use of information derived from records or files described by this section or knowingly discloses identifying information concerning a person who voluntarily delivers a child to a designated emergency infant care provider. An offense under this subsection is a Class B misdemeanor."

House Bill 706 allows the provision of a form to allow the abandoning parent to make any voluntary disclosures of the medical and genetic history of the child.[75] This is found in section 262.302 of the Texas Family Code and provides:

"(b) A designated emergency infant care provider who takes possession of a child under this section has no legal duty to detain or pursue the parent and may not do so unless the child appears to have been abused or neglected. The designated emergency infant care provider has no legal duty to ascertain the parent's identity and the parent may remain anonymous. *However, the parent may be given a form for voluntary disclosure of the child's medical facts and history*." (emphasis added).

This is done voluntarily and therefore the parent is under no obligation to provide this information. Should the parent agree to provide this information it will be on the basis that his or her anonymity will not be compromised. This is a good compromise in respect of access to information by the child when he or she reaches the appropriate age and wishes to find out his or her genetic and medical history. The most important aim of the safe haven concept is to preserve the life of the child. This was emphasized by Texas representative Geanie Morrison

[75] Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 178.

at the hearing on House Bill 706 when she stated "it is better to have a baby delivered safely to a designated provider with no medical history than it is to find this same baby discarded in the trash.".[76]

4.2.5 Fathers' rights

Texas has what is called a putative father registry, this allows putative fathers to indicate their intention to claim paternity. It requires the putative father to register in order to receive notice of court proceedings regarding the child; adoption proceedings as well as any actions brought to terminate parental rights.[77] In 10 states, filing with the putative father registry is the only way of establishing a right of notice, however in the state of Texas there are many ways for putative fathers to assert their rights.[78] A putative father is referred to as a man who alleges that he is the biological father of the child, born to a woman, who is not married at the time of the child's birth, although his legal relationship with the child has not been established.[79] A putative father may also be "a man who has had sexual relations with a woman to whom he is not married, and is therefore on notice that such woman may be pregnant as a result of such relations".[80] In the state of Texas House Bill 706 caused for amendment to the Texas Family

[76] An Act Relating to the Emergency Possession of and Termination of the Parent Child Relationship of Certain Abandoned Children: Hearing on H.B. 706 Before the House Comm. on Juvenile Justice & Family Issues, 2001 Leg., 77th Sess. (Tex. 2001), available at http://www.house.state.tx.us/house/commit/archive/c340.htm testimony of Texas Rep. Geanie Morrison, sponsor of H.B. 706.

[77] http://www.adoptionattorneys.org/aaaa/birth-parents/putative-father-registry accessed on 2018-02-15; https://www.childwelfare.gov/pubPDFs/putative.pdf at 2, accessed on 2018-02-15.

[78] http://www.adoptionattorneys.org/aaaa/birth-parents/putative-father-registry accessed on 2018-02-15; https://www.childwelfare.gov/pubPDFs/putative.pdf at 2, accessed on 2018-02-15.

[79] Child Welfare Information Gateway "The Rights of unmarried fathers" 2014 Washington DC: US Department of Health and Human Services, Children's Bureau, available at http://bit.ly/2aOlQ2K; see also Swingle "Rights of unwed fathers and the best interests of the child: can these competing interests be harmonized? Illinois' putative father registry provides an answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759; further see chapter 6 on the rights of unmarried fathers in respect of abandoned children.

[80] Beck "A national putative father registry" Vol. 36 Issue 2 (Winter 2007) *Capital University Law Review* 295-362, 300; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. rev*. 1033, 1034 fn 9, where a putative father is defined as the alleged biological father of a child born out of wedlock in terms of the *Black's Law Dictionary* 623 (7th ed. 1999). Further, the Illinois Department of Children and Family Services, "Protect your rights as a father: what is a putative father", available at https://www2.illinois.gov/dcfs/search/pages/results.aspx?k=putative%20fathers, defines a putative father as a "man who may be a child's father, but who was not married to the child's mother before the child was born and has not established the fact that he is the father in a court proceeding", accessed 2019-11-28; see also

Code to include the requirement that the Department of Protective and Regulatory services report the child to the appropriate state and local law enforcement agency as a potential missing child, immediately after assuming care of the child.[81] This was solidified as law in terms of the Texas Family Code section 262.305(a). Section 262.305(b) provides that the law enforcement agency that receives a report referred to in (a) shall investigate whether the child is in fact missing. Assuming that the father has knowledge of the child these provisions will assist him in locating his child. The Texas Family Code went even further by providing the following in section 160.402:

> "(a) Except as otherwise provided by Subsection (b), a man who desires to be notified of a proceeding for the adoption of or the termination of parental rights regarding a child that he may have fathered may register with the registry of paternity:
>
> (1) before the birth of the child; or
>
> (2) not later than the 31st day after the date of the birth of the child.
>
> (b) A man is entitled to notice of a proceeding described by Subsection (a) regardless of whether he registers with the registry of paternity if:
>
> (1) a father-child relationship between the man and the child has been established under this chapter or another law; or
>
> (2) the man commences a proceeding to adjudicate his paternity before the court has terminated his parental rights.

Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L.J*. 939, which describes the plight of putative fathers 939-942; also see Parness and Clarke Arado "Safe haven, adoption and birth record laws: where are the daddies?" 36 2007 *Cap. U. L. Rev.* 207, 211; further see chapter 6 on the rights of unmarried fathers in respect of abandoned children.

[81] Beck "A national putative father registry" Vol. 36 Issue 2 (Winter 2007) *Capital University Law Review* 295-362, 300; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1034 fn 9, where a putative father is defined as the alleged biological father of a child born out of wedlock in terms of the *Black's Law Dictionary* 623 (7th ed. 1999); Further, the Illinois Department of Children and Family Services, "Protect your rights as a father: what is a putative father" at https://www2.illinois.gov/dcfs/search/pages/results.aspx?k=putative%20fathers defines a putative father as a "man who may be a child's father, but who was not married to the child's mother before the child was born and has not established the fact that he is the father in a court proceeding"; see also Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L.J*. 939 which describes the plight of putative fathers at 939-942; also see Parness and Clarke Arado "Safe haven, adoption and birth record laws: where are the daddies?" 36 2007 *Cap. U. L. Rev.* 207, 211; further see chapter 6 on the rights of unmarried fathers in respect of abandoned children.

(c) A registrant shall promptly notify the registry in a record of any change in the information provided by the registrant. The vital statistics unit shall incorporate all new information received into its records but is not required to affirmatively seek to obtain current information for incorporation in the registry."

This section establishes a putative father registry in the state of Texas, which allows a man to register his details and those of the child either before the birth or not later than the 31st day after the birth. However, even if he does not register in terms of the registry he is still entitled to be notified of the adoption of the child or of the termination of parental rights in respect of the child if he had a relationship with the child or he has filed a paternity suit in respect of the child.[82] An obligation rests on the state to ensure that the father and all other necessary parties have been notified in respect of a status hearing where a service plan to reunite the child with its parents may be discussed.[83] This section will not apply should the child be an abandoned child, in that case no service plan is drawn up and the parental rights are automatically terminated. Section 263.407 provides:

"(a) There is a rebuttable presumption that a parent who delivers a child to a designated emergency infant care provider in accordance with Subchapter D, 1 Chapter 262:

(1) is the child's biological parent;

(2) intends to relinquish parental rights and consents to the termination of parental rights with regard to the child; and

(3) intends to waive the right to notice of the suit terminating the parent-child relationship.

(a-1) A party that seeks to rebut a presumption in Subsection (a) may do so at any time before the parent-child relationship is terminated with regard to the child.

[82] s 160.402(b)(1) and (2).

[83] "Section 263.202(a) If all persons entitled to citation and notice of a status hearing under this chapter were not served, the court shall make findings as to whether:
(1) the department has exercised due diligence to locate all necessary persons, including an alleged father of the child, regardless of whether the alleged father is registered with the registry of paternity under Section 160.402;"

(b) If a person claims to be the parent of a child taken into possession under Subchapter D, Chapter 262, before the court renders a final order terminating the parental rights of the child's parents, the court shall order genetic testing for parentage determination unless parentage has previously been established. The court shall hold the petition for termination of the parent-child relationship in abeyance for a period not to exceed 60 days pending the results of the genetic testing.

(c) Before the court may render an order terminating parental rights with regard to a child taken into the department's custody under Section 262.303, the department must:

(1) verify with the National Crime Information Center and state and local law enforcement agencies that the child is not a missing child; and

(2) obtain a certificate of the search of the paternity registry under Subchapter E, 2 Chapter 160, not earlier than the date the department estimates to be the 30th day after the child's date of birth."

Subsection (a-1) allows the father to rebut the presumption of intention to terminate the parental rights any time before the actual termination of the parent-child relationship. Subsection (b) allows the court to order genetic testing to be done if someone claims to be the parent of the child prior to terminating the parental rights. There is also a final check that the court does in the instance where no one comes forward claiming to be the child's parent. The court will require the Department of Family and Protective Services to firstly verify that the child is not a missing child and secondly to prove by way of certificate that they have checked the putative father registry.[84] This also ensures that fathers' rights are afforded adequate protection.[85] These

[84] s 263.407(c)(1)(2).

[85] In South Africa in many abandonment cases the biological father is not a part of the biological mother's life and is often unaware of the fact of the pregnancy. The abandoning mother has often first been abandoned by the father of the child; Blackie (National Adoption Coalition of South Africa) "Fact sheet on child abandonment in South Africa, research study: Child adoption and abandonment in the context of African ancestral beliefs in contemporary urban South Africa" 2014 8; see Louw "The constitutionality of a biological father's recognition as a parent" vol.13 Jan 2010 *PER* 181: "It is only in those instances in which a parent fails to make use of a given opportunity to develop a relationship with his or her child that the responsibility entrusted to the particular parent should be limited or denied. In this way, a negative outcome is not anticipated or prejudged— each parent would have to take responsibility for his or her own lack of commitment to the child"; see also Eckhard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 131.

sections show that the state has not solely relied on a putative father registry, but has devised many ways of protecting fathers' rights as seen in terms of section 160.402(b)(1) and (2) where a man is entitled to be notified of proceedings regardless of whether he registered with a putative father registry. A putative father registry only works if firstly the father is aware of the existence of the registry and secondly if he is aware of the actual pregnancy in order for him to assert his rights.[86] It is submitted that, presuming this awareness is a weakness of the putative father registry in Texas, it would also be a weakness if it were implemented in this way in South Africa. This is so because in many abandonment cases in South Africa the biological father is not a part of the biological mother's life and is often unaware of the fact of the pregnancy. The abandoning mother has often first been abandoned by the father of the child.[87]

4.3 BABY SAFE HAVEN LAWS IN CALIFORNIA

4.3.1 Designated safe haven providers

State Senator James Brulte filed Senate bill 1368[88] in 2000, which was passed by both the House and Senate.[89] The bill was designed to protect unwanted babies and assist young girls

[86] Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" (80) 2017 *THRHR* 253-266, 263; see also Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky.L.J.* 949, 953-954.

[87] In South Africa in many abandonment cases the biological father is not a part of the biological mother's life and is often unaware of the fact of the pregnancy. The abandoning mother has often first been abandoned by the father of the child; Blackie (National Adoption Coalition of South Africa) "Fact sheet on child abandonment in South Africa, research study: Child adoption and abandonment in the context of African ancestral beliefs in contemporary urban South Africa" 2014 8; see Louw "The constitutionality of a biological father's recognition as a parent" vol.13 Jan 2010 *PER* 181 "It is only in those instances in which a parent fails to make use of a given opportunity to develop a relationship with his or her child that the responsibility entrusted to the particular parent should be limited or denied. In this way, a negative outcome is not anticipated or prejudged — each parent would have to take responsibility for his or her own lack of commitment to the child"; see also Eckhard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 131.

[88] S.B. 1368 Chapter 824, Session Laws 2000.

[89] Magnusen "From dumpster to delivery room: does legalizing baby abandonment really solve the problem?" 22 2001/2002 *J. Juv. L. 1 La Verne Law Review, Inc. Journal of Juvenile Law* 1-28, 10.

and women with a legal and safe way to abandon their baby without fear of prosecution.[90] This bill was enacted as the "Save a Baby" bill in 2001. Senator Brulte stated:

> "If we save one life, then we've done our job. Senate Bill 1368 gives young expectant mothers options that are legal and saves lives…Our message to young mothers is that guilt, shame, [and] panic are not reasons to destroy a newborn's chance at life. There are many people willing to adopt these babies, and we need to create greater awareness of options rather than child abandonment."[91]

Alongside bill 1368 another bill was proposed, namely Senate bill 101, which was designed to implement a public awareness campaign targeted at those likely to abandon their baby.[92] Unfortunately, this bill was not enacted, resulting in five babies being abandoned in unsafe locations throughout California during the first nine months after the introduction of the safe haven law.[93] From this, the conclusion may be drawn that educating the public about the existence of the laws is as important as the actual laws itself; one does not work without the other.[94] Lacci provides:

[90] Magnusen "From dumpster to delivery room: does legalizing baby abandonment really solve the problem?" 22 2001/2002 *J. Juv. L. 1 La Verne Law Review, Inc. Journal of Juvenile Law* 1-28, 10.

[91] Press release, California State Senate Republican Caucus, Abandoned Baby Legislation Introduced by Brulte (19 Jan, 2000), Magnusen "From dumpster to delivery room: does legalizing baby abandonment really solve the problem?" 22 2001/2002 *J. Juv. L. 1 La Verne Law Review, Inc. Journal of Juvenile Law* 1-28, 10; see s 1368, 1999-2000 Reg. Sess. (Cal. 2000); California Health and Safety Code 1255.7 (West Supp. 2000) and California Penal Code 271.5 (West Supp. 2000).

[92] Magnusen, "From dumpster to delivery room: does legalizing baby abandonment really solve the problem?" 22 2001/2002 *J. Juv. L. 1 La Verne Law Review, Inc. Journal of Juvenile Law* 12 where "in 2002 a teen abandoned her baby in a public bathroom, despite her claims of ignorance of the state's safe haven law, the mother was arrested and charged with attempted murder and abandonment".

[93] Magnusen, "From dumpster to delivery room: does legalizing baby abandonment really solve the problem?" 22 2001/2002 *J. Juv. L. 1 La Verne Law Review, Inc. Journal of Juvenile Law* 12.

[94] This can be seen from the baby Andrew case where the mother dumped her baby into a dumpster. Baby Andrew suffered skull fractures, hypothermia and dehydration. This despite the existence of the "Save A Baby" laws. The teenage mother was charged with attempted murder and child endangerment; Rivera and Louima "Newborns abandoned despite safe haven law" 6 Feb 2002 *L.A. Times*; Kay "Los Angeles newborn found in trash bin crime" 23 Jan 2002 *L.A. Times*; Magnusen "From dumpster to delivery room: does legalizing baby abandonment really solve the problem?" 22 2001/2002 *J. Juv. L. 1 La Verne Law Review, Inc. Journal of Juvenile Law* 12; see also Lacci "Statistically speaking: can safe haven legislation succeed without education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88; also see Ayres "Kairos and safe havens: the timing and calamity of unwanted birth" 15 2008-2009 *William and Mary Journal of Women and the Law* 227, 273-277 where the need for educating the public on safe haven laws is discussed; further see Sanger "Infant safe haven laws: legislating in the culture of life" 106 2006 *Colum. L. Rev.* 753-829, 792, who discusses that publicity does not always result in women making use of the safe havens as was seen in New Jersey which apparently has one of the best safe haven public relation campaigns, at 795; also mentioned in Lacci "Statistically speaking: can safe haven legislation succeed without

> "Knowledge and access to information is essential because many young pregnant women — especially those likely to commit neonaticide — are extremely passive. It is unlikely that these women will seek out information on Safe Haven abandonment or other options on their own. Therefore, if a state does not make adequate attempts to publicize Safe Haven laws, then they will not be effective for the women who need them most."[95]

Wirgler defines abandonment in terms of Californian law as "desertion by the parent with the intent to completely sever the parent/child relationship, including its rights and obligations".[96] In an earlier case, *In re Cordy*,[97] the California Supreme Court applied the ordinary, dictionary meaning to abandonment and defined it as being "to relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance fidelity; to quit; to forsake".[98] These two definitions both omit the voluntary aspect requisite in abandonment. However, the voluntary nature of the act of abandonment has been dealt with in the matter of *In re Marriage of Jill and Victor D*[99] where voluntary relinquishment of custody was the relevant factor considered by the court to determine whether the child was "left" or abandoned for the purposes

education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88, 89; also see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*; further see Dillard "Six years later, law not widely known Safe Haven seeks to protect unwanted babies" 5-11 March 2007, *Forth Worth Business Press* where the writer states that a sign indicating a safe baby site resulted in a baby being safely abandoned.

[95] Lacci "Statistically speaking: can safe haven legislation succeed without education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88, 89, where the author points out that many states failed to develop any sort of plan to advertise these laws and therefore reach women who might leave their babies at a safe haven.

[96] Wirgler "Abandonment as a ground for the termination of parental rights" (16) 2007 *The Journal of Contemporary Legal Issues* 333-344, 333; The South African Children's Act 38 of 2005 defines abandoned as: "'abandoned', in relation to a child, means a child who — (a) has obviously been deserted by the parent, guardian or caregiver; or (b) has, for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least three months", while the proposed amendment by the Children's Amendment Bill of 2019 reads: "'abandoned child' means a child who — (a) has been deserted by a parent, guardian or care-giver; or (b) for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months; or (c)has no knowledge as to the whereabouts of the parent, guardian or caregiver and such information cannot be ascertained by the relevant authorities."

[97] 169 Cal. 150, 153 (1915). District Court of Appeal, First District, California. *In re Cordy*. Civ. 1420, 21 May 1914.

[98] 169 Cal. 150, 153 (1915). District Court of Appeal, First District, California. *In re Cordy*. Civ. 1420, 21 May 1914.

[99] App. 3 Dist. (2010) 110 Cal.Rptr.3d 369, 185 Cal.App.4th 491.

of termination of parental rights.[100] Relinquishment for the purpose of termination of parental rights does not necessarily occur at the same moment the child is left with the other parent. This is illustrated by *In re Cattalini*,[101] where the court decided that a court order placing the sole care and custody of the children with the mother is not an indication of the father voluntarily abandoning his children.[102] A similar matter is the *Application of Croze*[103] where the court found a mother, who voluntarily handed her child to third persons to be cared for gratuitously, until she was able to resume her parental duties, not to have abandoned her child and therefore she did not forfeit custody of her child.[104] Therefore, voluntary relinquishment of parental rights must be done intentionally.

According to the California Penal Code section 271.5 a child 72 hours old or younger may be voluntarily relinquished to a safe surrender site and no parent or person having lawful custody may be prosecuted if he or she surrenders a child in this way.[105] Section 1255.7 of the California Health and Safety Code defines a safe-surrender site as follows:

> "(a)(1) For purposes of this section, 'safe-surrender site' means either of the following:
>
> (A) A location designated by the board of supervisors of a county or by a local fire agency, upon the approval of the appropriate local governing body of the agency, to be responsible for accepting physical custody of a minor child who is 72 hours old or younger from a parent or

[100] App. 3 Dist. (2010) 110 Cal.Rptr.3d 369, 185 Cal.App.4th 491.
[101] 72 Cal App 2d 662 (1946). District Court of Appeal, Third District, California. *In re Cattalini et al.* Civ.7145 Sac. 5705. 24 Jan 1946.
[102] However, the opposite would be true if a parent who has been given the right to visit the child fails to do so. In that instance it would constitute voluntarily leaving. This was expressed by Wirgler "Abandonment as a ground for the termination of parental rights" (16) 2007 *The Journal of Contemporary Legal Issues* note 52, 336 commenting on the case of *In re Conrich* 221 Cal App 2d 662 (1963); in another matter, *In re Estate of Barassi* (App. 2 Dist. 1968) 71 Cal.Rptr. 249, 265 Cal.App.2d 282, though the natural father had not contacted his children since divorcing their mother and had not contributed to their support. It was found that he had not "abandoned" them and had not forfeited his superior right to their custody where his attempt to contact them had been discouraged by their mother, who had been awarded custody, and by the children's maternal relatives and where the natural father had been unemployed for substantial period of time.
[103] (App. 1956) 145 Cal.App.2d 492, 302 P.2d 595.
[104] (App. 1956) 145 Cal.App.2d 492, 302 P.2d 595.
[105] This is in contrast with the Texas Family Code s 262.302(a) where a child 60 days or younger may be voluntarily relinquished at a designated safe haven provider.

individual who has lawful custody of the child and who surrenders the child pursuant to Section 271.5 of the Penal Code. Before designating a location as a safe-surrender site pursuant to this subdivision, the designating entity shall consult with the governing body of a city, if the site is within the city limits, and with representatives of a fire department and a child welfare agency that may provide services to a child who is surrendered at the site, if that location is selected.

(B) A location within a public or private hospital that is designated by that hospital to be responsible for accepting physical custody of a minor child who is 72 hours old or younger from a parent or individual who has lawful custody of the child and who surrenders the child pursuant to Section 271.5 of the Penal Code.

(2) For purposes of this section, 'parent' means a birth parent of a minor child who is 72 hours old or younger.

(3) For purposes of this section, 'personnel' means a person who is an officer or employee of a safe-surrender site or who has staff privileges at the site.

(4) A hospital and a safe-surrender site designated by the county board of supervisors or by a local fire agency, upon the approval of the appropriate local governing body of the agency, shall post a sign displaying a statewide logo that has been adopted by the State Department of Social Services that notifies the public of the location where a minor child 72 hours old or younger may be safely surrendered pursuant to this section."

The child cannot be released to just any person present at the safe-surrender site but must be released to personnel on duty in terms of section 1255.7(a)(3). Once the child is received at a safe-surrender site, the personnel on duty shall ensure that a coded confidential ankle bracelet is placed on the child[106] and provide the individual who is surrendering the child with a copy of the coded bracelet to facilitate the return of the child pursuant to section 1255.7(f).

[106] California Health and Safety Code s 1255.7(b)(1); also see Law Offices of Stimmel, Stimmel & Roeser "Safe haven laws — a safe place to leave a newborn" *Stimmel Law* at https://www.stimmel-law.com/en/articles/safe-haven-laws-safe-place-leave-newborn?cv=1, last accessed 2019-12-06.

Possession of the coded bracelet does not give the person a right to parentage or custody of the child[107] it also does not ensure that reclaiming of the child will be successful; if there is any suspicion of abuse or neglect then the personnel at the safe-surrender site will contact a child protective agency.[108] Here, Californian law has recognised a gap not dealt with in the Texan law. According to Texan law, no method exists to easily ascertain the identity of the parent or guardian should he or she wish to reclaim the child.[109] However, Californian law has simplified this, by providing that the relinquishing person may produce the ankle bracelet as proof, although not guaranteeing that reclaiming the child will be successful.

The mere fact that the child was voluntarily surrendered is not an indication of child abuse or neglect.[110] Further, the personnel at the safe-surrender site must provide the individual with a medical information questionnaire, which the individual may decline to complete or complete and return at the time the child is surrendered, it may also be mailed at a later stage.[111] Only non-identifying information is required to be provided on the questionnaire and each questionnaire contains the following notice:

> "Notice: The baby you have brought in today may have serious medical needs in the future that we don't know about today. Some illnesses, including cancer, are best treated when we know about family medical histories. In addition, sometimes relatives are needed for life-saving treatments. To make sure this baby will have a healthy future, your assistance in completing this questionnaire fully is essential. Thank you."[112]

[107] California Health and Safety Code s 1255.7(b)(2).
[108] California Health and Safety Code s 1255.7(f).
[109] However, there is provision made for genetic testing in terms of s 263.407(b) of the Texas Family Code.
[110] California Health and Safety Code s 1255.7(f).
[111] California Health and Safety Code s 1255.7(b)(3).
[112] California Health and Safety Code s 1255.7(b)(3); see chapter 5 The Right to Knowledge of One's Origins par 5.1 where the argument in favour of having health information is refuted "firstly even if people had accurate information about their genetic relatives, insufficient evidence exists to prove that it improves risk prediction and that it will lead to better health outcomes. In essence, this knowledge seems to have little impact on people's health related behaviours. Secondly, even in general, health information is seldom disseminated from parents to children. From this, it is clear that anonymity policies do not impede the health interests of donor-conceived children. As a result, the same outcome will apply with abandoned children in that a mother's right to anonymity

Once the child arrives the child is medically screened and provided with the necessary medical care.[113] Personnel have 48 hours[114] within which to notify child protective services or a county agency providing child welfare services of the arrival of the child and all medical information pertaining to the child.[115] In this regard only non-identifying information shall be communicated to the agency.[116] The child protection agency then assumes temporary custody of the child[117] and investigates the circumstances of the case and reports all known identifying information regarding "the child to the California Missing Children Clearinghouse and to the National Crime Information Center".[118] A 14-day cooling-off period is provided to the parent or person relinquishing the child.[119] This cooling-off period is unique to Californian law and entails that the person may return to reclaim physical custody of the child within 14 days. Prior to the child being given back to the parent or individual, "the child welfare agency shall verify the identity of the parent or individual; conduct an assessment of his or her circumstances and ability to parent and request that the juvenile court dismiss the petition for dependency and

will not hinder the health interests of abandoned children". South African Law Reform Commission Draft Issue Paper 32 Project 140 "The Right to Know One's Biological Origins" 20 MAY 2017 25 par 2.46 and at 26 par 2.49 and 27 par 2.58; see also Berg et al "National institutes of health state-of-the-science conference statement: family history and improving health" 151 2009 *Annals of Internal Medicine*: 872-77; also see Wilson et al. "Systematic review: family history in risk assessment for common diseases" 151 2009 *Annals of Internal Medicine* 878-85; South African Law Reform Commission Draft Issue Paper 32 Project 140 "The Right to Know One's Biological Origins" 20 MAY 2017 25 par 2.47; see also Wang et al "Family history assessment: impact on disease risk perceptions" 43 2012 *American Journal of Preventative Medicine* 392-98; Heshka et al "A systematic review of perceived risks, psychological and behavioural impacts of genetic testing" 10 2008 *Genetic Medicine* 19-32; There will no longer be a need for genetic information with the advancement of precision medicine for more on this see Collins *The Language of Life: DNA and the Revolution in Personalized Medicine* (2011) and Novelli "Personalised genomic medicine," supplement 1, *Internal and Emergency Medicine* 5 (2010): s 81-90. Centers for Disease Control and Prevention "Awareness of family health history as a risk factor for disease — United States, 2004" *Morbidity and Mortality Weekly Report* 53 (2004) 1044-47; Murf et al "The comprehensiveness of family cancer history assessments in primary care" 10 2007 *Journal of Community Genetics* 174-80; Plat et al "Obtaining the family history for common, multifactorial diseases by family physicians: a descriptive systematic review" 15 2009 *European Journal of General Practice* 231-42.

[113] California Health and Safety Code s 1255.7(c); Also see https://www.childwelfare.gov/pubPDFs/safehaven.pdf last accessed 2019-12-06.

[114] California Health and Safety Code s 1255.7(d)(1); Also see https://www.childwelfare.gov/pubPDFs/safehaven.pdf last accessed 2019-12-06.

[115] California Health and Safety Code s 1255.7(d)(1); Also see https://www.childwelfare.gov/pubPDFs/safehaven.pdf last accessed 2019-12-06.

[116] California Health and Safety Code s 1255.7(d)(2).

[117] California Health and Safety Code s 1255.7(e).

[118] California Health and Safety Code s 1255.7(e).

[119] California Health and Safety Code s 1255.7(g).

order the release of the child".[120] Section 1255.7 of the California Health and Safety Code specifies that a child may be relinquished by a parent or *individual with lawful custody*, thus widening the scope of who may relinquish a child. The steps in determining whether the person relinquishing the child indeed has lawful custody is not addressed and, because of the nature of these laws in providing anonymity, it is submitted that legally regulating who may relinquish a child will not be possible.

4.3.2 Termination or relinquishment of birth parents' rights

According to the California Family Code, section 7822(a) a proceeding may be brought under the following circumstances:

> "(1) The child has been left without provision for the child's identification by the child's parent or parents.
>
> (2) The child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.
>
> (3) One parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child.
>
> (b) The failure to provide identification, failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents. In the event that a guardian has been appointed for the child, the court

[120] California Health and Safety Code s 1255.7(f); This is subject to s 319 of the Welfare and Institutions Code which deals with the initial petition hearing; examination and report; release; grounds for continued detention; judicial findings and order; limitations upon right to make educational or developmental services decisions for the child.

may still declare the child abandoned if the parent or parents have failed to communicate with or support the child within the meaning of this section.

(c) If the child has been left without provision for the child's identification and the whereabouts of the parents are unknown, a petition may be filed after the 120th day following the discovery of the child and citation by publication may be commenced. The petition may not be heard until after the 180th day following the discovery of the child.

(d) If the parent has agreed for the child to be in the physical custody of another person or persons for adoption and has not signed an adoption placement agreement pursuant to Section 8801.3, a consent to adoption pursuant to Section 8814, or a relinquishment to a licensed adoption agency pursuant to Section 8700[121], evidence of the adoptive placement shall not in itself preclude the court from finding an intent on the part of that parent to abandon the child. If the parent has placed the child for adoption pursuant to Section 8801.3, consented to adoption pursuant to Section 8814, or relinquished the child to a licensed adoption agency pursuant to Section 8700, and has then either revoked the consent or rescinded the relinquishment, but has not taken reasonable action to obtain custody of the child, evidence of the adoptive placement shall not in itself preclude the court from finding an intent on the part of that parent to abandon the child.

(e) Notwithstanding subdivisions (a), (b), (c), and (d), if the parent of an Indian child has transferred physical care, custody and control of the child to an Indian custodian, that action shall not be deemed to constitute an abandonment of the child, unless the parent manifests the intent to abandon the child by either of the following:

(1) Failing to resume physical care, custody, and control of the child upon the request of the Indian custodian provided that if the Indian custodian is unable to make a request because the parent has failed to keep the Indian custodian apprised of his or her

[121] Of the Welfare and Institutions Code deals with the relinquishment for adoption, which is outside of the scope of this study and s 366.26 of the Code details the procedure where the identity of the birth parents are known and the birth parents even go as far to select the prospective adoptive parents.

> whereabouts and the Indian custodian has made reasonable efforts to determine the whereabouts of the parent without success, there may be evidence of intent to abandon. (2) Failing to substantially comply with any obligations assumed by the parent in his or her agreement with the Indian custodian despite the Indian custodian's objection to the noncompliance."

For the purposes of this study, focus is placed on the one-year period in order for termination to take place and the parent's intent to abandon. The abandonment of a child with another parent is excluded from this discussion because in the instance of abandonment through safe havens, abandonment of the child is with a designated infant care provider and not with a parent. According to the court *In re A.B. a Minor v Scott R,*[122] section 7822 of the California Family Code establishes the grounds for terminating parental rights due to a parent's voluntary abandonment and allows for commencement of proceedings where "one parent has left the child in the care and custody of the other parent for a *period of one year* [own emphasis added] without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child".[123] It further states that "this statute is liberally construed to serve and protect the interests and welfare of the child" and "the juvenile court's findings must be based on clear and convincing evidence".[124] The court had to investigate the one-year statutory period for abandonment and whether this period must occur immediately before the proceeding for termination is brought or whether it can occur any time prior to the proceedings.[125] The court found that this section in its plain language meaning does

[122] 2 Cal.App.5th 912 Court of Appeal, Fourth District, Division 1, California. *IN RE A.B., a Minor. John O. et al. Petitioners and Respondents, v Scott R., Objector and Appellant.* D069257 Filed 8/24/2016. *In re A.B.*, 2 Cal.App.5th 912 (2016).
[123] s 7822(a)(3) of California Family Code.
[124] s 7821 of the California Family Code; Also referred to by the court *In re A.B.* 2 Cal.App.5th 912 (2016) 919; The state of California stopped using the clear and convincing evidence requirement and instead applies the preponderance of evidence burden of proof to ascertain whether parental rights should be terminated based on parental unfitness; See Lee and Thue "Unpacking the package theory: why California's statutory scheme for terminating parental rights in dependent child proceedings violates the due process rights of parents as defined by the United States Supreme Court in *Santosky v Kramer*" 13 2009 *UC Davis Journal of Juvenile Law and Policy* 143, 161.
[125] *In re A.B.* 2 Cal.App.5th 912 (2016) 912.

not limit such period to immediately prior to the proceeding.[126] In coming to this conclusion the court referred to the *Connie M.* case[127] concluding that "to hold that the one-year period immediately preceding the filing of the petition is the requisite year would defeat the legislative purposes of the statute".[128] The court held that interpreting it in the manner the appellant was suggesting would interfere with the child's potential adoption, stability and security.[129] Therefore, it was decided that a year at any point in the child's life prior to the institution of proceedings for the termination of the parental rights would suffice.[130]

The second aspect of *In re A.B.* judgment is the presumption that the parent had an 'intent to abandon' the child. This is a question of fact and must be proven on the basis of convincing evidence. The court *In re A.B* in quoting *In re B. J. B.*[131] stated that "in determining a parent's intent to abandon", the superior court must objectively measure the parent's conduct, "considering not only the number and frequency of his or her efforts to communicate with the child, but the genuineness of the parent's efforts".[132]According to *In re Daniel M*[133] the parent does not have to have an intent to abandon the child *permanently*. Evidence of the parent's intent to abandon is found in section 7822(b), which defines this intent as a parent who fails to provide identification, support or fails to communicate with the child. According to section 7822(b) token efforts to communicate with the child are not enough.[134] The decision made by

[126] *In re A.B.* 2 Cal.App.5th 912 (2016) 919, 920.
[127] *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1235–1237, 222 Cal.Rptr. 673 (*Connie M*).
[128] The court referred to repealed sections of the Civil Code s 232 where the legislature was specific in indicating where it used the word "immediately" in one section (b) and omitted the same word in (a). Therefore concluding that the legislature is perfectly capable and knew how to limit the one-year period if that was its intent *In re A.B.*, 2 Cal.App.5th 912 (2016).
[129] *In re A.B.* 2 Cal.App.5th 912 (2016) 922.
[130] *In re A.B.* 2 Cal.App.5th 912 (2016) 912.
[131] (1986) 185 Cal.App.3d 1201, 1212, 230 Cal.Rptr. 332.
[132] *In re A.B.* 2 Cal.App.5th 912 (2016) 923.
[133] *In re Daniel M.*, III, *A Minor. Craig P. Petitioner and Respondent, v Daniel M., JR., Objector and Appellant.* (1993) 16 Cal.App.4th 878, 883, 20 Cal.Rptr.2d 291.
[134] *In re Adoption of Andrea Oukes and Andrew Lee Oukes, Minors. Larry Lee Moore and Kay Jewel Moore, Petitioners and Respondents, v Donnal Lee McGary Oukes, Objector and Appellant,* 14 Cal.App.3d 459, 467, 92 Cal.Rptr. 390 (1971), where the court hinted that failure to communicate may be stronger evidence of abandonment and justify termination of that parent's rights than failure to provide support; Wirgler "Abandonment

the court was in line with the legislative purpose of providing an abandoned child with the stability and security of an adoptive home.[135] The one-year period is reasonable and along with evidence of the intent to abandon prevents a parent from thwarting the adoption process by initiating contact shortly before the proceedings interrupting the one-year period, which interruption prevents termination of his or her parental rights.[136] The fact that the intent to abandon need not be permanent and that mere token efforts to communicate with the child is not regarded as enough to thwart the adoption process enables children who have been abandoned to be moved through the system quickly and not be institutionalised and left without a home and family for years.[137] All these provisions in place focus on promoting the best interests and welfare of the child.

4.3.3 Immunity from prosecution or affirmative defense

In California section 271.5(a) of the Penal Code indicates the existence of immunity from prosecution rather than a mere affirmative defense.[138] However, the immunity from prosecution, like in other states, may only be enjoyed if abandonment is done within the confines of section 271.5. A parent who voluntarily relinquishes a child 72 hours old or younger to a safe-surrender site in terms of section 271.5(a) of the California Penal Code will not be prosecuted in terms of section 270, 270.5, 271 or 271a.[139] Each of these sections will now be

as a ground for the termination of parental rights" (16) 2007 *The Journal of Contemporary Legal Issues* 333-344, 334, 335 "Token efforts. Of course, evidence of support or communication by the allegedly abandoning parent will rebut the presumption of intent to abandon. When such evidence is offered, s 7822(b) instructs the courts to distinguish genuine from "token" efforts. Considerable litigation has centred on the issue of whether a parent's efforts to communicate or provide support were genuine or instead merely "token".

[135] *In re A.B.* 2 Cal.App.5th 912 (2016) 924.

[136] *In re A.B.* 2 Cal.App.5th 912 (2016) 924.

[137] *In re A.B.* 2 Cal.App.5th 912 (2016) 923.

[138] s 271.5(a) "No parent or other individual having lawful custody of a minor child 72 hours old or younger may be prosecuted for a violation of Section 270, 270.5, 271, or 271a if he or she voluntarily surrenders physical custody of the child to personnel on duty at a safe-surrender site"; see also Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 137.

[139] s 271.5 California Penal Code.

discussed to determine exactly what the parent or person having lawful custody is immune from when abandoning his or her child in terms of section 271.5.

Section 270 states that "a parent of a minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care (such as prayer by a duly accredited practitioner) shall be liable for a fine of up to $2000 or jail for the maximum period of a year or both". Proof of the parent not providing clothing, food, shelter or medical attendance is sufficient to rebut any lawful excuse by the parent.[140] With the abandonment of children, parents or persons with lawful custody would under normal circumstances be held liable in terms of this section, however, if the parent or person who has lawful custody of the minor 72 hours of age or younger, abandons the child in the manner prescribed by section 271.5 of the California Penal Code then such parent or person is exempt from prosecution. Exemption from prosecution also applies in terms of section 270.5, which provides "every parent who refuses, without lawful excuse[141], to allow his or her minor child into his or her home and does not provide alternative shelter shall be guilty of a misdemeanor and liable to a maximum fine of $500".

Section 271 of the California Penal Code provides: "Every parent of any child under the age of 14 years, and every person to whom any such child has been confided for nurture, or education, who deserts such child in any place whatever with intent to abandon it, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 or in the county jail not exceeding one year or by fine not exceeding one thousand dollars ($1,000) or by both." According to

[140] s 270 California Penal Code.

[141] s 270.5(c) of the Penal Code, lawful excuse in terms of this section shall include, but not be limited to, a reasonable fear that the child's presence will endanger the safety of the parents or other persons living in the home. This is not applicable to abandoned infants as they pose no threat to parents or other persons, however, parents or persons having lawful custody who relinquish their child in terms of s 271.5 of the Penal Code shall be exempt from prosecution.

section 271.5 a parent or person with lawful custody will also be exempt from prosecution under this section, however, it is important to bear in mind that the exemption only extends to a child 72 hours or younger that is abandoned in the way prescribed, that is, to a safe-surrender site. Therefore, prosecution will occur if the child is older than 72 hours and under 14 years of age in terms of section 271.[142] This is contrasted with the Texas Penal Code section 22.041(b), which provides that a person commits an offense if he or she abandons a child younger than 15.[143]

Section 271a of the Penal Code provides: "any person who willfully or knowingly abandons his or her minor child (under the age of 14 years), or refuses to maintain his or her minor child, or relinquishes the child to an orphan asylum or charitable institution claiming that the child is an orphan, may face imprisonment pursuant to subdivision (h) of Section 1170, or jail not exceeding one year, or will be subject to a fine not exceeding one thousand dollars ($1,000), or both." The relinquishment of a child to a safe-surrender site amounts to willful and knowledgeable abandonment, however the parent or person with lawful custody will be exempt from prosecution in terms of section 271.5 only if the child is in fact 72 hours old or younger. Therefore, it may be deduced that a child older than 72 hours will cause the relinquishing person to be held accountable in terms of this section.

In addition to the immunity from prosecution, enjoyed by the parent or person having lawful custody of the child, the personnel of a safe-surrender site shall not be subject to criminal, civil or administrative liability for accepting and taking possession of the child even if the child is

[142] For the abandonment of a child older than 14 years a parent faces liability in terms of the provisions of the Californian Family Code s 7822(a) as well as in terms of section 270 of the California Penal Code as discussed above. These sections only make mention of the term "child" and do not specify an age.
[143] For the abandonment of a child older than 15 years in terms of Texas law, a parent faces liability for abandonment in terms of the Texas Penal Code s 22.041 which only mentions the word "child" and does not specify an age.

older than 72 hours or the parent or person surrendering the child did not have lawful custody of the child.[144] Also included in this immunity are any other persons who provide assistance to someone wishing to surrender an infant within the provisions of section 271.5 of the Penal Code, such persons will not be held liable if they do so without compensation and will only incur liability for willful misconduct, gross negligence or recklessness.[145] Californian law is explicit in providing that there is no liability for the personnel of a safe-surrender site if the child is older than 72 hours. Although not explicitly provided for in Texan law, the non-liability of personnel may be inferred through section 262.302 of the Texas Family Code.

4.3.4 Confidentiality

Confidentiality plays an important role in the use of safe haven laws. Without the guarantee of confidentiality, parents or persons with lawful custody will not make use of safe haven laws and will instead opt for unsafe methods of abandonment where their identities remain unknown. Section 1255.7(d)(2) of the California Health and Safety Code provides for the protection of the identities of parents or persons who have lawful custody who make use of safe-surrender sites to such an extent that any personal identifying information is required to be removed from the medical information questionnaire.[146]

> "1255.7(d)(2) Any personal identifying information that pertains to a parent or individual who surrenders a child that is obtained pursuant to the medical information questionnaire is

[144] s 1255.7(h) of the California Health and Safety Code however this section does not provide immunity for personal injury or wrongful death, including, but not limited to, injury resulting from medical malpractice; also see https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200920100AB1048 last accessed 2019-12-06.

[145] s 1255.7(i)(1) of the California Health and Safety Code; Assistance in this regard is transporting the infant to the safe surrender site at request of the surrendering person or accompanying such person to a safe surrender site or performing any other act in good faith for the purposes of effecting the safe surrender, this in terms of s 1255.7(i)(2) of the California Health and Safety Code.

[146] Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 883, where the author points out that the burden of remaining anonymous is placed on the parent, this thesis disagrees with the authors' view in that this section expressly states that the child protective services or county agency shall not disclose the information provided by the parent and such identifying information shall be redacted from any medical information provided by the parent. Thus this section seems to place the responsibility squarely on the child protective services or county agency.

> confidential and shall be exempt from disclosure by the child protective services or county agency under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Personal identifying information that pertains to a parent or individual who surrenders a child shall be redacted from any medical information provided to child protective services or the county agency providing child welfare services."

Further protection is afforded by the exemption from application of section 6250 of the California Government Code, which recognises an individual's right to privacy but "declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state". This section does not apply and there is no right of access to information pertaining to a parent or person who made use of a safe-surrender site. Despite this guarantee of confidentiality, one of the weaknesses of these safe haven laws, as stated previously, is the personal surrender of the infant. In other words, the parent or individual with lawful custody must, in spite of their shame, relinquish the child by making face-to-face contact with a member of the personnel at the designated safe-haven site. This could serve as a deterrent for young women facing crisis pregnancies.

4.3.5 Fathers' rights

California is one of the states without a putative father registry.[147] There are however various ways for the alleged father to assert his rights. The definition of a natural parent is "a non-adoptive parent whether biologically related to the child or not".[148] Further "'parent and child relationship' means the legal relationship existing between a child and the child's natural or adoptive parents to which the law confers or imposes rights, privileges, duties, and

[147] Beck "A national putative father registry" with appendix "Survey of putative father registries by state" Vol. 36 Issue 2 Winter 2007 *Capital University Law Review* 295-362, 342; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033; for more on fathers' rights, see Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 885-895; see also chapter 6 the rights of unmarried fathers in the abandonment of children.

[148] s 7601(a) California Family Code.

obligations".[149] This term not only refers to the mother and child relationship, but also to the father and child relationship, and the child can have more than two parents.[150] Section 7602 of the Family Code provides that "the parent child relationship extends equally to every child and to every parent regardless of the marital status of the parents". This is similar to South African law where unmarried fathers have responsibilities and rights over their children in certain instances expressed in section 21 of the Children's Act 38 of 2005. Furthermore, according to the South African Children's Act section 30(1) "more than one person may hold parental responsibilities and rights in respect of the same child". Prior to the enactment of section 7602 the issue of unmarried fathers' rights to custody of their children, and the right not to have their parental rights terminated in favour of an adoption, was a contentious one. The previous section 7611 of the Family Code was declared invalid by the decision of *In re Jerry P*[151]and provided the following:

> "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with section 7540) [conclusive presumption as to child of marriage] or Chapter 3 (commencing with section 7570) of Part 2 [voluntary declaration of paternity] or in any of the following subdivisions:
>
> (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.
>
> (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid...

[149] s 7601(b) & (c) California Family Code.
[150] s 7601(b) & (c) California Family Code.
[151] (App. 2 Dist. 2002) 116 Cal.Rptr.2d 123, 95 Cal.App.4th 793.

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid...

(d) He receives the child into his home and openly holds out the child as his natural child."

In the *In re Jerry P* matter Jerry P had been a dependent child of the juvenile court since shortly after his birth when both he and his mother tested positive for cocaine in their bloodstreams.[152] The court initially found J.R to be Jerry's "presumed father" and ordered father and son to be provided with family reunification services, which eventually could lead to J.R's custody of Jerry.[153] Upon rehearing, the court found J.R could not be Jerry's presumed father because he never complied with section 7611(d) by receiving Jerry into his home.[154] The additional argument brought by the respondent was that J.R could not be the "presumed father" because he was not the boy's biological father.[155] The California court of appeal held that a presumed father status is not dependent on a biological link and that section 7611 of the Family Code and the related dependency scheme is unconstitutional in that it allows a mother or third persons to prevent a man from attaining presumed father status.[156] In coming to this conclusion, the court held that the purpose of reunification is to serve the best interests of all concerned and therefore it's unthinkable that the Legislature chose to limit this to biological fathers only.[157] The court held that rebutting the presumption that a man is the natural father, which can be done by clear and convincing evidence, was only applied in an appropriate instance at the discretion of the court. The court further held that finding one man not to be the biological father, does not instantly award another man paternity "otherwise, a child could be precluded from having a loving, nurturing relationship with a committed father by a man the child may never even have

[152] *In re Jerry P* 95 Cal.App.4th 793 (2002) 797.
[153] *In re Jerry P* 95 Cal.App.4th 793 (2002) 797.
[154] *In re Jerry P* 95 Cal.App.4th 793 (2002) 797.
[155] *In re Jerry P* 95 Cal.App.4th 793 (2002) 797.
[156] *In re Jerry P* 95 Cal.App.4th 793 (2002) 797, 803.
[157] *In re Jerry P* 95 Cal.App.4th 793 (2002) 801.

met, who may be totally uninterested in the child and who cannot obtain presumed father status in his own right".[158] The court reiterated that presumed fatherhood for the purposes of dependency proceedings denotes "one who promptly comes forward and demonstrates a full commitment to his paternal responsibilities, emotional, financial and otherwise".[159] It is whether the man in question demonstrated a "sufficient commitment"[160] to his parental responsibilities, whether there exists a "familial bond"[161] between child and man and has nothing to do with whether the man has a biological link to the child.[162] This thesis agrees with the court's approach that a biological link should be secondary to a demonstration of commitment. In section 21 of the South African Children's Act the unmarried father must show a commitment to the child by "consenting to be identified as the child's father"[163] or "contributing to the child's upbringing"[164] or "contributing towards expenses for maintenance of the child for a reasonable period".[165] However, section 21 is reserved for the biological father and thus requires a biological link – unlike the court's decision in the abovementioned case that a biological link should only be a secondary consideration.[166]

The next argument that was addressed by the Appeal Court was brought by J.R who alleged that section 7611 and the related dependency scheme[167] violates the assurance of due process and equal protection because it allows a mother or third person to single-handedly stop a man

[158] *In re Jerry P* 95 Cal.App.4th 793 (2002) 804.
[159] *In re Jerry P* 95 Cal.App.4th 793 (2002) 801; referring to the decision of the court in *Adoption of Kelsey S* 1992 1 Cal. 4th 816, 849 [4 Cal.Rptr.2d 615, 823 P.2d 1216] 849.
[160] *In re Jerry P* 95 Cal.App.4th 793 (2002) 804.
[161] *In re Jerry P* 95 Cal.App.4th 793 (2002) 805.
[162] *In re Jerry P* 95 Cal.App.4th 793 (2002) 805.
[163] s 21(1)(*b*)(i) of the Children's Act 38 of 2005.
[164] s 21(1)(*b*)(ii) of the Children's Act 38 of 2005.
[165] s 21(1)(*b*)(iii) of the Children's Act 38 of 2005.
[166] See *AB v Minister of Social Development and Another* 2017 3 BCLR 267 (CC) where the majority of the court required a genetic link in terms of s 294 of the Children's Act 38 of 2005.
[167] A dependency scheme refers to the court declaring the child a ward of the state, in other words a dependent of the state. In dependency scheme proceedings only mothers and presumed fathers have the right to reunification services. In adoption proceedings a mother and a presumed father may withhold consent to adoption.

from becoming a presumed father.[168] To qualify as a presumed father the man must, according to section 7611(d), satisfy two requirements. He must openly regard the child as his own and he must take the child into his home.[169] The court again referred to the decision in *Adoption of Kelsey S* in which the court stated that "the trial court must consider whether petitioner has done all that he could reasonably do under the circumstances".[170] In other words, as soon as the father is aware of the pregnancy, he must fully take up his parental responsibilities and demonstrate a readiness to assume full custody of the child. Further aspects that should be considered by the court are the father's contribution to birth and pregnancy expenses; public acknowledgment that he is the father and acting promptly to take custody of the child.[171]All of these factors had been satisfied in the present case as J.R contributed financially, was present at the birth, publicly identified himself as the father and developed a bond with the child.[172] The Supreme Court in *Adoption of Kelsey S* recognised that being acknowledged as a presumed father is not exclusively in the man's control. He is at the mercy of the mother of the child and third persons. The mother may prevent the man from taking the child into his home or the Department of Children and Family Services (DCFS) may have taken custody of the child. In order for even a natural father to succeed over would-be adoptive parents, he needs to qualify as a presumed father, which demonstrates the superiority of the presumed father status over that of a natural father.[173] The court in the *Adoption of Kelsey S* stated: "The anomalies under this statutory scheme [are] readily apparent." It went on to state that:

> "a father who is undisputably ready, willing, and able to exercise the full measure of his parental responsibilities can have his rights terminated merely on a showing that his child's best interest would be served by adoption. If the child's mother, however, were equally of the opposite

[168] *In re Jerry P* 95 Cal.App.4th 793 (2002) 806.
[169] *In re Jerry P* 95 Cal.App.4th 793 (2002) 806.
[170] *Adoption of Kelsey S* 1992 1 Cal. 4th 816, 849 [4 Cal.Rptr.2d 615, 823 P.2d 1216] 850.
[171] *Adoption of Kelsey S* 1992 1 Cal. 4th 816, 849 [4 Cal.Rptr.2d 615, 823 P.2d 1216] 849.
[172] *In re Jerry P* 95 Cal.App.4th 793 (2002) 806, 807.
[173] *In re Jerry P* 95 Cal.App.4th 793 (2002) 807.

> character-unready, unwilling, and unable-her rights in the child could nevertheless be terminated only under the much more protective standards [of showing unfitness by clear and convincing evidence]. Such a distinction bears no substantial relationship to protecting the well-being of children. Indeed, it has little rationality."[174]

The court in this case also went on to state that it leads to an irrational distinction between fathers. "Under the statutory scheme, two fathers who are by all accounts equal in their ability and commitment to fulfill their parental missions can be treated differently based solely on the mother's decisions whether to allow the father to become a presumed father."[175] The court held that the statutory scheme largely ignores the child's best interests.[176] Although the father may apply for a foster care license to satisfy the requirement that the child must be taken into his home, this may be denied on grounds other than his commitment to his parental responsibilities like in this case where J.R was denied a foster care license because he had no home of his own.[177] It furthermore does not give him a right to have the child placed with him and gives him an extra burden not carried by the mother and the natural father.[178] The California Appeal Court overturned the order denying reunification services to the father and the cause was remanded for further proceedings.[179] The dissenting judgment relied mainly on the facts of the case disputing that J.R. came forward promptly to assume his parental duties and in view of that found it unnecessary to entertain the constitutional issue raised by J.R.[180]

The new section 7611(d) speaks about the presumed parent and not the presumed father. It provides "the presumed parent welcomes the child into his or her home and openly holds out

[174] *Adoption of Kelsey S* 1992 1 Cal. 4th 816, 849 [4 Cal.Rptr.2d 615, 823 P.2d 1216] 847.
[175] *Adoption of Kelsey S* 1992 1 Cal. 4th 816, 849 [4 Cal.Rptr.2d 615, 823 P.2d 1216] 847-848.
[176] *In re Jerry P* 95 Cal.App.4th 793 (2002) 809; In South Africa the best interests of the child is of paramount importance in all matters concerning children according to s 28(2) of the Constitution of the Republic of South Africa, 1996; for an in-depth discussion of the best interests of the child see chapter 7.
[177] *In re Jerry P* 95 Cal.App.4th 793 (2002) 811, 812.
[178] *In re Jerry P* 95 Cal.App.4th 793 (2002) 812.
[179] *In re Jerry P* 95 Cal.App.4th 793 (2002) 793.
[180] *In re Jerry P* 95 Cal.App.4th 793 (2002) 818.

the child as his or her natural child". Here the word parent connotes that the responsibility has shifted to both the woman and the man to show that he or she has contributed financially, emotionally, been present and developed a relationship with the child beyond a mere biological connection. The significance of the *In re Jerry P case* in child abandonment is that it demonstrates the protection Californian laws afford, not only to biological fathers, but also to men who act like a father to the child although they have no biological link to the child. It ensures a method for men who have developed a bond with the child or taken up the responsibility to father the child prior to birth to object to the child being declared a ward of the state in dependency proceedings and claim reunification with the child[181] and allows them to object to the child being given up for adoption. This after the child has been abandoned through one of the safe havens.

Various other sections exist that allow fathers to assert their rights in instances of child abandonment through the use of safe haven laws. Similar to South African law, the child of a wife cohabiting with her husband, who is not impotent or sterile, shall be presumed to be the child of the husband.[182] Section 7551 of the California Family Code provides that the court may order an alleged father to submit to genetic tests. Section 7554(a) provides that, if the tests show that the alleged father is in fact not the father of the child, the question of paternity shall be resolved. Although genetic testing may prove otherwise, a man is not left at a loss and may apply to the court to be regarded as the child's presumed father in terms of section 7611(d). Section 7570(a) and (b) supports the establishment of paternity and provides the importance

[181] California Health and Safety Code s 1255.7(f); This is subject to s 319 of the Welfare and Institutions Code which deals with the initial petition hearing; examination and report; release; grounds for continued detention; judicial findings and order; limitations upon right to make educational or developmental services decisions for the child.

[182] This is referred to in Latin as *pater es quem nuptiae demonstrant* which means the father of the child is the husband of the mother this is supported by s 38(1) of the Children's Act 38 of 2005 "A child born of parents who marry each other at any time after the birth of the child must for all purposes be regarded as a child born of parents married at the time of his or her birth"; Skelton, Kruger and Robinson et al *The Law of Persons in South Africa* (2019) 96; s 7540 California Family Code.

and reasons behind establishing paternity. This section sets the tone for the sections to follow and shows the Legislature's aim in further enhancing fathers' rights.

> "The Legislature hereby finds and declares as follows:
>
> (a) There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development.
>
> (b) A simple system allowing for establishment of voluntary paternity will result in a significant increase in the ease of establishing paternity, a significant increase in paternity establishment, an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process to determine and establish paternity and is in the public interest."

Section 7571 provides an opportunity for both mother and father to sign a voluntary declaration of paternity form, which shall be sent "to the Department of Child Support Services within 20 days of the date the declaration was signed. A copy of the declaration shall be made available to each of the attesting parents". This may also be completed any time after the child is born by the child's parents and sent (after being notarized) to the department.[183] Prenatal clinics[184], "local child support agency offices, offices of local registrars of births and deaths, courts, and county welfare departments within this state" also provide parents with the opportunity to sign voluntary paternity forms.[185] "Publicly funded or licensed health clinics, pediatric offices, Head Start programs, child-care centers, social services providers, prisons, and schools may also

[183] s 7571(d) California Family Code.
[184] s 7571(e) California Family Code.
[185] s 7571(f) California Family Code.

offer parents the opportunity to sign a voluntary declaration of paternity".[186] In the decision of *In re Mary G*,[187] a father was precluded from being declared a presumed father because he did not sign a voluntary paternity form in the state of California but in Michigan.[188] The Court of Appeal decided that to the degree that California's statutory scheme precludes the father from attaining presumed father status solely due to geography violates his constitutional equal protection rights.[189] This decision is significant for safe haven laws because if a mother abandons her child in one state, for example, the father will still be able to assert his rights if he signed a voluntary acknowledgement of paternity in another state.[190]

4.4 BABY SAFE HAVEN LAWS IN NEBRASKA

4.4.1 Designated safe haven providers

The enactment of safe haven legislation in Nebraska faced a number of challenges. Although it started on the right footing, a lack of consensus by the legislature led to the exclusion of various important aspects that bore shocking results for children of all ages.[191] Legislative bill 6 (L.B. 6) was introduced by Richard Pahls to the Nebraska legislature in January 2007.[192] L.B. 6 contained all the right provisions commonly contained in other states' safe haven legislation.

[186] s 7571(j) California Family Code.
[187] *In re Mary G* [151 Cal.App.4th 184 (2007)] 151 Cal.App.4th 184 Court of Appeal, Fourth District, Division 1, California. In re MARY G., a Person Coming Under the Juvenile Court Law. *San Diego County Health and Human Services Agency, Plaintiff and Respondent, v. Jennifer G. et al., Defendants and Appellants*. No. D049027. May 24, 2007.
[188] *In re Mary G* 151 Cal.App.4th 184 (2007) 192.
[189] *In re Mary G* 151 Cal.App.4th 184 (2007) 198.
[190] s 7573 California Family Code provides "Except as provided in Sections 7575, 7576, 7577, and 7612, a completed voluntary declaration of paternity, as described in Section 7574, that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support."
[191] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 774.
[192] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 774; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

It provided that only a child thirty days or younger[193] could enjoy safe haven protection; it provided instructions to the receiver on what to do when receiving a child and stipulated a specific time period within which a parent must be notified by the Department of Health and Human Services (DHHS) that their parental rights would be terminated.[194] Prior to terminating parental rights, a ninety-day waiting period was implemented so that parents have enough time to consider their options.[195] L.B. 6 also required the DHHS to educate the public on the existence of the safe haven laws.[196] Everything was in place for an effective law that would continue with similar provisions that were tried and tested in other states. However, due to a lack of consensus when legislative bill 157 (L.B. 157) was introduced, they changed the age limit from thirty days or younger to 72 hours or younger.[197] This age limit was common in many other states and did not prove to be the problem,[198] the problem the Nebraska legislature experienced was how this age limit would be implemented. How would hospital workers

[193] The age limit of thirty days was chosen to allow the parents time to consider all the options available to them, according to Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771, 774; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[194] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 774; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[195] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 774; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[196] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 774; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[197] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 774; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[198] Arizona Revised Statute s 13-3623.01(H)(1); California Health and Safety Code s 1255.7(a)(1)(A); Minnesota Statute s 609.3785(1); Utah Code Annotations s 62A-4a-801(2); Wisconsin Statute Annotations s 48.195(1); Colorado Revised Statute s 19-3-304.5(1)(a); Mississippi Code Annotations s 43-15-201(1).

determine whether the infant is 30 days or younger or alternatively 72 hours or younger?[199] This became the main point of contention and with the enactment of L.B. 157[200] the age limit was completely excluded in its entirety and replaced with the word "child"; the ninety-day waiting period for the termination of parental rights was also deleted as well as any instructions to hospital staff receiving the child.[201]

After the enactment of L.B. 157, parents were dropping off older children at hospitals instead of infants.[202] The law was only in force for four months and had already been used twenty-seven times with a total of thirty-six pre-teens and teenagers dropped off at hospitals.[203] L.B. 157 was not achieving its intended purpose which was to prevent neonaticide and this was due to the fact that it neglected to include a maximum age allowed in the abandonment of infants.[204] L.B. 157 also failed to provide anonymity to its users; it also allowed any person to drop off a child, this had the likelihood of creating serious infringements of parental rights if someone

[199] This was also the question posed by the author in Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev*. 877, 882.
[200] 2008 Nebraska Laws 157 s 1.
[201] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 775-776; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; further see Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.
[202] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 776; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; for more commentary on Nebraskan law see Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.
[203] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 777, 794. Many of these teens and pre-teens were mentally ill, which illustrated an underlying problem in the child welfare system of Nebraska in providing aid to parents with mentally ill children; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.
[204] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 787; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

other than a parent relinquished a child.[205] The argument in favor of allowing a broader scope of individuals to relinquish a child was if a stranger, for example, witnesses the parents or guardians neglecting or abusing a child, that stranger should be allowed to relinquish such a child to a safe haven.[206] This argument was untenable because other methods such as state care were already in place to protect that specific group of children.[207] Relinquishment by a narrower, limited number of participants, such as the mother or father, is in the child's best interests as it ensures parental rights, and that ultimately mothers' rights are not violated. Leaving it open for anyone to abandon could infringe upon the parents' rights. Donnelly argues that the Nebraska legislature, for the sake of brevity, failed to realise the need for the provisions to be expressly stated and did not truly intend to omit the provisions.[208] This thesis does not agree with Donnelly's argument. The fact that previous L.B. 6 contained these specific provisions must have alerted the legislature to their importance, this despite the existence of unanswered issues such as the fact that preventing the relinquishment of an older child is impossible. Firstly, because the age of the child cannot be established accurately at the moment of relinquishment and secondly, even if the child is older than the laws allow, will the personnel refuse the parent the right to relinquish that child? Will such refusal be in the best interests of

[205] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 787; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[206] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 787; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[207] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 787; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[208] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 790; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

the child? L.B. 157 also provided no guidance to hospital workers on what to do when a child was dropped off and the subsequent legal effect on parental rights after the child was dropped off was also not addressed.[209] Would the parental rights terminate immediately? Was this classified as abandonment? These were some of the issues not addressed by L.B. 157.[210]

A special legislative session was held on 21 November 2008 where the Nebraska legislature revised L.B. 157 and limited the age to infants up to thirty-days old.[211] In light of the discussion above, merely changing the age limit is insufficient. The Nebraska revised statute reads as follows:

> Section 29-121 "No person shall be prosecuted for any crime based solely upon the act of leaving a child thirty days old or younger in the custody of an employee on duty at a hospital licensed by the State of Nebraska. The hospital shall promptly contact appropriate authorities to take custody of the child."

It still does not specify who may leave an infant. It also does not provide a procedure that must be followed after the appropriate authorities take custody of the child and no information regarding the termination of parental duties is provided. With so many examples of safe haven laws functioning effectively in other states, it is hard to understand why the Nebraska legislature has failed in properly correcting the problem during the special session. Reinvention of the wheel is not necessary, neither is a copy and paste of other laws suggested, however there can be nothing wrong with implementing that which has proven to work elsewhere.

[209] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 790; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[210] Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 792; Neal "Reforming the safe haven in Ohio: protecting the rights of mothers through anonymity" Vol. 25 2012 *Journal of Law and Health* 347-380, 353; see also Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854.

[211] Nebraska Revised Statute s 29-121; Donnelly "Nebraska's youth need help — but was a safe haven law the best way?" Vol. 64 2009-2010 *University of Miami Law Review* 771-808, 792.

From section 29-121 it is evident that only hospitals are designated as safe haven providers in Nebraska and this was true even under its pre-revised version. According to Cornett, "states that have defined 'safe haven' more broadly view more options as the solution to dangerous child abandonments. The more places to leave your child safely, the more likely a parent is to do it".[212] However, as Cornett also points out, the "more-is-better argument is not without its faults".[213] She bases this statement on four problems. Firstly, there is a lack of awareness of safe haven legislation and state legislatures have just assumed that people know about this legislation.[214] This thesis agrees with this statement, it has been shown that a lack of public awareness of these laws can leave them ineffective, simply gathering dust on a shelf. This was particularly true in California where Senate Bill 101, that proposed to implement a public awareness campaign, was rejected which led to more unsafe, life threatening abandonments despite the existence of these laws.[215] Secondly, confusion exists about which locations qualify as safe havens, as different states have designated different locations.[216] This argument also boils down to awareness, however the Texas legislature found a way of creating such awareness

[212] Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 839; see also Raum and Skaare "Encouraging abandonment: the trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D.L. Rev.* 511, 513-14; and see Parness "Lost paternity in the culture of motherhood: a different view of safe haven laws" 42 2007 *Val.U.L.Rev.* 81, 92.

[213] Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 839; see also Raum and Skaare "Encouraging abandonment: the trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D.L. Rev.* 511, 513-14.

[214] Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 839; see also Raum and Skaare "Encouraging abandonment: the trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D.L. Rev.* 511, 513-14.

[215] See fn 52; In Utah in the matter of *Vigil v Fogerson* 126 P.3d 1186, 1189 (N.M. Ct. App.2005) two young parents tried to abandon their newborn without complying with the state's safe haven law, apparently she was not aware of the Safe Haven for Infants Act, they had no knowledge of a safe haven location under the law that would allow them to abandon their infant without prosecution. We must not disregard the fact that not using the laws could also be due to a complete disregard for the laws, see Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 841.

[216] Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 839; Magnusen "From dumpster to delivery room: does legalizing baby abandonment really solve the problem?" 22 2001/2002 *J. Juv. L. 1 La Verne Law Review, Inc. Journal of Juvenile Law* 1-28, 18-19.

by requiring each designated emergency infant care provider to post a notice stating that it accepts abandoned infants, and such notice must be in a clearly visible location.[217] Thirdly, the increase of locations mean a greater chance of leaving the child with an unsuitably medically qualified person, which could cause the infant not to receive prompt medical care.[218] The Texas legislature once again manages to answer this problem by specifying in its own safe haven legislation that different emergency medical care providers may act as safe havens. In addition, where the legislature allowed for a non-emergency medical services provider to accept relinquishment of an infant, it clearly specifies that the designated safe haven in terms of section 262.301(D)(ii) must have a staff member who is licensed as a registered nurse or who is able to provide emergency medical services to a child taken into its possession.[219] Lastly, more locations mean an increase in the possibility that one parent could terminate the parental rights of the other without the other parent's knowledge.[220] This last point can be solved by the introduction of a putative father registry. Fathers' rights will in any event be threatened whether there are more or fewer safe havens designated in terms of the law, this is because anonymity forms an essential component of these laws, without which these laws will lose their appeal.[221] The only way to safe guard this, even to a small extent, is through a putative father registry.[222]

[217] See fn 26; Texas Family Code s 262.306.
[218] Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 839; A number of states allow abandonment in locations other than hospitals for this see MISS.CODE.ANN. s 43-15-207 where children may be left at adoption agencies and L.A. CHILD CODE ANN. art. 1150 (2004) where children may be left at pregnancy crisis centres and ME.REV.STAT.ANN. (Maine Revised Statutes) tit. 22, s 4018 (2004) where children may be left at dentists' offices.
[219] Texas Family Code s 262.301(D)(ii).
[220] Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 840.
[221] Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854, 847; Dreyer "Texas' safe haven legislation: is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2002 *Texas Journal of Women and the Law* 167-192, 180; Choo "Safe Haven laws for unwanted infants may be unwise" 14 May 2001 *Women's E-News,* available at https://womensenews.org/2001/05/safe-haven-laws-unwanted-infants-may-be-unwise/ accessed 2018-01-19.
[222] For more on the putative father registry see chapter 6 for unmarried fathers' rights in the abandonment of infants.

4.4.2 Termination or relinquishment of birth parents' rights

The Nebraska legislature failed to address this issue in the revised statutes.[223]

4.4.3 Immunity from prosecution or affirmative defense

Section 29-121 of the Nebraska Revised Statute provides that "*no person shall be prosecuted* [own emphasis] for any crime based solely upon the act of leaving a child thirty days old or younger in the custody of an employee on duty at a hospital licensed by the State of Nebraska". No provision is made for instances where the child is older than thirty days, nor if the person abandoning a child in this case will be prosecuted and for what crime.

4.4.4 Confidentiality

No mention is made of confidentiality or anonymity by the legislature in section 29-121 when using these laws. The closest reference to the protection of the identities of individuals is found in section 43-104.01.(5):

> "The department shall not divulge the names and addresses of persons listed with the biological father registry to any other person except as authorized by law or upon order of a court of competent jurisdiction for good cause shown."

This protection is provided to biological fathers. The biological mother is indirectly protected by statute by the fact that her name is excluded from the newspaper publication issued to locate the biological father in terms of section 43-104.14. The failure to expressly provide for confidentiality, which is seen as the driving factor behind safe haven laws, is perhaps another important aspect overlooked by the Nebraska legislature that may cause these laws to function less effectively.[224]

[223] See ss 29-121 of the Nebraska Revised Statutes.

[224] See Raum and Skaare "Encouraging abandonment: the trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D.L. Rev.* 511, 528, where Nebraska is the state that falls into the first group that do not explicitly provide for confidentiality but they also do not provide for the identification of parents; see also Cooper

4.4.5 Fathers' rights

Nebraska has a biological father registry established in terms of section 43-104.01.(1). It provides:

> "The Department of Health and Human Services shall establish a biological father registry. The department shall maintain such registry and shall record the names and addresses of (a) any person adjudicated by a court of this state or by a court of another state or territory of the United States to be the biological father of a child born out of wedlock if a certified copy of the court order is filed with the registry by such person or any other person, (b) any putative father who has filed with the registry, prior to the receipt of notice under sections 43-104.12 to 43-104.16, a Request for Notification of Intended Adoption with respect to such child, and (c) any putative father who has filed with the registry a Notice of Objection to Adoption and Intent to Obtain Custody with respect to such child."

If the father files a request to be notified of the intended adoption of the child or a notice of objection to adoption and a request for custody then this father shall include his name, address and social security number on these notices.[225] The following information must also be provided, the name and "address of the mother; the month and year of the birth or the expected birth of the child; the case name; court name, and location of any Nebraska court having jurisdiction over the custody of the child".[226] Furthermore, "a statement by the putative father that he acknowledges liability for contribution to the support and education of the child after birth and for contribution to the pregnancy-related medical expenses of the mother of the child".[227] This section goes on to state that the putative father shall be estopped from denying paternity of the child in any action for paternity after filing the above mentioned notices.[228]

"Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 882.

[225] s 43-104.01.(2) of Nebraska Revised Statutes; Failure to timely file with the Registry will imply consent to adoption see NEB. REV. STAT. s 43-104.04.

[226] s 43-104.01.(2) of Nebraska Revised Statutes.

[227] s 43-104.01.(2)(b)-(e) of Nebraska Revised Statutes.

[228] s 43-104.01.(3) of Nebraska Revised Statutes.

However, the next paragraph provides that the father may revoke the filing of the above notices and then it will be as if such notices were never filed.[229] This contradicts the previous paragraph that speaks about estopping the father from denying paternity. The only way to reconcile these two is by the assumption that, as long as an action for paternity has not been instituted, the father may still revoke his notices. However, filing the notice to object to an adoption and intent to request custody by the father himself may be seen as the institution of an action for paternity in itself and would thus not allow the father to revoke the filing thereof. It seems that this point was overlooked by the legislature and would undoubtedly cause confusion.

The notice of objection to adoption and intent to obtain custody shall be filed under the biological father registry anytime during the pregnancy and no later than five business days after the birth of the child.[230] In order to safeguard the rights of biological fathers an obligation to notify the biological father has now been created by section 43-104.12 of the Nebraska Revised Statute. This section requires the agency or attorney representing the biological mother to notify the biological father by certified mail, restricted delivery and with return receipt requested. This section varies from a biological father who filed any of the notices above to one that is presumed to be the biological father by the biological mother.[231] The content of the notice is just as important and is listed in section 43-104.13 of the Nebraska Revised Statute, which includes *inter alia*:

> "(5) That the possible biological father has the right to (a) deny paternity, (b) waive any parental rights he may have, (c) relinquish and consent to adoption of the child, (d) file a Notice of Objection to Adoption and Intent to Obtain Custody pursuant to section 43-104.02, or (e) object

[229] s 43-104.01.(4) of Nebraska Revised Statutes.
[230] s 43-104.02.(1) of Nebraska Revised Statutes.
[231] s 43-104.12.(1)-(7) of the Nebraska Revised Statutes.

to the adoption in a proceeding before any Nebraska court which has, prior to his receipt of this notice, adjudicated him to be the biological father of the child;

(6) That to deny paternity, to waive his parental rights, or to relinquish and consent to the adoption, the biological father must contact the undersigned agency or attorney representing the biological mother, and that if he wishes to object to the adoption and seek custody of the child he should seek legal counsel from his own attorney immediately; and

(7) That if he is the biological father and if the child is not relinquished for adoption, he has a duty to contribute to the support and education of the child and to the pregnancy-related expenses of the mother and a right to seek a court order for custody, parenting time, visitation, or other access with the child."[232]

The statutes go even further in trying to locate the biological father where reasonable efforts by the agency or attorneys could not locate the biological father. In this instance a publication must be placed in a legal newspaper in Nebraska and any other state where the biological father may be and is made once a week for three consecutive weeks.[233] Besides the identity of the biological father and description of date and place of conception, this notice must also include all the steps the biological father may take in asserting his rights, which include denying paternity; waiving parental rights; relinquish and consent to adoption; filing notices described in 43-104.02; or objecting to the adoption.[234] The identity of the biological mother is not revealed in this publication, another indication of the protection of confidentiality albeit indirectly and not mentioned in statute. However, her name is mentioned in the notice personally served on the biological father by the attorneys or agency in terms of section 43-104.13.

[232] s 43-104.13.(5)-(7) of Nebraska Revised Statutes.
[233] s 43-104.14 Nebraska Revised Statutes.
[234] s 43-104.14.(f) Nebraska Revised Statutes.

The previous application of section 43-104.02 to biological fathers was found unconstitutional *In re Jaden M*[235] where the issue was whether a father, who was previously determined in a paternity action to be a biological father, needed to file with the biological father registry.[236] After Brian H. filed a paternity action in district court, the court determined he was the biological father of Jaden M.[237] The court ordered him to pay child support and granted him visitation.[238] Over 1 year later, with the consent of Jaden's mother, Jaden's stepfather filed for adoption.[239] The county court determined that Brian's consent to the adoption was not required because Brian failed to comply with section 43–104.02 and 43–104.05.[240] The *court a quo* erroneously applied section 43-104.02[241] and 43-104.05[242] to Brian as the biological father and

[235] *In re Adoption of Jaden M.*, 272 Neb. 789 (2006).
[236] *In re Adoption of Jaden M*., 272 Neb. 789 (2006).
[237] *In re Adoption of Jaden M*., 272 Neb. 789 (2006) 790.
[238] *In re Adoption of Jaden M*., 272 Neb. 789 (2006) 790.
[239] *In re Adoption of Jaden M*., 272 Neb. 789 (2006) 790.
[240] *In re Adoption of Jaden M*., 272 Neb. 789 (2006) 790.
[241] Nebraska Revised Statutes "A Notice of Objection to Adoption and Intent to Obtain Custody shall be filed with the biological father registry under section 43-104.01 on forms provided by the Department of Health and Human Services (1) at any time during the pregnancy and no later than five business days after the birth of the child or (2) if the notice required by section 43-104.13 is provided after the birth of the child (a) at any time during the pregnancy and no later than five business days after receipt of the notice provided under section 43-104.12 or (b) no later than five business days after the last date of any published notice provided under section 43-104.14, whichever notice is earlier. Such notice shall be considered to have been filed if it is received by the department or postmarked prior to the end of the fifth business day as provided in this section."
[242] Nebraska Revised Statute "(1) If a Notice of Objection to Adoption and Intent to Obtain Custody is timely filed with the biological father registry pursuant to section 43-104.02, either the putative father, the mother, or her agent specifically designated in writing shall, within thirty days after the filing of such notice, file a petition for adjudication of the notice and a determination of whether the putative father's consent to the proposed adoption is required. The petition shall be filed in the county court in the county where such child was born or, if a separate juvenile court already has jurisdiction over the custody of the child, in the county court of the county in which such separate juvenile court is located. (2) If such a petition is not filed within thirty days after the filing of such notice and the mother of the child has executed a valid relinquishment and consent to the adoption within sixty days of the filing of such notice, the putative father's consent to adoption of the child shall not be required, he is not entitled to any further notice of the adoption proceedings, and any alleged parental rights and responsibilities of the putative father shall not be recognized thereafter in any court. (3) After the timely filing of such petition, the court shall set a trial date upon proper notice to the parties not less than twenty nor more than thirty days after the date of such filing. If the mother contests the putative father's claim of paternity, the court shall order DNA testing to establish whether the putative father is the biological father. The court shall assess the costs of such testing between the parties in an equitable manner. Whether the putative father's consent to the adoption is required shall be determined pursuant to section 43-104.22. The court shall appoint a guardian ad litem to represent the best interests of the child. (4)(a) The county court of the county where the child was born or the separate juvenile court having jurisdiction over the custody of the child shall have jurisdiction over proceedings under this section from the date of notice provided under section 43-104.12 or the last date of published notice under section 43-104.14, whichever notice is earlier, until thirty days after the conclusion of adoption proceedings concerning the child, including appeals, unless such jurisdiction is transferred under subdivision (b) of this subsection. (b) Except as otherwise provided in this subdivision, the court shall, upon the motion of any party, transfer the case to the district court for further proceedings on the matters of custody, visitation, and child support with respect to

not the putative father.[243] The appeal court applied the approach of the U.S Supreme Court in *Lehr v Robertson*[244] "[W]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [citation omitted] his interest in personal contact with his child acquires substantial protection...".[245] Section 43-104.02 did not apply where the mother acknowledged the father.[246] The only exceptions to the notification requirements are a valid relinquishment and consent or a denial of paternity and waiver of rights[247] or those contained in section 43-104.15. The parental rights of all biological fathers are now protected not just those that made use of section 43-104.02. In light of the above, the adoption order was reversed.

4.5 CONCLUSION

Safe haven laws require the personal handover of an infant by the biological mother or by a person with lawful custody. In view of the fact that anonymity is a driving factor behind the use of these systems, the very nature of safe haven laws requiring personal handover may pose as a deterrent to would-be relinquishers. Both the Texas Family Code as well as the California Health and Safety Code expressly protect the identities of parents or persons who have lawful

such child if (i) such court determines under section 43-104.22 that the consent of the putative father is required for adoption of the minor child and the putative father refuses such consent or (ii) the mother of the child, within thirty days after the conclusion of proceedings under this section, including appeals, has not executed a valid relinquishment and consent to the adoption. The court, upon its own motion, may retain the case for good cause shown."

[243] *In re Adoption of Jaden M.*, 272 Neb. 789 (2006) 790.

[244] *Lehr v. Robertson*, 463 US 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); Crozen "Telltale termination case" 31 2009 *Fam. Advoc.* 13; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1040; Arcaro "No more secret adoptions: providing unwed biological fathers with actual notice of the florida putative father registry" 37 2008 *Cap. U. L. Rev.* 449, 483; for more on *Lehr* see Cornett "Remembering the endangered "child": limiting the definition of "safe haven" and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833-854, 842; also see Beck "A national putative father registry" Vol. 36 Issue 2 (Winter 2007) *Capital University Law Review* 295-362, 299.

[245] 272 Neb. 789 Supreme Court of Nebraska. *In re ADOPTION OF JADEN M. Ronald L. and Tracey L., appellees, vs Brian H., appellant.* Nos. S–05–1527, S–06–073.Dec. 22, 2006 4.

[246] 272 Neb. 789 Supreme Court of Nebraska. *In re ADOPTION OF JADEN M. Ronald L. and Tracey L., appellees, vs Brian H., appellant.* Nos. S–05–1527, S–06–073.Dec. 22, 2006 5.

[247] s 43-104.11 Nebraska Revised Statutes.

custody. However, no mention of confidentiality in this sense is made by the laws of the state of Nebraska.[248] Although, the Texas Family Code provides confidentiality to "a person" who voluntarily delivers a child it is presumed that this person must be a parent in terms of section 262.302(a).[249] Nevertheless, even if the law specifies that relinquishment can only be done by a parent,[250] how can this be proven where the person's confidentiality is protected? According to the Texas Family Code section 262.302 the designated emergency infant care provider has no duty to detain or pursue the parent unless the infant shows signs of neglect and abuse, therefore, even if the emergency infant care provider were suspicious that the person relinquishing the child is not a parent or someone with lawful custody, he or she cannot pursue that person. Thus, there is no assurance that the relinquishing person is a parent or a person with lawful custody, even with the necessary laws in place. In Texas, the child must be 60 days old or younger,[251] in the state of California the child must be 72 hours old or younger[252] and in Nebraska infants can be up to thirty-days old,[253] to be legally relinquished to a safe haven provider. The exact age of the child will only be determined upon subsequent medical

[248] See par 4.4.4 of chapter 4 US law.
[249] Texas Family Code s 262.308 however a rebuttable presumption of this person being the biological parent does exist in terms of s 263.407 of the Texas Family Code; Nebraskan legislation does not specify who may leave an infant; see also Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 881.
[250] California Penal Code s 271.5
[251] Texas Family Code s 262.302; Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 881-882, where the author points out that most states impose a thirty-day limitation or a 72 hour limitation from birth; also see Lacci "Statistically speaking: can safe haven legislation succeed without education? Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88; Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 18.
[252] California Penal Code s 271.5; Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 881-882; also see Lacci "Statistically speaking: can safe haven legislation succeed without education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88; Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 18.
[253] Nebraska Revised Statute s 29-121; Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 881-882; also see Lacci "Statistically speaking: can safe haven legislation succeed without education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88; Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 18.

examination.[254] Californian law sanctions the instance where a child that is relinquished is more than 72 hours old and under 14 years of age, with one year imprisonment or a thousand dollars fine, or both.[255] How the parent will be prosecuted if the exact age of the child is only determined after confidential relinquishment, remains unanswered. Furthermore, no mention of the imposition of sanctions where a child is older than stipulated in the Safe Haven laws is made in the state of Texas or Nebraska. A concerning aspect is the fact that a safe haven will not accept a child if the child shows signs of neglect or abuse,[256] does this mean the child will be handed back to the parent? If that is the case, this thesis submits that it would not be in the abused child's best interests to be handed back to the abusing parent. Biehl submits that the requirements of safe haven laws act as barriers that assume that parents are rational, mature and have a certain patriarchal construction of what "good" parenting is.[257] Biehl then goes on to provide that safe haven laws are based on the assumption that the person abandoning their infant is "evil, insane, immature, or just selfish".[258] Thus, it is submitted that the author's lines of argument are conflicting. The author goes on to provide that safe haven laws are a "quick fix" to a complex problem that does not consider the effects of post-partum depression on women and that do not help women, but instead punish them for being divergent from society's

[254] Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 881-882, Cooper points out that practically the age limits cannot be strictly enforced and will only be estimations since the parents relinquishing the child have no obligation to leave any information about themselves or the child.

[255] s 271 of the California Penal Code, see par 4.3.3 of chapter 4 US law; The abandonment of a child older than 14 is covered by the general provisions governing abandonment see California Family Code s 7822(a), also see California Penal Code s 270.

[256] Cooper "Fathers are parents too: challenging safe haven laws with procedural due process" 31 2003 *Hofstra L. Rev.* 877, 881-882; also see Raum and Skaare "Encouraging abandonment: the trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D.L. Rev.* 511, 526.

[257] Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 18; also see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*.

[258] Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 18; also see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*.

patriarchal and traditional idea of what motherhood should be.[259] In the author's words it "demonizes" women, perpetuates the "oppressive conceptualization" of motherhood and has not shown that it saves the lives of children.[260] It is reactionary instead of preventative and does not empower women to make reproductive choices.[261] In response to Biehl, this thesis disagrees with the author on the following basis. Firstly, the confidentiality aspect of safe haven laws is indicative of the no-judgement policy that these laws adopt. By not identifying the mother, she is shielded from any stigma or demonisation or rejection that may result from exposure. Secondly, the immunity from prosecution and in some states the affirmative defense also illustrates how women and or the other person who abandons the child but who has lawful custody, is shielded, not in this case from the public opinion, but from the judgment that may be pronounced in terms of the law. This, it is submitted also helps women by not "punishing" them as suggested by the author. Demonisation and rejection of these mothers occur when all the law does is punish the act of abandonment without providing an alternative to it.[262] Thirdly, by creating a safe haven option, women are provided with more, not fewer choices, as these laws add to the reproductive choices that women have. Providing women with a cooling-off period as some states' laws do, is also taking into account that women may suffer from mental challenges relating to pregnancy and birth and therefore permits them to change their minds. Whether the period of two weeks is enough is debatable. Fourth and finally, to state that the

[259] Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 18; also see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*.

[260] Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 22; also see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*; Gee "South Carolina's Safe Haven for Abandoned Infants Act: a "band-aid" remedy for the baby-dumping 'epidemic'" 53 2001 *South Carolina Law Review* 151, 162, where the author also criticises the effectiveness of safe haven laws on the basis that women are not offered help. Some suggestions made by the author would be to educate women on contraceptives, to promote adoption and make it easier for women to be single mothers.

[261] Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 21-22; also see Eisner "Create a world where babies aren't abandoned" 07/01/2003 *Philadelphia Inquirer*.

[262] Such as what is observed in South African law in terms of the Children's Act 38 of 2005 s 305(3)(*d*) which punishes the act of child abandonment.

laws are reactionary leads to the question: what is the ultimate aim of these laws? The answer is to prevent unsafe infant abandonment and therefore these laws achieve this aim by providing an alternative to unsafe abandonment. These laws are not aimed at counselling women, or at ensuring re-unification, which may be done if the mother changes her mind within the cooling off period, but these laws are aimed at ensuring that the lives of infants are safeguarded. Other mechanisms may be developed to counsel the mother prior to making this decision to abandon, some of which already exist.[263] Thus, these laws aim to prevent unsafe infant abandonment. Other mechanisms may be developed to prevent infant abandonment altogether, such as counselling and government support and aid to alleviate poverty, but that is not the purpose of these laws. These laws are aimed at preserving the life of the child, where abandonment is already taking place. Not being able to compute whether these laws actually work, converge with the fact that there is also no evidence that it does not work.[264] As pointed out by the author, not all women experience motherhood in the same way.[265] In agreement with this statement, this thesis proposes that this is the reason why safe havens cater to those women who, despite other mechanisms such as counselling or government support, still opt to abandon. For this reason a safe alternative must be available. Furthermore, Hollinger opines that infant abandonment laws do not consider the rights of fathers.[266] The rights of fathers will be discussed in detail in chapter six. A further criticism of these laws are that they disadvantage

[263] See Amato Pregnancy Counselling Centre at www.amato.co.za last accessed 2019-10-01, and also see https://www.christianaction.org.za/index.php/links/pro-life-organisations-crisis-pregnancy-centres, last accessed 2019-10-01.
[264] Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 19.
[265] Biehl "Validating oppression: safe haven laws as perpetuation of society's demonization of 'bad' mothers" Vol. 22 No. 4 Winter 2002-2003 *Children's Legal Rights Journal* 23.
[266] Dailard "The drive to enact 'infant abandonment' laws – a rush to judgment?" Vol. 3 No. 4 August 2000 *The Guttmacher Report on Public Policy*.

children and their sense of identity and belonging by protecting the anonymity of the birth parents.[267] For more on the child's right to knowledge of his or her origins see chapter five.

In conclusion, the lessons learnt from the establishment of baby safe haven laws in the states under discussion is that none of these laws are without flaws, despite having the other to learn from. Important elements, as discussed above, are not addressed and others, even if addressed, have practical limitations and anomalies that are attributed to the fact that some aspects cannot be controlled through legislation.[268] In the face of the best interests of the child,[269] these anomalies merely have to be accepted as a risk the legislature is willing to take to save the lives of infants.

[267] Dailard "The drive to enact 'infant abandonment' laws – a rush to judgment?" Vol. 3 No. 4 August 2000 *The Guttmacher Report on Public Policy*.
[268] Such as the exact age of a child that is relinquished and making sure that the person who relinquishes the child is either the parent or a person with lawful custody of the child.
[269] Discussed at chapter 7.

PART THREE: CHALLENGES IN IMPLEMENTING A SAFE METHOD OF INFANT ABANDONMENT

CHAPTER 5: THE RIGHT TO KNOWLEDGE OF ONE'S BIOLOGICAL ORIGINS VERSUS THE RIGHT TO LIFE

5.1 INTRODUCTION[1]

The right to life in section 11 of the Constitution of the Republic of South Africa, 1996 is a fundamental right that forms part of the most important of all human rights and serves as the source of all other personal rights in the Bill of Rights.[2] The guarantee of the right to life is regarded as the vanguard of the implementation of a safe method of infant relinquishment. This chapter discusses the landmark decision of the court in *S v Makwanyane*[3], as well as the positive obligations of the state that stem from the right to life. The right to knowledge of one's origins is contentious and sparks much debate. Such right is very important in the context of child abandonment where knowledge of origins is very often not accessible as the methods used to avoid infanticide and unsafe abandonment are focused on anonymity. These methods include anonymous birth, confidential birth, baby safe haven laws and baby safes. One common aspect among these methods is the absence of the identity of the biological parents – whether such information is preserved to allow the child access to it at a later stage (such as in confidential birth) or whether such information does not exist (such as with the use of baby safes). The extent of the protection of the knowledge of origins is investigated in this chapter. There is no express right to knowledge of one's origins in the South African Constitution.[4] Limitations imposed on the knowledge of origins could, however, affect conduct and interests protected by other rights in the Constitution – for example, the right of the child to physical and

[1] This chapter forms part of an article submitted to TSAR, but which has not yet been published. It is important to note that the weight that is accorded each right discussed under this section differs from country to country depending on societal differences. Although this study is based on a South African approach and perspective it does take into account the international approach which is largely reflected through the exploration of the mother's right to privacy.

[2] *S v Makwanyane* 1995 3 SA 391 (CC) para 144 and 146; also mentioned in Currie and De Waal *The Bill of Rights Handbook* (2013) 258.

[3] *S v Makwanyane* 1995 3 SA 391 (CC). This decision is discussed to show the importance of such a right in a South African context.

[4] There are no explicit rights to avoid origin deprivation within international law either. However, the right to a name, nationality and the duty upon states to protect cultural integrity do exist; further, broader principles also exist such as the best interests of the child, equality and non-discrimination; see Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 77.

psychological integrity as expressed in section 12 of the Constitution; the right to freedom of association in section 18; the right to human dignity in section 10; the right to equality in section 9; and, last but not least, the best interests of the child in section 28 of the Constitution. In paragraph 5.3.1 it is explained that knowledge of one's origin is an aspect of the conduct and interests protected by these other rights and that, as such, the South African Constitution protects a right to knowledge of one's origins. In May of 2017, the South African Law Reform Commission launched Project 140, Draft Issue Paper 32 "The Right to Know One's Biological Origins". In this issue paper, chapter 6 dealt with abandoned children and considered various proposed solutions to child abandonment such as baby hatches (a specific look at Germany)[5] and safe haven laws (as implemented in the US).[6] It further discusses whether baby hatches will protect the child's right to knowledge of his or her origins and its advantages and disadvantages. The questions that this issue paper poses are: whether South Africa should enact safe haven laws similar to those in the US; whether South Africa should enact confidential birth laws similar to those in Germany; or if both of these options should be implemented. It further investigates whether an abandoned child has the right to knowledge of his or her biological origins and the role of ancestor worship. No further work has been conducted on this issue paper and parts thereof, dealing with the right to knowledge of one's origins, will be discussed throughout this chapter and referred to in the footnotes. Thus the right to life and the right to knowledge of one's origins are the two issues which collide when discussing safe methods of infant relinquishment.

Some of the research that is analysed will involve donor-conceived children as usually these children are also left without any knowledge of their genetic origins. Certain clear

[5] See chapter 3 on German law for more on this.
[6] See chapter 4 US law for more on this.

disadvantages to not knowing one's genetic origins exist, one of them being the lack of knowledge of one's family medical history. Physicians use the family history as a method to identify any known genetic diseases present in their patients' family members and to identify family risk factors that may exist in their own patients.[7] When caring for a sick child information gained through family history can provide clues regarding the underlying cause of a disease and can hasten diagnosis and treatment.[8] This premise has been challenged on the following grounds. Firstly even if people had accurate information about their origins, inadequate data exists to prove that it improves risk prognosis and that it will result in better health.[9] Thus having this knowledge has not shown to impact how people behave health-wise.[10] Secondly, generally, parents rarely inform their children of their health related issues.[11] From this, it is clear that anonymity policies do not impede the health interests of donor-conceived

[7] Lauzon "The health benefits to children having their genetic information" and "The importance of constructing family trees" in Guichon, Giroux and Mitchell *Right to Know One's Origins: Assisted Human Reproduction and the Best Interests of Children* (2012) 196-197, available at http://ebookcentral.proquest.com/lib/ujlink-ebooks/detail.action?docID=3115807, accessed 2020-01-29; Blyth "The role of birth certificates in relation to access to biographical and genetic history in donor conception" 17 2009 *International Journal of Children's Rights* 207-233, 216; for an opposing view see Berg et al "National institutes of health state-of-the-science conference statement: Family history and improving health" 151 2009 *Annals of Internal Medicine* 872-877; also see Wilson et al "Systematic review: Family history in risk assessment for common diseases" 151 2009 *Annals of Internal Medicine* 878-885; also discussed by Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 22.

[8] Lauzon "The health benefits to children having their genetic information" and "The importance of constructing family trees" in Guichon, Giroux and Mitchell *Right to Know One's Origins: Assisted Human Reproduction and the Best Interests of Children* (2012) 198, available at http://ebookcentral.proquest.com/lib/ujlink-ebooks/detail.action?docID=3115807, accessed 2020-01-29; see also Heaton and Kruger *South African Family Law* (2017) at 26-28 for persons who may not marry, who are in prohibited degrees of relationship.

[9] South African Law Reform Commission Draft Issue Paper 32 Project 140 "The right to know one's biological origins" 20 May 2017 25 par 2.46; see also Berg et al "National institutes of health state-of-the-science conference statement: Family history and improving health" 151 2009 *Annals of Internal Medicine* 872-877; also see Wilson et al "Systematic review: Family history in risk assessment for common diseases" 151 2009 *Annals of Internal Medicine* 878-885.

[10] South African Law Reform Commission Draft Issue Paper 32 Project 140 "The right to know one's biological origins" 20 May 2017 25 par 2.47; see also Wang et al "Family history assessment: Impact on disease risk perceptions" 43 2012 *American Journal of Preventative Medicine* 392-98; Heshka et al "A systematic review of perceived risks, psychological and behavioural impacts of genetic testing" 10 2008 *Genetic Medicine* 19-32; There will no longer be a need for genetic information with the advancement of precision medicine, for more on this see Collins *The Language of Life: DNA and the Revolution in Personalized Medicine* (2010); Novelli "Personalised genomic medicine" 5 2010 *Internal and Emergency Medicine* supplement 1, s 81-90.

[11] South African Law Reform Commission Draft Issue Paper 32 Project 140 "The right to know one's biological origins" 20 May 2017 26 par 2.49; Centers for Disease Control and Prevention "Awareness of family health history as a risk factor for disease — United States, 2004" 53 2004 *Morbidity and Mortality Weekly Report* 1044-1047; Murf et al "The comprehensiveness of family cancer history assessments in primary care" 10 2007 *Journal of Community Genetics* 174-80; Plat et al "Obtaining the family history for common, multifactorial diseases by family physicians: A descriptive systematic review" 15 2009 *European Journal of General Practice* 231-242.

children above and beyond what is generally observed in society.[12] As a result, the same outcome will apply with abandoned children in that a mother's right to anonymity will not hinder the health interests of abandoned children above and beyond what those children will generally experience if they lived with both their parents.

The right to know one's origins amounts to the right to know one's biological family and ascendance, as well as how and where you were born namely the condition of one's birth.[13] It protects an individual's interest to identify where he or she comes from.[14] To know one's origin is seen as sufficiently important to give rise to a human right.[15] Besson provides that the right to knowledge of one's origins is one of the dimensions of a broader right to ascertain and preserve one's identity.[16] Freeman states, identity is "what we know and what we feel. It is an

[12] South African Law Reform Commission Draft Issue Paper 32 Project 140 "The right to know one's biological origins" 20 May 2017 27 par 2.58.

[13] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 140; see Appell "Certifying identity" 42 2014 *Capital University Law Review* 35 for an interesting viewpoint on the creation of an identity through a birth certificate; see Cocco A "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 535-540 where the author discusses what the right to knowledge of origins encompasses, i.e. whether it includes the right to know one's siblings. The author referred to the matter of Corte di Cassazione of 20 March 2018 no. 6963 where in the opinion of the Court of Cassation, the right of the adult adoptee has to be considered a prevailing right only with regard to biological parents and with regard to the petitioner's siblings, there is a need to balance the interests that are involved. The court found that the balance can be achieved through simply questioning the people involved. The court allowed the petitioner to obtain information about his/her parents as well as of his/her adult siblings provided there is compliance with the confidentiality requirement; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see van Raak-Kuiper *Koekoekskinderen en het Recht op Afstammingsinformatie* proefschrift, Universiteit Tilburg (2007).

[14] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 140; see Appell "Certifying identity" 42 2014 *Capital University Law Review* 35 for an interesting viewpoint on the creation of an identity through a birth certificate; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see van Raak-Kuiper *Koekoekskinderen en het Recht op Afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).

[15] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 140; Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 276-277; Besson *The Morality of Conflict. Reasonable Disagreement and the Law* (2005) 422-424; Whether it enjoys protection in terms of the South African Constitution, will be discussed hereunder; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see van Raak-Kuiper *Koekoekskinderen en het Recht op Afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).

[16] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 141; see Appell "Certifying identity" 42 2014 *Capital University Law Review* 35 for an interesting viewpoint on

organizing framework for holding together our past and our present and it provides some anticipated shape to future life".[17] Lindner advances that, when we do not satisfy the common need for association, we jeopardise our human dignity.[18] According to Ronen "…the legal recognition of an individualised identity is necessary to reaffirm society's commitment to the child as a human being in its own right".[19] A child's family and community are his or her starting points in life and these, according to Ronen, should ideally be his or her family of origin and community of origin.[20] Research indicates that adopted adults that had a connection with their psychological parents still wanted to meet their birth parents, this in order to fill a void.[21] According to Ronen preserving the child's identity is also protecting personal ties that are significant to the child.[22] However, the role of genetics in forming personal identity is disputed.[23] Haslanger provides that the development of a full self and a healthy identity "do

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the creation of an identity through a birth certificate; Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see van Raak-Kuiper *Koekoekskinderen en het Recht op Afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).

[17] Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 290; see also Masson and Harrison "Identity: Mapping the frontiers" in Lowe and Douglas *Families Across Frontiers* (1996) 278-279; and Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 141; see also Woodhouse "'Are you my mother?': Conceptualizing children's identity rights in transracial adoptions" in Buss and Maclean *The Law and Child Development* (2010) 353-375, for more on the child's identity rights in adoption matters; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see van Raak-Kuiper *Koekoekskinderen en het Recht op Afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).

[18] Lindner *Emotion and Conflict: How Human Rights can Dignify Emotion and Help Us Wage Good Conflict* (2009) 151.

[19] Ronen *Re-understanding the Child's Right to Identity on Belonging, Responsiveness and Hope* (2016) 9; also see Wilson "Identity, genealogy, and the social family: The case of donor insemination" 11 1997 *International Journal of Law, Policy, and the Family* 281; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 177.

[20] Ronen *Re-understanding the Child's Right to Identity on Belonging, Responsiveness and Hope* (2016) 9; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 177.

[21] Ronen *Re-understanding the Child's Right to Identity on Belonging, Responsiveness and Hope* (2016) 10; Feast and Howe *Adoption, Search and Reunion: The Long Term Experience of Adopted Adults* (2000).

[22] Ronen *Re-understanding the Child's Right to Identity on Belonging, Responsiveness and Hope* (2016) 12; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 177; Ronen argues for the protection of a child-constructed identity as opposed to a majority identity. This assumes that identity is developed through contact and interaction with other human beings, who are of importance to the one whose identity is developing. Therefore it involves the child's preferences rather that what is imposed upon that child; Ronen "Redefining the child's right to identity" 18 2004 *Int'l J.L. Pol'y & Fam* 147.

[23] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107; Witt "Family resemblances: Adoption, personal identity, genetic

not require contact with, or even specific knowledge of, biological relatives".[24] She goes on to state that identities are formed on cultural representations and that although the natural nuclear family composition or blueprint does form an important part of a person's identity, in the face of a society that is evolving this archetype, should not be used in a manner that treats as inferior those who cannot live up to it.[25] Research has indicated that having a healthy identity is still possible for those who do not know their genetic origins and thus struggle with self-awareness.[26] Witt[27] says that baby hatches provides mothers with an alternative to infanticide and thus promotes the child's right to life.[28] Ronen, however, sees the severing of the connection between parent and child through safe-surrender programs as a problem.[29] Witt continues by stating that those who believe that baby hatches violate a child's right to know his or her origins do so because they believe that that knowledge is central to the healthy formation of their identity.[30] She argues that the basis for identity formation is not in knowing one's biological origins, as for most of human history "children have developed adequate identities or selves without access to biogenetic information".[31] She states that, contrary to the

essentialism" in Haslanger and Witt (eds) *Adoption Matters: Philosophical and Feminist Essays* (2005) 135-145; Haslanger "Family, ancestry and self – What is the moral significance of biological ties?" in Haslanger *Resisting Reality: Social Construction and Social Critique* (2012) 180.

[24] Haslanger "Family, ancestry and self – What is the moral significance of biological ties?" in Haslanger *Resisting Reality: Social Construction and Social Critique* (2012) 180; also see Blauwhoff where the difference between numerical and narrative identities are discussed. In this context narrative identities are relevant in that it concerns the person's psychological connection between past and present. Here the author also points out that narrative identity is compatible with the notion that the need to know one's origins is a socially constructed one and this need is based on Western ideas about biology, see 20.

[25] Haslanger "Family, ancestry and self – What is the moral significance of biological ties?" in Haslanger *Resisting Reality: Social Construction and Social Critique* (2012) 179-181.

[26] Mackenzie and Stoljar *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (1999); Meyers *Being Yourself: Essays on Identity, Action, and Social Life* (2004).

[27] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27.

[28] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27.

[29] Ronen *Re-understanding the Child's Right to Identity on Belonging, Responsiveness and Hope* (2016) 9.

[30] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27.

[31] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27; However, see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 543 where the author points out that ignorance of one's biological origins can cause mental and psychological suffering; Witt's arguments are supported by the expert opinions of Golombok and Jadva, as well as Rodrigues, in this regard see Thaldar "Post-truth jurisprudence: The

assertion made by Velleman who claims that anonymous donor vending deprives children of an essential ingredient in the development of a healthy identity, the evidence does not show extensive psychological damage in children who have no knowledge of their biological origins.[32] However, Witt does concede that children should be told the truth about their origins and just like with adoption, there should be access to original birth certificates for children surrendered in baby safes.[33] This is in an effort to ensure equal treatment of all children. She further emphasises that baby safes will serve the best interests of children only if it includes mechanisms that preserves original birth records.[34] It is submitted that the guarantee of anonymity provided by the use of baby safes is what attracts women to make use of this method.[35] By requiring the woman to leave the child's birth certificate, such anonymity previously guaranteed will be diminished. A woman who was keeping her pregnancy a secret will be exposed by having to apply for a birth certificate. Further, the prospect that the baby safe provider may contact her will also discourage her from making use of this method. Therefore, it is submitted that total anonymity with baby safes will ensure its continued use.[36] A balancing of the child's right to life, and the child's right to knowledge of his or her origins will now be conducted to determine which one enjoys pre-eminence and whether the limitation of the child's right to knowledge of his or her origins is justified in terms of the section 36 limitation clause. First, however, the right to life is discussed.

case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 235-236 who discusses the opinions of these experts as expressed in the case of *AB v Minister of Social Development*.

[32] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27; Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No.2 2018 *The Italian Law Journal* 541-542; see for criticism on Velleman's viewpoint Haslanger "Family, ancestry and self – What is the moral significance of biological ties?" in Haslanger *Resisting Reality: Social Construction and Social Critique* (2012) 158-181

[33] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27.

[34] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27.

[35] See German law chapter 3 par 3.2; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 317.

[36] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27.

5.2 THE RIGHT TO LIFE

Protecting the right to life serves as a motivation for the limitation of the right to knowledge of one's origins.[37] In other words, it serves as a reason for the limitation of the right to knowledge of one's origins and this serves as the context in which the right to life will be discussed.

5.2.1 The development of the legal right to life

The United States Declaration of Independence made the first proclamation of every human being's right to life in 1776:[38]

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.— That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

The US Constitution was then drafted in 1787 but it failed to include a bill of rights.[39] In 1789 it became clear that a bill of rights was needed and as a result one was added, including the right to life.[40] This right to life remained limited by excluding all women, all black slaves and Native Americans.[41] Centuries later the American Declaration of Rights and Duties of Man

[37] See par 5.3.4 below.
[38] Wicks *The Right to Life and Conflicting Interests* (2010) 36; Colon-Collazo "The drafting history of treaty provisions on the right to life: The legislative history of the right to life in the Inter-American legal system" in Ramcharan *The Right to Life in International Law* (1985) 33.
[39] Wicks *The Right to Life and Conflicting Interests* (2010) 36.
[40] Wicks *The Right to Life and Conflicting Interests* (2010) 37; Becker *The Declaration of Independence: A Study in the History of Political Ideas* (1933) 175; also see Zinn *A People's History of the United States: 1492- present* (1999).
[41] Wicks *The Right to Life and Conflicting Interests* (2010) 35; Becker *The Declaration of Independence: A Study in the History of Political Ideas* (1933) 225; also see Zinn *A People's History of the United States: 1492- Present* (1999).

was adopted in April 1948 by the Organisation of American States (OAS).[42] The first article of this declaration provided that "every human being has the right to life, liberty and the security of his person", similar to the subsequently developed Universal Declaration of Human Rights (UDHR).[43] The UDHR laid the foundation to the South African Bill of Rights.[44] The UDHR was drafted by the Human Rights Commission (established under the UN Charter) and adopted by the General Assembly of the United Nations on 10 December 1948, where forty-eight countries agreed to the list of human rights while eight countries abstained.[45] South Africa was one of the eight countries that abstained, refusing to sign the UDHR because the establishment of the UDHR coincided with the Apartheid Government coming into power.[46] The Holocaust was one of the main forces that shaped the UDHR.[47] The preamble of the UDHR recognises the intrinsic dignity and equal and inalienable rights of all human beings as the basis of freedom, justice and peace in the world.[48] Article 3 of the UDHR states: "Everyone has the right to life, liberty and security of the person." According to Wicks this is one of the first clear statements of an international right to life.[49] Although the American Declaration of Rights and Duties of Man seemed to be the first in this regard.[50] One of the main catalysts for the creation

[42] Wicks *The Right to Life and Conflicting Interests* (2010) 44; Colon-Collazo "The drafting history of treaty provisions on the right to life: The legislative history of the right to life in the Inter-American legal system" in Ramcharan *The Right to Life in International Law* (1985) 33.
[43] Wicks *The Right to Life and Conflicting Interests* (2010) 44.
[44] Parliament of the Republic of South Africa Human Rights Document, available at https://www.parliament.gov.za/storage/app/media/EducationPubs/human_rights_email_eng.pdf last accessed 2019-11-29.
[45] Wicks *The Right to Life and Conflicting Interests* (2010) 38; Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (2000) 37.
[46] For more on South African history see http://www.sahistory.org.za/article/south-african-constitution-bill-rights last accessed 2020-02-03; Du Plessis *Understanding South Africa's Transitional Bill of Rights* (1994); Nicol *The Making of the Constitution, A Story of South Africa's Constitutional Assembly May 1994 to December 1996* (1997); see also Licht, DeVilliers, Schlemmer and Van Wyk *South Africa's Crisis of Constitutional Democracy: Can the U.S. Constitution Help?* (1994).
[47] Wicks *The Right to Life and Conflicting Interests* (2010) 38.
[48] Universal Declaration of Human Rights.
[49] Wicks *The Right to Life and Conflicting Interests* (2010) 39; The American Declaration of Rights and Duties of Man, adopted in April 1948, was actually the first human rights treaty albeit a regional rather than universal document.
[50] Colon-Collazo "The drafting history of treaty provisions on the right to life: The legislative history of the right to life in the Inter-American legal system" in Ramcharan *The Right to Life in International Law* (1985) 36; The American Declaration on the Rights and Duties of Man became the first international declaration on human rights,

of an internationally recognised right to life are the Nazi policies that undervalued human life, including policies where aged, insane and incurable people were taken to institutions and killed, while between fifty and one hundred hostages were shot for every one German life taken.[51] Further, the death penalty was applied for any act against the German government which caused a remarkable rise in the imposition of the death penalty from 32 in 1937 to 5 191 in 1944.[52] According to Morsink "life was cheap to the Nazis".[53] The right to life was buttressed by article 25, which includes rights to food, clothing and medical care.[54]

Although the UDHR was non-binding, its influence on the development of international human rights is unprecedented[55] and the characteristic concerning these rights that is most prominent is that these rights apply to everyone and everywhere.[56] The Human Rights Commission then successfully completed two covenants, albeit long after the UDHR was completed.[57] These two covenants were the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These were both adopted by the General Assembly on 16 December 1966 in Resolution 2200 (XI).[58] South Africa ratified the ICCPR on 10 December 1998 and the ICESCR on 12 January 2015. Article

it was not a treaty – therefore it was not legally binding, nor capable of enforcement. The same may be said of the UDHR.

[51] Wicks *The Right to Life and Conflicting Interests* (2010) 39; Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (2000) 37; Colon-Collazo "The drafting history of treaty provisions on the right to life: The legislative history of the right to life in the Inter-American legal system" in Ramcharan *The Right to Life in International Law* (1985) 34.

[52] Wicks *The Right to Life and Conflicting Interests* (2010) 39; see also Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (2000) 40.

[53] Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (2000) 40; Wicks *The Right to Life and Conflicting Interests* (2010) 39.

[54] Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (2000) 40; Wicks *The Right to Life and Conflicting Interests* (2010) 39.

[55] Some authors disagree, such as Simpson who called it "little more than an exhalation of pious hot air" in Simpson *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001) 11.

[56] Wicks *The Right to Life and Conflicting Interests* (2010) 40; Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (2000) 40.

[57] Wicks *The Right to Life and Conflicting Interests* (2010) 40-41; McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1994) 14.

[58] Wicks *The Right to Life and Conflicting Interests* (2010) 41; McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1994) 14.

6 of the ICCPR provides "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".[59] Paragraph five of article 6 states: "5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." This article was inspired by a high regard for the interests of the unborn child and that if the woman is pregnant she should not be given the death sentence at all, this was in an effort to save the life of the unborn child.[60] This is the most universally accepted version of the right to life.[61] The Third Committee of the General Assembly held that the right to life was not a right conferred by society but was a duty owing to the individual, a duty to protect his or her right to life.[62] It was unusual to insert a declaratory statement in a legal document, however the first line of article 6 received an overwhelming majority of the votes.[63] Article 6 illustrates that there are instances in which the right to life may be deprived and this may be found in the third line of paragraph one, which provides "no one shall be arbitrarily deprived of his life". The precise detail as to what arbitrary deprivation is was not specified and was also criticised on the basis that capital punishment as mentioned in article 6 is not regarded as a generally recognised practice.[64] However, the inclusion of the right to life in the ICCPR solidified it as a legally enforceable right in international law.[65] In 1969 the American Convention of Human Rights (ACHR) was signed

[59] Ramcharan "The drafting history of Article 6 of the International Covenant on Civil and Political Rights" in Ramcharan *The Right to Life in International Law* (1985), see 42-56 for a detailed timeline on the formulation of the right.
[60] Ramcharan "The drafting history of Article 6 of the International Covenant on Civil and Political Rights" in Ramcharan *The Right to Life in International Law* (1985) 45, 53.
[61] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 373.
[62] Wicks *The Right to Life and Conflicting Interests* (2010) 41; Bossuyt *Guide to the Travaux Preparatoires' of the International Covenant on Civil and Political Rights* (1987) 119 (Third Committee, 12th session 1957, A/3764, section 112); Ramcharan "The drafting history of Article 6 of the International Covenant on Civil and Political Rights" in Ramcharan *The Right to Life in International Law* (1985) 51.
[63] 65 votes to three with four abstentions, Wicks *The Right to Life and Conflicting Interests* (2010) 41; Ramcharan "The drafting history of Article 6 of the International Covenant on Civil and Political Rights" in Ramcharan *The Right to Life in International Law* (1985) 51.
[64] Wicks *The Right to Life and Conflicting Interests* (2010) 42; Ramcharan "The drafting history of Article 6 of the International Covenant on Civil and Political Rights" in Ramcharan *The Right to Life in International Law* (1985) 51.
[65] Wicks *The Right to Life and Conflicting Interests* (2010) 42.

and substituted the UDHR in the states that ratified it.[66] The right to life in the ACHR is contained in article 4 and is protected from the moment of conception.[67] Prior to this in 1950 the European Convention on Human Rights (ECHR) was developed by the Council of Europe.[68] The ECHR's aim was the collective enforcement of certain of the Rights stated in the UDHR.[69] The right to life provision in article 2 of the ECHR provides:[70]

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."[71]

Here all intentional deprivations of life are prohibited contrary to the ICCPR which only prohibits arbitrary killings.[72] Years later, Africa developed the African Charter on Human and Peoples' Rights which was approved by the Organisation of African Unity in 1981 and came into force in 1986.[73] Article 4 protects the right to life and article 5 protects the right to human dignity. Articles 4 and 5 clearly illustrate that human life and dignity require special legal protection:

> "Article 4: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. Article 5:

[66] Wicks *The Right to Life and Conflicting Interests* (2010) 42.
[67] Wicks *The Right to Life and Conflicting Interests* (2010) 42.
[68] Wicks *The Right to Life and Conflicting Interests* (2010) 42-45; for a detailed discussion of the drafting of the ECHR see Lester "Fundamental rights: The United Kingdom isolated?" 1984 *Public Law* 46.
[69] Preamble to ECHR; Wicks *The Right to Life and Conflicting Interests* (2010) 42.
[70] For full information on the drafting history of the European Convention on Human Rights see Ramcharan "The drafting history of Article 6 of the International Covenant on Civil and Political Rights" in Ramcharan *The Right to Life in International Law* (1985) 57-61.
[71] Wicks *The Right to Life and Conflicting Interests* (2010) 44; see also Harris "Regional protection of human rights: The Inter-American achievement" in Harris and Livingstone (eds) *The Inter-American System of Human Rights* (1998) 2.
[72] Wicks *The Right to Life and Conflicting Interests* (2010) 44; see also Harris "Regional protection of human rights: The Inter-American achievement" in Harris and Livingstone (eds) *The Inter-American System of Human Rights* (1998) 2.
[73] Wicks *The Right to Life and Conflicting Interests* (2010) 44; see also Harris "Regional protection of human rights: The Inter-American achievement" in Harris and Livingstone (eds) *The Inter-American System of Human Rights* (1998) 2.

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[74]

Menghistu opines that protecting all other rights without first ensuring and protecting the right to life is fruitless and ineffectual.[75] Other rights can only find applicability once the right to life is preserved and safe guarded.[76] The committee on the rights of the child (CROC) is against the implementation of baby safes, baby safe haven laws and anonymous birth because the child will not know his or her origins. In other words, the child will not know his or her biological parents.[77] This is in terms of article 7 and 8 of the Convention on the Rights of the Child (UNCRC), which grants the child the right to a name, nationality and to be cared for by his or her parents. However, as mentioned above, other rights can only be enforced once life is in existence. Witt says that baby safes promote the child's right to life and serves as an alternative to infanticide, unsafe abandonment and does not violate the human rights of an infant.[78] This

[74] African Charter on Human and People's Rights.
[75] Menghistu "The satisfaction of survival requirements' in Ramcharan (ed) *The Right to Life in International Law* (1985) 63; Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 372.
[76] Menghistu "The satisfaction of survival requirements' in Ramcharan (ed) *The Right to Life in International Law* (1985) 63; Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 372.
[77] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27; Diver "Conceptualizing the "right" to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties : The "Right" to Access Genetic Ancestry* (2014) 77-102 at 83 where the author points out that the system of anonymous birth in Luxembourg was criticised by the committee as well as baby nests in Austria. The Committee expressed the hope that such occurrences might eventually be addressed by signatory states to redress origin deprivation; UN Committee Luxembourg par 184 and 185 and UN Committee Austria para 251 and 252; Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 188-189; Anonymous birth is also against Dutch Public order as decided by the Hague court and discussed in Vonk "De autonomie van het kind in het afstammingsrecht" 2010 referring to The Hague Court 24 September 2009, LJN: BK1197 at 1 [open access version via Utrecht University repository]; further see Vonk "Weten, Kennen en Erkennen: Kinderen van ouders die niet samen zijn" Vol. 38 No. 4 2013 *Nederlands tijdschrift voor de mensenrechten* 515-531.
[78] Witt "The good of the child" 7 February 2013 *Boston Review*, available at https://bostonreview.net/world/good-child last accessed 2019-02-27.

makes the right to life a prerequisite of the enjoyment of other rights.[79] The right to life is a civil right and there are two ways that the state can infringe this right. The first is by doing something, such as committing murder, and secondly, by refraining from doing something, such as not providing the basic needs required to survive.[80] Thus by not providing a shelter (in the form of a baby safe or other safe haven method) as a basic need to enable survival, it could be argued that the state is not fulfilling the requirements embedded in the right to life. Contrary to this, the right to life has been seen as very limited in its scope, for instance article 6 of the ICCPR is said not to include failure to reduce infant mortality, while practicing or tolerating infanticide would violate the article.[81] In today's society this restrictive interpretation is regarded as inadequate. The European Commission on Human Rights has held that the concept that everyone's life shall be protected by law means that the state must not only make sure that life is not taken intentionally, but must also implement the necessary measures that will protect life.[82] It is the right of everyone to preservation and enjoyment of his or her existence and survival.[83]

[79] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 63; Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 372.

[80] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 63; Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 372.

[81] Dinstein "The right to life, physical integrity and liberty" in Henkin (ed) *The International Bill of Rights* (1981) 115; Scheuner "Comparison of the jurisprudence of national courts with that of the organs of the convention as regards other rights" in Roberston (ed) *Human Rights in National and International Law* (1968) 214, 239; Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 64.

[82] The right to life should also compel a state to create and maintain circumstances in which a right may be exercised to the fullest; Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 372; for more on the right to life specifically with regard to children see Kruuse "'Fetal rights'? The need for a unified approach to the fetus in the context of feticide" 2009 *THRHR* 126-136; Meyerson "Abortion: the constitutional issues" 1999 *SALJ* 50-59; Naudè "The value of life: A note on *Christian Lawyers Association of SA v Minister of* Health" 1999 *SAJHR* 541-562.

[83] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 66.

The requirement that states should take positive measures to protect life, was expressed by the Human Rights Committee in its general comments on article 6 of the ICCPR.[84] The Committee suggested that state parties take all possible measures to "reduce infant mortality and to increase life expectancy".[85] If states are required to do something that would infer that the minimum basic needs required for sustaining life, such as food, education, shelter, clothing and employment, must be met by the state[86] – how does one safeguard the life of an infant about to be abandoned? The answer may be found in providing a safe alternative – whether that is a baby safe, safe haven or another method such as confidential birth. This places a positive duty on the state to act. There can be no life without access to the basic material goods and services essential to sustain and preserve life.[87] Raphael says that when a need is of paramount importance, and when the meeting of it is feasible, such a need becomes a right.[88] These needs are the basic needs listed above and which Feinberg calls "crying needs".[89] Violations of one set of rights are usually accompanied by violations of others.[90] It is a universally accepted principle that governments must incorporate appropriate policies to implement the provisions of the conventions and they must create an environment favourable for its utilisation.[91] In reality, governments fail to implement these conventions due to their inattention and detachment regarding the problems of the urban and rural poor.[92]

[84] UN Doc. CCPR/SR 222 par 59 (1980).
[85] UN Doc. CCPR/SR 222 par 59 (1980).
[86] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 66.
[87] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 66.
[88] Winslade "Human needs and human rights" in Pollack (ed) *Human Rights* (1971) 27-28, 32; Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 68.
[89] Winslade "Human needs and human rights" in Pollack (ed) *Human Rights* (1971) 27-28, 32; Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 68.
[90] Winslade "Human needs and human rights" in Pollack (ed) *Human Rights* (1971) 27-28, 32; "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 68.
[91] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 69.
[92] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 70.

The League of Nations passed the first comprehensive international instrument on children's rights, the Declaration of the Rights of the Child of 1924.[93] This formed the structure of the later UN Declaration on the Rights of the Child (1959) which granted children rights as opposed to just protection.[94] However, without any enforcement or implementation provisions this merely served as a guideline to states and was non-binding.[95] It was not mandatory and few states integrated it into their domestic law.[96] These conventions framed children's rights in very broad terms and failed to provide adequate protection. Children's rights were mainly protected in certain Western countries and were not high on the agenda around the world.[97] In the US in the 1970s a strong movement for the protection of children's rights emerged that was aimed at a more liberation-oriented approach this was a break away from the earlier paternalism.[98] This movement's aim was the recognition of children's rights as human rights and the demand to establish a binding international instrument is what led to an official proposal from the Polish delegation.[99] The UN Convention on the Rights of the Child of 1989 was binding and created international criterion that had to be met by states in their domestic

[93] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 401, 402; De Villiers "The rights of children in international law: guidelines for South Africa" (3) 1993 *Stell LR* 289; Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 70.
[94] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 401, 402; De Villiers "The rights of children in international law: Guidelines for South Africa" (3) 1993 *Stell LR* 289; Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 70.
[95] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 401, 402; De Villiers "The rights of children in international law: Guidelines for South Africa" (3) 1993 *Stell LR* 289.
[96] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 2; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.
[97] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 2; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.
[98] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 3; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.
[99] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 3; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.

laws.[100] It contains an implementation system that permits child-focussed human rights jurisprudence.[101] The convention provides state parties with positive duties in article 6 which states that "state parties shall ensure to the maximum extent possible the survival and development of the child". The complete article 6 of the UNCRC reads as follows:

> "1. States Parties recognize that every child has the inherent right to life.
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."

The UNCRC is the first binding universal treaty that is entirely focussed on the protection of children's rights.[102] Adequate protection was not an easy goal to achieve and only materialised after a challenging drafting process in attempting to balance traditions, cultural practices and sweeping suggestions for the empowerment of children.[103] This proposal underwent several changes and eventually led to the emergence of the UNCRC that was passed by the General

[100] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402; McGoldrick "The United Nations Convention on the Rights of the Child" (5) 1991 *It Jnl of Law and the Family* 132; Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010*PER/PELJ* 156 the UNCRC has been held to enjoy a heightened status in the South African legal framework for two important reasons: (a) Convention rights pertaining to children have been constitutionalised in s 28 of the Constitution, thereby giving the UNCRC legal significance in South Africa. (b) Specific provisions (such as s 233 and s 39(1)(*b*)) in the Constitution require courts to consider international law in their deliberations. In addition the Children's Act now states as one of its objectives the realisation of the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.

[101] McGoldrick "The United Nations Convention on the Rights of the Child" (5) 1991 *It Jnl of Law and the Family* 132; Ronen "Redefining the child's right to an identity" 18 2004 *International Journal of Law, Policy and the Family* 149; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 165, states that it is inarguably clear that the UN Convention on the Rights of the Child applies to a baby at birth and that is how it should be. The authors continue by stating that the question whether the convention was correct in limiting a child to the event of birth is one that others are beginning to question as well; see also Alderson *Young Children's Rights* (2008); see further, Cornock and Montgomery "Children's rights in and out of the womb" 19 2011 *Int'l J. Child. Rts.* 3; Veerman "The ageing of the UN Convention on the Rights of the Child" 18 2010 *Int'l J. Child. Rts*. 585.

[102] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 1; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 165; see Cantwell "Are children's rights still human?" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 37; see also Vandenhole "Distinctive characteristics of children's human rights law" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 21.

[103] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 3; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.

Assembly in 1989.[104] The UNCRC placed the child on the same level as an independent bearer of rights and brought children's issues to the forefront of the human rights agenda.[105] Steward points out however that "'borderline or unusual conditions' were not taken into account by the drafters of the Convention", there was no dialogue on the "consequences of being rendered genetically kinless".[106] South Africa ratified the UNCRC on 16 June 1995 and to date only the US, despite signing the UNCRC, has not taken any further action in respect of it. The day it opened for signature 61 states signed up for the UNCRC, this considerable amount of support gives it its legal force internationally.[107] The full range of rights is protected by the UNCRC including political, social, cultural as well as civil rights, whereas previous treaties drew a distinction between civil and political rights and social and economic rights.[108] By combining all the rights under one document the interdependence of these rights are demonstrated.[109] Prior to implementation of the UNCRC general treaties would simply apply the same rights as applied to adults to children.[110] The problem with this approach was that certain rights could not apply to children and were thus excluded.[111] The UNCRC applies to all children under the

[104] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 3; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.
[105] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 1; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.
[106] Steward "Interpreting the child's right to identity in the U.N Convention on the Rights of the Child" 26 1992-1993 *Family Law Quarterly* 221-233; During the drafting stage several countries expressed concern that including a provision that related to biological identity might conflict with future domestic policies in the advancement of reproductive technologies see Diver (ed) *A Law of Blood-Ties : The "Right" to Access Genetic Ancestry* (2014) 79; According to Detrick, Doek and Cantwell the term "family relations" was preferred over "family identity" see Detrick, Doek, and Cantwell (eds) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"* (1992) 294; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 159.
[107] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 1; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 402-404.
[108] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 4.
[109] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 4.
[110] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 4; see also Doek "The CRC: Dynamics and directions of monitoring its implementation" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 99.
[111] Such as the right to vote; Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 4.

age of 18, regardless of citizenship or permanent residence status.[112] It is underpinned by five key principles, which all actions of states are to be measured against.[113] Firstly, article 3 makes the best interests of a child a primary consideration in all actions by the state and, although this is widely adhered to in domestic laws, this article introduces such a consideration into international law for the first time.[114] This article makes the best interests of the child *a* primary consideration and not *the* primary consideration, meaning that many interests exist not only those of the child but that those of the child shall be one of those that get primary consideration.[115] The exact nature of the best interests of the child shall be discussed later but this thesis suggests that survival after birth would be in the best interests of the child and being

[112] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 411.

[113] Five key principles provided by Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 4-5; Nowak *A Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 15 quoting the Committee of the UNCRC only recognises 4 general principles excluding a 5 of the UNCRC as a general principle. The evolving capacities of children are important and should be regarded as a general principle. A 5 ensures the evolving capacities of children are taken into account and thus a single blueprint of what applies to a specific age group is not applied to all children in other age groups. Each right in the UNCRC is applied to a child as it suits that specific child thus rights in the UNCRC would apply differently to an infant for example than to an older child. Nowak also goes on to state that there is a danger in regarding the right to life as a general principle as it may misrepresent its significance as a substantive right however Nowak concludes by stating the full significance of a 6 only becomes clear if interpreted alongside the other rights and it being regarded as a general principle highlights the fundamental values underlying the convention and focuses in on the criteria in measuring the progress states make in implementing the UNCRC; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 408 highlights the four key rights as emphasised by the committee; also see Lundy and Byrne "The four general principles of the United Nations Convention on the Rights of the Child: The potential value of the approach in other areas of human rights law" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 52.

[114] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 4.

[115] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts.* 409; see *Fletcher v Fletcher* 1948 1 SA 130 (A); Bekink and Brand "Constitutional protection of children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 194; Human "Die effek van kinderregte op die privaatregtelike ouer-kind verhouding" 2000 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 398; s 28(2) of the South African Constitution. The child's best interest "has been described as 'a golden thread which runs throughout the whole fabric of our law relating to children'": Clark "A 'golden thread?' Some aspects of the application of the standard of the best interest of the child in South African family law" 2000 *Stell LR* 3; also see *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) for more on s 28(2) that was said to give a right to children distinct from s 28(1); Also discussed in Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 46 where the author points out that if the best interests are not necessarily of paramount consideration then it must be a primary consideration. A 3 has been criticised for its open-endedness and ambiguity but is clarified by the other substantive rights in the UNCRC; Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.

placed in a life-threatening environment would not be in the best interest of the child. The best interests of the child standard should be applied to all the provisions of the convention.[116] Secondly, article 5 recognises the rights and duties of parents or legal guardians to provide appropriate direction and guidance to the child, which is appropriate to the child's growth and development.[117] This thesis argues that to enable parents or legal guardians to provide appropriate direction and guidance to the child for growth and development, the means to do so needs to be provided by the state. In order to grow and develop the child needs to be in a safe environment and not be exposed to dangerous circumstances that could hinder that growth and development. Thirdly, article 12 enables the child to express his or her views by providing for his or her right to be heard.[118] According to Sloth Nielsen "[t]his, then, is the provision which recognises that the best interest of the child is not merely to be read off from what adults think is best for the child, but that children as bearers of rights have a right to a say as well".[119] Fourthly, article 2 states that the UNCRC will apply to all children everywhere without discrimination[120] and lastly and most importantly article 6 protects the child's right to life, survival and development.[121] Article 6 is of fundamental importance as there can be no best interests or duties on parents or right to be heard without life. The right to life in the UNCRC forms a significant starting point for all other rights in the convention that are similar to the

[116] Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.
[117] Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 82; see Ronen *Re-understanding the Child's Right to Identity on Belonging, Responsiveness and Hope* (2016) 162.
[118] Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 82; See Ronen *Re-understanding the Child's Right to Identity on Belonging, Responsiveness and Hope* (2016) 162.
[119] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts* 409.
[120] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts* 409: "The extension of the listed categories not just to the direct subjects of the Convention, i.e. children, but also to the child's parents or legal guardians, is a notable departure from other human rights treaties." This was done in order to protect children from the negative effects of discrimination against particular traits of their parents.
[121] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts* 409.

right to life in the ICCPR and in other international treaties.[122] There is no doubt that article 6 of the UNCRC requires positive action to be taken by state parties to ensure the survival and development of the child.[123] Paragraph one represents the traditional obligations of states to respect the life of children through non-interference and paragraph two gives the states positive duties to ensure the development and survival of the child.[124] Some participatory rights were viewed as extreme and as a result it was feared many states won't accept the UNCRC as the rights granted to children may be at the expense of those of the parents and family.[125] According to Fottrell the rights of the child and the family in most cases coincide and as a result these objections have no basis.[126] The preamble recognises the family as the fundamental unit, articles 9, 18 and 20 all recognise the family in some way or other.[127] The implementation of the convention involves periodic reporting, the first one within two years of ratification and thereafter every five years.[128] The report must make clear what the state has done to bring its

[122] Nowak *A commentary on the United Nations Convention on the Rights of the Child Article 6 the Right to Life, Survival and Development* (2005) 1.
[123] Nowak *A commentary on the United Nations Convention on the Rights of the Child Article 6 the Right to Life, Survival and Development* (2005) 1.
[124] Nowak *A commentary on the United Nations Convention on the Rights of the Child Article 6 the Right to Life, Survival and Development* (2005) 36; Ramcharan "The concept and dimensions of the right to life" in Ramcharan *The Right to Life in International Law* (1985) 9 "The Human Rights Committee appears to have correctly interpreted the right to life as requiring: 'that States adopt positive measures. In this connexion [sic], the Committee considers that it would be desirable for State parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics'."; Menghistu "The satisfaction of survival requirements' in Ramcharan (ed) *The Right to Life in International Law* (1985) 66; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts* 410.
[125] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 5-6.
[126] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 5-6.
[127] A 9 provides that children shall not be separated from parents against their will; a 18 recognises the equal role of both parents in the upbringing of the child and a 20 requires that the State establish a system of care when the child is separated from the family although the provision specifically a 20(3) "is silent on more pragmatic issues such as kin reunion, familial contact or information provision"; see Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 80-81; see Convention on the Rights of the Child, Preamble 5 and 6; according to Brower "The impact of family paradigms, domestic constitutions and international conventions on disclosure of an adopted person's identities and heritage: A comparative perspective" 22 2000-2001 *Michigan Journal of International Law* 587-672, the Convention seems to suggest a moral obligation to remove obstacles to birth-kin repatriation however according to Steward no positive obligation to facilitate information release or contact with genetic relatives exist; see Steward "Interpreting the child's right to identity in the U.N. Convention on the Rights of the Child" 26 1992 *Fam. L.Q.* 221, 227-228, 224.
[128] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 6; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts* 416; also discussed in Blauwhoff *Foundational Facts, Relative*

laws in line with the convention.[129] The committee of experts that monitors the UNCRC will then make recommendations by highlighting areas of concern.[130] Some problems exist with monitoring of the implementation of the UNCRC in various countries.[131] The committee only meets three times a year for sessions of four weeks, in that time it has to consider a large number of initial as well as periodic reports but is limited to five reports per session.[132] This together with its relatively limited power to carry through with anything that countries do or do not do in respect of the UNCRC make its implementation an ongoing problem.[133]

Truths: A Comparative Law Study on Children's Rights to Know Their Origins (2009) 55; see also Doek "The CRC: Dynamics and directions of monitoring its implementation" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 99; for more on ways to improve compliance with the UNCRC see Kilkelly "Using the Convention on the Rights of the Child in law and policy: Two ways to improve compliance" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 179.

[129] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 6; Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts* 416; see also Doek "The CRC: Dynamics and directions of monitoring its implementation" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 99; for more on ways to improve compliance with the UNCRC see Kilkelly "Using the Convention on the Rights of the Child in law and policy: Two ways to improve compliance" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 179.

[130] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 6; see UN Convention on the Rights of the Child Treaty Series 20 November 1989 No. 27531, aa 43-45 on the role of the Committee and the nature of State obligations; see also Doek "The CRC: Dynamics and directions of monitoring its implementation" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 99; for more on ways to improve compliance with the UNCRC see Kilkelly "Using the Convention on the Rights of the Child in law and policy: Two ways to improve compliance" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 179.

[131] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 12-13; see generally Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007); see also Doek "The CRC: Dynamics and directions of monitoring its implementation" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 99; for more on ways to improve compliance with the UNCRC see Kilkelly "Using the Convention on the Rights of the Child in law and policy: Two ways to improve compliance" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 179.

[132] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 12-13; see generally Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007); see also Doek "The CRC: Dynamics and directions of monitoring its implementation" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 99; for more on ways to improve compliance with the UNCRC see Kilkelly "Using the Convention on the Rights of the Child in law and policy: Two ways to improve compliance" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 179.

[133] Fottrell *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 12-13; see generally Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007); see also Doek "The CRC: Dynamics and directions of monitoring its implementation" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 99; for more on ways to improve compliance with the UNCRC see Kilkelly "Using the Convention on the Rights of the Child in law and policy: Dwo ways to improve compliance" in Invernizzi and Williams (eds) *The Human Rights of Children From Visions to Implementation* (2016) 179.

The positive duties that rest on states as laid down in the UNCRC is in respect of article 6 paragraph 2 "[e]nsuring to the maximum extent possible the survival and development of the child" creates a duty on the state to reduce infant mortality and prevent infanticide. According to Menghistu "if one seeks to ensure the right to life, it cannot be done without taking the necessary measures and means which make the right to life meaningful".[134] The right to life can only be protected if the right environment exists otherwise human rights will have no practical significance.[135] The most important indicator for the life, survival and development of the child and for monitoring the implementation of article 6 is the mortality rate of children under five, which is the probability of dying between birth and exactly five years of age expressed per 1000 live births.[136] According to Nowak if states do not take sufficient action to protect children against preventable causes of death, they violate the most paramount of all human rights, the right of children to life and survival.[137] A cause of death that can be regarded as preventable is dying from exposure that is caused by being left in a toilet, drain, sewer, open field or dustbin. The rate of death resulting from abandonment in 2009 in South Africa was 17.9 per 100 000 for girl infants and 14.4 per 100 000 for boy infants.[138]

[134] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 76.
[135] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 76.
[136] Such a report was conducted by Matthews, Abrahams, Jewkes, Martin and Lombard in 2013 entitled "The epidemiology of child homicides in South Africa" *Bulletin of the World Health Organization*, a preventable cause of death is child abandonment and according to this report the rate of death resulting from abandonment was 17.9 per 100 000 for girl infants and 14.4 per 100 000 for boy infants in 2009. The rate of early infanticide was 27.7 per 100 000 infants less than 1 week old and an overall homicide rate among children younger than 15 years of 0.54 per 100 000; also see Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 15 where the UNCRC Committee stated that information should also be provided on the measures taken to ensure the registration of the deaths of children, proper reporting on the causes of death and measures to prevent these deaths; further see also Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 the Right to Life, Survival and Development* (2005) 38.
[137] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 the Right to Life, Survival and Development* (2005) 2.
[138] Matthews, Abrahams, Jewkes, Martin and Lombard "The epidemiology of child homicides in South Africa" 2013 *Bulletin of the World Health Organization*.

This right to life in article 6 has to be interpreted widely as it also contains an obligation to ensure the development of the child. The concept of human development is defined in article 1 of the UN Declaration on the Right to Development of 1986 as "a comprehensive process aimed at full realization of all civil, political, economic, social and cultural rights of the human being".[139] To ensure the development of the child, an environment must be created by state parties that enable all children to grow up healthily and protected and to have all their mental and physical abilities looked after.[140] A number of other rights are important for the development of the child and these include: article 24 the right to health; articles 28 and 29 — the right to education; the right to an adequate standard of living, which includes nutrition, water, clothing and housing contained in article 27.[141] The right to social security in article 26 and rest, leisure and play in article 31.[142] As part of their development, children must also be protected from infanticide and infant mortality. The rate of early infanticide was 27.7 per 100 000 infants less than 1 week old in South Africa in 2009.[143]

The contents for the development of the child are discussed in other articles of the UNCRC. Each of these will now be discussed separately. Article 5 provides that "states parties should respect the responsibilities, rights and duties of parents or anyone else responsible for the child

[139] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 2; see generally Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 83-95.
[140] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 2; see generally Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 83-95.
[141] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 2; see generally Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 83-95.
[142] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 2 the prohibition of the death penalty, the protection of children in armed conflicts and their non-recruitment into the armed forces (all contained in aa 37, 38 and 2nd OP to the UNCRC).
[143] Matthews, Abrahams, Jewkes, Martin and Lombard "The epidemiology of child homicides in South Africa" 2013 *Bulletin of the World Health Organization*.

to provide appropriate guidance and direction in the exercise of the rights in the convention". This article establishes the fact that parents or guardians have responsibilities, rights and certain duties in respect of children. It develops a line that must be drawn between state interference and the exercise of parental rights and responsibilities.[144] Article 18 does the same by providing that "parents have the primary responsibility for the upbringing and development of the child and that the best interests of the child must be their primary concern".[145] However, this article goes on to provide that "appropriate assistance" must be rendered to parents or guardians to fulfil their functions.[146] This assistance must be provided by the state by developing institutions, facilities and services for the care of the children.[147] This is in line with the subsidiary responsibility of state parties to ensure protection and care as stated in article 3(2) of the UNCRC.[148] The convention recognises the family as the natural and fundamental group unit of society and the "natural environment for the growth and well-being of all its members and particularly children".[149] The preamble goes on to provide that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".[150] These articles make it clear that parents take the primary responsibility for the survival and development of the child and the state renders assistance when this is not possible. Article 20 provides for those instances where there is no family environment, for instance where the child has been removed from the family environment, such as in cases of abandonment. In these circumstances a child is entitled to

[144] See Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 46 where this article is discussed.
[145] United Nations Convention on the Rights of the Child a 18 par 1; Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.
[146] United Nations Convention on the Rights of the Child a 18 par 2.
[147] Also see Bekink "'Child divorce': A break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of parents" Vol. 15 No. 1 2012 *PER* 198, where a 18 of the UNCRC is also discussed.
[148] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 38; see generally Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 83-95.
[149] 4th preambular par of the UNCRC.
[150] 5th preambular par of the UNCRC.

special protection and assistance. The child's right to healthcare services also forms part of the development of the child in terms of article 24 that provides that the state must take "measures to diminish child and infant mortality"[151], "to ensure the provision of necessary medical assistance"[152] and "to ensure the appropriate pre-natal and post-natal healthcare for mothers"[153].

Parents or guardians are responsible according to article 27 for providing "an adequate standard of living for the child" but when unable to do so the state will assist in the form of support programs targeted at providing housing, clothing and nutrition. Further, article 23(3) provides for the care of disabled children; articles 28 and 29 deals with the right of the child to an education and finally articles 31 and 39 deal with the "right to leisure, play and recreation" and social integration of an abused child respectively. These articles illustrate the many facets of the development of a child and most importantly that parents bear the primary responsibility of ensuring these rights. If parents bear the main responsibility, what is the role of the state? The role played by states are to step in if parents are not able to meet or carry through their primary responsibilities. In instances of infant abandonment, the parent is not able to meet her responsibility of caring for the child and therefore requires the state to intervene "to ensure to the maximum extent possible the survival and development of the child" in accordance with article 6. Ideally, intervention should occur prior to the act of abandonment because the act of abandonment threatens the life of the infant and without life, as has been illustrated above, no development of the child can be spoken of. However, no system is in place to ensure the protection by the state prior to abandonment. Women are forbidden to leave their infants at the hospital and hospital staff are not trained in understanding the dangers of rejecting the mother's

[151] United Nations Convention on the Rights of the Child a 24 par 2(a).
[152] United Nations Convention on the Rights of the Child a 24 par 2(b).
[153] United Nations Convention on the Rights of the Child a 24 par 2(d).

request to accept an infant. There is also a fear that it would cause a proliferation of abandonment cases should the state adopt measures to assist. In this respect the UNCRC mentions that the right to life is an inherent right, meaning it is non-derogable and recognised as a *jus cogens*[154] under international law.[155] State parties are under an obligation to protect the right to life against undue interference.[156] Nowak states that this protection can only occur if governments know what they are up against, in other words, if these threats have developed a pattern that should be known to state parties.[157] In South Africa 3500 babies were abandoned in 2010,[158] this number is significant in indicating a pattern, or "a known threat", and shows the vulnerability of children, particularly infants, in the country. In view of this, the right to life and development of infants deserves protection and it may be said that the state is therefore under an obligation to take into account this trend. Abandonment may also result in infanticide[159] – depending on where an infant is abandoned.[160] The right to life is often in conflict with other rights, especially in respect of the unborn child and the woman's right in

[154] The principles that forms the norms of international law which cannot be set aside. Certain fundamental overriding principles of international law, Garner (ed) *Black's Law Dictionary* (2014); Ramcharan "The concept and dimensions of the right to life" in Ramcharan *The Right to Life in International Law* (1985) 15; For more on the right to life as a *jus cogens* see Gormley "The right to life and the rule of non-derogability: peremptory norms of *jus cogens*" in Ramcharan *The Right to Life in International Law* (1985) 120-159; Redelbach "Protection of the right to life by law and by other means" in Ramcharan *The Right to Life in International Law* (1985) 186.

[155] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 18; Ramcharan "The concept and dimensions of the right to life" in Ramcharan *The Right to Life in International Law* (1985) 14-15; Redelbach "Protection of the right to life by law and by other means" in Ramcharan *The Right to Life in International Law* (1985) 184.

[156] According to Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 18 this is seen as the horizontal effects of human rights.

[157] Nowak *Commentary on the United Nations Convention on the Rights of the Child Article 6 The Right to Life, Survival and Development* (2005) 18.

[158] Child Welfare South Africa estimate the number of children to be abandoned in 2009/2010 at 2750, a marked increase from previous years (this number excluded Johannesburg and Cape Town metropolitan areas). Cape Town Child Welfare reported between 500 to 600 babies and children abandoned between 2009 and 2010, and Johannesburg Child Welfare (one of the largest child protection organisations in the Gauteng province) reported rescuing an average of fifteen babies a month over this period. Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of the Witwatersrand 2014) 7.

[159] The crime of killing an infant within one year of its life. Putkonen, Weizmann-Henelius, Collander, Santtila, Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 12 January 2007 *Archives of Women's Mental Health* 15.

[160] In South Africa children are most commonly abandoned in in 70% cases in unsafe locations such as toilets, drains, sewers and gutters. Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of the Witwatersrand 2014) 45-46.

section 12(2) of the bill of rights, "the right to freedom and security of the person" which includes the right to bodily and psychological integrity (specifically paragraph (a) — making decisions regarding reproduction). However, of relevance in this chapter is children who have already been born, have legal subjectivity and therefore have subjective rights. When a child is born alive it is regarded as a natural person. The right to life existed before it was established by any covenant.[161] The rights contained in the conventions are not self-operative and there is a positive duty on each signatory to put the substantive rights into effect.[162] It is the primary duty of the state not only to respect the right to life but also to ensure the right to life.[163] No means of achieving this result is provided for by the UNCRC or any other covenant that contains the right to life. How a state can give effect to a right is firstly by preventing violation and secondly by providing remedies where violations have occured.[164] When an infant is abandoned in an unsafe location[165] the right to life of that infant is threatened and therefore this amounts to a violation of the right to life should the child die as a result. The applicable remedy is charging the mother for the crime of concealment of birth in terms of the General Law Amendment Act 46 of 1935.[166] However, as stated above, giving effect to a right is more than just providing remedies in case of violation, but firstly to *prevent* violation. In order to prevent infant abandonment that can lead to death, and therefore protecting the right to life, a system such as baby safes, safe haven laws, anonymous birth or confidential birth laws would prove most preventative. By providing the mother with a system that ensures her anonymity and most

[161] Kabaalioğlu "The obligations to 'respect' and to 'ensure' the right to life" in Ramcharan *The Right to Life in International Law* (1985) 161.
[162] Kabaalioğlu "The obligations to 'respect' and to 'ensure' the right to life" in Ramcharan *The Right to Life in International Law* (1985) 161.
[163] Kabaalioğlu "The obligations to 'respect' and to 'ensure' the right to life" in Ramcharan *The Right to Life in International Law* (1985) 165.
[164] Kabaalioğlu "The obligations to 'respect' and to 'ensure' the right to life" in Ramcharan *The Right to Life in International Law* (1985) 166.
[165] Open velds, rubbish dumps, dustbins etc. Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of the Witwatersrand 2014) 8.
[166] s 1 amends s 113 of the General Law Amendment Act 46 of 1935; This will be discussed in the chapter on South African law.

importantly ensures that the child's right to life is preserved, the need for remedies that deal with contravention are reduced.[167]

The implications for South Africa after having ratified the convention is that it must refrain from acts that defeat the object of the convention and it needs to review legislation to ensure the domestic law is consistent with the principles of the convention.[168] In this respect, South Africa included section 28 in the Bill of Rights that is based on the principles in the convention. Where a specific article of the convention is not covered by section 28 it may be found elsewhere in the Constitution. An example here would be the right to life, which is guaranteed in section 11 of the Constitution and applies to all. However, it does not provide for the right to survival and development of the child as stated in the UN Convention on the Rights of the Child article 6. According to Pieterse, the Constitution provides the right to life in an open-ended manner, being unqualified does not make the right absolute but suggests that it should be interpreted broadly and generously.[169] "The South African Bill of Rights is also unique in that it contains socio-economic rights alongside civil and political rights, thereby reflecting the interdependence of these rights."[170] An example of socio-economic rights in the Constitution may be found in section 28(1)(*c*) of the Constitution, which provides for basic nutrition, shelter, basic healthcare services and social services in line with article 24 of the UNCRC.[171] Section

[167] "It is better to have a baby delivered safely to a designated provider with no medical history than it is to find this same baby discarded in the trash." Dreyer "Texas' safe haven legislation: Is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2003 *Texas Journal of Women and the Law* 180.

[168] Sloth Nielsen "Ratification of the United Nations Convention on the Rights of the Child: some implications for South African law" 11 1995 *S. Afr. J. on Hum. Rts* 418-419; see also Ledogar "Implementing the Convention on the Rights of the Child through national programmes of action for children" 1 1993 *Int Jnl of Children's Rights* 377.

[169] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 376; for more on the right to life specifically with regard to children see Kruuse "'Fetal rights'? The need for a unified approach to the fetus in the context of feticide" 2009 *THRHR* 126-136; Meyerson "Abortion: the constitutional issues" 1999 *SALJ* 50-59; Naudè "The value of life: A note on *Christian Lawyers Association of SA v Minister of* Health" 1999 *SAJHR* 541-562; Buthelezi en Reddi "Killing with impunity: The story of an unborn child" 2008 *De Jure* 429-437.

[170] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 376.

[171] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 377.

7(2) of the Constitution provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". According to Pieterse this enhances the justiciability of the socio-economic rights in the Bill of Rights, and directs the state to take positive action to enforce civil and political rights.[172]

> "Applied to the right to life, the duty to protect the right would probably oblige the state to protect the lives of citizens from violent attacks, whereas the duties to promote and fulfil the right to life might mandate the state to create suitable living conditions for its people, thereby awarding the right to life a socio-economic dimension."[173]

The duties to promote and fulfil the right to life might also mandate the state to create safe alternatives to unsafe infant abandonment and, in turn, also give the right a socio-economic dimension. As stated in *S v Makwanyane*,[174] the right to life is subject to the limitation clause and therefore infringement of the socio-economic elements of the right, such as the right to a safe alternative to unsafe infant abandonment, would have to pass the test in the section 36 limitation clause. When interpreting the right to life in the South African Constitution, international law should be taken into account and as a result, it may be interpreted broadly such as expressed under international human rights instruments. The court fully expounded on the right to life in *S v Makwanyane* and, although the court did not define the right, some judges did indicate that it has a socio-economic content. Judge O'Regan mentions, when linking the right to life and dignity that the right to life includes the "right to live as a human being, to be part of a broader community, to share in the experience of humanity".[175] This gives the right to life socio-economic content. States will therefore be obligated to meet certain needs

[172] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 377.
[173] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 377.
[174] *S v Makwanyane* 1995 3 SA 391 (CC).
[175] In *S v Makwanyane* 1995 3 SA 391 (CC) all the judges dealing with the right to life, with the exception of Sachs J, conceded that the right is subject to the limitation clause contained in s 33 of the interim Constitution para 326 and 327.

associated with the right to life, such as the right to food, shelter and education, because of its socio-economic element. Sachs J mentions that one might apply ". . . an objective approach in relation to the enjoyment of the right to life, namely, that the State is under a duty to create conditions to enable all persons to enjoy the right...".[176] Section 11 of the Constitution should be interpreted in line with the right to life contained in international instruments and conventions – that is to say a broad interpretation.[177] However, in *Soobramoney v Minister of Health Kwa-Zulu Natal*[178] the issue of socio-economic rights was discussed based on section 27(3) of the Constitution, the right not to be refused emergency medical treatment in conjunction with the right to life. The Constitutional Court held that there was no need to include the right to life in this claim as section 27 was sufficient as a socio-economic right in itself.[179] Chaskalson P did not reject the wide interpretation of the right to life, in fact he expressly acknowledged that food, healthcare, housing and social security, water and work all form part of the right to life, similar to what was stated by O'Regan J in *S v Makwanyane*.[180] However, the *Soobramoney* case shows that the right to life will probably not come into play when an existing socio-economic right, which is equally strong, is applied.[181] According to Pieterse "the constitutional right to life must at least ensure access to these basic survival requirements if it is to have any significance for a large percentage of the population".[182] It is

[176] Sachs J in *S v Makwanyane* 1995 3 SA 391 (CC) para 326 and 327.
[177] s 39(2) of the Constitution provides when interpreting the Bill of Rights, a court, tribunal or forum (b) must consider international law.
[178] 1998 1 SA 765 (CC). The facts are as follows: Mr Soobramoney was suffering from heart disease, cerebro-vascular disease and kidney failure. He was requesting the state to provide him with life prolonging renal dialysis at state expense. He appealed against the decision of the Durban High Court refusing such treatment on the basis that it is only given to certain patients who were on the road to recovery or who qualified for a kidney transplant. This as a result of limited resources. On behalf of the appellant it was argued that s 27(3) of the Constitution must be read together with section 11 that refusing emergency medical treatment violates the right to life.
[179] See *Soobramoney* 1998 1 SA 765 (CC) para 15-16.
[180] *Soobramoney* 1998 1 SA 765 (CC) para 15-16; Keener and Vasquez "A life worth living: Enforcement of the right to health through the right to life in the Inter-American Court of Human Rights" 2008-2009 *Columbia Human Rights Law Review* 595-624.
[181] See Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 382.
[182] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 384.

suggested that without the basic requirements necessary to survive there would be no value in this right for infants about to be abandoned. This thesis agrees with the assertion by Pieterse that the right to life should encompass socio-economic elements as expressed in international law and this should be the case regardless of the presence of these individual rights in the Constitution.[183] In the absence of this socio-economic element, the right is a mere empty promise, an empty assertion that provides protection to adults or children of a certain age, not infants battling to survive in harsh conditions after being abandoned. Should a socio-economic element form part of section 11, then the right to shelter in respect of potential abandoned infants must apply too. The right to shelter will prevent the infringement of the infant's right to life and thus is an essential component of the right to life in an effort to preserve life. Although this definition or extension of the right to life has not been confirmed by the Constitutional Court in *Soobramoney* the realisation of this element will enhance the inherent value in this right.

5.2.2 The value inherent in the right to life in section 11 of the Constitution

The most effective means of protection of life happens first in the domestic law of a country.[184] An obligation now exists according to international treaties for countries who are parties to these treaties to impose criminal sanctions for infringement of the right to life.[185] The Constitution[186] as the basis for all other laws in the Republic of South Africa is the relevant starting point for the protection of the right to life. The Constitution is the supreme law of the Republic[187] and any law that is inconsistent with it shall be invalid and of no force or effect.[188]

[183] Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385.
[184] Wicks *The Right to Life and Conflicting Interests* (2010) 48-49.
[185] Wicks *The Right to Life and Conflicting Interests* (2010) 48-49; General Comment No.6: The Right to Life (1982) par 3.
[186] Constitution of the Republic of South Africa, 1996.
[187] Preamble of the 1996 Constitution; *S v Makwanyane* 1995 3 SA 391 (CC) par 155.
[188] Preamble of the 1996 Constitution; Cornell *The Dignity Jurisprudence of the Constitutional Court of South Africa* (2013) 175.

Chapter 2 – Bill of Rights sets out the fundamental rights to which every person is entitled under the Constitution and sets out how this chapter should be interpreted by the courts:[189]

> "A constitution is no ordinary statute.[190] It is the source of legislative and executive authority.[191] It determines how the country is to be governed and how legislation is to be enacted.[192] It defines the powers of the different organs of State, including Parliament, the executive, and the courts as well as the fundamental rights of every person which must be respected in exercising such powers."[193]

In *S v Zuma and Two Others*[194] the Constitutional Court dealt with the approach to be adopted in the interpretation of the fundamental rights enshrined in Chapter 3 of the Interim Constitution.[195] It gave its approval to a "generous" and "purposive" approach whilst giving expression to the underlying values of the Constitution.[196] Kentridge AJ, who delivered the judgment of the Court, referred with approval[197] to the following passage in the Canadian case of *R v Big M Drug Mart Ltd*:[198]

> "The meaning of a right or freedom guaranteed by the [Canadian Charter of Rights and Freedoms] Charter must be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than legalistic one,

[189] Cornell *The Dignity Jurisprudence of the Constitutional Court of South Africa* (2013) 175.
[190] *S v Makwanyane* 1995 3 SA 391 (CC) par 15.
[191] *S v Makwanyane* 1995 3 SA 391 (CC) par 15.
[192] *S v Makwanyane* 1995 3 SA 391 (CC) par 15.
[193] *S v Makwanyane* 1995 3 SA 391 (CC) par 15.
[194] *S v Zuma and Others* 1995 4 BCLR 401 (SA) paras 14 and 15.
[195] *S v Zuma and Others* 1995 4 BCLR 401 (SA) paras 14 and 15.
[196] *S v Zuma and Others* 1995 4 BCLR 401 (SA) paras 14 and 15.
[197] *S v Zuma and Others* 1995 4 BCLR 401 (SA) paras 14 and 15; *S v Makwanyane* 1995 3 SA 391 (CC) par 9.
[198] (1985) 18 DLR (4th) 321, 395-6.

aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."[199]

The Constitution:

> ". . . provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."[200]

It provides in section 11 that "everyone has the right to life". This fundamental right was dealt with in the judgment of *S v Makwanyane* and another[201] where the court held that "the rights to life and dignity are the most important of all human rights and the source of all other personal rights in chapter three of the interim constitution".[202] This case concerned a robbery from a bank security vehicle which was delivering monthly wages to the Coronation Hospital in Johannesburg.[203] The two prisoners were part of a group of robbers who had planned the robbery.[204] All the robbers had been armed with AK47s and had opened fire on the security vehicle and the accompanying vehicle when they had driven into the hospital parking area.[205] As a result of the shooting, two policemen and two bank security officials were shot dead.[206] The Constitutional Court had to decide whether the form of punishment imposed, namely the

[199] (1985) 18 DLR (4th) 321, 395-6; As O'Regan J points out in her concurring judgment, there may possibly be instances where the "generous" and "purposive" interpretations do not coincide. That problem does not arise in the present case.
[200] *S v Makwanyane* 1995 3 SA 391 (CC) par 7, 130 fn 4 These words are taken from the first par of the provision on National Unity and Reconciliation with which the Constitution concludes. s 232(4) provides that for the purposes of interpreting the Constitution, this provision shall be deemed to be part of the substance of the Constitution, and shall not have a lesser status than any other provision of the Constitution.
[201] 1995 3 SA 391 (CC).
[202] *S v Makwanyane* 1995 3 SA 391 (CC), Chaskalson P par 144.
[203] *S v Makwanyane* 1995 3 SA 391 (CC) par 319.
[204] *S v Makwanyane* 1995 3 SA 391 (CC) par 319.
[205] *S v Makwanyane* 1995 3 SA 391 (CC) par 319.
[206] *S v Makwanyane* 1995 3 SA 391 (CC) par 319.

death penalty was constitutional. Langa DP found that the state is under a duty to promote respect for the right to life.[207] This is because the Constitution incorporates the "values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion".[208] The state must function as a role model.[209] The state must take the lead to achieve "a culture of respect for human life and dignity, based on the values reflected in the constitution".[210] The principle that the value of a human life is "inestimable" is upheld by the state when the state performs its role by not only propagating but also by demonstrating "its regard for human life and dignity by refusing to destroy the life of the criminal".[211] Chaskalson P went on to state the following:

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3.[212] By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."[213]

However, the right to life was found not to be absolute. Self-defence is recognised by all legal systems.[214] In accordance with the limitation clause[215] "where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor".[216] According to Chaskalson this is also applicable where a hostage-taker threatens the life of the hostage, it is permissible to kill the hostage-taker in order to save the life of the

[207] *S v Makwanyane* 1995 3 SA 391 (CC) Langa DP par 222.
[208] *S v Makwanyane* 1995 3 SA 391 (CC) Langa DP par 222.
[209] *Olmstead v United States* 277 US 438 485 (1928) in the dissenting opinion by Judge Brandeis who states that the Government teaches all people by its example.
[210] *S v Makwanyane* 1995 3 SA 391 (CC) par 222.
[211] *S v Makwanyane* 1995 3 SA 391 (CC) par 222.
[212] Of the Interim Constitution, now chapter 2 of the 1996 Constitution.
[213] *S v Makwanyane* 1995 3 SA 391 (CC) Chaskalson P par 144.
[214] *S v Makwanyane* 1995 3 SA 391 (CC) par 138.
[215] s 33 of the Interim Constitution now s 36 of the 1996 Constitution. The limitation clause provides "(1) The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."
[216] *S v Makwanyane* 1995 3 SA 391 (CC) par 138.

innocent hostage but this may only be done if the hostage is in imminent danger.[217] The state may also kill when putting down a rebellion or protecting itself from external aggression.[218] There has to be a balancing of the right to life of the offender and the right to life of the victim.[219] If no other alternative exists then killing the individual serves as a justifiable limitation of the right to life.[220] Chaskalson P went on to state:

> "In the balancing process the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment, and the existence of a severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet."[221]

Didcott J, although in disagreement at what seems to be too simple of a solution, referred to the opinion of some public commentators that section 9 of the Interim Constitution "every person shall have the right of life" read with section 33(1)(*b*) of the Interim Constitution, which provides that no statutory limitation on that or any other constitutional right shall "negate the essential content of the right in question" will finally rid any doubt about the unconstitutionality of the death penalty because the execution of a prisoner does in fact negate the essential content of the right.[222] He based his opinion on the fact that although the right to life bears its essential content and is unqualified, factors such as self-defence and the state's duty to protect the lives

[217] *S v Makwanyane* 1995 3 SA 391 (CC) par 138.
[218] *S v Makwanyane* 1995 3 SA 391 (CC) par 139.
[219] *S v Makwanyane* 1995 3 SA 391 (CC) par 138.
[220] *S v Makwanyane* 1995 3 SA 391 (CC) par 138.
[221] *S v Makwanyane* 1995 3 SA 391 (CC) par 145.
[222] *S v Makwanyane* 1995 3 SA 391 (CC) Didcott J par 193.

of its citizens by ensuring that killing is met with condign punishment remains some of the considerations in developing the full scope of the right in future.[223] Kriegler J held that the exercise is to determine whether there is an invalid infringement of a right protected by chapter 3 of the Interim Constitution and this calls for a two-step approach.[224] Firstly, ask whether there has been contravention of a right guaranteed in the Bill of Rights?[225] Secondly, if so, does the infringement fall within the limits of the limitation clause?[226] Kriegler J went on to hold that "the right to life at the very least indicates that the state may not deliberately deprive any person of his or her life".[227] The second stage to the enquiry is whether the infringement of this right falls within the ambit of the limitation clause in other words, whether it is "reasonable and justifiable in an open and democratic society" based on freedom and equality.[228] This thesis asks the question whether non-development of a system to protect infants from unsafe abandonment amounts to the deliberate deprivation of life and whether such deprivation would fall within the ambit of the limitation clause. Langa J found that section 277(1) of the Criminal Procedure Act 51 of 1977 did not pass the reasonableness test of the limitation clause and thus found it unnecessary to compare it to the further provisions of the limitation clause.[229] Importantly, Langa J went on to provide that he does not exclude the application of the limitation clause to the right to life and any law limiting the right would have to comply with the requirements of the limitation clause.[230] He went further to provide that the protection afforded by the Constitution is applicable to all persons including the weak, the poor and the vulnerable, and this protection also extends to criminals.[231] An infant can be regarded as weak

[223] *S v Makwanyane* 1995 3 SA 391 (CC) Didcott J par 193.
[224] *S v Makwanyane* 1995 3 SA 391 (CC) Kriegler J par 208.
[225] *S v Makwanyane* 1995 3 SA 391 (CC) Kriegler J par 208.
[226] *S v Makwanyane* 1995 3 SA 391 (CC) Kriegler J par 208.
[227] *S v Makwanyane* 1995 3 SA 391 (CC) par 208.
[228] *S v Makwanyane* 1995 3 SA 391 (CC) par 209.
[229] *S v Makwanyane* 1995 3 SA 391 (CC) Langa J par 217.
[230] *S v Makwanyane* 1995 3 SA 391 (CC) par 217(b).
[231] *S v Makwanyane* 1995 3 SA 391 (CC) par 230.

and vulnerable and is therefore also entitled to the protections offered by the Bill of Rights. Madala J emphasised that:

> "the concept of *ubuntu* permeates the constitution generally and more particularly Chapter 3 of the interim constitution which embodies the entrenched fundamental human rights.[232] The concept carries in it the ideas of humaneness, social justice and fairness."[233]

Mahomed J expressed the need for *ubuntu* as:

> "the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognising their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by."[234]

He went on to state that the death penalty offends crucial sections of the Constitution, such as section 9 (Interim Constitution) which prescribes in peremptory terms that "every person shall have the right to life".[235] Mahomed J posed various questions that he found unnecessary to answer in this case "What is a 'person'?" and "when does 'personhood' and 'life' begin?"[236] These questions have already been answered in our law, for instance the law of persons prescribes that legal subjectivity begins at birth and any sign of life is sufficient.[237] In this way

[232] *S v Makwanyane* 1995 3 SA 391 (CC) par 237.
[233] *S v Makwanyane* 1995 3 SA 391 (CC) par 237.
[234] *S v Makwanyane* 1995 3 SA 391 (CC) par 263.
[235] *S v Makwanyane* 1995 3 SA 391 (CC) Mahomed J par 261-299.
[236] *S v Makwanyane* 1995 3 SA 391 (CC) par 268.
[237] s 239 Criminal Procedure Act 51 of 1977 for the crime of concealment of birth proving that the child breathed is necessary "Evidence on charge of infanticide or concealment of birth.—(1) At criminal proceedings at which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother. (2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth." However according to Boezaart there is no requirement that a specific sign of life must be present, see in this regard Boezaart *The Law of Persons* (2017) 12-13 for the common law requirements of birth which are that the foetus must be separate from the mother's body and have lived independently after birth; see also Carnelley, Skelton et al *Law of Persons in South Africa* (2019) 22; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017)

a newborn that is discarded after birth is a legal subject under protection of the Constitution's Bill of Rights. A baby born alive[238] is protected by the right to life, the right to human dignity and all other rights in the Bill of Rights.[239] Mahomed J stated that the death penalty amounts to the "deliberate annihilation of life" and with reference to *S v Mhlongo*[240] held that it "amounts to the destruction of the greatest and most precious gift which is bestowed on all humankind".[241] He continued by providing that the invasion of the offender's right to dignity is inherent with the application of the death penalty as he is effectively told:

> "You are beyond the pale of humanity. You are not fit to live among humankind. You are not entitled to life. You are not entitled to dignity. You are not human. We will therefore annihilate your life."[242]

Mokgoro J referred to the matter of *Dudgeon v United Kingdom*[243], per Walsh J who expressed the view that:

> ". . . in a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt."[244]

She pointed out that in:

> "Hungarian jurisprudence, the right to life and the right to human dignity are protected as twin rights in section 54(1) of that Constitution.[245] They are viewed as an inseparable unity of

31-32; In terms of s 1(1) of the Births and Deaths Registration Act 51 of 1992 no specific sign of life is necessary to validate a birth for the purposes of registration.

[238] In other words one that has shown any signs of life.

[239] Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 165 mention that babies are unquestionably human beings with all that this entails.

[240] 1994 1 SACR 584 (A) 587e-g.

[241] *S v Makwanyane* 1995 3 SA 391 (CC) Mahomed J par 265.

[242] *S v Makwanyane* 1995 3 SA 391 (CC) par 271; see the observations of Brennan J in *Trop v Dulles* 356 US 84 100.

[243] (1982) 4 EHRR 149, the European Court of Human Rights 184.

[244] *S v Makwanyane* 1995 3 SA 391 (CC) par 305.

[245] *S v Makwanyane* 1995 3 SA 391 (CC) Mokgoro J par 309.

rights.[246] Not only are they regarded as a unity of indivisible rights, but they also have been held to be the genesis of all rights.[247] In international law, on the other hand, human dignity is generally considered the fountain of all rights".[248]

She went on to provide that no different from the spirit of *ubuntu* is the International Covenant on Civil and Political Rights 1966,[249] which in its preamble, makes references to "the inherent dignity of all members of the human family" and concludes that "human rights derive from the inherent dignity of the human person".[250] In Judge Mokgoro's view the right to life and dignity are different sides of the same coin and the concept of *ubuntu* embodies them both.[251] Judge O'Regan held that the right to life is, in one sense, the originator of all the other rights in the Constitution.[252] If you do not have life you are unable to exercise any other rights.[253] O'Regan went on:

> "But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."[254]

[246] *S v Makwanyane* 1995 3 SA 391 (CC) Mokgoro J par 309.
[247] *S v Makwanyane* 1995 3 SA 391 (CC) Mokgoro J par 309.
[248] *S v Makwanyane* 1995 3 SA 391 (CC) Mokgoro J par 309.
[249] GA Res 2200 (XXI), 21 UN GAOR SUPP (no 16) at 62, UN DOC A/6316 (1966)
[250] *S v Makwanyane* 1995 3 SA 391 (CC) par 309.
[251] *S v Makwanyane* 1995 3 SA 391 (CC) par 311.
[252] *S v Makwanyane* 1995 3 SA 391 (CC) O'Regan J para 326, 327.
[253] *S v Makwanyane* 1995 3 SA 391 (CC) O'Regan J para 326, 327.
[254] *S v Makwanyane* 1995 3 SA 391 (CC) O'Regan J para 326, 327.

Judge O'Regan concluded by expressing that the right to life and the right to human dignity lie at the heart of our constitutional framework.[255] Judge Sachs expressed that the Constitution is clear by the language used in the rights in question and the values enshrined that there is no room for the death penalty.[256]

The Constitutional Court emphasised the importance and inherent value attached to life. That there should be no limitation to this right except in terms of the limitation clause. That this right goes hand in hand with the right to dignity and ultimately without life there cannot be the enjoyment of any other rights. A human being should not be deprived of his or her right to life and a high level of respect must be accorded such a right. This right is a gift afforded to all. As mentioned earlier "3500 babies were abandoned in South Africa in 2010",[257] these infants are abandoned in places such as toilets, drains, sewers and gutters; rubbish sites, dustbins and land fills.[258] Very often places such as parks and the open veld are used. These infants are seldom abandoned in hospitals due to the fear of the police. Sometimes women travel to a township in order to keep their anonymity and other times infants are left on doorsteps or near train tracks.[259] Incidences of infants being left on taxis have also been reported.[260] The rights to life and dignity are threatened by each abandonment of an infant. The infant is left in a potentially life threatening environment and in an environment that infringes directly on human dignity. Abandonment in a sewer, open veld or even on a doorstep is inhumane and degrading to the life of that child. The values espoused by the Constitutional Court in respect of the right to life extends to all persons who have been born alive or having shown any sign of life and are

[255] *S v Makwanyane* 1995 3 SA 391 (CC) par 342.
[256] *S v Makwanyane* 1995 3 SA 391 (CC) para 345-392.
[257] No more recent statistics exist in respect of child abandonment in South Africa.
[258] See www.doorofhope.co.za last accessed 2020-01-30.
[259] Blackie "Fact sheet on child abandonment research in South Africa research study on Child Abandonment and adoption in the context of African ancestral beliefs in contemporary Urban South Africa" 20 May 2014.
[260] Wicks reported on 2015/12/05, a mother that left an infant on a taxi with a note, News 24 https://www.news24.com/SouthAfrica/News/please-forgive-me-moms-note-left-on-baby-abandoned-in-taxi-20161205, last accessed 2018-09-19.

therefore bearers of rights. If the death penalty deliberately annihilates life, then not implementing a system to protect life would also, in the words of Mahomed J, "amount to the destruction of the greatest and most precious gift which is bestowed on all humankind".[261] The right to life contains both a negative as well as a positive element, Kriegler J said *at the very least* it is a duty on the state not to deprive any person of his or her life.[262] The duty not to deprive anyone of life and the duty to protect life. Langa J stated that this right is applicable to all and thus according to this thesis would include the vulnerable infant. Madlala J emphasised that *ubuntu* indicates an idea of humaneness.[263] This thesis suggests it to be inhumane to be left in an open veld or toilet or drain.

One of the disadvantages in attaching a positive duty to the right to life is financial in nature. If the state is to implement certain measures to protect and preserve life, it will require the financial means to do so. It has been found that restrictive approaches to the right to life are inadmissible.[264] In the matter of *Villagran Morales v Gautemala*[265] the court recognised that the right to life includes "not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence".[266] The court went further by stating that the creation of conditions are important to ensure that infringement of this right does not occur.[267] As already dealt with above some of the positive obligations created by this right to life include the right to food, shelter, employment, water and medical care. In *Social and Economic Rights Action Center v Nigeria*[268] the African Commission on Human and Peoples' Rights dealt with the

[261] *S v Makwanyane* 1995 3 SA 391 (CC) par 265.
[262] *S v Makwanyane* 1995 3 SA 391 (CC) Kriegler J par 208.
[263] *S v Makwanyane* 1995 3 SA 391 (CC) Madlala J par 237.
[264] Wicks *The Right to Life and Conflicting Interests* (2010) 218 referring to the court in *Villagran Morales v Gautemala* Series C. No.77 (1999).
[265] *Villagran Morales v Gautemala* Series C. No.77 (1999) par 144.
[266] *Villagran Morales v Gautemala* Series C. No.77 (1999) par 144.
[267] *Villagran Morales v Gautemala* Series C. No.77 (1999) par 144.
[268] Comm. 155/96, 15th ACHPR AAR Annex V (2000-2001).

existence of both a positive as well as a negative duty on states when it comes to enforcement of rights.[269] The positive duty to ensure survival and development and the negative duty to refrain from interfering with this right. India provides a good example of positive obligations imposed on the state under the right to life. In *Maneka Gandhi v Union of India*[270] the Supreme Court of India stated that the right to life includes the right to human dignity, this was further expanded on in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*[271] where the court added a socio-economic element to the right to life by including the right to live with human dignity as part of the right to life and the bare necessities that go with this right were listed as nutrition, shelter, clothing, facilities for reading and writing.[272] Ultimately, the positive obligations created by the right to life cannot place an impossible burden on the state, as expressed in the *Soobramoney v Minister of Health Kwa-Zulu Natal*[273] where the Constitutional Court stated that the plaintiff's right to medical treatment has to be considered within the confines of budgetary constraints imposed on the state. In the matter of *Öneryildiz v Turkey*[274] the respondent state reminded the European Court of Human Rights that an impossible burden must not be placed on the state authorities without considering the best possible means of distributing resources to the important cases first.[275] However, in this case the European Court found that the preventative measures to counter the risk to life were reasonable and suitable and did not place too large of a financial burden on the state.[276] In this regard, two limits exist in respect of states claiming insufficient resources as a reason for not fulfilling the socio-economic aspect of the right to life.[277] Firstly, if the diversion of the resources are not excessive

[269] Comm. 155/96, 15th ACHPR AAR Annex V (2000-2001).
[270] 1978 1 SCC 248.
[271] 1981 2 SCR 516.
[272] 1981 2 SCR 516.
[273] 1998 (1) SA 765 (CC).
[274] 2004 ECHR 657; 2005 41 E.H.R.R. 20.
[275] 2004 ECHR 657; 2005 41 E.H.R.R. 20.
[276] 2004 ECHR 657; 2005 41 E.H.R.R. 20.
[277] Wicks *The Right to Life and Conflicting Interests* (2010) 221.

and secondly, if no policy problems are created by the diversion.[278] The Human Rights Committee regards limited resources as no excuse for failing to meet the positive obligations under the right to life.[279]

5.3 THE RIGHT TO KNOWLEDGE OF ONE'S ORIGINS: THE SOUTH AFRICAN EQUIVALENT AND ITS COMPOSITION

5.3.1 The conduct and interests of children affected by the limitation of the right to knowledge of their origins through the use of baby safes

Knowing one's origins involves discovering one's identity. Identity, which is derived from the Latin term *identĭtas* is defined as "the state of having unique identifying characteristics held by no other person or thing".[280] "Identity is what makes every human being a unique entity that can be individualized in society."[281] Furthermore, "one's genetic heritage is located within the

[278] Wicks *The Right to Life and Conflicting Interests* (2010) 221.

[279] The Human Rights Committee established under article 28 of the International Covenant on Civil and Political Rights; Wicks *The Right to Life and Conflicting Interests* (2010) 221. However this statement was made in a case (*Lantsova v Russian Federation Communication* 763/1997) where the life of the person being a detainee was directly the responsibility of the state and it was more than likely easier to fulfil the obligations in this case as it was possible that relatively inexpensive measures could have been adopted to avert the risk.

[280] Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 59-60; *The Collins English Dictionary* https://www.collinsdictionary.com/dictionary/english/identity last accessed 2020-02-10; also see Wilson "Identity, genealogy, and the social family: The case of donor insemination" 11 1997 *International Journal of Law, Policy, and the Family* 270, 272, 281-282. Wilson also supports a dynamic notion of identity, instead of a monolithic and static one, using the idea of "narrative identity" as opposed to a "fixed identity" in her discussion of the importance of genetic ties.

[281] Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 60; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 159-160 "it is about the right to know one's ancestral background, including medical and genetic information about oneself and one's biological parentage, the circumstances of one's conception, time and place of birth, and records of other events meaningful to the individual (such as when baptized and by whom)"; see Steward "Interpreting the child's right to identity in the U.N. Convention on the Rights of the Child" 26 1992 *Fam. L.Q.* 221 (226 who provides that personal identity covers a wide range of different areas of belonging, which are not only biological but also familial, social, cultural and political); see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 20.

static aspect of one's identity".[282] Origins is part of the static aspect of identity.[283] Currently in international law the trend is to recognise that the right to identity includes the right to know one's biological origins an example of this is the Universal Declaration of Human Rights for Future Generations,[284] "which includes, in Article 4, the right of persons belonging to future generations to know their personal and collective origins, identity and history".[285] Further, article 8 of the European Convention on Human Rights protects identity within the right to privacy and the Convention on the Rights of the Child, also recognises the child's right to know its origins in articles 7 and 8.[286] However, according to Diver the Convention on the Rights of the Child is much less straightforward when it comes to the recognition of the need for a genetic identity.[287] The term "parent" for instance is not defined in the Convention therefore it is

[282] Static refers to image, physical features, name, birth information, sex, parenthood, genetic heritage and nationality according to Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 60; see Leckey "Identity, law, and the right to a dream?" 38 2 2015 *Dalhousie Law Journal* 525-548, 543, where the author discusses the case of *Pratten v British Columbia* (Attorney General), 2011 BCSC 656, [2011] 10 WWR 712 [Pratten], rev'd, 2012 BCCA 480, 357 DLR (4th) 660, leave to appeal refused, [2013] 2 SCR xii, where the case focuses on a genetically fixed identity not taking into account that genetic connection is a social process.

[283] Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 61; The right to an identity does not stop at childhood but extends to adults as well, see Eekelaar "The importance of thinking that children have rights" in Alston, Parker and Seymour (eds) *Children, Rights and the Law* (1992) 234.

[284] Paris 22 September 1994.

[285] Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 67.

[286] According to Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 81 aa 7 and 8 emphasize the significance of "family relations" yet it fails to provide a definition on what constitutes relatedness; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 178, highlights the tension between the UNCRC and the ECHR. The UNCRC makes the child's interests a primary consideration and therefore establishes a hierarchical relationship between the interests of the child and parents (see Besson "Enforcing the child's right to know their own origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int'l J.L. Pol'y & Fam.* 137) whereas the ECHR has a more balanced approach; also refer to the decision of *Jäggi v Switzerland* 58757/00 [2006] ECtHR 13 July 2006, (2008) 47 E.H.R.R. 30; further see Guerra "European Convention on Human Rights and family life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see van Raak-Kuiper *Koekoekskinderen en het recht op afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).

[287] Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties : The "Right" to Access Genetic Ancestry* (2014) 77-102, 81, the author states that "it does not create a clear duty actively to protect or enforce identity rights, however, but seems at least to express support for the psychological benefits that attach to having knowledge of one's familial origins."; see also Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 188.

uncertain whether it refers to the child's right to know his or her legal, adoptive parents or his or her biological parents.[288] However, the UN Committee on the Rights of the Child has indicated that both biological and legal parents are included under article 7 of the Convention and has used this assertion as the grounds for recommending that state parties ensure that children know their birth parents.[289] Giroux asserts that recognition of the right to identity of a child is always in the best interests of a child, best interests and identity are not irreconcilable.[290] Having no knowledge[291] of one's origins occurs not only with the use of baby safes but in artificial insemination and adoption matters, therefore a lot of the work on the knowledge of

[288] Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 188.

[289] Concluding Observations: France (30 June 2004) CRC/C/15/Add.240, [23]); also see Fenton-Glynn Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 188-189; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 9 where the author points out that a 7(1) of the UNCRC has not been given an absolute character because of the use of the words "as far as possible".

[290] Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 71-72; Ziemele "Article 7: The right to birth registration, name and nationality, and the right to know and be cared for by parents" in Ziemele *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 26-27; Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 97-112. With respect to the relations between the expression "as far as possible" and "the best interests of the child" principle, there are two different views. "While some authors defend the idea that the limitation should be read in accordance with Article 3, others state that it does not refer to the best interests of the child. The risk of subscribing to the first theory is that it is too subjectivist and could deny the right of the child to know his or her own origins." Ziemele explains that although all circumstances need to be weighed, "an absolute prohibition on the right to know biological parents is contrary to the UNCRC". "On the other hand, some authors maintain that Article 7 does not make reference to the best interests of the child and that the expression 'as far as possible' appear[s] to provide a much stricter and less subjective qualification than the former, and that [t]he words imply children are entitled to know their parentage if this is possible, even if this is deemed to be against their best interests." "An intermediate position, such as the one explained above, states that although there is a close relationship between the best interests of the child and the right to identity, the principle of Article 3 cannot be used as an excuse to refuse the recognition of the right to identity, which is a fundamental right."; For a contrary opinion see Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 235-236 where the expert opinions of Golombok, Jadva and Rodrigues are discussed and indicate that speculation has been replaced by empirical evidence and has resulted in the finding that there is no negative impact on the psychological well-being of the child in not knowing his or her origins and thus is not in the child's best interests; also see Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.

[291] "Knowing" according to Giroux does not necessitate a social relationship between the child and his or her biological parents. Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 63; see Richards "Assisted reproduction and parental relationships" in Bainham et al (eds) *Children and their Families: Contact, Rights and Welfare* (2003) 309. Richards points out that the circumstance of "[k]nowing the manner of your conception and the identity, and perhaps some other information, about the gamete provider is not, of course, the same thing as having a social relationship with that person".

one's origins will overlap from investigations conducted into adoption, artificial insemination and donor-conceived children.[292] A lack of this knowledge has the same effects on children whether he or she was conceived naturally and then abandoned or whether he or she was artificially conceived.[293] The effects of not knowing one's origins are the same for children across the board. The main difference between artificial insemination, adoption and abandonment is that through abandonment the information about a child's genetic origins is predominantly unknown and here it will not be factually possible for the child to know his or her biological parents much less be cared for by them as stated in articles 7 and 8 of the UNCRC.[294] Whereas in instances involving artificial insemination and in some cases of adoption, such information is readily available but access thereto is restricted.[295] Various questions posed by O'Donovan find relevance here.[296] These concern the need to know one's genetic parentage such as: "why is there a desire to know genetic origins? What are the legal, cultural and economic significances attached by particular societies to knowledge of biological parentage?[297] Are there societies in which social parenthood is differentiated from biological

[292] For more on children conceived through artificial insemination and their right to an identity see Drăghici, Didea and Duminică "The right of children to know their parents — a constitutive element of the child's identity" 2013 *Acta U. Danubius Jur.* 115.

[293] Diver "Conceptualizing the 'right' to avoid origin deprivation: international law and domestic implementation" in Diver (ed) *A Law of Blood-Ties : The "Right" to Access Genetic Ancestry* (2014) 87 says "The psychological aspects of being deprived of genetic origin are likely to be similar, irrespective of how biological kinlessness might have arisen."; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 172-173, "forty-six percent of parents fail to disclose to their child the truth of his or her conception. A large number of donor conceived children will be left ignorant of the circumstances" surrounding their birth and will not be able to effectively exercise their identity rights; see also Golombok et al "Families with children conceived by donor insemination" 73 2002 *Child Dev.* 952; also see Cook "Villain, hero or masked stranger: ambivalence in transaction with human gametes" in Bainham et al (eds) *Body Lore and Laws* available at https://it.b-ok2.org/book/986070/0c31cd last accessed 2019-11-29; Maclean and Maclean "Keeping secrets in assisted reproduction — the tension between donor anonymity and the need of the child for information" 8 1996 *Child & Fam. L.Q.* 243.

[294] Giroux and De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 74; This factual impossibility can only be eliminated if measures are put in place to secure information from the mother before she relinquishes her child – this is more the case with safe haven laws and confidential birth but not through the use of baby safes.

[295] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 28.

[296] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 28.

[297] Blackie describes that a lack of knowledge of biological parentage can impact on a person's ability to define who he or she is and where he or she belongs. This is especially true in the African community where there is a link to biological ancestors and an identity can only be attributed once paternal lineage is determined and appropriated. Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (Masters Dissertation,

parenthood?"[298] Knowledge of one's origins is seen as an important component of one's psychological balance.[299] Having no knowledge of one's origins is said to amount to discrimination by comparison to children who have this knowledge.[300] Furthermore, individuals have an interest in knowing their medical history and in ascertaining legal rights such as inheritance rights.[301] At the root of rights are interests[302] this in terms of the "interest theory" explains that having a right is having an interest protected by imposing legal and moral normative constraints on the actions of others with respect to the object of that interest.[303] The following are some of the interests involved in the right to know one's origins.[304] Firstly, there is an interest in identity, without this knowledge one is said to be uprooted from one's natural

University of Witwatersrand 2014); Stevens "Who I come from" in Guichon, Giroux and Mitchell *Right to Know One's Origins: Assisted Reproduction and the Best Interests of Children* (2012) 31, available at ProQuest E-book Central, http://ebookcentral.proquest.com/lib/ujlink-ebooks/detail.action?docID=3115807.

[298] For more on this see Amorós "Biology-based systems of parentage and safety valves protecting social parenting" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 123, where the author states that the attribution of parental responsibility or certain parental rights to persons other than legal parents is not an original suggestion; also see Vonk "De autonomie van het kind in het afstammingsrecht" 2010 10 (open access version via Utrecht University repository) where the author discusses bringing legal reality in line with biological reality by establishing biological parenthood and also discusses the instances in Dutch law where the biological parent also becomes the legal parent upon the request of the child. However, it is not possible to bring biological reality in line with legal reality where the father is a sperm donor see at 10, very few men would come forward to be donors if later legal fatherhood could be established. According to the author, the position of the child in Dutch law is in line with the development perspective, where the independence of the child is increasingly recognised, but the position of the child is also influenced by the care perspective where the child is being presented in view of his or her relationship to others; also see Vonk "Weten, Kennen en Erkennen: Kinderen van ouders die niet samen zijn" Vol. 38 No. 4 2013 *Nederlands tijdschrift voor de mensenrechten* 515-531.

[299] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 140; O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 37-39; Eekelaar *Family Law and Personal Life* (2006) chapter 3; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see Van Raak-Kuiper *Koekoekskinderen en het recht op afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).

[300] Besson "Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 140; O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 37-39; Eekelaar *Family Law and Personal Life* (2006) chapter 3; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009); further see Van Raak-Kuiper *Koekoekskinderen en het recht op afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).

[301] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 29-36; Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273, 277-279.

[302] MacCormick *Legal Right and Social Democracy* (1982) 154.

[303] MacCormick *Legal Right and Social Democracy* (1982) 154.

[304] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 29.

geographical; social or cultural environment. Secondly, knowledge of one's medical history[305] so as to avoid the possibility of marriage within the prohibited degrees of consanguinity[306] and lastly a material interest in attaining the right to inheritance. Of these three, the first is said to have the greatest importance.

Warnock, referring to children created by donor insemination, expresses: "I cannot argue that children who are told their origins…are necessarily happier, or better off in any way that can be estimated. But I do believe that if they are not told, they are being wrongly treated."[307] This clearly illustrates doubt as to the value inherent in telling a child about his or her origins, wrongful treatment is insufficient to support an argument for disclosure. Freeman states that at the root of this wrongful treatment is deception and points out what Bok has stated that those who learn that they have been lied to in an important matter are resentful, disappointed, and suspicious and feel wronged.[308] Feelings of genealogical insecurity can arise in children who do not know who one or both their parents are.[309] According to Sants "a genealogically bewildered child is one who either has no knowledge of his natural parents or only uncertain knowledge of them", this undermines the child's sense of security and affects his or her mental health.[310] Leighton opposes this view held by Sants by stating that there is a violence that comes

[305] This has been dealt with in par 5.1 above where it was proven that a lack of such knowledge will not severely impact or change health related behaviours of individuals.
[306] For more on this see South African Law Reform Commission Draft Issue Paper 32 Project 140 "The Right to Know One's Biological Origins" 20 May 2017 36 para 2.91-2.94.
[307] Warnock "The good of the child" Vol. 1 No. 2 1987 *Bioethics* 141, 151; Thaldar (2018) "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 235-236, reference is made to the expert opinion of Professor Susan Golombok, director of the Centre for Family Research, Cambridge University, United Kingdom who testified in the *AB* case that: "The presence or absence of a genetic link between a parent and child in the context of surrogacy does not appear to have an effect on the child's psychological well-being." Further, both experts in the *AB* case, Golombok and Rodrigues agree that a positive parent-child bond does not require a genetic parent-child link.
[308] Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 288; Bok *Lying: Moral Advice in Public and Private Life* (1978) 21.
[309] Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 288.
[310] Sants "Genealogical bewilderment in children with substitute parents" 37 1964 *British Journal of Medical Psychology* 133-140, 133; also see Humphrey and Humphrey "A fresh look at genealogical bewilderment" 1986 *British Journal of Medical Psychology* 59, 133-140; Freeman *The Moral Status of Children: Essays on the Rights*

from the belief in heredity, it comes from seeking to keep one within his or her own family or tradition.[311] Leighton considers it an endeavour for separateness and not so much for the knowing of one's origins.[312] According to studies, there is no evidence to show that donor-conceived children suffer from genealogical bewilderment, on the contrary there are no noteworthy differences between the socio-emotional adjustment of donor-conceived children and those children that are naturally conceived.[313] If it can be said that information about one's genetic origins is not required for the formation of a healthy identity, then it is submitted that no right to claim knowledge of one's origins exists on this basis.[314]

Identity provides some anticipated shape to future life and is the structure within which the past and present are held together.[315] Freeman argues that the right to an identity is the right not to be deceived about one's true origins.[316] Warnock negotiates that one should at least have access

of the Child (1997) 185-212; for an opposing view on genealogical bewilderment see Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107 who states that upon a closer look at the text on genealogical bewilderment it is clear that it is based on a particular view of what a good family should look like.

[311] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107, 92-93; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 7 where the author refers to the criticism expressed by French Scholars on the right to know one's genetic origins that such right to know, originates in a racist and eugenic concept of identity.

[312] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107, 92-93.

[313] Golombok et al "Children born through reproductive donation: a longitudinal study of social adjustment" 54 (6) 2013 Jun *Child Psychology Psychiatry and Allied Disciplines* 653-60; Freeman and Golombok "Donor insemination" 2012 *Reproductive Biomedicine Online*; Blake et al "'Daddy ran out of tadpoles': How parents tell their children that they are donor conceived, and what their 7-year-olds understand" 25 2010 *Human Reproduction*: 2527-34; South African Law Reform Commission Draft Issue Paper 32 Project 140 "The Right to Know One's Biological Origins" 20 May 2017 29 par 2.66 provides that this does not mean that none of the donor-conceived children suffer because of a lack of information to origins but the evidence does not show that to forge a healthy identity, such information is necessary.

[314] South African Law Reform Commission Draft Issue Paper 32 Project 140 "The Right to Know One's Biological Origins" 20 May 2017 30 par 2.68 provides that to develop an adequate identity depends on social conditions such as education, love etc. and these conditions are available to donor-conceived children; see also Haslanger "Family, ancestry and self – What is the moral significance of biological ties?" in Haslanger *Resisting Reality: Social Construction and Social Critique* (2012) at 158-181 ; The Law Reform Commission also goes on to state that deemphasizing the value of genetic information could assist in donor-conceived children developing a healthy sense of self.

[315] Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 290.

[316] Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 291.

to information concerning one's ethnic origin and genetic health[317] but Freeman states that that is offering too little information.[318] Triseliotis states that in order to feel complete and whole it is important to "know one's background, genealogy and personal history", that it is in fact a psychological need in all people.[319] "The idea of the importance of blood ties and genes is common to most people and they feel profoundly deracinated if brought up with no knowledge of their blood origins."[320] This implies that biological origins must be known for psychological health and the need to know is universal.[321]

The question in this instance is whether the "right" to knowledge of one's origins should be extended to children abandoned in a baby safe? O' Donovan is of the opinion that it should be extended, in instances of adoption, donation and surrogacy, as it is of sufficient importance in terms of a psychological interest in identity,[322] but does not make mention of abandoned children and whether it can be extended to them. It may be damaging to the child's concept of self to find out very late in life about his or her genetic origins.[323] On the other hand, such knowledge may infringe the parents' desire for secrecy or privacy. The question whether it is in the best interests of the child to know his or her origins is contentious. It might be argued that, in the short-term, children require security and that keeping such information a secret will ensure this.[324] However, deceiving the child can cause harm to the relationship between the

[317] Warnock *A Matter of Life* (1985) par 4.13.
[318] Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 291.
[319] Triseliotis "Obtaining birth certificates" in Bean (ed) *Adoption* (1984) 38.
[320] Tonybee *Lost Children: The Story of Adopted Children Searching for Their Mothers* (1985) 196; O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 31.
[321] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 31.
[322] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 34.
[323] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 34; But what about the psychological difficulties experienced by the mothers who are in denial about the pregnancy until sometimes the moment when the child emerges from her body and in these cases the sudden discovery of the newborn invokes psychological distress and panic and might lead to the killing of the baby; see Bonnet "Adoption at birth: Prevention against abandonment or neonaticide" 17 1993 *Child Abuse & Neglect* 501, 505; also see Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" 2012 Vol 13 *Theoretical Inquiries in Law* 153, 163.
[324] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 37.

social parents and the child, causing the child to lose trust and confidence in them.[325] Bok puts forward commanding arguments for truthfulness and says that deceit is a form of deliberate assault on a human being and the "deceiver fails to respect the moral personality of the deceived".[326] What are the justifications for deception? The justification advanced is paternalistic in nature that the deceiver knows what is better for the child than the child him or herself.[327] Truth is based on the idea of personal identity, while deception is based on the welfare of the child.[328] Informing the child that he or she was abandoned is one aspect, but having the information available to inform the child who his or her genetic parents are is quite another.

With each right there is a correlative duty. Should the right to knowledge of origins become a legally recognised right in South Africa, a correlative duty of disclosure will exist. A duty of disclosure would in this instance be on the mother who is abandoning the child, and such imposition may cause the mother to opt for unsafe methods of abandonment instead of a rigorously regulated method where disclosure is a prerequisite. In a normal birth situation, parents are obligated to register a birth certificate within 30 days of the child's birth.[329] The parents have no right to privacy in that instance, therefore it could be argued that the mother in abandonment cases should have no right to privacy.[330] It is however important to distinguish between the circumstances surrounding a normal birth and the circumstances surrounding a birth where the mother opts to abandon. Due to the differing circumstances, sometimes life threatening circumstances for both mother and child, it would be safe to accord such a mother

[325] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 37.
[326] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 37-38; Bok *Lying: Moral Advice in Public and Private Life* (1978) 18-22.
[327] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 38.
[328] O'Donovan"A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 27, 39.
[329] s 9(1) Births and Deaths Registration Act 51 of 1992.
[330] The mother's right to privacy will be discussed extensively hereunder and weighed against the child's right to knowledge of its origins.

with the right to privacy in terms of section 14 of the Constitution.[331] If indeed the mother is compelled to leave her identifying information, she should not be compelled to disclose information about the father she might not even have. How this affects the father will be discussed in the next chapter.[332] Triseliotis showed the harm that is done when a child is denied access to or knowledge of his or her true identity. In respect of adoption he stated that the less information that was revealed about the adoptees' origins, the greater the problems for the adoptee.[333] Knowing is for the proper development of a sense of identity.[334] The "ability to cope satisfactorily with different life situations or to enter into relationships with others is largely dependent on the strength and quality of the individual's identity".[335] The opposite of this identity, according to Triseliotis, is a sense of isolation or emptiness.[336] Knowing one's origins is said to be for the purpose of completing one's self-image. The majority of adoptees searching for their origins painted a general picture of sorrow, inner pressures and concerns therefore making coping with different life situations a great struggle.[337] Although criticised by the minority judgment in *AB and Another v Minister of Social Development*[338] the Centre for Child Law (*the Centre*) pointed out that section 294 of the Children's Act is a clear

[331] See section to follow on where the mother's right to privacy is weighed against the child's right to knowledge of his or her origins.
[332] See chapter on fathers' rights; also see Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 185-197 where the authors discussed the power of the mother to unilaterally decide to exclude the father from the child's life, this has been said by some to be part of the reproductive rights of the mother; see Chambers who suggests that an unfettered right of a mother to give a newborn child up for adoption is an essential component of a mother's autonomy and dignity, which should be exercised exclusively. Chambers argues that if the mother is required to obtain the permission of the father, she may instead choose to abort the child; in this respect see Chambers "Newborn adoption: birth mothers, genetic fathers, and reproductive autonomy" 26 2010 *Canadian Journal of Family Law* 339, 343-345.
[333] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 36, 54-55; Steward "Interpreting the child's right to identity in the U.N. Convention on the Rights of the Child" 26 1992 *Fam. L.Q.* 221, 227-228; Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 8.
[334] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 3; A differing opinion is one of Ansfield "The adopted child" in Ansfield *The Adopted Child* (1971) 18, a psychiatrist that urges parents not to tell children for the fear of hurting them. He provides that there is no reason to believe that children are better off if they are told.
[335] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 80.
[336] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 81.
[337] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 82.
[338] 2017 3 BCLR 267 (CC).

indication that the provision is aimed at regulating the genetic origin of children born of surrogate motherhood agreements to ensure their best interests are promoted and this is because children are entitled to know their genetic origin.[339] The Centre went on to state that there is a need for genetic link between a child and at least one parent. This is important for the self-identity and self-respect of a child and the harm that could result if this is not respected is "unquestionably, all important".[340] The Centre had two assertions based on the statement that "it is better to not be born at all, than to be born without being able to determine the identity of one's genetic parents": (a) It is better not to be born into a psychologically harmful situation, given the choice one would rather not be born at all and (b) to be born without being able to determine who one's genetic parents are is to be born into a psychologically harmful situation.[341]

[339] *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) par 153 and see para 154-166; see also Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 231-253; Van Niekerk "Assisted reproductive technologies and the right to reproduce under South African Law" (20) 2017 *PER / PELJ*.

[340] *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) par 153; This was refuted in *AB* by the expert opinions of Golombok as well as Jadva who provided the following insight regarding identity and not knowing one's genetic origins: "Identity formation happens gradually throughout childhood and especially during adolescence. Multiple factors in a child's environment have an 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", see Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 231-253, 239. Thaldar draws the conclusion that although not knowing one's genetic origins may complicate identity formation, it is unlikely to cause psychological harm to a child. Therefore, the best interests of the child cannot be said to require that a child must know his/her genetic origins, Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 231-253, 239-240.

[341] *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) par 188; "In support of this premise, the Minister relied on an ethical expert opinion by Professor Donna Knapp van Bogaert, an ethics expert at the University of Limpopo. Van Bogaert's expert opinion comprised four parts; part II dealt with the best interests of the child. The essence of the opinion in part II is that knowing one's genetic origins – the identity of one's genetic parents – is critical for a child's identity. Van Bogaert went as far as stating that it is immoral to intentionally create a child who will not know the identity of both genetic parents" in Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 238; She was found not to be an expert in the field of psychology. Her evidence was later rejected, along with those of the other experts (although this thesis submits that the rejection of the evidence of Golombok, Jadva and Rodrigues was done erroneously); see *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) par 269; Van Bogaert expert opinion part II (revised version) (*AB* record 2577-2595).

According to the minority judgment none of these assertions were proven.[342] Firstly, the academic article relied on by the Centre for Child law by Frith concludes "[a]t present, perhaps all that we can say is that it is not possible to reach any definite conclusions about the effects of secrecy and anonymity on the [psychological] welfare of donor offspring"[343]. Golombok and Jadva provide that it has been empirically proven that no psychological harm is caused to a child who does not know his or her genetic origins.[344] In terms of the studies conducted these children (referring to donor-conceived children who had not been told about their genetic parentage) were no more likely than adopted children who were told about their origins and IVF children (all of whom were genetically related to both parents) to show emotional or behavioural problems or a reduced awareness of their capability or social recognition.[345] Some studies find that children who knew the circumstances of their birth show greater adjustment difficulties.[346] The South African Law Reform Commission makes the argument:

> "If it is not clear that nondisclosure harms children's interests in strong family relationships and if secret-keeping in general has not been shown to be prima facie wrong, then giving parents

[342] *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) para 203-207; see fn 176 for opposing views from Witt.

[343] Frith "Gamete donation and anonymity: The ethical legal debate" 16 2001 *Human Reproduction* 821.

[344] This will be discussed in more detail in the sections to follow; see Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 231-253, 235-236; The opinions of these experts are referred to despite the fact that the court in *AB v Minister of Social Development* rejected these opinions erroneously as being divergent; see par 269 fn 245. Thaldar provides that they are in fact unanimous and not divergent, see 250. Thaldar goes on to state that independent evaluation does not mean wilful ignorance of the evidence at hand; Jadva expert opinion at par 8 (*AB* record 1799 and 1794-1824); Rodrigues expert opinion at para 9 (*AB* record 2561); Golombok expert opinion (*AB* record 737-745); Golombok et al "The European study of assisted reproduction families: The transition to adolescence" 17 2002 *Human Reproduction* 830-40; Golombok et al "Children born through reproductive donation: A longitudinal study of psychological adjustment" 54 2013 *Journal of Child Psychology and Psychiatry* 653-60; Lycett et al "Offspring created as a result of donor insemination: a study of family relationships, child adjustment, and disclosure" 82 2004 *Fertility and Sterility* 172-79; for an opposing view see McGee et al "Gamete donation and anonymity: Disclosure to children conceived with donor gametes should not be optional" 16 2001 *Human Reproduction* 2033-36, where the authors state that withholding the truth about donor-conceived children's mode of conception is likely to have negative consequences on family relationships; Imber-Black *The Secret Life of Families: Truth-Telling, Privacy, and Reconciliation in A Tell-All Society* (1998) argue that non-disclosure can produce family tensions such as anxiety, loneliness, stress and self-doubt.

[345] Golombok, Murray, Brinsden and Abdalla "Social versus biological parenting: Family functioning and socioemotional development of children conceived by egg or sperm donation" 40 1999 *Journal of Child Psychology and Psychiatry* 519, 526.

[346] Golombok et al "Children born through reproductive donation: A longitudinal study of psychological adjustment" 54 2013 *Journal of Child Psychology and Psychiatry* 653-60.

> the power to decide whether and when to disclose the use of a donor seems consistent with the value that we assign to parental autonomy."[347]

Furthermore, it was found that the absence of a genetic and or gestational link between parents and their child does not appear to jeopardise the development of positive family relationships.[348] Professor de Melo-Martin provides that these arguments show that the failure to disclose does not negatively affect people's interests in strong family-relationships and therefore promoting such interests does not require disclosure.[349] In the same way if non-disclosure has not shown to negatively impact family relationships then giving the mother the power to decide to stay anonymous after relinquishing her child through a baby safe proves to be consistent with her parental autonomy. Furthermore Golombok *et al* has confirmed that the theory that "children who were unaware of their biological origins would show higher levels of adjustment problems was not supported".[350] The reason advanced for the discrepancies in the findings of different authors as stated above, suggest that children born through egg and sperm donation do not suffer the loss of an existing parent as adopted children and do not have to form relationships with new family members.[351] Consequently, psychological problems can

[347] South African Law Reform Commission Draft Issue Paper 32 Project 140 "The Right to Know One's Biological Origins" 20 May 2017 23 par 2.33

[348] In Jadva, Murray, Lycett, MacCallum, Golombok and Rust "Non-genetic and non-gestational parenthood: Consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3" 21 2006 *Human Reproduction* 1918, 1923 it was found that the absence of a genetic and or gestational link between parents and their child does not appear to jeopardize the development of positive family relationships.

[349] de Melo-Martín "The ethics of anonymous gamete donation: is there a right to know one's genetic origins?" 44 2014 *Hastings Center Report* 1-8; With donor-conceived children there is a difference between disclosure and anonymity. In fact the method used to conceive may be disclosed but the anonymity of the donor may remain, this has not damaged family functioning according to Freeman and Golombok "Donor insemination: A follow-up study of disclosure decisions, family relationships and child adjustment at adolescence" 25 2012 *Reproductive Biomedicine Online* 193-203.

[350] Golombok, Blake, Casey, Roman and Jadva "Children born through reproductive donation: A longitudinal study of psychological adjustment" 54 2013 *Journal of Child Psychology and Psychiatry* 653, 657.

[351] Golombok, Murray, Brinsden and Abdalla "Social versus biological parenting: Family functioning and socioemotional development of children conceived by egg or sperm donation" 1999 40 *Journal of Child Psychology and Psychiatry* 519 at 526; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 8 and 18; for more on this see Brodzinsky and Schechter *The Psychology of Adoption* (1990).

result from experiences of the child leading up to adoption as opposed to psychological problems being as a result of the child not knowing his or her origins.

Finally but most importantly, the purpose of baby safes have to be measured against the purpose for knowing one's origins. Baby safes are aimed at saving the lives of newly born abandoned babies, whereas knowing one's origins is aimed at having a sense of belonging and identity although the absence of these cannot be said to permanently affect one's psychological well-being. In view of the above, the right to life must prevail.

5.3.2 The rights in the Bill of Rights that protect the conduct and interests relating to the knowledge of one's origins

"All rights in the Bill of Rights protect certain conduct and interests of the bearers of the right. All the rights in the Bill of Rights impose legal duties on those who are bound by the rights."[352] By interpreting the relevant provisions of the Constitution the conduct and interests protected by a right and the duties imposed will be determined.[353] Except when they are expressly excluded from being bearers,[354] children are the bearers of all rights in the Bill of Rights.[355] Apart from a few specific restrictions, every child has the same protections in the Bill of Rights as his or her adult counterpart.[356] The child as described in the previous section has feelings of sorrow, emptiness or isolation and also has an incomplete self-image without information about his or her origins. The right to knowledge of one's origins is not expressly guaranteed in the constitution of South Africa, neither is the right to an identity. However, in the matter of *AB*

[352] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 277.
[353] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 277.
[354] Such as the right to vote s 19 of SA Constitution (the right to freedom of association).
[355] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 445; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 12 BCLR 1429 (CC), 2014 2 168 (CC) par 38.
[356] *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 CC par 52; These restrictions include the right of every adult citizen to vote and to stand for public office in s 19(3), the specific rights of workers and employers in s 23, and the rights of detained, arrested and accused persons in s 35.

and Another v Minister of Social Development[357] the Minister reframed the best interests of the child narrative by stating that the purpose of section 294 is to safeguard the child's right to know his or her genetic origins.[358] Section 294 provides:

> "Genetic origin of child.—No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

The High Court in the *AB* case held that there is no persuasive opinion that it is necessarily in the best interests of the child to know the identity of his or her genetic parents and that a lack of such knowledge would have an effect on the child's psychological well-being.[359] As a result the High Court declared section 294 unconstitutional.[360] However, the majority of the Constitutional Court held that section 294 is constitutional and thus upheld the right to knowledge of one's biological origins as serving the best interests of the child.[361] Whereas the minority of the court rejected the right to knowledge of one's genetic origins in section 294. The majority however decided that "clarity regarding the origin of a child is important to the self-identity and self-respect of the child".[362] This thesis does not agree with the majority

[357] In *AB v Minister of Social Development* 2017 3 BCLR 267 (CC), 2017 3 SA 570 (CC).
[358] Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 237.
[359] High Court Judgment *AB v Minister of Social Development* [2015] 4 All SA 24 (GP) par 85.
[360] High Court Judgment *AB v Minister of Social Development* [2015] 4 All SA 24 (GP) para 84 and 106.
[361] In contrast to the High Court's opinion that there was no persuasive evidence before the court to indicate that the child knowing his or her genetic origins is necessarily in his or her best interests, see par 84; also see Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.
[362] *AB v Minister of Social Development* 2017 3 BCLR 267 (CC), 2017 3 SA 570 (CC) par 294; In contrast to what was decided in *Odièvre v France* where Judge Greve, who stated that at prenatal stage the rights of the child and the mother converge, held that it is in the best interests of the child to be born in a safe environment, without putting either the child or the mother's life in jeopardy, regardless of the future repercussions. In response to the system of anonymous birth Judge Greve held: "The primary interest of the child is to be born and born under circumstances where its health is not unnecessarily put at risk by birth in circumstances in which its mother tries to secure secrecy even when that means that she will be deprived of professional assistance when in labour", see 86. This opinion is not shared by Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in*

opinion of the Court on the basis that various expert opinions, proving that the child suffers no psychological harm in not knowing its genetic identity, were disregarded by the Court.[363]

Since the right to knowledge of one's origins is not specifically recognised or protected in the Bill of Rights, the question that will be answered in this section is whether the various other rights afforded in the Bill of Rights protect the right to knowledge of one's genetic origins.[364] These rights are discussed below, followed by the limitation of these rights by the right to life.

5.3.2.1 Section 12 – "The right to freedom and security of the person"

> "(2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) To make decisions concerning reproduction;
>
> (b) To security in and control over their body; and
>
> (c) Not to be subjected to medical or scientific experiments without their informed consent."

Section 12(2) defines the ambit of the right to security of the person to include protection of physical integrity and, psychological integrity.[365] "Integrity" includes ideas of self-determination and autonomy.[366] Therefore, the right to control over one's body includes control

Europe: Developments, Challenges and Opportunities (2014) 191-196, who contends that mothers should not be placed in the position to have to make a choice between the child's safety and its right to knowledge of its origins.

[363] See *AB v Minister of Social Development* 2017 3 BCLR 267 (CC), 2017 3 SA 570 (CC).par 269 fn 245; In this respect also see Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 235-236 who shares this opinion.

[364] Taking into consideration what was said by Leckey that this "right to know one's origins" of which the content, basis or limits are unknown is more a norm or element of discourse than a legal right; see in this regard Leckey "Identity, law, and the right to a dream?" 38 2 2015 *Dalhousie Law Journal* 525-548, 543; Germany, however has established the right to knowledge of one's origins, which is founded on the constitutional regulation of the general personality right ("allgemeine Persönlichkeitsrecht"), which was laid down as the right to the free development of personality ("Recht auf die freie Entfaltung seiner Persönlichkeit" a 2(1) Grundgesetz), and combined with the principle of the dignity of the human person ("Menschenwürde" a 1(1) Grundgesetz); see Reis "The right to know one's genetic origins: Portuguese solutions in a comparative perspective" 5 2008 779-799, 781-782.; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 101 for more on the German law on the right to knowledge of origins.

[365] Currie and De Waal *The Bill of Rights Handbook* (2013) 286-289; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 359-374.

[366] Currie and De Waal *The Bill of Rights Handbook* (2013) 288; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 359-374; In *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) , 2017 3 SA 570 (CC) para 82-89 it was held in the minority judgment that the exclusion by s 294 of the Children's Act 38 of 2005 of surrogacy agreements when the commissioning parents do not contribute gametes for fertilization can

over one's mind.[367] The right of security of the person protects both the right to the physical as well as the psychological integrity of the person.[368] The right to psychological integrity as pointed out by Currie and De Waal includes control over one's mind.[369] In *AB and Another v Minister of Social Development*[370] the question the Court had to deal with was whether section 294 of the Children's Act 38 of 2005 limits AB's rights to psychological integrity in terms of section 12(2), human dignity, equality, privacy, access to reproductive healthcare and therefore whether it was constitutional. Section 294 recognises the conclusion of an agreement with a surrogate mother in terms of which the latter will carry on a pregnancy to term for the intended parents. The section creates "a genetic link requirement" which entails that: "no surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents; or if that is not possible due to biological, medical or other valid reasons, by the use of the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

aggravate the psychological harm caused by the infertility of commissioning parents and that this limitation of the right to psychological integrity could not be justified in terms of the general limitation clause.

[367] Currie and De Waal *The Bill of Rights Handbook* (2013) 288; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 359-374.

[368] *R v Morgentaler* 1988 44 DLR 4th 385.

[369] Currie and De Waal *The Bill of Rights Handbook* (2013) 288.

[370] 2017 3 BCLR 267 (CC). This case concerned s 294 of the Children's Act 38 of 2005 that regulates surrogacy agreements. The first applicant was a woman with a permanent and irreversible condition which prevented her from becoming pregnant. She had been trying unsuccessfully for 14 years to have a child. But for the provisions of s 294 of the Act, a surrogate motherhood agreement would be an option that would enable her to have a child. In terms of s 294 no surrogate motherhood agreement is valid except by the use of the gametes of both commissioning parents; or if that is not possible due to biological, medical or other valid reasons, by the use of the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person. Because the first applicant was unable to donate her own gametes and was furthermore not involved in a sexual relationship with a person who was able to make such a contribution, the provisions of s 294 absolutely precluded surrogacy as an option for applicant to become a parent. High Court having found that genetic link requirement contained in s 294 infringes upon several human rights of commissioning parents High Court having declared provision inconsistent with the Constitution and invalid. The Constitutional Court declining to confirm declaration of invalidity. Although this case deals with surrogacy the court deals extensively with the right in s 12(2) to psychological integrity and it is this aspect of the judgment that will be explored here.

The minority of the Court found that the analysis of freedom in *Ferreira v Levin NO and others*[371] "as ordinarily a protection against physical impediment does not accord with section 12(2)'s explicit focus on integrity and in particular psychological integrity".[372] Section 12(2) introduces a new freedom right comparable to those detailed elsewhere in the Bill of Rights.[373] Section 12(1) and 12(2) share the purpose of protecting particular freedoms.[374] Section 12 is a mix of freedom and security rights, brought together because both sets protect a person's ability to lead their lives without being subjected to certain constitutional restrictions – that is why they are placed under the same heading.[375] Section 12(1) protects specific physical freedoms (incursions into the physical domain of individuals and provides procedural and substantive protection for any deprivation of physical liberty) along with a residual right to protect freedom more generally in exceptional instances, however, section 12(2) is a free standing freedom right that should be interpreted broadly on its own terms.[376]

According to the court freedom means more than just physical liberty, therefore section 12(2) protects "the right to bodily and psychological integrity".[377] Section 12(2) was defined in the Court's judgment as not being limited to preserving abortion rights but rather the section was interpreted to include all instances where bodily or psychological integrity of a person is harmed.[378] These infringements can take a number of forms but should be interpreted within the general rubric of "freedom and security of the person".[379] Section 12(2) emphasises whether a law or conduct deprives a person of freedom or security broadly understood.[380] This

[371] 1996 1 BCLR 1 (CC).
[372] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC), Khampepe J par 60.
[373] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC), Khampepe J par 60.
[374] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 61.
[375] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 61.
[376] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 63.
[377] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 65.
[378] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 66.
[379] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 66.
[380] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 66.

general guiding principle is wider than "freedom and security of the person" protected by section 12(1) as it incorporates considerations of bodily and psychological integrity.[381] The drafting history of section 12(2) illustrates that it was not until later on that the protection afforded by this section was extended to include "bodily and psychological integrity".[382] This change in language shows a shift from only providing protection to a person's *corpus* to one that acknowledges that people's lives are multifaceted and therefore bodily as well as psychological protections are necessary.[383] This shift in language builds on the recognition in our common law that a person's psychological integrity can also be harmed in various ways and harm cannot only be limited to bodily harm.[384] In *NM and others v Smith and others (Freedom of Expression Institute as amicus curiae)*[385] the Court described the harm that emerges from the psychological stress caused by the removal of the applicant's choice to disclose medical information, with subsequent damaging effects.[386] Disclosing this information without permission from the affected person would amount to an assault on their psychological integrity.[387] Continuing with the Court in *AB* the minority went on to provide that bodily and psychological integrity are two different concepts, although a single infringement of section 12(2) may speak to both aspects.[388] However, another act may challenge only the psychological integrity of the affected person.[389] Whether the psychological integrity of a person has been harmed is a subjective question, as people's mental and emotional responses may vary.[390] In this particular case the minority of the Court found that infertility has the capacity to detrimentally affect the psychological integrity and wellbeing of the person[391] and in fact it is

[381] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 66.
[382] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 67.
[383] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 67.
[384] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 68.
[385] 2007 ZACC 6; 2007 5 SA 250 (CC); 2007 7 BCLR 751 (CC) par 40.
[386] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 69.
[387] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 69.
[388] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 81.
[389] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 81.
[390] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 82.
[391] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 89.

the impact that section 294 has on the psychological integrity of conception and pregnancy infertile people that limits the right in section 12(2)(*a*).[392] It prevents these people from using surrogacy to have a child of their own.[393] Section 12(2)(*a*) is violated where a law, by preventing persons from making a decision concerning reproduction, causes harm to their psychological integrity[394] and thereby infringes their right to equality in terms of section 9.[395] The Court's majority judgment gave section 12(2) a more restrictive interpretation when it said "it does not give someone the right to bodily integrity in respect of someone else's body," referring to the bodily integrity of the surrogate mother.[396] The Court also made mention of the best interests of the child in section 7 and stated that section 294 gives effect to the best interests of the child-to-be.[397] More specifically the Court referred to section 7(1)(*f*) of the Children's Act, which deals with the need for the child to maintain contact with his family, culture or tradition and 7(1)(*h*), which deals with the child's physical and emotional security and development.[398] Therefore the majority of the Court held that section 294 did not limit the commissioning parents' right to reproductive autonomy or to make decisions concerning reproduction in terms of section 12(2)(*a*).

The psychological impact of not knowing one's origins is a subjective question, although some authors indicate that children who do not know their origins will experience feelings of

[392] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 92.
[393] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 92.
[394] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 94.
[395] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 127; Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 162 reminds us that s 9 is not aimed at merely achieving formal equality and that it must be read as grounded on a substantive conception of equality that takes actual social and economic disparities between groups and individuals into account; Currie and De Waal *Bill of Rights Handbook* (2013) 233-234.
[396] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) para 313-315; for the theory that women do not enjoy security in and control over their own bodies see: Neff "Woman, womb, and bodily integrity" 3 1990 *Yale Journal of Law & Feminism* 327; Banda "Building on a global movement: Violence against women in the African context" 8 2008 *African Human Rights Law Journal* 1; and Office of the United Nations High Commissioner for Human Rights (OHCHR) Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa, (A/HRC/32/42/Add.2, June 2016).
[397] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 300.
[398] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 195.

loneliness, sorrow and incompleteness, others indicate that not knowing one's origins does not negatively impact one's psychological well-being.[399] Thus, an abandoned child's psychological integrity is covered by section 12(2) of the Constitution in that this section covers more than just the *corpus* but goes beyond that to cover psychological aspects as well.[400] It may further be said that the right to psychological integrity does encompass a right to know one's genetic origins because not knowing *may* impact a person's psychological well-being, although this remains a subjective investigation and is dependent on the specific individual.

5.3.2.2 Section 18 — "the right to freedom of association"

"Everyone has the right to freedom of association."

"One of the ways in which human beings express their humanity is through their relations with others."[401] South African law does not explicitly guarantee the child a right to a family however, the right to a family is protected by South African courts and provided for in an indirect manner in legislation, and furthermore freedom of association is not limited to merely corporations but extends to family relations.[402] The preamble of the Children's Act states that

[399] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 153; and see Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 236 and 239; Golombok, Blake, Casey, Roman and Jadva "Children born through reproductive donation: A longitudinal study of psychological adjustment" 54 2013 *Journal of Child Psychology and Psychiatry* 653, 657; also see who shares the same view Witt "The good of the child" 7 February 2013 *Boston Review* https://bostonreview.net/world/good-child, last accessed 2019-02-27.

[400] *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 67.

[401] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 400. Interestingly a 9 of the German Constitution limits this right to only associations and corporations, including associations for the improvement of working and economic conditions. However nothing in South African text indicates that to associate should be limited to organisations and their activities.

[402] Boniface "Do children in South Africa have a right to a family? An exploration of the development of the concept 'a right to a family' in South African Law" May 2015 *Conference Proceedings International Workshop on Law and Politics* 2015 230-242 ISBN: 978-605-86637-5-6 at 238-239; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 400-401; The South African provision covers the field, which has been described in American literature as a "continuum from the least protected form of association in commercial activities to the most protected forms of association to engage in political or religious [activities] or for highly personal reasons, such as family relations". In Nowak and Rortunda *Constitutional Law* (1995) 1118; for more on how families are envisaged and defined by the state see Hall and Richter "Introduction: children, families and the state" in Hall *South African Child Gauge* (2018) 26-28, where the authors refer to a White Paper on Families in South Africa developed by the Department of Social Development and approved by Cabinet in June 2013 which states: "there are different types of families in South Africa which are products of various cultures and social contexts. Therefore, the need exists to recognize the diverse nature of South Africa's families in all initiatives that

the child, "for the full and harmonious development of his or her personality should grow up in a family". Section 2 of the Children's Act when mentioning the objects of the act states that "children have the right to family, or parental care or to appropriate alternative care[403] when removed from the family environment".[404] The child's need to be brought up in a stable family environment is one of the factors taken into account when considering the best interests of the child. Section 28(1)(*b*) of the Constitution also mentions that every child has the right to family care. The UNCRC does not define the term family but does recognise that family relations form part of the child's identity in article 8 and stipulates that children have a right to information about the whereabouts of absent family members, where the absence is due to state action.[405] The African Charter on the Rights and Welfare of the Child also does not define family but the preamble to the Charter states "for the full and harmonious development of his personality the child should grow up in a family environment in an atmosphere of happiness, love and understanding". Article 18 of the Charter states that "the family shall be the natural unit and basis of society; it shall enjoy the protection and support of the state for its establishment and development". Thus it appears that the family has special protection under the Charter.[406]

address their plight." However, this White Paper does indicate a view of the ideal family as a stable unit built on the foundation of marriage and where the parents are cohabiting.

[403] Appropriate alternative care is not necessarily away from the family or parents, it becomes relevant where the removal is firstly, constitutionally valid and secondly providing appropriate alternative care does not render a removal constitutionally compatible with what is regarded as a primary right to family and parental care in Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 451.

[404] s 2(a) of the Children's Act.

[405] UNCRC a 9(4); see Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties : The "Right" to Access Genetic Ancestry* (2014) 81, where it is pointed out that the UNCRC fails to define relatedness; see also McCarthy "Making the most of international law on the right to identity: An analysis of article 8 of the United Nations Convention on the Rights of the Child" 3 2004 *Cork Online Law Review* 1-32, 12, where he argues that the UNCRC does not determine exactly which categories of relatedness fall within its wide sphere of family relationships. Here an example is made of a 9(3) which only refers to the need for contact between the child and its parents but makes no reference to siblings or other blood relatives.

[406] Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" 80 2 2017 *THRHR* 257-259; Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship, Care and Contact* (LLD, University of Pretoria, January 2007) 148.

In *Minister of Police v Mboweni*[407] the court dealt with section 28(1)(*b*) of the Constitution and stated that this right demonstrates alternate ways of ensuring the fulfilment of the right and the section suggests a progression from an ideal of being raised in a family, keeping in mind that the definition of family differs among different communities in South Africa and what is considered a family evolves over time.[408] In *Government of the Republic of South Africa v Grootboom*[409] the Court said that section 28(1)(*b*) and (*c*) should be read together and that they ensure that children are properly cared for by their parents or families, the Court held that although the primary responsibility rested on parents and families, where children are abandoned or lack a family environment, the state does bear the primary responsibility in providing for them.[410] In the case of *In re: Certification of the Constitution of the Republic of South Africa*[411] the Court dealt with marriage and family rights. An objection was made that international instruments and the constitutions of various countries recognise the right to a family, whereas the South African Constitution does not.[412] The Court stated that the duty on states to protect family life had been interpreted in a multitude of ways and there is no universal acceptance of the need to recognise the rights to marriage and family life as being fundamental in the sense that they require express constitutional protection.[413] It went on to state that the provisions in the proposed Constitution "either directly or indirectly support the institution of

[407] 2014 JOL 32253 (SCA) 8 9.
[408] *Minister of Police v Mboweni* [2014] 4 All SA 452 (SCA) 458 par 10; also see *Du Toit v Minister for Welfare and Population Development* 2002 ZACC 20, 2003 2 SA 198 (CC); also see Robinson and Prinsloo "The right of the child to care and constitutional damages for the loss of parental care: Some thoughts on *M v Minister of Police and Minister of Police v Mboweni*" 2015 Volume 15 No. 5 *PER*, available at http://dx.doi.org/10.4314/pelj.v18i5.14 1681-1687.
[409] 2000 11 BCLR 1169 (CC) 1204.
[410] 2000 11 BCLR 1169 (CC) 1204 par 74; for an in-depth discussion of the *Grootboom* case see Clark "'Please, Sir, I want some more': New developments in the South African saga of child maintenance and children's rights" in Miller *Frontiers of Family Law* (2018) 78.
[411] 1996 10 BCLR 1253 (CC).
[412] 1996 10 BCLR 1253 (CC).
[413] *In re: Certification of the Constitution of the Republic of South Africa* para 96-98; Boniface "Do children in South Africa have a right to a family? An exploration of the development of the concept 'a right to a family' in South African Law" May 2015 *Conference Proceedings International Workshop on Law and Politics* 2015 230-242 ISBN: 978-605-86637-5-6 234.

marriage and family life".[414] The Court also stated that disagreements about the definition of a "family" would be prevented if this right were not expressly included in the Constitution.[415] Boniface opines that this seems to be an easy way out and poses the question why such a right is not constitutionalised.[416]

In the case of *Jooste v Botha*[417] the court considered what is included in a child's right to family or parental or appropriate alternative care and stated that family means a father, mother and child or it can mean the extended family including grandparents, aunts and uncles.[418] In *Dawood; Shalabi; Thomas v The Minister of Home Affairs*[419] the court held that section 25(9)(*b*) of the Aliens Control Act violated a core element of the alien spouses' right to family and thus their right to human dignity.[420] In this judgment the court recognised the aspect of the right to family life which is illustrated by the fact that spouses have the right to live together as man and wife.[421] Van Heerden J stated that the right to family fell within the ambits of the right to human dignity.[422] Cronje and Heaton stipulate that this case recognised that the family is a social institution of vital importance and that families come in different shapes and sizes. Care should therefore be taken not to entrench certain forms of family at the expense of other

[414] *In re: Certification of the Constitution of the Republic of South Africa* par 101; Boniface "Do children in South Africa have a right to a family? An exploration of the development of the concept 'a right to a family' in South African Law" May 2015 *Conference Proceedings International Workshop on Law and Politics* 2015 230-242 ISBN: 978-605-86637-5-6 235.
[415] *In re: Certification of the Constitution of the Republic of South Africa* par 99; Boniface "Do children in South Africa have a right to a family? An exploration of the development of the concept 'a right to a family' in South African Law" May 2015 *Conference Proceedings International Workshop on Law and Politics* 2015 230-242 ISBN: 978-605-86637-5-6 234-235.
[416] Boniface "Do children in South Africa have a right to a family? An exploration of the development of the concept 'a right to a family' in South African Law" May 2015 *Conference Proceedings International Workshop on Law and Politics* 2015 230-242 ISBN: 978-605-86637-5-6 235.
[417] 2000 2 SA 199 (T).
[418] *Jooste v Botha* 2000 2 SA 199 (T) par 208F.
[419] 2000 1 SA 997 (CPD); also discussed in Robinson "Family and child law in South Africa: Common law v constitutional norms and values" 2007 *International Survey of Family Law* 271-290 276-277.
[420] *Dawood; Shalabi; Thomas v The Minister of Home Affairs* 2000 1 SA 997 (CPD) par 1000A and 1001A and B par A; Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship, Care and Contact* (LLD University of Pretoria January 2007) 159.
[421] Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship, Care and Contact* (LLD University of Pretoria, January 2007) 159.
[422] *Dawood; Shalabi; Thomas v The Minister of Home Affairs* 2000 1 SA 997 (CPD) para 1033-1036A.

forms.[423] The legal definition of a family should transform as society transforms.[424] According to Boniface, this court's decision demonstrated that our courts believe that a right to a family exists but they have to be innovative when interpreting the Constitution to protect such a right.[425] This thesis submits that the right to a family should be entrenched in the Constitution as it would emphasise the importance of children being adopted quickly and not being subjected to prolonged institutionalisation.

"The right to freedom of association" is interpreted to include family associations. Associational freedom is often justified in that it enables individuals to exercise relatively unrestrained control over the various relationships and practices deemed critical to their self-understanding.[426] Considerations such as that of identity strongly militate against state interference.[427] "Selfness" is a "by-product of a complex array of semi-independent neural networks that control the body's journey through life".[428] Alexis de Tocqueville stated that the "art of associating" is an essential condition for civilisation, the legislature that attacks the right

[423] Cronje and Heaton *South African Family Law* (2004) 227-228; Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship, Care and Contact* LLD University of Pretoria, January 2007 at 159; also see Boniface "Do children in South Africa have a right to a family? An exploration of the development of the concept 'a right to a family' in South African Law" May 2015 *Conference Proceedings International Workshop on Law and Politics* 2015 230-242 ISBN: 978-605-86637-5-6 236 at fn 48; see also *Minister of Home Affairs v Fourie* 2005 ZACC 19, 2006 1 SA 524 (CC); also see *Du Toit v Minister for Welfare and Population Development* 2002 ZACC 20, 2003 2 SA 198 (CC).

[424] Barrat *The Law of Persons and the Family* (2017) 161-174 for the changing nature of families; Heaton and Kruger *South African Family Law* (2017) 3 defines families both in the wide sense and in the narrow sense; for more on the diversity of families and the challenge in defining families see Barrat et al *Law of Persons and the Family* (2017) 161-175; for more on how families are envisaged and defined by the state see Hall and Richter *South African Child Gauge* (2018) 26-28; see also *Minister of Home Affairs v Fourie* 2005 ZACC 19, 2006 1 SA 524 (CC); also see *Du Toit v Minister for Welfare and Population Development* 2002 ZACC 20, 2003 2 SA 198 (CC).

[425] Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with Specific Reference to Guardianship, Care and Contact* (LLD, University of Pretoria, January 2007) 160; Boniface "Do children in South Africa have a right to a family? An exploration of the development of the concept 'a right to a family' in South African Law" May 2015 *Conference Proceedings International Workshop on Law and Politics* 2015 230-242 ISBN: 978-605-86637-5-6 236-237.

[426] Currie and De Waal *The Bill of Rights Handbook* (2013) 397-398.

[427] Currie and De Waal *The Bill of Rights Handbook* (2013) 407.

[428] Currie and De Waal *The Bill of Rights Handbook* (2013) 398.

to freedom of association attacks the foundations of society.[429] It is seen as the cornerstone of a democratic society because firstly, there is a need to associate in order to fully realise one's humanity and secondly, it is necessary for a functioning democracy.[430] Both these reasons have a common basis that a person cannot function without other people, cannot develop an identity without others or be of influence. As the meaning of the traditional value of *ubuntu* indicates, a "person is a person because of people". Individual human worth is also found in the freedom to associate and is an expression of personal identity. The right to privacy in section 14 of the Constitution also protects freedom of association particularly those associations of an intimate nature such as family. There are very few kinds of association which enjoy no constitutional protection,[431] as it has a wide protective ambit. The state can regulate the association itself or the association's goals but with associations that are supported by some other constitutional right, distinctions are rarely made between the association and its goals.[432] This is not an issue in intimate associations such as families. Consequently the degree of protection is derived from the constitutional protection for the association's objective.[433] The intimate association's goal and its means are inextricably linked and therefore receive the strong constitutional protections that flow from privacy rights or human dignity rights.[434] Many intimate relationships consist of nuclear and extended family structures and good reasons exist for the state to interfere in family associations.[435] Firstly, due to the vulnerability of children and secondly, to make certain that future citizens "are in a position to discharge their responsibilities to the state and to others".[436] The state must ensure that the family association is not a cover for abuse and

[429] De Tocqueville *Democracy in America* (1954), cited in Beaudoin and Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (1989) 235.
[430] Currie and De Waal *The Bill of Rights Handbook* (2013) 397.
[431] Currie and De Waal *The Bill of Rights Handbook* (2013) 401, criminal associations and associations that directly threaten the constitutional order are two types that do not enjoy constitutional protection.
[432] Currie and De Waal *The Bill of Rights Handbook* (2013) 407.
[433] Currie and De Waal *The Bill of Rights Handbook* (2013) 407.
[434] Currie and De Waal *The Bill of Rights Handbook* (2013) 407.
[435] Currie and De Waal *The Bill of Rights Handbook* (2013) 407-408.
[436] Currie and De Waal *The Bill of Rights Handbook* (2013) 408.

neglect.[437] The Constitutional Court has recognised both the importance of the family structure and its limits.[438] Thus the right to freedom of association includes family associations and provides protection for the family. A child that does not have knowledge of his or her origins is thus deprived of a family and his or her right to freedom of association in terms of section 18 is infringed as a result.

5.3.2.3 Section 10 — "the right to human dignity"

"Everyone has inherent dignity and the right to have their dignity respected and protected"

Human dignity is seen as the central value of the "objective, normative value system".[439] The founding provisions of the Constitution in section 1 states that the Republic of South Africa is founded on "the values of human dignity, the achievement of equality and the advancement of human rights and freedoms". Human dignity ranks equally with equality and freedom and this requires the conception of a constitutional order in which the purpose of rights is where state power secures the goals of dignity and equality.[440] The origins of human dignity have been traced to Kantian moral philosophy where human dignity is considered to be what gives a

[437] Currie and De Waal *The Bill of Rights Handbook* (2013) 408.

[438] For example, by supporting parental relationships with children born out of wedlock and the adoption of children by non-citizens see Currie and De Waal *The Bill of Rights Handbook* (2013) 408; see also *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) where the court determined that unwed fathers are entitled to the same rights of access as other fathers; see also *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); Baby safes are a limit to the family structure in that it hinders the rights of fathers, in this respect see Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 190-191 where the authors discussed the power of the mother to unilaterally decide to exclude the father from the child's life, this has been said by some to be part of the reproductive rights of the mother; see Chambers who suggests that an unfettered right of a mother to give a newborn child up for adoption is an essential component of a mother's autonomy and dignity, which should be exercised exclusively. Chambers argues that if the mother is required to obtain the permission of the father, she may instead choose to abort the child, in this respect see Chambers "Newborn adoption: Birth mothers, genetic fathers, and reproductive autonomy" 26 2010 *Canadian Journal of Family Law* 339, 343-345.

[439] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) par 56; It protects the intrinsic human worth of all people, see *Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC), 2000 3 SA 936 (CC) par 35; *Bhe v Magistrate Khayelitsha; Shibi v Sithole* CCT69/03 [2004] ZACC 18, 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC); *SA Human Rights Commission v President of RSA* 2005 1 BCLR 1 (CC), 2005 1 SA 580 (CC) par 48.

[440] Currie and De Waal *The Bill of Rights Handbook* (2013) 250-251.

person their intrinsic worth.[441] The constitutional protection of dignity "requires us to acknowledge the value and worth of all individuals as members of society".[442] Human dignity is seen as the source from which other rights flow, it's the source of all other personal rights in the Bill of Rights.[443] "Although the constitution contains no express right to family life, the constitutional court held that this right is indirectly protected via the right to dignity."[444] It is the basis of the right to equality as everyone must be treated equally and are worthy of respect.[445] In *S v Makwanyane* the Constitutional Court described the right to human dignity and the right to life as the most important human rights.[446] Importantly, the right to human dignity can be limited, it is not inviolable.[447] The question is how is the core value of human dignity impacted when doing the balancing exercise of rights in the Constitution?[448] This leads to the question whether the lack of knowledge of origins infringes on a child's right to human dignity? According to Sants[449] "the genealogically deprived child is handicapped by not

[441] Chaskalson "Human dignity as a foundational value of our constitutional order" 16 2000 *SAJHR* 198 citing Schachter "Human dignity as a normative concept" 77 1983 *American Journal of International Law* 848; Currie and De Waal *The Bill of Rights Handbook* (2013) 251.
[442] *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 29 Ackermann J.
[443] Currie and De Waal *The Bill of Rights Handbook* (2013) 253; *S v Makwanyane* 1995 3 SA 391 (CC) O'Regan J par 328 and Chaskalson P par 144.
[444] Currie and De Waal *The Bill of Rights Handbook* (2013) 407; Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 158-159; Van der Linde in *Grondwetlike Erkenning van Regte ten Aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD Thesis University of Pretoria 2001) concludes that an express protection of the right to respect for family life, such as found in a 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights would have avoided this indirect protection and brought South Africa in line with international trends.
[445] *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 30.
[446] 1995 3 SA 391 (CC) par 144.
[447] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 352. If it were inviolable then killing in defence of one's own life or incarceration as punishment for a crime would never be allowed. However, see *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 7 BCLR 663 (CC), 2002 4 SA 613 (CC) par 28: "[T]he right to life, to human dignity and to bodily integrity are individually and collectively essential and collectively foundational to the value system prescribed by the Constitution. …It therefore follows that any significant limitation of any of these rights, would for its justification demand a very compelling countervailing public interest." With regard to s 36(1)(*c*) the Constitutional Court observed that some attacks on human dignity are more serious than others, here the power relationship between the parties concerned is relevant. Violation of a weak, vulnerable person's dignity by a strong person in authority is more serious; see *Le Roux v Dey* 2011 6 BCLR 577 (CC), 2011 3 SA 274 (CC) par 46; In this context an infant is regarded as vulnerable and weak and as a result violation of the right to human dignity of an infant will be taken more seriously.
[448] *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 15.
[449] Freeman "The new birth right?: Identity and the child of the reproduction revolution" 1996 *The International Journal of Children's Rights* 273-297, 288; Bok *Lying: Moral Advice in Public and Private Life* (1978) 21; Sants "Genealogical bewilderment in children with substitute parents" 37 1964 *British Journal of Medical Psychology*

knowing which clan or family he belongs to. Such children appear to be disturbed by this blockage of possible displacement".[450] Triseliotis states that in order to feel complete and whole it is important to know one's background,[451] while O'Donovan avers that biological origins must be known for psychological health.[452] Triseliotis expresses that the general picture gained from the majority of adoptees searching for their origins was one of "unhappiness and inner pressures and worries making coping with life situations a great effort".[453] The author continues by stating that the majority of adoptees had a poor self-image, troubled and unhappy with a sense of "emptiness, isolation, vacuum; feeling false, not being a real or a whole person; depressed and unhappy; tense and anxious; not coping and unable to get close to people".[454] Jadva and Golombok refute this opinion by providing that not knowing one's genetic origins does not negatively affect one's psychological well-being.[455] Further, Leighton questions Sants by stating that surely adoptees can have clans within his or her adoptive family.[456] Various authors have stated that dignity is at the core of psychological well-being.[457] The Cambridge Dictionary defines dignity as the importance and value that a person has that makes other people respect them or makes them respect themselves. In *AB v Minister of Social Development*, Rodrigues, a clinical psychologist in South Africa, referring to donor-conceived

133-140, 134; also see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-543 where the author, with reference to the matter of *Goodwin v United Kingdom*, Judgment 11 July 2002 European Court of Human Rights, points out that protecting the correct development and growth of the individual indirectly achieves the main objective of the ECHR, which is guaranteeing respect for human dignity and freedom.

[450] Sants "Genealogical bewilderment in children with substitute parents" 37 1964 *British Journal of Medical Psychology* 133-140, 134.

[451] Warnock *A Matter of Life* (1985) par 4.13; Triseliotis "Obtaining birth certificates" in Bean (ed) *Adoption* (1984) 38.

[452] O'Donovan "A right to know one's parentage?" 2 1988 *International Journal of Law and the Family* 31.

[453] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 82.

[454] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 81-82.

[455] See Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 239; Golombok, Blake, Casey, Roman and Jadva "Children born through reproductive donation: a longitudinal study of psychological adjustment" 54 2013 *Journal of Child Psychology and Psychiatry* 653, 657; in support of this see Witt "The good of the child" 7 February 2013 *Boston Review* https://bostonreview.net/world/good-child last accessed 2019-02-27

[456] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107, 78.

[457] Ziedonis, Larkin and Appasani "Dignity in mental health practice and research: Time to unite on innovation, outreach and education" 144 (4) 2016 Oct *Indian J Med Res.* 491–495, 491.

children who are unaware of their origins, observed that these children have not manifested any discernible higher incidence of psychological problems than children in the general population.[458] Following the above, the feeling that one's dignity has been infringed is a subjective investigation into each individual's experiences. For one child, not knowing his or her origins may not have an impact on his or her dignity and for another it may. It is evident that dignity protects the right to knowledge of one's origins because it (dignity) is at the core of one's psychological well-being and, as determined above, a lack of knowledge of one's origins could possibly have an impact on one's psychology.

5.3.2.4 Section 28(1)(*a*) – "the right to a name and nationality from birth"

> "(1) Every child has the right
>
> (a) to a name and a nationality from birth;"

A child's right to a legal identity is comprised of his or her "right to a name and nationality from birth". The importance of nationality is to avoid statelessness.[459] The right to a legal identity is an extension of the right to human dignity.[460] The view was expressed that the right to an identity has important psychological and emotional substance because a name connects a child to his or her family.[461] The right to a name starts at birth and includes the child's right to be registered by the state in a birth register immediately after birth.[462] Although an abandoned child's birth is registered, in most instances it is not registered with their family name and

[458] See Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* at 242; Rodrigues' expert opinion II para 8.1-8.2 (*AB* record pp 2560-2561); In support of this see Witt "The good of the child" 7 February 2013 *Boston Review* https://bostonreview.net/world/good-child last accessed 2019-02-27.
[459] Currie and De Waal *The Bill of Rights Handbook* (2013) 604.
[460] Mosikatsana "Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution" 1988 3 *Michigan Journal of Race & Law* 370.
[461] Currie and De Waal *The Bill of Rights Handbook* (2013) 603; Mosikatsana "Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution" 1988 3 *Michigan Journal of Race & Law* 370.
[462] Currie and De Waal *The Bill of Rights Handbook* (2013) 603; This is a contentious issue as abandoned children are very often not registered after birth by the state because it is uncertain whether their parents are from South Africa or from another country. This falls outside of the scope of this study, for more on this issue see Boniface and Rosenberg "The challenges relating to undocumented abandoned children in South Africa" 2019 *TSAR* 1.

merely with a name assigned by a social worker.[463] This may be interpreted to infringe upon their section 28(1)(*a*) right and in turn it may be deduced that being deprived of a family name does infringe upon one's right to knowledge of one's origins. As proposed by Sants, denying a child information about their birth parents may lead to genealogical bewilderment.[464] However, Leighton has opposed this view by providing that there is violence that comes from the belief in heredity.[465] This is so because society has placed an expectation on what can be regarded as a "normal family" and outside of that norm, one who does not know cannot "fit in" or be accepted.[466] Although genealogical bewilderment is said to provide a diagnosis for the suffering experienced by adoptees, Leighton maintains that it does the opposite, it is not the confusion of one who thinks he is something that he is not but the confusion of "ducks" and "swans" making family together.[467] Therefore, a lack of knowledge of one's origins does not necessarily deprive one of a legal identity. It is submitted, that legal identity is not necessarily biological identity. Everyone has a legal identity because, as expressed by Leighton, such identity or "clan" can be found in an adoptive family.[468]

5.3.2.5 Section 28(1)(*b*) — "the right to family and parental care"

> "(1) Every child has the right–
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;"

[463] See s 12 of the Births and Deaths Registration Act 51 of 1992.
[464] Sants "Genealogical bewilderment in children with substitute parents" 37 1964 *British Journal of Medical Psychology* 133-140, at 133; also see Humphrey and Humphrey "A fresh look at genealogical bewilderment" 59 1986 *British Journal of Medical Psychology* 133-140; see also Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 543.
[465] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107, 92-93.
[466] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107, 89-90.
[467] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107, 92.
[468] Leighton "Addressing the harms of not knowing one's heredity: Lessons from genealogical bewilderment" 3 2012 *Adoption and Culture* 63-107, 78.

The question under consideration is whether the right to parental and family care encompasses a right to know one's genetic origins? Not only does the right to dignity protect the right to a family but the right to a family is also protected in terms of section 28. Section 28(1)(*b*) places a duty on parents and family of children to provide care and this in turn implies a duty on the state to support the institution of the family.[469] Where a child has been removed from the family environment a duty rests on the state to place the child in an environment that closely resembles a family environment. "Family" in this section is extended to blood relatives such as grandparents, aunts and uncles.[470] If the term "family" is only extended to blood relatives then this section would presuppose the protection of the right to knowledge of one's genetic origins. This becomes very challenging because the social reality is that not every child can be cared for by his or her own parents or family. If protection is afforded to family and such family is no longer in existence due to a baby safe that has been provided for by the state, then the enforcement of this section would place a duty on the state, at the very least, to disclose identifying information concerning the family. Without such knowledge, the right to a family, and in essence the right to knowledge of one's origins, as protected in this section, is infringed.

[469] Currie and De Waal *The Bill of Rights Handbook* (2013) 604; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 451; In *M v S* 2007 12 BCLR 1312 (CC), 2008 3 SA 232 (CC) par 28 the Constitutional Court held that the duties in respect of the right to family and parental care rest primarily on parents who can afford it, however even in these instances the state must still provide the legal and administrative infrastructure to ensure that children are cared for even when they are in the care of parents or other caregivers. This is done through passing laws to maintain children and to protect them from maltreatment, abuse, neglect or degradation see *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC), 2001 1 SA 46 (CC) par 78; Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 159; In *Jooste v Botha* 2000 2 SA 199 (T) the court was prepared to interpret section 28(1)(*b*) in a manner consistent with the common law being "aimed at the preservation of a healthy parent-child relationship in the family environment against unwarranted executive, administrative and legislative acts" para 207H and 207I.

[470] *Jooste v Botha* 2000 2 SA 199 (T) par 208D- 208F.

Although the Convention on the Rights of the Child[471] does not define the term "family", it refers to "extended family"[472], "parents"[473] and "family relations".[474] "Parents" may refer to both legal and biological parents.[475] It also recognises that family relations form part of the child's identity,[476] and stipulates that children have a right to information about the whereabouts of absent family members, where the absence is due to an action that was initiated by the state.[477] The UN Committee on the Rights of the Child has specified that children must know their birth parents, by stating that both biological as well as legal parents are included under article 7,[478] thus making it clear that according to the UNCRC, a right to knowledge of one's origins does exist. The African Charter on the Rights and Welfare of the Child (ACRWC hereinafter also referred to as the Charter)[479] does not define the family.[480] The preamble to the Convention stipulates, "for the full and harmonious development of his personality the child should grow up in a family environment in an atmosphere of happiness, love and understanding". The Charter states that "the family shall be the natural unit and basis of society;

[471] United Nations General Assembly, Convention on the Rights of the Child (UNCRC) 20 November 1989, UN Treaty Series Vol 1577.
[472] a 5; Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[473] a 7; Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[474] a 8; Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258; see Diver "Conceptualizing the "right" to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties : The "Right" to Access Genetic Ancestry* (2014) 82 where she states that the rights enshrined in a 8 could at times be expanded upon in domestic hearings to consider beyond the usual parameters of family, nationality and name. The courts can make decisions to release biological information and therefore not leaving it solely in the hands of social workers or non-biological parents.
[475] This as stated by the United Nations Committee on the Rights of the Child see par 5.3.1 above.
[476] a 8; Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[477] a 9(4); Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[478] Concluding Observations: France ((30 June 2004) CRC/C/15/Add.240, [23]); also see Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 189-190.
[479] Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11/07/1990, CAB/LEG/24.9/49.
[480] Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.

it shall enjoy the protection and support of the state for its establishment and development".[481] The Charter goes on to state that every child has the right to "parental care and protection"[482] and that parents (or other persons) responsible for the care of children must be assisted by the state.[483] The state has a duty to protect the development of the family,[484] and it appears that the family has special protection under the Charter. The ACRWC's approach appears to be more generous in its interpretation of "family". Accordingly, it is arguable whether the ACRWC recognises a child's right to knowledge of its origins. In addition to the Convention and the Charter, there are various other provisions that express the need to protect the family and that emphasise the role of the family.[485]

5.3.2.6 Section 28(2) — "the best interests of the child"

> "A child's best interests are of paramount importance in every matter concerning the child."

The dispute in *AB v Minister of Social Development* was centred around the best interests of the child. The Minister and the Centre for Child Law argued that the best interests of the child require a commissioning parent's own gametes to be used for the conception of the child and the applicants said that it does not. The basis of the Minister's argument was the child's right to knowledge of its origins.[486] The majority judgment of the Constitutional Court decided that the best interests of the child require that a surrogacy child must be conceived from the

[481] a 18; Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[482] a 19; Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[483] a 20(2); Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[484] a 18 and 20(2); Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[485] The United Nations Document Emerging Issues for Children in the Twenty First Century 4 April 2000; a 12 Universal Declaration of Human Rights 1948; aa 18(1), 18(2), 27 and 29 African Charter on Human and Peoples' Rights 1981; The concluding observations of the Committee on the Rights of the Child: South Africa 28 January 2000, also recommended that the state should provide support, such as training for parents (par D5 22); Boniface and Rosenberg "The potential effects of the legalization of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers" (80) 2017 *THRHR* 253-266, 258.
[486] Which as stated above does not expressly exist in the Constitution.

gamete(s) of the commissioning parent(s).[487] In so doing, it recognised that the right to knowledge of the child's genetic origins is in the child's best interests. Section 28(2) contains a constitutionally entrenched right, which stands separate from the other rights in section 28(1).[488] It serves as a standard which all law and conduct that affect children should be tested against.[489] It is not advisory but amounts to enforceable rules.[490] Giroux asserts that recognition of the right to identity of a child is always in the best interests of a child – best interests and identity are not irreconcilable.[491] However, this right does not serve as an absolute defence for the limitation of the other right.[492]

The content of the best interests of the child as listed in the Children's Act is analysed with reference to the opinions of experts in the field of psychology. When considering the best interests of the child, section 7 of the Children's Act 38 of 2005 has a list of factors to take into account.[493] A few provisions from this list will be dealt with briefly. Firstly, section 7(1)(*d*)(i) "the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from- (i) both or either of the parents". The effects of not

[487] *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) par 294.
[488] *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) par 17; *Sonderup v Tondelli* 2001 2 BCLR 152 (CC), 2001 1 SA 1171 (CC) par 29; *De Reuck v Director of Public Prosecutions (WLD)* 2003 12 BCLR 1333 (CC), 2004 1 SA 406 (CC) par 55; *M v S* 2007 12 BCLR 1312 (CC), 2008 3 SA 232 (CC) par 14.
[489] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 12 BCLR 1429 (CC), 2014 2 168 (CC) par 69; Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.
[490] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 446; see *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 11 BCLR 1105 (CC), 2009 6 SA 632 (CC) par 25; see also Ferreira "The best interests of the child: From complete indeterminacy to guidance by the Children's Act" 2010 *THRHR* 201; also see Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.
[491] See Giroux, De Lorenzi "Putting the child first: A necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 59-60; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 543 where the author states that the knowledge of one's origin cannot be linked just to the best interest of the child as it also concerns adult life and can be considered to be a part of a person's personal identity.
[492] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 446.
[493] See *McCall v McCall* 1994 3 SA 201 (C) where the Cape Provincial Division dealt with factors that determine the best interests of a child.

knowing his or her parents has been mentioned above specifically isolation, emptiness, not feeling like a whole or real person. These effects could be those likely experienced by the child when separated from his or her parents, depending on the stage at which separation occurs. Whether it be at a point where the child is a mere infant and has no knowledge of who his or her parents are or whether separation occurs when the child is older and aware of who his or her parents are. In either instance, the child could experience feelings of isolation, separation and emptiness. However, according to Jadva, not knowing one's genetic origins does not negatively affect a child's psychological well-being.[494] This opinion is also shared by Thaldar,[495] who states that the best interests of the child cannot be said to require that a child must know his or her genetic origins.[496] Therefore, if not knowing is not proven to cause psychological harm to a child then this thesis submits that there is no infringement of the best interests of the child in not knowing his or her genetic origins. Secondly, in terms of section 7(1)(*f*)(ii) "the need for the child (ii) to maintain a connection with his or her family, extended family, culture or tradition", the lack of any negative effects on the child of not knowing his or her origins indicates that there is no need for the child to maintain a connection with his or her

[494] This was refuted in *AB* by the expert opinions of Golombok as well as Jadva (par 29 *AB* record 1808) who provided the following insight regarding identity and not knowing one's genetic origins: "Identity formation happens gradually throughout childhood and especially during adolescence. Multiple factors in a child's environment have an 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" see Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 239. Thaldar draws the conclusion that although not knowing one's genetic origins may complicate identity formation, it is unlikely to cause psychological harm to a child. Therefore, the best interests of the child cannot be said to require that a child must know his/her genetic origins, Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 239-240; also see *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) par 153; in support of this see Witt "The good of the child" 7 February 2013 *Boston Review* https://bostonreview.net/world/good-child last accessed 2019-02-27

[495] Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 239. Thaldar draws the conclusion that, although not knowing one's genetic origins may complicate identity formation, it is unlikely to cause psychological harm to a child. Therefore, the best interests of the child cannot be said to require that a child must know his/her genetic origins; also see Stalford "The broader relevance of features of children's rights law: The 'best interests of the child' principle" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 37.

[496] Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 239.

family.[497] According to Golombok, referring to surrogacy, whether or not there exists a genetic link between a parent and child does not affect a child's psychological well-being.[498] Lastly, section 7(1)(*h*) provides that when considering the best interests of the child "the child's physical and emotional security and his or her intellectual, emotional, social and cultural development" should be taken into account. Feelings such as loneliness, isolation and insecurity due to not knowing one's origins, all indicate a "psychological complication" (in the words of Thaldar) as opposed to it being a "psychological harm".[499] Triseliotis states that the child's social development is affected because he or she is "unable to get close to people".[500] However, this is disputed by the expert evidence of Golombok and Jadva, who indicate that there is no negative effects on a child's psychological well-being of not knowing his or her genetic origins.[501] Furthermore, Rodrigues supports this view by providing that donor-

[497] For more on the cultural and traditional aspects see Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of the Witwatersrand 2014); Cultural norms regarding the formation of blood ties are widespread in South Africa. The belief in ancestors still feature prominently and this could be the motivation behind the emergence of the recognition of a right to knowledge of one's origins as seen in the *AB* judgment. Gerrand and Nathane-Taulela "Developing a culturally relevant adoption model in South Africa: The way forward" 58 2015 *International Social Work* 58 observe that most black South African families still practise ceremonies to introduce the biological child to living relatives and ancestral spirits, to enable the child to develop a sense of belonging and identity. Gerrand *The Legal Adoption of Unrelated Children: A Grounded Theory Approach to the Decision-Making Processes of Black South Africans* (Doctoral Thesis, University of Witwatersrand 2017), goes on to state at 69 that if rituals like "imbeleko" are not performed, which introduces the newborn baby to the ancestors, the child will be subject to bad luck and misfortune for the rest of his or her life. According to Gerrand, the traditional black South African families have rigid boundaries based on blood ties at 142; also see Mokomane and 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).

[498] Golombok expert opinion referred to in Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 236; Jadva, Murray, Lycett, MacCallum, Golombok and Rust "Non-genetic and non-gestational parenthood: Consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3" 2006 21 *Human Reproduction* 1918, 1923; in support of this see Witt "The good of the child" 7 February 2013 *Boston Review* https://bostonreview.net/world/good-child last accessed 2019-02-27.

[499] Thaldar on drawing conclusions from Dr Jadva's opinion para 20-27 (*AB* record 1804-1807) and referring to the opinion of Professor Metz opinion I (*AB* record 1950-1967), Metz expert opinion II (*AB* record 2563-2576), Metz expert opinion II at par 14.2 (*AB* record 2571) in "The Constitution as an instrument of prejudice: A critique of *AB v Minister of Social Development*" Unpublished, forthcoming in the *CCR*.

[500] Triseliotis *In Search of Origins: The Experiences of Adopted People* (1973) 81-82.

[501] Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 239; Golombok, Blake, Casey, Roman and Jadva "Children born through reproductive donation: A longitudinal study of psychological adjustment" 54 2013 *Journal of Child Psychology and Psychiatry* 653, 657; in support of this see Witt "The good of the child" 7 February 2013 *Boston Review* https://bostonreview.net/world/good-child last accessed 2019-02-27.

conceived children who are unaware of their origins, have not shown a higher frequency of psychological problems than children in the general population.[502]

5.3.3 Justification for factual limitations

The factual limitation of the rights discussed above needs to be justified in accordance with the section 36 limitation clause. Section 36 reads as follows:

> "(1)The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

Constitutional rights and freedoms are not absolute.[503] They have boundaries set by the rights of other people and by important social concerns such as safety, health, public order and democratic values.[504] Section 36 sets the requirements for the limitation of rights in the Bill of Rights.[505] Not all infringements are unconstitutional, where an infringement can be justified in accordance with the criteria in section 36 it will be constitutionally valid.[506] The limitation of

[502] Rodrigues expert opinion II at par 8.1-8.2 (*AB* record 2560-2561); Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 242; in support of this see Witt "The good of the child" 7 February 2013 *Boston Review* https://bostonreview.net/world/good-child last accessed 2019-02-27.
[503] Currie and De Waal *The Bill of Rights Handbook* (2013) 150.
[504] Currie and De Waal *The Bill of Rights Handbook* (2013) 150.
[505] Currie and De Waal *The Bill of Rights Handbook* (2013) 150; see also Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol.17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* for more on the application of the proportionality principle in the limitation of rights; "Limitation of rights" chapter 30 in Cheadle et al *South African Constitutional Law: The Bill of Rights* (2005) 698-699; see also Robinson "Provisional thoughts on limitations to the right to procreate" Vol. 18 No. 2 2015 *PER* 351 where the limitation of rights is discussed in par 4.4.
[506] Currie and De Waal *The Bill of Rights Handbook* (2013) 151; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 310-327.

rights cannot be done haphazardly, it needs to be justified with strong reasons.[507] The limitation must be justifiable, this means it must serve a compellingly important purpose.[508] It will only be justifiable if the restriction will accomplish its purpose and this purpose can only be achieved by restricting the rights.[509] Section 36 is a general limitation section because it applies to all rights in the Bill of Rights and the same set of criteria is applied to all rights when limited.

There is a two-step approach in determining the infringement of a right and whether it is justifiable.[510] First, is whether a right in the Bill of Rights has been infringed by law or conduct.[511] Second, is whether the infringement can be justified as a permissible limitation of the right, this presupposes a "yes" to the first question.[512] Baby safe laws would qualify as law that would limit the right to knowledge of one's origins (as proven to exist in each of the rights discussed above). Can this infringement however be justified as a permissible limitation? For the second stage of the enquiry, section 36 is analysed below. What is being limited is the right to knowledge of one's origins as embodied in the rights mentioned above.

5.3.3.1 Section 36(1)(*a*) — "the nature of the right"[513]

[507] Currie and De Waal *The Bill of Rights Handbook* (2013) 151; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 310-327.

[508] Currie and De Waal *The Bill of Rights Handbook* (2013) 151; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 310-327; Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* 2232.

[509] Currie and De Waal *The Bill of Rights Handbook* (2013) 152; see Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* 2232 where Rautenbach explains that a "due" relation between the limitation and its purpose would render the limitation justifiable in other words a limitation cannot be justified if no purpose exists.

[510] Currie and De Waal *The Bill of Rights Handbook* (2013) 152-154; see *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) where the Constitutional Court was willing to depart from the two stage approach to rights and their limitation in order to avoid having to decide the question whether a right has been infringed. A decision criticized for being artificial. A decision that was repeated in *Jordan v S* 2002 6 SA 642 (CC) para 28-29.

[511] Currie and De Waal *The Bill of Rights Handbook* (2013) 153.

[512] Currie and De Waal *The Bill of Rights Handbook* (2013) 153.

[513] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 317; Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* 2254 where Rautenbach states that in South Africa the nature of the right also refers to a particular aspect of the right that has been limited as well as to the nature of the bearer of the right in that particular case.

The nature of the various rights have been discussed above. "What is being protected by the right, how important is the right and the way in which it is exercised in an open and democratic society?"[514] "The nature of the right" relates mainly to the importance of the right in "an open and democratic society based on human dignity, equality and freedom".[515] It further also involves the way in which the right has been exercised and the importance of that method of exercising the right.[516] Section 12, the right to freedom and security of the person. Section 18, the right to freedom of association. Section 10, the right to human dignity. Section 28(1)(*a*), the right to a name and nationality from birth. Section 28(1)(*b*), the right to family and parental care and lastly section 28(2), the best interests of the child. These rights embody the right to knowledge of one's origins in one form or another and their limitation will be discussed in the form of the right to knowledge of origins as a whole. It has been stated that children are the bearers of all the rights in the Constitution with a few exceptions.[517] Therefore, these listed rights protect children, they are the bearer of the rights in this instance.[518]

5.3.3.2 Section 36(1)(*b*)— "the importance of the purpose of the limitation"

The limitation of the right must promote or protect a permissible or lawful interest.[519] If no purpose exists, the limitation is invalid and the other factors need not even be considered any further.[520] "The purpose of the limitation" refers to the "benefit", which is to be achieved by

Whether the bearer is a natural or juristic person could influence the strictness of the standard. This thesis suggests that if the bearer of the right or rights is a child, only serious circumstances would warrant limitation of such rights.

[514] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 317.

[515] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 317.

[516] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 317.

[517] Such as the right to vote in s 19 of the Constitution.

[518] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 317 where the authors state that the nature of the right also includes the identity of the bearer of the right.

[519] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 317.

[520] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 318. Sometimes the purpose of a limitation and the relationship between the limitation and its purpose will be self-evident. In such cases according to Cameron J in *S v Meaker* 1998 8 BCLR 1038 (W), there is no need for a mountain of statistics and reports to support a limitation argument. A common sense analysis would suffice (1047A-G).

the limitation.[521] The more important the purpose, the greater the permissible discretion may be.[522] Reasonableness requires the limitation of a right to serve some goal or aim and justifiability requires that aim to be meaningful and of significance in a constitutional democracy.[523] If the limitation does not serve a purpose that contributes to "an open and democratic society based on human dignity, equality and freedom" it cannot be justifiable.[524] The purpose of the limitation of the right to knowledge of one's origins would be to save a life. The right to life in section 11 of the Constitution serves as a purpose for the limitation of the right to knowledge of one's origins. "The protection of all other human rights is futile and ineffective without first protecting the most basic, the most fundamental, the most elemental and supreme right a human being can have which is the right to life."[525] Other rights can only exist once life is in existence and is protected. The purpose behind baby safe laws is to protect the lives of infants by ensuring that they are safely abandoned as opposed to being abandoned in unsafe locations where death could result. This is the driving force behind these laws. It provides safe shelter for the most vulnerable members of society.[526] Witt says that baby safes promote the child's right to life and serves as an alternative to infanticide and unsafe abandonment and does not violate the human rights of an infant.[527] This makes the right to life

[521] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 318; Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER*) 2255 "the mere exercise of a legitimate power or a legal competence is not the purpose that must be noted for balancing purposes; the importance of the purposes for which such powers and competences are exercised must be determined".
[522] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 318-319.
[523] Currie and De Waal *The Bill of Rights Handbook* (2013) 162-164; *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) par 26 the court simply accepted in one sentence that the law in question was unjustifiable, it amounted to unfair discrimination and the respondents found no point in justifying it.
[524] Currie and De Waal *The Bill of Rights Handbook* (2013) 162-164; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 318-319.
[525] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 63; Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 372.
[526] Oaks *Giving up baby Safe Haven Laws, Motherhood, and Reproductive Justice* (2015) 1.
[527] As previously mentioned in para 5.2; Witt "The good of the child" 7/02/2013 *Boston Review* https://bostonreview.net/world/good-child, last accessed 2019-02-27.

an essential pre-requisite before other rights may be enjoyed.[528] The Door of Hope organisation started in 1999 with a hole in the wall where babies may be safely relinquished without the mother's identity being required. The organisation's purpose is to "save children and help them to not only survive but to THRIVE".[529] Thus, survival of the child is the key driving force behind the implementation of baby safes and a baby safe law. Germany's *babyklappen*[530] is another example of baby safes designed with the purpose of protecting the lives of infants that are abandoned through ensuring safe abandonment. Therefore, the benefit achieved by limiting the child's right to knowledge of his or her origins is the fact that the child's right to life is protected. The other possible purposes that are also served by baby safe laws are the public interest, in that unsafe abandonment that leads to death, is a common concern among citizens, with the bodies of infants being found in places such as dumpsters, drains, open velds and toilets. Furthermore, the good morals of society dictate that infants should not be left in unsafe environments that could lead to death.

5.3.3.3 Section 36(1)(*c*) — "the nature and extent of the limitation"

The way in which the limitation affects the right concerned needs to be assessed.[531] Does it amount to a serious or minor infringement of the right?[532] Proportionality entails that the infringement of rights should not be greater than what is necessary in order to achieve the

[528] Menghistu "The satisfaction of survival requirements" in Ramcharan (ed) *The Right to Life in International Law* (1985) 63; Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372-385, 372.
[529] Door of Hope website "About Us" page https://doorofhope.co.za/about-us/ last accessed on 2018-12-07.
[530] Other synonyms include "Babyfenster", "Babykorb", "Aktion Moses-Babyklappe", "Moses-Babyfenster", "Babynest", "Babytur", "Babyhilfe" und Projekt Findelbaby"; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 5; see chapter on German law for more on this; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 156.
[531] Currie and De Waal *The Bill of Rights Handbook* (2013) 168-169; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 319-320.
[532] Currie and De Waal *The Bill of Rights Handbook* (2013) 168-169; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 319-320; How intrusive is the limitation in respect of the conduct and interests that are protected by the right? see Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* 2255.

purpose.[533] The question is, does it do more damage to rights than is reasonable to achieve its purpose?[534] To answer this, one needs to look at how extensive the infringement is.[535] The effects of the child not knowing his or her origins or not having an identity cause feelings of incompleteness, a poor self-image; lack of self-respect; unhappy; sorrowful; inner pressures; makes them unable to cope with life situations; tense and anxious; gives them no sense of security; and their psychological health is affected. As a result, the purpose that the right to knowledge of one's origins serves is to allow the child a sense of emotional security, to develop a healthy identity and self-image,[536] completeness and belonging; self-respect; a sense of security and the ability to cope with life situations. The limitation or non-limitation of each individual right will now be discussed.

Firstly, based on the opinions of Golombok, Jadva and Rodrigues, it is submitted that the section 12(2) right to psychological integrity is not affected by a lack of knowledge of one's origins. The authors have however pointed out that the discrepancy between their research concerning adoption may be based on the fact that donor-conceived children do not experience the loss of an existing parent and they do not need to establish new relationships with new

[533] Currie and De Waal *The Bill of Rights Handbook* (2013) 171; *S v Manamela* 2000 3 SA 1 (CC) par 34 an assessment of how extensive the infringement is, is the first necessary step; *S v Meaker* 1998 8 BCLR 1038 (W), it is the effect of the limitation on rights and not the effect of the limitation on the rights holder that is of concern; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 319-320.

[534] Currie and De Waal *The Bill of Rights Handbook* (2013) 168; see *S v Makwanyane* 1995 3 SA 391 (CC) par 184; see also Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 319-320.

[535] Currie and De Waal *The Bill of Rights Handbook* (2013) 168; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 319-320; see also Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* 2256 the extent of a discretion to limit rights also forms part of the nature and extent of the limitation.

[536] Although Witt makes the case that children have developed adequate identities or selves without access to biogenetic information, she does however mention that some individuals feel harmed by a lack of access to information about their origins. She states that "if knowledge of one's biological and genetic origins, or direct acquaintance with bio family members, were a necessary part of developing a healthy identity, the evidence would show widespread, serious psychological damage in children who lack such knowledge and acquaintance. That is not the case"; Witt "The good of the child" 7 February 2013 *Boston Review* https://www.bostonreview.net/world/good-child, last accessed 2019-02-27.

family members.[537] In this regard this thesis submits that in the instance of surrogacy agreements, there is also a loss experienced by the child, namely being separated from the gestational mother but that despite this loss, children have not shown any negative impact psychologically.[538] Whether the child suffers any negative psychological impact would depend on the stage at which the child is adopted and on the specific child in question,[539] it is therefore concluded that relinquishing a newborn child through a baby safe will not have a negative psychological impact on the child provided that child is adopted into a family soon after relinquishment. Secondly, it is evident that the right to freedom of association in terms of section 18 of the Constitution is limited if the child does not know his or her origins and according to Van Heerden J this impacts upon human dignity.[540] However, the definite impact on human dignity is questionable, as discussed next. Thirdly, although the right to human dignity in section 10 is inextricably linked to psychological well-being, the evidence of Golombok, Jadva and Rodrigues indicates that a child's psychological well-being is not negatively impacted in donor-conceived children with a lack of this knowledge. This thesis therefore submits that there is not sufficient evidence to indicate that the right to human dignity is in fact limited if the child has no knowledge to its origins. This, however is also a subjective question because some children may have their dignity impacted and others may not.[541] Fourthly, it may be stated that the child's section 28(1)(*a*) right is limited by the lack of

[537] Golombok and Brinsden et al "Social versus biological parenting: Family functioning and the socioemotional development of children conceived by egg or sperm donation" 1999 *Journal of Child Psychology and Psychiatry* 526.
[538] Golombok et al "Surrogacy Families: Parental functioning, parent-child relationships and children's psychological development at age 2" 47 2006 *Journal of Child Psychology and Psychiatry* 213, 220.
[539] In this respect note that a contrary opinion was cited by the Minister of Social Development which is the opinion of Van Bogaert who in filing a supplementary affidavit revised her previous position by stating that she does not know whether not knowing one's genetic origins may cause harm to a child but that one should employ a cautious approach, at *AB* record 2577-2595); see Thaldar "Post-truth jurisprudence: The case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 241.
[540] *Dawood and Another v Minister of Home Affairs and Others; Shalabi And Another v Minister of Home Affairs And Others; Thomas and Another v Minister of Home Affairs and Others* 2000 1 SA 997 (CPD) para 1033-1034.
[541] The expert opinions are preferred despite the statement by Van Heerden J that a right to family falls within the ambits of human dignity.

knowledge of his or her origins and this also holds true for the fifth right under consideration which is the child's section 28(1)(*b*) right to family and parental care. Lastly, taking into account the analysis of the best interests of the child (section 28(2)) conducted above, this thesis supports the conclusion drawn by Thaldar, based on the expert opinions of Golombok, Jadva and Rodrigues, who states that the best interests of the child cannot be said to require that a child *must* know his or her genetic origins.[542]

In conclusion, with the use of baby safes it is probable that the child will not know his or her origins because the mother is guaranteed absolute anonymity. Therefore, the use of baby safes would limit the purpose that the right to knowledge of one's origins is trying to achieve by limiting the rights to freedom of association, to a name and nationality from birth, and to family and parental care, but would not necessarily limit the child's psychological integrity, human dignity or the child's best interests. Ultimately, the aim of the use of baby safes is to save the life of the child, that is to guarantee the child's right to life in terms of section 11 of the Constitution. The limitation of the right to knowledge of origins is a serious limitation, however, its nature and extent is not more extensive than the purpose it is trying to achieve, which is to save the life of the infant. Therefore, it does not do more damage than is reasonable in order to save a life.

5.3.3.4 Section 36(1)(*d*) — "the relation between the limitation and its purpose"

"The relation between the limitation and its purpose" determines whether the nature of the limited right and the seriousness and extent of the limitation outweigh the importance of the

[542] Thaldar "Post-truth jurisprudence: the case of *AB v Minister of Social Development*" 34 2 2018 *South African Journal on Human Rights* 239.

purpose of the limitation.[543] A valid basis for the infringement must exist.[544] The law must serve the purpose that it is designated to serve, if it does not it cannot be a reasonable limitation of the right.[545] It cannot only marginally contribute to achieving its purpose as that will not be an adequate justification for the infringement of fundamental rights.[546] It must be determined whether the limitation is capable of promoting the purpose at all.[547] The limitation of someone's right to know his or her origins occurs automatically through the use of a baby safe. The use of a baby safe in turn saves the life of the infant by preventing unsafe abandonment. Therefore, the use of the baby safe guarantees the right to life but at the same time limits the right to knowledge of one's origins. Thus, a relation exists between the limitation and its purpose. The limitation of the right to knowledge of origins through the use of baby safes serves the purpose of saving the lives of infants and therefore amounts to a reasonable limitation of the right to knowledge of one's origins. The use of a baby safe does not merely marginally contribute to saving an infant's life but is the direct mechanism used in ensuring that an infant is not discarded elsewhere in life threatening situations.[548]

5.3.3.5 Section 36(1)(*e*) — "less restrictive means to achieve the purpose"

[543] For a discussion of the rational relationship test see Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 353; In *First National Bank v CIR*; *First National Bank v Minister of Finance* 2002 7 BCLR 702 (CC), 2002 4 SA 768 (CC) para 108-109, it was held that no relevant relation exists between the legitimate and important legislative purpose to exact payment of a customs debt and the total deprivation of the property of persons who have nothing to do with the debt.

[544] Currie and De Waal *The Bill of Rights Handbook* (2013) 169-170; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 320-322.

[545] Currie and De Waal *The Bill of Rights Handbook* (2013) 169-170; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 320-322.

[546] Currie and De Waal *The Bill of Rights Handbook* (2013) 169-170; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 320-322.

[547] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 322-323; see also Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* 2256, s 36(1)(*d*) relates to whether the limitation is capable of making a contribution to the achievement of the purpose (rational relationship test) and if so, to what extent is the contribution. Rautenbach refers to it as the weakest test that can be applied to the limitation of a right; see *eg S v Williams* 1995 3 SA 632 (CC) par 86 where the court stated that the deterrence value is so marginal that it does not justify the imposition of this special punishment, referring to corporal punishment for crimes committed by juveniles.

[548] For example the Door of Hope Organisation in Johannesburg has saved the lives of 1645 babies, 208 of which was saved through the baby safe. This means that 12% of these babies were saved through the use of a baby safe.

Can less drastic measures be applied to equally effectively achieve the purpose.[549] This means that due regard must be had to alternative means to achieve the purpose. The less restrictive alternative must be as effective. The alternative must be reasonable and justifiable in an open and democratic society.[550] The use of baby safes is not the only method available to save the lives of infants from unsafe abandonment. Various other methods exist. Firstly, anonymous birth.[551] Anonymous birth is similar to normal birth in a hospital, the only difference is a woman does not give up her identity.[552] A medical consultation is required, which ranges from the obligation to provide information and the social history of the mother, to the instructions of the patient in the event of her death.[553] She also receives care and psychological counselling in the vulnerable period after birth, known as the post-partum period.[554] After the birth of the child the mother may leave immediately, depending on her health condition.[555] At this point in time,

[549] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 322-323; see *Phillips v Director of Public Prosecutions* 2003 3 SA 345 (CC) par 20; see also *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) par 57; Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights." vol. 17 n. 6 2014 *Potchefstroom Electronic Law Journal (PER)* 2257 the method that interferes the least must be chosen; also see Klatt and Meister *The Constitutional Structure of Proportionality* (2012 reprint 2014) 9; Currie and De Waal *The Bill of Rights Handbook* (2013) 170; Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 163 quotes Goldstone in *Harksen v Lane* 1998 1 SA 300 (CC) who describes this "final leg of the enquiry" as a "weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality".

[550] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 322-323; Currie and De Waal *The Bill of Rights Handbook* (2013) 170.

[551] See German law chapter on a full discussion on anonymous birth; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio,* available at www.comparazionedirittocivile.it, last accessed 2020-02-03.

[552] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173; see the chapter on German law for a full discussion on anonymous birth laws; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio,* available at www.comparazionedirittocivile.it last accessed 2020-02-03; see Vonk "De autonomie van het kind in het afstammingsrecht" 2010 5-6 (open access version via Utrecht University repository); Vonk "Weten, Kennen en Erkennen: Kinderen van ouders die niet samen zijn" Vol. 38 No. 4 2013 *Nederlands tijdschrift voor de mensenrechten* 515-531.

[553] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 147-173.

[554] Kuhn concludes that in 37% of cases mediation was also offered at counselling facilities, Kuhn *Babyklappen und anonyme Geburt: Sozialregulationen und sozialpädagogischer Handlungsbedarf* (2005) 330; Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22.

[555] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22.

the same procedure applies as if the child was delivered in a baby safe, the infant first receives medical care and thereafter is placed into the care of a family.[556] In the instance of anonymous birth, the identity of the child is still unknown and an infringement of the right to knowledge of the child's origins still exists.[557] As a result, this method is not less restrictive than the use of baby safes. The second possible method that exists is safe haven laws.[558] Safe haven laws allow the relinquishment of infants to designated safe haven providers such as fire stations, hospitals, churches or police stations. Once the infant is safely relinquished he or she receives the necessary medical care and the normal process as with baby safes then follows. The woman has the option of leaving certain non-identifying information relating to the child's medical history and general information about the family. Although the child will not know his or her origins he or she may be given certain basic information, therefore the full impact of not knowing could be minimised, as some basic information may be available. Thus, this method may lessen the negative effect of the limitation of the right to knowledge of origins.

[556] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Hamper *Babyklappe und anonyme Geburt, Zur thischen und rechtlichen Problematik unter besonderer Berucksichtigung der Rolle von Arztinnen und Arzte* (2010) 21; According to Nadene Grabham Operations Director of the Door of Hope Children's Mission in South Africa the following procedure takes place when a baby is left in a baby box. The baby is left in a baby box any time of the day or night. The baby box is on the same property as a baby house so staff will immediately remove the baby from the baby box (staff is alerted by an alarm that is triggered once a baby is placed inside) and do a health check and take photos, weight and measurement and make notes of any marks etc. on the baby's body. They will take the baby's temperature and vital signs. If all is not well they take the baby to emergencies at a Johannesburg hospital. If all is well, they bath and feed the baby. Within 24 hours they refer the case to their child protection agency such as Abba, Impilo or Child Welfare who will apply at the Children's Court to appoint the Door of Hope as the legal guardian as a Child and Youth Care Centre (CYCC). Due to the fact that they are a CYCC babies are registered in the name of the Door of Hope. They will also place an ad in the local newspaper which will run for 3 months. A case of abandonment is opened at the local police station by the child protection agency, however, sometimes the Door of Hope's own social worker will open up a case in this respect. If no response is received on the ad and no information is received, then the police case will be closed and the baby becomes legally adoptable. If information is left with the baby in baby box such as a clinic card etc., the social worker will investigate and follow up on any information relating to the mother to try find her. About 95% of the time no information is left or the clinic card is left but the page with the mother's details is ripped out. If a name and surname is left with the baby they will use that, if no name and surname is found they will choose a name and surname for the baby. If the police itself brings a baby that was dropped in an unsafe location then in that instance a case of abandonment has already been opened and the police already arrive with a case number.

[557] This was also stated by the Hague court as discussed in Vonk "De autonomie van het kind in het afstammingsrecht" 2010 1 (open access version via Utrecht University repository) referring to The Hague 24 September 2009, LJN: BK1197, where the court decided that the fact that the child is unable to choose to know his or her origins is against Dutch public order.

[558] See the chapter on the US laws for a full discussion on safe haven laws.

Lastly, confidential birth was established by the German legislature as a legally regulated alternative to baby safes and anonymous birth.[559] In confidential birth practices, the mother's identity is recorded in a sealed envelope and not initially disclosed. According to German law the importance of the child's knowledge of the origin of mother and father[560] in terms of section 25(2)(2) of the SchKG is intended to promote the willingness of the pregnant woman to provide the child with as comprehensive as possible information of his or her background.[561] After the birth of the child the proof of origin is sent in a sealed envelope by the counselling office to the Federal Office for Family and Civil Society Tasks and is kept there.[562] The hospital, clinic or obstetrics provider will not know the true identity of the mother, only the counselling centre will have this information.[563] Confidential birth protects the right of the child to one day know his or her origins if he or she chooses but according to Hadžimanović, confidential birth "is only a half-hearted step in the right direction"[564], because women may be plagued for the rest of their lives with the possibility that the child may request their information. When the child reaches the age of 16, the child has a right to inspect the proof of origin or to demand copies, a right of access, from the Federal Office of Family and Civil Society Tasks in terms of section 31(1) of the SchKG. The mother may refuse to allow the child access to the information. Therefore, confidential birth provides the child with the possibility of knowing his or her origins, more so than with the use of baby safes, anonymous birth or baby safe haven laws. It ensures that the purpose of the limitation, which is the right to life is promoted without the accompanying negative effects of the limitation of the knowledge of origins, although some of the negative effects could be on the mother's right to privacy. However, this is only the case if

[559] See the chapter on German law for a full discussion on confidential birth laws.
[560] See fn 55 for information on the rights of the father.
[561] s 25(3) SchKG.
[562] s 27(1) SchKG; Schwedler "Die vertrauliche Geburt- EinMeilenstein fur Schwangere in Not?" 5 2014 *NZFam* 195.
[563] For more on this refer to chapter 3 for the Laws of Germany.
[564] Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 1, available at www.comparazionedirittocivile.it, last accessed 2020-02-03.

the mother agrees to disclosure, if she does not, the child's right to knowledge of his or her origins will be infringed. Nevertheless, a less restrictive means to achieve the purpose does exist, namely confidential birth.[565]

5.3.4 Concluding remarks on the limitation of the right to knowledge of one's origins in terms of the limitation clause

The nature of the right to the knowledge of one's origins is that, although it protects the child's right to know, not knowing does not have any negative impact on the child's psychological well-being, neither is it said to impact the child's dignity or the child's best interests. The importance of the purpose of the limitation of the right to knowledge of one's origins is that such limitation is done for the protection of the life of the infant and thus serves a very important purpose. Limiting the child's right to knowledge of its origins does not bare serious consequences, as it does not negatively impact the child's psychological well-being. The motivation behind such limitation is to save the life of the infant and therefore this justifies the extent of the limitation. Anonymity of the mother is a driving factor behind the use of baby safes and therefore it may be said that limiting the child's right to knowledge of origins is directly linked to saving the child's life and thus achieving its purpose.[566] Less restrictive means do exist to achieve the purpose, such as confidential birth where information is kept and may be accessed upon request of the child. The mother may still refuse this request, therefore this alternative method does not guarantee with certainty that the child will be granted access to information concerning his or her biological origins in so far as the identity of the biological mother is concerned. A further alternative as implemented by the court in *Odièvre*, was to

[565] For more on confidential birth see chapter 3 German law para 3.5.

[566] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 another possible citation is (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43, 21: "It is better to have a baby delivered safely to a designated provider with no medical history than it is to find this same baby discarded in the trash." Dreyer "Texas' safe haven legislation: Is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2003 *Texas Journal of Women and the Law* 180.

provide the applicant with non-identifying information concerning her biological origins. In the end, the limitation of the right to knowledge of one's origins is justified in an open and democratic society based on human dignity, equality and freedom, when weighed against the child's right to life that must be preserved.

5.4 THE MOTHER'S RIGHT TO PRIVACY AS A COMPETING INTEREST AGAINST THE CHILD'S RIGHT TO KNOWLEDGE OF ITS ORIGINS

5.4.1 The biological mother's right to privacy

In terms of the sections discussed above, the right to knowledge of one's origins does exist and this right will apply to everyone under the behest of the Constitution. In direct opposition to the child's right to knowledge of its origins, is the mother's right to privacy. This section is aimed at establishing whether the mother's right to privacy outweighs the child's right to knowledge of his or her origins since it has been determined that the child's right to life outweighs the child's right to knowledge of his or her origins.[567] This is discussed extensively in *Odièvre v France*[568] where the court highlighted the existence of two competing interests, the applicant's interests in finding out about her origins and the interest of the woman who did not wish to be identified as the applicant's mother, in an attempt to protect her private life.[569] The problem the court had to deal with was that article 8 of the ECHR encompasses both "private" and "family" life and applies therefore to both the applicant and the natural mother.[570] The court acknowledged that there are different ways of securing respect for private life and the nature of the State's obligation will depend on which aspect of private life is at issue.[571]

[567] See para 5.3.3.1- 5.3.3.5 above.
[568] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[569] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 par 27 (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[570] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 par 44 (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[571] *X and Y v The Netherlands* 26 March 1985, Series A, no. 91, 12, section 24.

Maternity under French law is regarded as an aspect of private life and receives statutory protection in terms of article 9 of the Civil Code, in terms of that provision it is in contravention of the right to private life to publish information without consent that identifies a woman as being pregnant.[572] This is contrasted by the fact that the right to private life in terms of the Convention also encompasses the child's right to know his or her origins.[573] In terms of the South African Bill of Rights the right to privacy is separate from the right to knowledge of one's origins (as encompassed in the rights discussed above).[574] The right to privacy in a South African context is contained in section 14 of the Bill of Rights. Section 14 provides:

> "Everyone has the right to privacy, which shall include the right not to have –
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

Section 14 firstly guarantees a general right to privacy and then secondly deals with specific infringements of privacy.[575] A two-stage analysis must be conducted to determine whether there has been an infringement of the right to privacy.[576] At first, the extent of the right must be assessed to determine whether law or conduct has infringed the right and next, if indeed there is an infringement, it must be determined whether it complies with the section 36

[572] See *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 para 37 and 38, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[573] See *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 par 25, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. where the applicant contended that establishing her basic identity was an integral part not only of her "private" life but also of her "family" life. In par 27 the Government did not deny the notion of private life which could sometimes encompass information enabling a person's physical or social identity to be established.
[574] See par 5.3.2 above that sets out in which rights the right to knowledge of one's origins is encompassed.
[575] Currie and De Waal *The Bill of Rights Handbook* (2013) at 294; The type of privacy concerned here is informational privacy, according to the Constitutional Court in *Mistry v Interim National Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC). Certain factors are important when dealing with informational privacy: the manner in which the information was obtained; whether it concerned confidential aspects of the applicant's personal life; whether information was used for a purpose other than what it was intended for; or whether it was circulated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld; see Currie and De Waal *The Bill of Rights Handbook* (2013) 303.
[576] Currie and De Waal *The Bill of Rights Handbook* (2013) 294.

limitation clause.[577] At common law, the breach of a person's right to privacy is regarded as an *iniuria.*[578] According to Currie and De Waal "it occurs when there is an unlawful and intentional acquaintance with private facts by outsiders contrary to the determination and will of the person whose right is infringed, such acquaintance taking place by an intrusion or by disclosure".[579] This would be the situation where identifying information of the biological mother of a child is disclosed to the child, contrary to the will of the biological mother. There are two elements to determining the unlawfulness of the disclosure, containing both subjective and objective components. The first indicates that an infringement must be subjectively contrary to an individual's will and secondly, it must be objectively unreasonable according to the *boni mores* of the community.[580] Intention in the form of *animus iniuriandi* is required to establish a breach of privacy.[581] This intention is presumed once the plaintiff has established that there has been unlawful infringement, the onus is then on the defendant to rebut the presumption.[582] The disclosure of private facts in breach of a relationship of confidentiality is regarded as an example of a breach of privacy.[583] According to Currie and De Waal the principle value served by privacy is human dignity[584], although the right to privacy is not

[577] Currie and De Waal *The Bill of Rights Handbook* (2013) 294.
[578] Currie and De Waal *The Bill of Rights Handbook* (2013) 294.
[579] Currie and De Waal *The Bill of Rights Handbook* (2013) 294; see also Neethling et al *Neethling's Law of Personality* (2005) 221.
[580] Currie and De Waal *The Bill of Rights Handbook* (2013) at 296-298; *Financial Mail v Sage Holdings* 1993 2 SA 451 (A) 462G; Neethling et al *Neethling's Law of Personality* (2005) 221; see Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 378 where this is referred to as a legitimate expectation of privacy, 378; for the criticism on the subjective aspect of this test see Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 379 and 380 providing that the subjective privacy expectations can be dealt with mainly where one chooses not to exercise the right.
[581] According to Neethling, this means that "the perpetrator must have directed his will to violating the privacy of the prejudiced party…knowing that such violation would (possibly) be wrongful" Neethling et al *Neethling's Law of Personality* (2005) 225; according to *NM v Smith* 2007 5 SA 250 (CC) the court did not find it necessary to determine whether an infringement of the right to privacy can include those done negligently, as a result it must be the intentional infringement; Currie and De Waal *The Bill of Rights Handbook* (2013) 297; see also Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 378.
[582] Neethling et al *Neethling's Law of Personality* (2005) 253; Currie and De Waal *The Bill of Rights Handbook* (2013) 296.
[583] *Bernstein v Bester NO* 1996 2 SA 751 (CC) as mentioned by Judge Ackermann; *Janse van Vuuren v Kruger* 1993 4 SA 842 (A) (doctor disclosing status of patient); also see Neethling et al *Neethling's Law of Personality* (2005) 227-231.
[584] However, infringement of the right to privacy is also seen as overlapping with the infringement of the right to psychological integrity see *NM v Smith* where the Constitutional Court emphasised that privacy concerned

limited to only serving one's dignity.[585] With regard to the unlawfulness of the disclosure, the biological mother's identity and her preference to keep such identity confidential, means that disclosure would be subjectively against her will. Therefore the only aspect left to determine is whether it would be against the objective *boni mores* of the community to disclose the identity of the biological mother to the child. This objective reasonableness of a subjective expectation was dealt with by the Constitutional Court in *Bernstein v Bester*.[586] In this case the Court used the German approach to arrange different forms of privacy in "concentric circles", defining the inner sanctum privacy as family life and home affairs, which enjoys absolute protection, however it may be limited if done in accordance with the limitation clause.[587] The outer layers of these "concentric circles" are referred to as "periphery privacy" that consists of public life and participation in public affairs, it does not enjoy absolute protection and expecting such protection can be regarded as unreasonable.[588] The identity of the biological mother is information that falls within the inner sanctum of privacy and is thus objectively justified but, although it enjoys a strong form of protection, it may be limited in terms of the general limitation clause.[589] It would have to be determined whether this limitation is reasonable and justifiable in an open and democratic society based on the factors listed in section 36.

personal matters and the court described personal matters as those matters which, if revealed will result in mental distress and injury to anyone who possesses ordinary emotions and intelligence, and where there is a will to keep them private; see Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 378.

[585] See par 5.3.2.3 for a discussion of the right to human dignity; Currie and De Waal *The Bill of Rights Handbook* (2013) 300.

[586] 1996 4 BCLR 449 (CC); 1996 2 SA 751 (CC).

[587] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 12 BCLR 1429 (CC), 2014 2 SA 168 (CC) par 60; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 379.

[588] *Bernstein v Bester* 1996 4 BCLR 449 (CC); 1996 2 SA 751 (CC) par 79; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 379.

[589] Although it may be extremely difficult to justify a factual limitation of this form of privacy; see *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 12 BCLR 1429 (CC), 2014 2 SA 168 (CC) par 60; see also par 5.4.2 here below on the "Justification for factual limitations".

5.4.2 Justification for factual limitations

5.4.2.1 Section 36(1)(*a*) — "the nature of the right"

As stated above the identity of the biological mother forms part of the inner sanctum privacy which deals with issues involving family life and home affairs. Private persons may be bound by the right. The right to privacy overlaps with the right to human dignity in section 10[590] and can overlap with the right to psychological integrity[591] because of the personal nature of the information and the possible effect of disclosing such information on the mind and emotions of the biological mother. Simultaneously, the right to knowledge of one's origins is also an inner sanctum privacy right dealing with family life and thus carries the same weight of importance as the mother's right to privacy.

5.4.2.2 Section 36(1)(*b*) — "the importance of the purpose of the limitation"

The limitation must be directed at safeguarding a lawful interest.[592] The question which may be asked is "what benefit can be achieved through the limitation?" The purpose of limiting the right to privacy would be to inform the child of his or her biological origins. The limitation would amount to a breach of the biological mother's right to a private life.[593] By doing so, the child's right to freedom of association in section 18; the child's right to a name and nationality from birth in section 28(1)(*a*); and the child's right to family and parental care in section 28(1)(*b*) is safeguarded. Therefore, the limitation of the right to privacy of the biological mother serves a lawful interest in protecting the child's rights. However, this is contrasted with the legitimate aim of securing the mother's right to privacy in safe abandonment matters in

[590] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* (Pty) Ltd 2000 10 BCLR 1079 (CC), 2001 1 SA 545 (CC) par 18; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 381.
[591] *NM v Smith* 2007 5 SA 250 (CC).
[592] Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 317.
[593] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 22 par 37, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.

other words the purpose of limiting the child's right to knowledge of his or her origins. The government of France described such a legitimate aim as alleviating the distress of mothers who did not have the means of bringing up their children.[594] As a result, if their right to privacy were protected, mothers would be more inclined to seek assistance rather than unsafely abandoning their infants or committing neonaticide. Looking at the number of rights and interests of the child that are protected when the right to privacy is limited versus the one legitimate aim of the right to privacy which is to promote the safe relinquishment of an infant, the former seems to outweigh the latter. However, upon closer inspection of the importance of the one legitimate aim, and considering the alternative to that being unsafe abandonment which could lead to death or neonaticide, this thesis proposes that enforcing the mother's right to privacy carries with it a stronger purpose than limiting this right by enforcing the child's right to knowledge of its origins. Safeguarding the right to privacy would promote safe relinquishment, ultimately ensuring the life of the infant.

5.4.2.3 Section 36(1)(*c*) — "the nature and extent of the limitation"

How extensive is the infringement, does it do more harm than good? Proportionality entails that the infringement of rights should not be greater than the aim of the limitation.[595] The question is, does it do more damage to rights than is reasonable to achieve its purpose?[596] The limitation of the biological mother's right to privacy would have far-reaching consequences as

[594] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 pg 21 par 36, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; also see Lefaucheur "The French 'tradition' of anonymous birth: the lines of argument" 18 2004 *International Journal of Law, Policy and the Family* 319-342; further see Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343-354; furthermore see Bonnet "Adoption at birth: Prevention against abandonment or neonaticide" 17 1983 *Child Abuse and Neglect* 501, 505.

[595] Currie and De Waal *The Bill of Rights Handbook* (2013) 171; *S v Manamela* 2000 3 SA 1 (CC) par 34 an assessment of how extensive the infringement is, is the first necessary step; *S v Meaker* 1998 8 BCLR 1038 (W), it is the effect of the limitation on rights and not the effect of the limitation on the bearer of rights that is of concern; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 319-320.

[596] Currie and De Waal *The Bill of Rights Handbook* (2013) 168; see *S v Makwanyane* 1995 3 SA 391 (CC) par 184; see also Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 319-320.

far as her rights to human dignity and psychological integrity are concerned. Exposing her identity would infringe upon her feelings of value and worth.[597] In addition, exposing the biological mother's identity would have emotional implications, thus infringing on her psychological integrity. Furthermore, the court in *Odièvre* highlighted the fact that a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied.[598] The court further held that the impact of disclosing the biological mother's identity has far-reaching implications. It will affect the adoptive parents, the father, as well as the other members of the biological family, such as any possible siblings.[599] In light of this, the limitation would be too far reaching, simply put the infringement of rights would be far more extensive than the purpose which the limitation seeks to achieve. The limitation would not only encroach upon the mother's right to privacy, but also the right to privacy of the father, the biological family and any siblings. Furthermore, the limitation would encroach upon the adoptive family who may also seek privacy.

5.4.2.4 Section 36(1)(*d*) — "the relation between the limitation and its purpose"

The law must serve the purpose that it is designed to serve, if it does not, it cannot be a reasonable limitation of the right.[600] Limiting the biological mother's right to privacy through disclosure serves the purpose of enforcing the child's right to knowledge of his or her origins. Thus, there is a connection between the limitation and its purpose. However, as mentioned above,[601] disclosure may go beyond its purpose and infringe the privacy rights of others too.

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[597] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 29, Ackermann J; *Nyathi v MEC for the Department of Health, Gauteng* 2008 5 SA 94 (CC) 45 (requires recognition of importance and worth of every human being).

[598] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 25 par 44, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.

[599] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 26 par 44, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; Here the court highlighted the fact that each of these individuals listed also have a right to respect for their own privacy.

[600] Currie and de Waal *The Bill of Rights Handbook* (2013) 169-170; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 320-322.

[601] See par 5.4.2.3 above.

5.4.2.5 Section 36(1)(*e*) — "less restrictive means to achieve the purpose"

The other means that could be employed to inform the child of his or her origins are those as prescribed by the court in *Odièvre*. The court regarded the provision of non-identifying information of the biological mother and biological family to the applicant as sufficient to enable the applicant to trace some of her roots, whilst at the same time ensuring the protection of third-party interests.[602] The court also made mention of the establishment of the National Council for Access to Information about Personal Origins, which is an independent body, through which individuals may request access to information about origins.[603] This access however, is subject to the approval of biological mothers.[604] It is in this way that both the right to knowledge of origins of the child as well as the right to privacy of the mother are protected.

5.4.3 Concluding remarks on the limitation of the right to privacy in terms of the limitation clause

Both the right to privacy of the mother and the child's right to knowledge of origins form part of the inner sanctum privacy rights. The mother's right to privacy outweighs the child's right to knowledge of its origins in that the purpose of limiting the right to privacy is less important than the legitimate aim carried by the right, which is to encourage safe relinquishment. The nature and extent of the limitation of the biological mother's right to privacy goes beyond simply limiting the mother's right but also limits the privacy rights of third parties. Although there is a direct link between the limitation and the purpose, it seems that limiting the right goes beyond the purpose it is designed to serve by limiting the rights of others. Finally, the court in *Odièvre* has determined that there is a less restrictive way in which to achieve the purpose and

[602] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 26 par 48, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[603] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 26 par 49, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[604] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 26 par 49, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.

that is by providing the child with non-identifying information about his or her biological origins. In this way, the biological mother's right to privacy remains protected.

5.5 AN INTERNATIONAL PERSPECTIVE

Article 24 of the 1966 ICCPR[605] contains the right to birth registration and allows the child to be legally recognised in a country and to receive public benefits, as well as find out about his or her origins at a later stage.[606] Paragraphs 2 and 3 are essential to the constitution and preservation of a child's identity.[607] Article 24 provides:

> "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
>
> 2. Every child shall be registered immediately after birth and shall have a name.
>
> 3. Every child has the right to acquire a nationality."

This would also enable a child to find out where he or she originates from. However, it has been argued that the right to knowledge of one's origins is actually derived from article 17 of the ICCPR, although it consists of the right to privacy, it also provides for protection of the family against unlawful interference.[608] It reads as follows:

[605] South Africa is a state party to the ICCPR and ratified it on 10 December 1998.
[606] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 141; Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005) 432; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 48 where the author states that this general human rights provision has been interpreted as containing a right to know one's origins as well; further see van Raak-Kuiper *Koekoekskinderen en het recht op afstammingsinformatie* (Proefschrift, Universiteit Tilburg 2007).
[607] See Appell "Certifying identity" 2014 *Capital Univeristy Law Review* 42, 35 on the formation of an identity through and by a birth certificate.
[608] Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 48, further at 49 the author points out that Van Bueren highlighted "that the right to know was already protected on the basis of Article 19(2) of the ICCPR prior to the approval of the final draft of Article 7(1) of the UNCRC".

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

The 1948 UDHR provides for a general right to a nationality in article 15 and this is also seen in article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which includes the right to a nationality guaranteed to everyone without discrimination.[609] The 1969 American Convention on Human Rights (ACHR) article 20 confers the right to a nationality to every person in the state in which he or she is born provided he or she is not entitled to any other nationality. The 1981 African Charter on Human and Peoples' Rights (ACHPR) does not contain the right to a nationality but a general right to non-discrimination against women and children in article 18(3). The UNCRC provides for the right to a name and nationality from birth in article 7:[610]

> "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
>
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

Article 6 of the ACRWC[611], prompted by article 7 of the UNCRC, provides that "every child shall have the right from his birth to a name" and "shall be registered immediately after birth".

[609] Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 3; United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965, entered into force on 4 January 1969.

[610] South Africa signed the United Nations Convention on the Rights of the Child (UNCRC) on 29 January 1993 and ratified it on 16 June 1995. Therefore, South Africa is a state party to the UNCRC and is therefore bound under international law to respect the rights and carry out the duties in that treaty; see South African Law Reform Commission Draft Issue Paper 32 Project 140 "The right to know one's biological origins" 20 May 2017 4.

[611] South Africa is also a state party to the African Charter on the Rights and Welfare of the Child (ACRWC), South Africa signed the ACRWC on 10 October 1997 and ratified it on 7 January 2000.

It also provides that every child shall have the right to acquire a nationality and state parties must ensure their constitutional legislation recognises the right to a nationality of a child in the territory in which the child is born, if that child is not entitled to another nationality. The European Convention on Human Rights (ECHR) contains no provisions on the right to a nationality however; article 8 deals with the right to a family life and privacy and this is said to encompass the right to know one's origins, which includes the right to know one's parents' identity as well as the circumstances of one's birth.[612]

The 1989 UNCRC is the first human rights convention to contain provisions granting both adults and children the right to know their origins.[613] Article 7 of the UNCRC is closely linked to article 8 on the right of the child to an identity.[614] Name and nationality are seen as elements of identity.[615] The right to be registered immediately after birth is to ensure the child can enjoy his or her rights in the state of birth and the same goes for the right to a name and to acquire a

[612] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 142; Various cases exist where the full meaning carried by a 8 was illustrated, for example in *Gaskin v United Kingdom* 10454/83 1989 ECtHR 13 (7 July 1989); *Mikulić v Croatia* 53176/99 2002 ECtHR 27 (7 February 2002), *Ebrü v Turkey* 60176/00 2006 ECtHR (30 May 2006) and *Jäggi v Switzerland* 58757/00 [2006] ECtHR 13 July 2006, (2008) 47 E.H.R.R. 30; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 161 some of the language used by the Strasbourg court appears to create a right to "self-realisation and authenticity"; Marshall "A right to personal autonomy at the European Court of Human Rights" 3 2008 *Eur. Human Rts. L. Rev.* 337, 350; for the positive and negative obligations attached to the right to a family life see Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13; Amorós "Biology-based systems of parentage and safety valves protecting social parenting" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 115.

[613] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 142; Mention must be made of a 30 of the Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption 1993, which repeats a 7 UNCRC; see also Van Bueren *The International Law on the Rights of the Child* (1998) 122.

[614] Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 10; Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 7.

[615] Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 10; Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 7; Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 77.

nationality.[616] The right to know and be cared for by his or her parents is a contentious issue in respect of the use of baby safes,[617] anonymous birth or confidential birth.[618] In these instances the identity of the biological parents are not known or are kept confidential. The committee on the rights of the child holds the view that the right to know and be cared for by his or her parents include biological parents and that the child has the right to know who they are as far as possible.[619] This right is seen as being a part of both article 7 and article 3 because it is considered in the best interests of the child to know his or her birth parents.[620] The words "as far as possible" however, suggest that there are situations where the child's right to know his

[616] Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 10; Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 7.

[617] Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 187-188, the Committee on the Rights of a Child has taken a strong stance against the use of baby boxes as seen in its concluding observations on the Czech Republic in 2011 where it urged the government to end the programme as soon as possible and to instead get to the root of the problem; see United Nations Committee on the Rights of the Child, Concluding Observations: Czech Republic (4 August 2011) CRC/C/CZE/CO/3-4, [50].

[618] Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 187-189; The Committee on the Rights of the Child does not favour these mechanisms because they apparently allow the mother to unilaterally decide the extent to which a child's rights can be exercised and this includes the right of the child to stay with his or her family where possible. It further gives no opportunity to the authorities to determine whether the child has family in terms of a 19 of the UNCRC. The Committee also finds a problem with the fact that it prevents the father from establishing a relationship with the child if he wishes.

[619] The UNCRC Committee has objected to laws which do not allow adopted children to find out who their biological parents are and has made it clear that denying the child access to information on his or her origins is in violation of a 7 and that the state has a responsibility to gather and conserve information concerning a child's identity. e.g. Czechoslovakia made a declaration that in the case of irrevocable adoptions the "non – communication of a natural parent's name or natural parents' names to the child is not in contradiction to this provision". In subsequent communications it became clear that the rule is not stringently applied; see UNCRC Committee, Concluding Observations: Czech Republic (UN Doc. CRC/C/15/Add.201, 2003), para 8-9; Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 26; Fenton-Glynn "Anonymous relinquishment and baby-boxes: life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 189.

[620] Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 26; Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 188-189.

or her biological parents will be limited.[621] Ziemele identifies the issue of abandoned children as one of the most problematic areas as concerns the right to be cared for by one's parents.[622] In ratifying the UNCRC the UK made a declaration limiting the definition of "parents" to those who are determined as being such according to the domestic law of each individual state.[623] This limitation was introduced because of the difference between legal motherhood and genetic motherhood.[624] However, this is not the approach of the Convention, which aim was for a child to know his or her genetic, birth and psychological parents.[625] In respect of unsafe abandoned children knowledge of biological origins is near impossible. A child is left abandoned without any identifying information due to the mother's fear of arrest. Article 8 of the UNCRC provides:

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[621] Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 27; The European Court of Human Rights when weighing interests of the anonymity of the mother who abandoned her child and that of a child to know the name of her mother decided in favour of the rights of the mother. The Court noted that the problem of anonymous birth is a complex one and there is no European consensus on the best way to deal with it. However the Court found that the French system of anonymous birth did not violate a 8, which provides for the protection of family life; see European Court of Human Rights, *Odièvre v France*, 15 January 2003, Judgments and Decisions 2003-III, para 44, 47 ((42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43); see also the dissenting opinion of Wildhaber J, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellompää; The decision in *Odièvre* was different from the one reached by the court in *Godelli v Italy* Judgement of 25 September 2012 European Court of Human Rights, here the court held that there was a violation of a 8 because Italian law with the use of anonymous birth, unlike its French counterpart, did not allow for the mother to change her mind and identify herself at a later stage if she so wishes; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 13 and fn 98, available at www.comparazionedirittocivile.it, last accessed 2020-02-03, for information on the current law reform in Italy where the law will allow children born anonymously to obtain non-identifying information of their birth mother; see also a 250 of Italy's Civil Code which does not make it mandatory for parents to recognize an illegitimate child, and if they choose to do so, they will not be named on the birth certificate; Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 188; Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 534-535; see Blauwhoff who points out that the words "as far as possible" were insisted upon by Germany and the United States on the basis of the recognition of the right to know would be difficult to reconcile with their practice of secret adoption. Various other countries also objected to the absolute wording such as Luxembourg which allows anonymous birth and the Czech Republic on the basis of its practice of artificial fertilization and adoption, see *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 51.

[622] Ziemele *A Commentary on the United Nations Convention on the Rights of the Child Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (2007) 27.

[623] O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 354; see also generally Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law*.

[624] For more on this see Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 156.

[625] Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 121-134.

"1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law
without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity."

Article 8 is the only one of its kind in international conventions, protecting the right to an identity.[626] It was developed because of the number of children that went missing in Argentina during the military junta between 1975 and 1983, which resulted in 145 to 170 children disappearing.[627] These children disappeared either as a result of kidnapping or as a result of their mothers being imprisoned.[628] International law was established to create a solution where the laws of Argentina failed.[629] This new article allowed the children to retain their family

[626] For more on a 8 see Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 82 and 94-95; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 52.

[627] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 7; "An estimated 30% of those who disappeared were women, some with children. It is known that 3% of the women were pregnant"; see O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 351-352; Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 143; Steward "Interpreting the child's right to identity in the U.N. Convention on the Rights of the Child" 26 1992 *Fam. L.Q.* 221, 222; Giroux "Putting the child first: a necessary step in the recognition of the right to identity" 27 2011 *Can. J. Fam. L.* 53, 77; Oren "Righting child custody wrongs: The children of the 'disappeared' in Argentina" 14 2001 *Harvard Human Rights Journal* 123-195, 163; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 11, available at www.comparazionedirittocivile.it, last accessed 2020-02-03; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 52-53.

[628] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 7; for more information see The International Children's Rights Monitor (Defence for Children International, Geneva) Vol. 1, No. 1 and 4 and Vol. 2, No.1; Oren "Righting child custody wrongs: The children of the 'disappeared' in Argentina" 14 2001 *Harvard Human Rights Journal* 123-195, 163; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 11, available at www.comparazionedirittocivile.it, last accessed 2020-02-03; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 52-53.

[629] O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 352; Oren "Righting child custody wrongs: The children of the 'disappeared' in Argentina" 14 2001 *Harvard Human Rights Journal* 123-195, 163. Delays in reuniting genetic kin can also influence implementation of the best-interests principle. This was seen in Argentina after the conflict, where eventually calls to reunite children with their biological parents or family was substituted with the request to merely inform them of their genetic origins because at that stage children had already formed a bond with the families they were with; see Oren"Righting child custody wrongs: The children of the 'disappeared' in Argentina" 14 2001 *Harvard Human Rights Journal* 123-195, 194; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN

identity.[630] Deprivation of identity called for special protection from the state to re-establish the child's identity and this included restoring the child to biological relatives to be reared by them.[631] The word "family" was deleted in the revised text and replaced by nationality, name and family relations.[632] There was a suggestion to include the words "lawful custodians" in paragraph two but it was deleted because the matter is dealt with in article 9.[633] The text as it now reads was adopted in 1989.[634] Articles 7 and 8 emphasise the significance of family relations yet fail to provide a useful definition of "relatedness".[635] Both articles 7 and 8 are devoted to identity rights.[636] It was believed that article 8 created a new form of human right.[637] Identity is not defined in the convention, leaving it open to possible wide interpretation. It does however give three examples of what it includes: nationality, name and family relations.[638] Furthermore, the child's personal history, its race, culture, religion, language, physical appearance, abilities and inclinations are also protected.[639] The sponsor of article 8 has stated:

Convention on the Rights of the Child?" 2018 *Gennaio* 11, available at www.comparazionedirittocivile.it, last accessed 2020-02-03.

[630] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 8; for more information about the discussions in the Working Group; Detrick (ed.) *A Guide to the 'Travaux Préparatoires'* (1992) 291-296.

[631] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 8.

[632] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 8.

[633] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 8.

[634] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 8.

[635] Diver "Conceptualizing the 'right' to avoid origin deprivation: international law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 81.

[636] O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 351-352.

[637] O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 352.

[638] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 143.

[639] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 144; Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 114-115; Hodgson "The international legal protection of the child's right to a legal identity and the problem of statelessness" 7 1993 *Int'l J.L. & Fam.* 255, 265.

> "the nature of the new right created by this article will, in fact, depend on the development of the legal systems of the countries concerned rather than on the specific phenomenon that initially prompted the sponsoring countries to introduce this new idea."[640]

Therefore, it will depend on what each state defines as identity, whether it be identity of biological parents or whether adoptive parents for example are sufficiently covered by the term "family relations". In some cases the right to know conflicts with the best interests of the child, this is particularly the case in adoption cases and children born of donated gametes. Article 8 protects the right of the child to preserve his or her identity and family relations.[641] Identity rights are not mentioned in the European Convention on Human Rights, however, article 8 that protects private and family life has been interpreted by the European Court of Human Rights as a right to one's own life story.[642] Furthermore, article 30 of the Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption[643] places an obligation on member state authorities to conserve the information on the origins of the child.[644] Sometimes this information is only made available to the child upon becoming an adult, but this is dependent on the laws of the country concerned.[645] It is not possible in all situations to disclose information regarding the child's biological parentage. In artificial procreation, for

[640] Cerda "The Draft Convention on the Rights of the Child: New rights" 12 1990 *Hum. Rts. Q.* 115, 117; see also Steward "Interpreting the child's right to identity in the UN Convention on the Rights of the Child" 26 1992 *Family Law Q.* 221-233, 223.
[641] Also discussed in O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review*.
[642] *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 where a person who remained in the care of the state until the age of majority wanted access to personal files on his childhood see par 11; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 166 the authors point out that a 8 of the ECHR includes those who will raise the child, the biological father, and siblings by reference to 'everyone'. The authors opine that if a mother can deny her child knowledge of who she is, she is also preventing the child knowledge of who the father is; For more on the positive and negative obligations imposed by the right to a family life see Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13; also see O' Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 354.
[643] of 29 May 1993.
[644] O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 354.
[645] O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 354.

example, it is not possible to reveal the identity of the donor because of donor anonymity.[646] A further example is in closed adoption cases where the identity of the biological parents are not disclosed to the child. According to Doek, "respect for family life which the child *de facto* has since birth may mean that it is not in the best interests of the child to be returned to a family that he or she does not know at all".[647] What is in the best interests of the child in abandonment cases? Is it in the best interests of the child for the law to strive to preserve his or her identity to such an extent that allowing a safe form of relinquishment would thwart that? Or is it in the best interests of the child to have no information concerning his or her identity, but to be alive and safe as opposed to the alternative of death or serious injury to health and well-being? Or is there a middle point where the law can both preserve the identity of the child as well as protect the child from near death due to unsafe abandonment? These are the important questions that need to be asked in view of the discussion of identity. Doek states that it is not feasible for a state to force parents by law to provide this information to the child as it would result in an unbalanced interference in the family and privacy of both the parents and the child.[648] Regardless of this, a proper interpretation of the UNCRC reveals that it includes the right to preserve your identity and the right to be informed about your biological origins. Luxembourg entered a declaration and reservation to the UNCRC in relation to article 7 as follows:

> "The government of Luxembourg believes that Article 7 of the Convention presents no obstacle to the legal process in respect of anonymous births, which is deemed to be in the interest of the child, as provided under article 3 of the Convention."[649]

[646] This in terms of s 41(2) of the Children's Act 38 of 2005 which prohibits the identity of a gamete donor or surrogate mother from being disclosed to a child or the child's guardian.
[647] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 9.
[648] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 11-12; for more theories on the development of an identity see Muuss and Velder *Theories of Adolescence* (1968) 426.
[649] UN. Doc. CRC/C/2/Rev.2 p 24; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 11, 14, available at www.comparazionedirittocivile.it, last accessed 2020-02-03; The UN Committee recommends that State parties consider removing the requirement of the biological mother's consent to reveal her identity and to research the root causes of women making use of anonymous birth in this respect see the concluding observations on the

In France, a system of anonymous birth also exists. The right to give birth secretly in France is called "accouchement sous X" (delivery under the name of "x") because the woman's name is replaced in the child's file by an "x".[650] This allows women to give birth anonymously and free of charge knowing that their identities will never be disclosed to the child without their consent.[651] Children will therefore have no link to their lineage at birth.[652] The UN Committee

combined third and fourth periodic reports of Luxembourg 64th session of the UN Committee 16 September-4 October 2013, CRC/C/LUX/CO/3-4, 29 October 2013; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 155 where the authors point out that similar regimes such as anonymous birth are carried out in Italy and Luxembourg; Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 189-190; This is contrary to the decision of the Hague court as discussed in Vonk "De autonomie van het kind in het afstammingsrecht" 2010 5 (open access version via Utrecht University repository); Vonk "Weten, Kennen en Erkennen: Kinderen van ouders die niet samen zijn" Vol. 38 No. 4 2013 *Nederlands tijdschrift voor de mensenrechten* 515-531.

[650] Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 155; also see Lefaucheur "The French 'tradition' of anonymous birth: The lines of argument" 18 2004 *International Journal of Law, Policy and the Family* 319-342; further see Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343-354; furthermore see Bonnet "Adoption at birth: Prevention against abandonment or neonaticide" 17 1983 *Child Abuse and Neglect* 501, 505.

[651] Villeneuve-Gokalp "Women who give birth 'secretly' in France 2007-2009" 66 (1) 2011 *Population-E* 131; Rosenberg "The Illegality of baby safes as a hindrance to women who want to relinquish their parental rights" October 2015 *Athens Journal of Law* 204; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 7, available at www.comparazionedirittocivile.it, last accessed 2020-02-03; the French *Conseil Constitutionnel* has decided in its judgment of 16 May 2012 that anonymous birth in France is not unconstitutional; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 8, this was criticised by Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 (2) 2007 *International Journal of Law, Policy and the Family* 137, 151; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 160 discuss the creation of the *Loi Royal* in France, in terms of which the woman is informed of the importance of leaving information in that it promotes the right of each person to know his or her origins. Her information is placed in a sealed envelope. This is completely voluntary and the woman may therefore refuse. The *Loi Royal* is similar to the German law system of confidential birth. In this respect see the German law chapter; also see Vonk "De autonomie van het kind in het afstammingsrecht" 2010 5 (open access version via Utrecht University repository) where anonymous birth in France is discussed and the author points out that the Hague court concluded on grounds of aa 7 and 8 of the CRC and a 198 of the Burgerlijk Wetboek that not mentioning who the mother is, is contrary to Dutch public order. This after a Dutch woman gave birth anonymously in France. The court was of the opinion that the minor must have the choice at a later stage to access information to his or her origins; also see Vonk "Weten, Kennen en Erkennen: Kinderen van ouders die niet samen zijn" Vol. 38 No. 4 2013 *Nederlands tijdschrift voor de mensenrechten* 515-531.

[652] Villeneuve-Gokalp "Women who give birth 'secretly' in France 2007-2009" 66 (1) 2011 *Population-E* 131; Rosenberg "The Illegality of baby safes as a hindrance to women who want to relinquish their parental rights" October 2015 *Athens Journal of Law* 204; This right has been strengthened by insertion of a 341 in the French Civil code that if a woman's identity is discovered no filiation links can be established by the child. For a full explanation of how accouchement sous x started in France see O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 81-82; also see Lefaucheur "The French 'tradition' of anonymous birth: The lines of argument" 18 2004 *International Journal of Law, Policy and the Family* 319-342; further see Willenbacher "Legal transfer of French Traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law,*

on the Rights of the Child expressed doubts about the French system of anonymous birth, arguing that the legislative measures being taken by the state party may not reflect the provisions of the Convention, and its general principles.[653] The response from French commentators was simply that article 7 is qualified by the words "as far as possible".[654] However, it must be borne in mind that the interpretations of conventions take place within national legal cultures and the understanding and interpretation of different concepts such as the concepts of "family" and "best interests of the child" depends on how national laws define them.[655] The need for anonymous birth in light of the UNCRC needs to be taken into account. Why does France have a system of anonymous birth? According to Bonnet, anonymous birth protects children from abuse and infanticide and in some instances preserves the life of the woman.[656] She also argues that anonymity is a privacy right.[657] Thery on the other hand argues that anonymous birth negates the objective fact of birth, clashes with the rights of children to know their origins and that this causes pain to the children born in such a way.[658] A possible compromise has been suggested in France where the bar on the establishment of a filiation

Policy and the Family 343-354; furthermore see Bonnet "Adoption at birth: Prevention against abandonment or neonaticide" 17 1983 *Child Abuse and Neglect* 501, 505.

[653] France IRCO Add. 20 p 14; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 7, 11 and 24, available at www.comparazionedirittocivile.it, last accessed 2020-02-03; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 160; U.N. Committee on the Rights of the Child, Concluding Observations on France para 43, U.N. doc. CRC/C/FRA/CO/ (June 22, 2009); United Nations Committee on the Rights of the Child, Concluding Observations: Austria (5 October 2012) CRC/C/AUT/CO/3-4, [30], where the committee expresses its preference for confidential birth.

[654] O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 81; Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 11, available at www.comparazionedirittocivile.it, 2020-02-03.

[655] O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 81; Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 58.

[656] Bonnet Geste D'Amour 1991; O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 82-83; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 163 disagree with this assertion and provide that for example abortion rates are not falling in France, which is second only to the UK in the number of abortions currently carried out each year.

[657] Bonnet *Geste D'Amour* (1991); O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 82-83.

[658] Thery *Couple Filiation et Parente Aujourd'hui* (1998); O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 82-83.

link be lifted, thus establishing a legal tie between the mother and the child once the mother's identity has been discovered.[659] This suggestion is similar to the system of confidential birth that has been established in Germany where the identity of the mother is preserved and upon the child reaching a certain age, he or she may request the information.[660] Eekelaar poses the question whether anyone would choose to live his or her entire life on the basis of deliberate deception about their genetic origin?[661] He states that this question is from a position of rights-based thinking instead of welfarism, which views the withholding of information from the child as being in the best interests of the child.[662] However, in the case of abandonment one can argue that the deception is not deliberate but done in order to preserve the child's life and seen as a last resort. Article 8(1) does contain an important limiting provision in the terms "as recognized by law" thus allowing the law of individual states to determine to what extent the identity of a child will be preserved. However, in terms of article 4 of the UNCRC it requires the state party to undertake all legislative, administrative or other measures to implement that right.

The principle in this article that state parties have to uphold is the non-separation of parents and children. The rest of the article states instances in which separation would be justifiable.

Article 9 of the UNCRC provides:

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[659] O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 82-83.

[660] Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 156; see also Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio*, available at www.comparazionedirittocivile.it, last accessed 2020-02-03.

[661] Eekelaar "Families and children: from welfarism to rights" in McCrudden and Chambers *Individual Rights and the Law in Britain* (1995) 301-333, 317; Freeman "The rights of the artificially procreated child" in Freeman *The Moral Status of Children. Essays on the Rights of the Child* (1997) 199; Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 12.

[662] Eekelaar "Families and children: from welfarism to rights" in McCrudden and Chambers *Individual Rights and the Law in Britain* (1995) 301-333, 317.

> "1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."

The wording of article 9(1) illustrates that state parties must take positive measures to prevent a separation of the child from his or her parents but the words "against their will" presupposes that state parties only have this duty if it is not against the will of the parents.[663] Doek expresses that "against their will" refers to both the will of the parents and the child,[664] however this thesis disagrees with that interpretation as not in all cases is a child able to express a will. Therefore, this sentence in article 9(1) is indeed referring to the will of the parents. When a child is abandoned, the will of the parent is expressed in the act of abandonment. The parent, usually the mother, has due to circumstances decided that she is no longer able to care for the child; therefore, the state will not be compelled in this instance to ensure non-separation, but should act in the best interests of the child by securing an alternative. The UN Committee on

[663] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 23.
[664] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 23.

the Rights of the Child has often recommended specific measures to prevent the abandonment of children by their parents.[665] These measures include family support or allowances in particular for single-parent families.[666] However, finances are not the only reason for the abandonment of children and limiting the provision of support to finances would not solve the problem.

The right to know one's origins has both positive and negative dimensions. Negative because it protects against active violations by state authorities and positive because it prevents passive omission by the state.[667] Article 7 of the UNCRC guarantees both the positive right to registration at birth and the positive right to preservation of data for later consultation.[668] Article 8 also gives positive duties to the state to assist and protect the re-establishment of the identity of the child. The right to know one's origins does not include the right to have a relationship with one's biological parents; it merely consists of the right to know who they are.[669] Article 9 of the UNCRC however provides that a child that is separated from one or both parents has the right to maintain a personal relationship and contact with them except if contrary to the child's best interests. Furthermore, article 18 provides:

> "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as

[665] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 23; e.g. UNCRC Committee, Concluding Observations: Norway (UN Doc. CRC/C/15/Add.262, 2005), par 24: "take measures to address the causes of the rising number of children who are removed from their families, including through adequate support for biological parents" and Kyrgyzstan (UN Doc. CRC/C/15/Add.244, 2004), par 40: "Adopt comprehensive strategy and take preventative measures to avoid separation of children from their family environment inter alia by providing parents or guardians with appropriate assistance".
[666] Doek *A Commentary on the United Nations Convention on the Rights of the Child Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated From His or Her Parents* (2006) 23.
[667] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 145.
[668] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 145, 146.
[669] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 146.

the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

Reference to "parents" in articles 9 and 18 of the UNCRC make it clear that the legal guardians and parents are included and not only the biological parents. Reference to these terms indicate that a wide interpretation is warranted of the word "parents" otherwise the terms "biological parents" or "genetic parents" may have been used instead.[670] An archaic interpretation would be to insist that children may only be raised by their biological parents as the best possible option. Restricting it to only biological would exclude many individuals from the ambit of this convention. This is contrary to the opinion of Hodgkin and Newell who state that children are best off with their biological parents.[671] The right to know and be cared for by his or her parents in article 7 is qualified by the words "as far as possible" and what is regarded as "as far as possible" is determined by each state.[672] The child's right to know conflicts with the biological mother's right to privacy. The biological mother could have a fundamental interest to keep her identity, or that of the biological father, secret when giving birth; she could have been the victim of rape or of an incestuous relationship.[673] In some cases both the right to life of the mother and the child may be protected by non-disclosure of the circumstances surrounding the

[670] Diver "Conceptualizing the 'right' to avoid origin deprivation: International law and domestic implementation" in Diver (ed) *A Law of Blood-Ties: The "Right" to Access Genetic Ancestry* (2014) 77-102, 79 where the author points out the reluctance of the Drafters to refer to biological identity due to the advancement of reproductive technologies in the future; However, see Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 159 where the authors state that the increasing use of techniques of medically assisted reproduction has made it imperative that we think constructively about the need to expand Article 8 to include a right to biological identity; see also Freeman Freeman "The rights of the artificially procreated child" in Freeman *The Moral Status of Children. Essays on the Rights of the Child* (1997); see also Ruggiero, Volonakis and Hanson "The inclusion of 'third parties': The status of parenthood in the Convention on the Rights of the Child" in Brems, Desmet and Vandenhole (eds) *Children's Rights Law in the Global Human Rights Landscape Isolation, Inspiration, Integration?* (2018) 71.

[671] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 146; Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 121.

[672] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 146.

[673] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 147; s 236(3)(*b*) and (*c*) of the Children's Act.

birth or pregnancy and the child might be better protected by not knowing certain elements of his or her biological origins.[674] To determine which right is dominant or deserves protection, whether the right of the child to know or the right of the mother to privacy deserves protection, one needs to analyse what would be in the best interests of the child. According to some authors, article 7 should be read in conjunction with article 3, thus imposing limits on the right to know in cases where the information would be contrary to the child's best interests.[675] This thesis agrees with that approach – in all matters the best interests of the child should be a primary consideration. In instances of a conflict between article 7 and 8 (the interest the child has in knowing his or her origins) and the child's other interests and the Committee's failure to provide criteria in balancing the child's interests with that of the parents may, according to Besson, be interpreted positively as rendering these conflicts unimportant and giving the child's interests priority over the interests of parents.[676] However, this does not answer the question whether articles 7 and 8 will have priority over *the child's* other interests. In child abandonment cases the affected interests include the child's right to life. The right to life in article 6 and the right to knowledge of origins in article 7 and 8 have to be balanced, although at face value, this thesis asserts that the right to life trumps the child's right to knowledge of origins because without life there can be no origins, this has also been proved in the above discussions. The question asked by Besson is whether the right to knowledge of identity can be weighed against the right to privacy of the mother, and if so, which right would enjoy pre-eminence.[677] In its case law, the European Court of Human Rights has confirmed that the right to know one's

[674] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 147.
[675] Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 97-112; Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 147.
[676] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 149.
[677] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 150.

identity is not absolute.[678] The determination of the extent of the state's positive duties resulting from the right to know one's origins, requires balancing that right with the rights of others and in doing so the state has a certain margin of appreciation.[679]

In the matter of *Odièvre v France*[680] the applicant alleged that the fact that her birth had been kept secret, with the result that it was impossible for her to find out her origins, amounted to a violation of her rights guaranteed by article 8[681] of the European Convention on Human Rights and amounted to discrimination contrary to article 14.[682] The applicant's biological mother gave birth under the "accouchement sous x" on 23 March 1965. The applicant was placed with Child Welfare Services and was adopted in 1965 by Mr and Mrs Odièvre. In 1990 the applicant managed to obtain non-identifying information about her natural family but sought detailed information about her birth since discovering that her natural parents had three sons and

[678] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 150.
[679] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 150; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 161.
[680] Application no. 42326/98, Strasbourg 13 February 2003 another possible citation is (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43 par 3; also discussed in Vonk "De autonomie van het kind in het afstammingsrecht" 2010 6 (open access version via Utrecht University repository) where the author questions the reasonableness of placing the mother and the child on equal footing; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 82.
[681] a 8 "Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"; see Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 177 where mention is made of the fact that a 8 is not absolute, refer to a 8(2) where it clearly indicates that this article is capable of restrictions when it clashes with other rights and freedoms; see Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13 for positive and negative obligations imposed by the right to a family life; Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 535; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 82.
[682] a 14 "Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 82.

therefore she had siblings. The applicant contended that establishing her basic identity was an integral part not only of her "private life" but also of her "family life" with her natural family with whom she hoped to establish emotional ties.[683] The Government excluded the latter possibility, contending that there needed to be the existence of a family in order to enjoy the guarantee under article 8.[684] A biological link was not enough to establish a "family life" in accordance with article 8.[685] The Government stood by the fact that no "family life" within the meaning of the Convention existed between the applicant and her natural mother – they had never met and the mother abandoned the applicant and consented to her adoption.[686] The only "family life" that fell within the scope of article 8 was that of the applicant and her adoptive parents.[687]

This case concerned two competing interests: the applicant's right to knowledge of her identity and the mother's right to privacy.[688] The court found it necessary to examine the case from the perspective of a private life not family life since the applicant wanted to know her biological

[683] Application no. 42326/98, Strasbourg 13 February 2003.
[684] The court referred to the case of *Marckx v Belgium* 13 June 1979 Series A no. 31; *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 18, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[685] Here the court referred to the situation where a person donated sperm only to enable a woman to become pregnant through artificial insemination and this did not give the donor the right to respect for family life with the child; *M v the Netherlands* 16944/90, Commission decision of 8 February 1993, Decision and Reports 74 p 120;In the matter of Mandet v France 30955/12 ECHR the court noted that the reasoning in the domestic court was based on the best interests of the child therefore there was no violation of Article 8 of the ECHR which contains the right to family and a private life. Therefore the child's known family unit was disrupted in order to protect the child's right to knowledge of his origins. A decision very contrary to normal practice of upholding the family unit such as the *pater es quem nuptia demonstrant* presumption followed in terms of South African law.
[686] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 18, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[687] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 18, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[688] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 18, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; also see Lefaucheur "The French 'tradition' of anonymous birth: The lines of argument" 18 2004 *International Journal of Law, Policy and the Family* 319-342; further see Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343-354; furthermore see Bonnet "Adoption at birth: Prevention against abandonment or neonaticide" 17 1983 *Child Abuse and Neglect* 501, 505.

information and was not questioning her relationship with her adoptive family.[689] Birth and the circumstances in which a child is born forms part of a child's and then an adult's private life guaranteed by article 8 of the Convention, therefore article 8 is applicable.[690] The applicant asserted that she was defending the right of the child and stated that giving birth anonymously was a failure by the system and not a woman's right.[691] She stated that anonymity could be avoided by other means because it was as a result of domestic violence, problems related to youth and financial problems.[692] She said in most cases the distress of a mother unable to care for her child could be alleviated by helping her or assisting her with the process of adoption and not through anonymity.[693] The applicant claimed that the principle of proportionality would only be satisfied if an independent body made the final decision regarding whether information should be disclosed in the instance where the contributor (in this case the biological mother) withholds consent or fails to respond.[694] In French law the National Council for Access to Information on Personal Origins could be searched in order to find out the identity of the mother, however this information can only be revealed with her consent.[695] The Council had

[689] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 18, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[690] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 18, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; Still the impact of French law on the applicant's private life was admitted and it was stated that she has a vital interest according to the Convention in establishing important aspects of her personal identity, such as the identity of her parents; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 82; also see Lefaucheur "The French 'tradition' of anonymous birth: The lines of argument" 18 2004 *International Journal of Law, Policy and the Family* 319-342; further see Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343-354; furthermore see Bonnet "Adoption at birth: prevention against abandonment or neonaticide" 17 1983 *Child Abuse and Neglect* 501, 505.
[691] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[692] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[693] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[694] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[695] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.

no discretion of its own to go against a decision of the mother not to disclose her identity.[696] The applicant claimed that this was not in line with the principle of proportionality.[697] The government maintained that anonymity pursued a legitimate aim, namely alleviating the stress of mothers who did not have the means of bringing up their children.[698] By affording them the option of confidentiality, it served to encourage women to give birth in favourable conditions, rather than alone with the risk that they may not attend to the child's needs.[699] Women who used this method amounted to approximately 600 a year and were young dependent women, still living with their parents in Muslim families in which pregnancy outside of marriage was a great dishonour, as well as isolated women with financial difficulties.[700] These groups of women sometimes also had more serious problems such as rape and incest.[701] Therefore, according to the government the system carried a public-health objective, which by protecting the mother's private life, enabled the rights and freedoms of others to be preserved.[702] It ensured that both the mother and the child had the required medical care and that the child could be adopted without delay.[703] The government went on to state that under French law, maternity

[696] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 81-85.
[697] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[698] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 21, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 81-85.
[699] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 21, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.
[700] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 ECHR 86 [36] another possible citation is (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; see also Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 186-187.
[701] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 ECHR 86 [36] (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R.; see also Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 193-196.
[702] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; see also generally Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 185-197.
[703] See Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 193.

received statutory protection as an aspect of private life in terms of article 9 of the Civil Code.[704] This case illustrates that the right to know, although important, is not absolute and a balance must always be struck between competing interests.

The court in *Gaskin v United Kingdom*[705] (hereinafter referred to as the *Gaskin* case) emphasised the importance of keeping information confidential if reliable information was obtained and in keeping third parties protected.[706] This case can be connected to the issue of access to one's genetic parentage and the question in this case in terms of article 8 of the ECHR was the extent of entitlement individuals have to files compiled by public authorities.[707] In this case the applicant wished to obtain details of the various foster homes where he stayed in order to assist him in overcoming his problems by learning about his past.[708] He also wished to establish his medical condition by gaining access to the files.[709] His claim to access to information was based on articles 8 and 10 of the ECHR. Mr Gaskin was denied access by the High Court on the ground that it would be against public interest, after which he applied to the Commission of the ECHR. The court held that, in view of the state's margin of appreciation, a

[704] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 20 (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; see also Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 192-193.

[705] 10545/83 1989 ECHR 13 7 July 1989, para 40 and 49, the question before the court was whether a fair balance was struck between competing interests namely the public interest in this case in the efficient functioning of the child-care system, on the one hand, and the applicant's interest in having access to a coherent record of his personal history, on the other. The Court examined whether the United Kingdom, in handling the applicant's requests for access to his case records, was in breach of a positive obligation flowing from a 8 of the Convention. The court found that there was a violation of a 8 of the convention because in the instance where the contributors of the information failed to respond to a request for information or unreasonably refuses consent there was no system in place to allow an independent third party to determine whether Mr Gaskin may have access to his files and thus there was no compliance with the proportionality requirement and therefore it was a breach of a 8; see also Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13.

[706] See *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 para 44 and 49.

[707] Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 65.

[708] See *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 par 11; see also Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 65 where the author points out that Mr Gaskin's claim concerned the construction of a narrative identity, even though he knew the identity of his genetic parents, he wanted information about his childhood and remote past.

[709] See *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 par 45.

system like the British one that made access to records conditional on consent of the contributor[710] was in line with article 8.[711] The court reiterated that people have a vital interest, protected by the convention, in receiving information necessary to know and understand their childhood and early development, but on the other hand confidentiality of public records serves an important purpose for receiving objective and reliable information and that confidentiality in this respect will also serve to protect third persons.[712] The court drew attention to the requirement of having an independent authority in instances where the contributor fails to answer or withholds consent and, because this was not provided to Mr Gaskin, the English courts failed to secure respect for the applicant's private and family life.[713] The case of *Gaskin* illustrates that, despite the importance of article 8 in guaranteeing the right to respect to family life and private life to everyone and encompassing the right to know one's origins, this right can be outweighed by other rights or by public interest.[714] In *Odièvre v France* the applicant's natural mother has expressly requested that information about the birth remain confidential.[715] The court stated that the word "everyone" in article 8 applies to both the child and the mother.[716] On the one hand, people have a right to know their origins, derived from "private life" and on the other hand, a woman's interest in remaining anonymous in order to protect her health by

[710] Contributors referred to medical practitioners, school teachers, police and probation officers, social workers, health visitors, foster parents and residential school staff. In this regard see par 15 of *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989.
[711] See *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 par 49.
[712] See *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 par 49; see also Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 161.
[713] *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 par 49; The applicant's complaint under article 10 was unsuccessful, in coming to this conclusion the court referred to the matter of *Leander v Sweden* ECtHR Appl. No. 9248/81, 26 March 1987, par 74 where it was found that a 10 is the right to freedom to receive information that others wish or is willing to impart.
[714] See *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 par 40 where the question was asked whether a fair balance had been struck between the competing interests, namely the public interest and the efficient functioning of the child-care system and the applicant's interest in having access to a coherent record of his personal history on the other hand. In answering this question, the court found that the confidentiality of the contents of the file served a legitimate aim by protecting both the rights of contributors and children in need of care, see in this regard par 43.
[715] However, the case of *Gaskin* concerned a different situation where the applicant had suffered psychological trauma and requested access to information to origins, which is different from access to information of one's natural parents, which is what the applicant is requesting in *Odièvre*.
[716] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 25, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43.

giving birth in appropriate medical conditions cannot be denied.[717] Third parties are also deserving of protection, namely the adoptive parents and the other members of the adoptive family. The court emphasised the French legislature's main aim, which is to protect both mother and child's health and ensure that children are not abandoned in life-threatening conditions. Furthermore, it also avoids illegal abortions and consequently respects the higher ranking value, which is the right to life. In *Odièvre v France* the applicant was given non-identifying information to trace some of her roots while ensuring the protection of third party interests. The French legislation attempts to balance the competing interests.[718] The court held that France has not exceeded the margin of appreciation afforded to it to grant access to information about one's origins and therefore there has been no violation of article 8 of the convention.[719] In their dissenting opinion, the minority of the court held that the mother has an absolute right of veto and this causes the rights of the child to be entirely neglected and forgotten and "blind preference was given to the sole interests of the mother".[720] The minority further found that there has been no fair balance struck between the competing interests and, as a result, article 8 of the convention has been violated.[721] In *Jäggi v Switzerland*[722]

[717] *Odièvre v France* Application no. 42326/98 Strasbourg 13 February 2003 p 25, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 535.

[718] Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 535, where the author discusses the case of *Odièvre v France*, commending France as being able to balance the interests at stake, because it gave women the right to give birth anonymously, yet granted the adopted children the right to obtain information on their origins.

[719] *Odièvre v France* ECtHR Application no. 42326/98 Strasbourg 13 February 2003 p 27, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 535.

[720] *Odièvre v France* ECtHR Application no. 42326/98 Strasbourg 13 February 2003 p 46 dissenting opinion par 7, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 162.

[721] *Odièvre v France* ECtHR Application no. 42326/98 Strasbourg 13 February 2003 p 46, (42326/98), (2004) 38 E.H.R.R. 43 (2003), (2004) 38 E.H.R.R. 43; The dissenting judges held: "Being given access to information about one's origins and thereby acquiring the ability to retrieve one's personal history is a question of liberty and, therefore, human dignity that lies at the heart of the rights guaranteed by the convention" at par 3 of the dissenting opinion; also see Freemen and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 162.

[722] *Jäggi v Switzerland* 58757/00 [2006] ECtHR 13 July 2006, (2008) 47 E.H.R.R. 30 par 39 and 40 the applicant's right to discover his parentage against the right of third parties to the inviolability of the deceased's body, the right to respect for the dead and the public interest in the protection of legal certainty had to be weighed. The court found that the applicant tried throughout his life to find the identity of his father, which implied mental and moral

(hereinafter referred to as the *Jäggi* case) the court adopted the dissenting judgment in *Odièvre*.[723] It considered that the right to identity, and thereby the right to know one's origins, forms a part of the inner core of the right to respect for one's private life.[724] The court held that there should be a careful review of the state's balancing of the rights in conflict.[725] According to Besson, the enforcement of the right to know differs from one country to the next, despite adherence to the same international instruments.[726] These differences are socio-cultural and historical in nature and have led to more weight being afforded to certain interests rather than others when interpreting the same international rights.[727] In France, as illustrated in the *Odièvre* decision, the child's right to knowledge of origins is not guaranteed. In the *Jäggi* decision, however, that viewpoint was changed by emphasising the importance of balancing all the rights without any abstract and absolute priority being given to any of them,[728] while the ECtHR (European Court of Human Rights) pointed out that an individual's interest in knowing his or

suffering. The court further found that there would be no intrusion of the private life of the deceased because he is deceased and legal certainty was not enough to deprive the applicant of knowledge of his parentage. In view of the afore-mentioned the court found that there was indeed a violation of article 8 of the ECHR; see Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13; see Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-543 where the author points out that ignorance of one's biological origins can cause mental and psychological suffering; see also Vonk "De autonomie van het kind in het afstammingsrecht" 2010 6 (open access version via Utrecht University repository) where the author discusses this case and points out what the court said that an individual's interest in discovering his parentage does not disappear with age.

[723] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 152.

[724] *Jäggi v Switzerland* 58757/00 [2006] ECtHR 13 July 2006, (2008) 47 E.H.R.R. 30 par 37 par 37; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 92.

[725] Also see Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 176.

[726] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 152.

[727] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 152; O'Donovan "Interpretation of children's identity rights" in Fottrell *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) 73-85.; O'Donovan "'Real' mothers for abandoned children" Vol. 36 No. 2 2002 *Law and Society Review* 347-378.

[728] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 154.

her descent does not disappear with age.[729] In the UK, the child's right to know his or her origins is guaranteed under British law, but is not absolute, and when in dispute must be weighed against the parent or the donor's right.[730] The Access to Personal Files (Social Services) Regulations 1989 was adopted as a consequence of the *Gaskin* case.[731] British law did not initially provide any protection to AI children, they were not granted any right to know their biological parents.[732] Now the child's right has to be weighed against the donor's interest which makes the British approach more balanced.[733] In Germany, the child's right to know his or her origins has been protected since 1988, when the German Federal Constitutional Court anchored it in the human dignity and personality rights of the German Basic Law.[734] Germany now has the practice of confidential birth,[735] which can be seen as restricting the child's right

[729] *Jäggi v Switzerland* 58757/00 [2006] ECtHR 13 July 2006, (2008) 47 E.H.R.R. 30 par 40; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 92.

[730] See Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 161 where it is stated that the court's decision in Gaskin might eventually lead to the development of a right to an identity; see also Feldman "The developing scope of article 8 of the European Convention on Human Rights" 3 1997 *Eur. Hum. Rts. L. Rev*. 265, 269; see Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13; see also *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 case par 29.

[731] See Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 161 where it is stated that the court's decision in Gaskin might eventually lead to the development of a right to an identity; see also Feldman "The developing scope of article 8 of the European Convention on Human Rights" 3 1997 *Eur. Hum. Rts. L. Rev*. 265, 269; see Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13; see also *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 case par 29.

[732] See Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol. 13 2012 *Theoretical Inquiries in Law* 153-178, 161 where it is stated that the court's decision in Gaskin might eventually lead to the development of a right to an identity; see also Feldman "The developing scope of article 8 of the European Convention on Human Rights" 3 1997 *Eur. Hum. Rts. L. Rev*. 265, 269; see Guerra "European Convention on Human Rights and Family Life. Primary issues" in Pascual and Pérez (eds) *The Right to Family Life in the European Union* (2017) 12-13; see also *Gaskin v UK* 10545/83 1989 ECHR 13 7 July 1989 case par 29.

[733] Almack "Seeking sperm: Accounts of lesbian couples' reproductive decision making and understandings of the needs of the child" 20 2006 *International Journal of Law, Policy and the Family* 1-22; Wallbank "The role of rights and utility in instituting a child's right to know her genetic history" 13 2004 *Social and Legal Studies* 245-64; Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 155.

[734] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 155.

[735] See chapter on German law.

to know his or her origins because the child does not have access to this information without the mother's consent, however, it may also be seen as protecting the child's right to know because at least the information is gathered and preserved. According to Besson, German law will need to show more balance between the conflict that exists between the child's right to know and the parents' right to privacy.[736] In addition, German law ranks the right to life of both the child and the mother higher than the child's right to know.[737] On the opposite end of the spectrum is Switzerland where the child's right to know enjoys absolute protection.[738] The right to knowledge of one's origins formed part of the unwritten right to personal freedom in Switzerland.[739] It was then written down and formed part of the federal constitution in 1992 and legislation in 1998 but only focussed on AI children and adopted children where the right was not absolute.[740] With the emergence of article 7 and 8 of the UNCRC the child's right to knowledge of origins was interpreted as absolute, this is now seen as being in violation of other fundamental rights.[741] According to Besson, the Swiss tribunal's case law that gives absolute priority to the child's right to know will have to be revised to respect the balancing requirement under article 8 of the ECHR.[742] Besson provides that a careful balancing should take place to

[736] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 155.
[737] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 155.
[738] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 155.
[739] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 155.
[740] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 155.
[741] Besson "Das Grundrecht auf Kenntnis der eigenen Abstammung" 1 2005 *Zeitschrift für Schweizerisches Recht* 39-71.
[742] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 156.

make sure both the child and the parents' interests are taken into account.[743] Although this thesis agrees with Besson that balancing must occur, it however wishes to point out that, in the end, one right will indeed outweigh another. If this outweighing does not occur, no final decision can and will ever be reached. Despite the fact that the court in *Odièvre* is said to have balanced the competing interests, it still decided against the right to knowledge of one's origins. One cannot ignore the motivation behind the use of systems of anonymous birth – very often it serves as an alternative to infanticide or unsafe abandonment or even illegal abortion. When weighing up whether the mother should make use of unsafe abandonment, for instance, or whether she may instead choose anonymity in birth – the answer would be anonymous birth. The real competing interests are not knowledge of origins of the child versus privacy of the mother, but rather knowledge of origins of the child versus the child's right to life. Thus, with both interests belonging to the child, a decision in line with the best interests of the child will have to prevail.

5.6 CONCLUSION

Ultimately, any decision concerning a child should take into account the best interests of the child.[744] The Constitution section 28(2) states that the best interests of the child are of paramount importance in every matter concerning the child. This was also firmly embedded in our legislation, particularly the Children's Act 38 of 2005, section 6 contains a number of general principles which must guide all proceedings, actions and decisions by any organ of state in any matter concerning a child. Section 9 states that in all matters concerning the care, protection and well-being of a child, the child's best interests are of paramount importance.

[743] Besson "Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int`l J.L Pol`y and Fam.* 137-159, 156.
[744] Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.

Section 7 lists the factors that must be taken into account when applying the best interests standard. According to Mills, it is evident that the provisions set out in South African legislation provide a strong and powerful basis for a child-centred approach in all court proceedings concerning a child.[745] The concept of the best interests of the child was explicitly established in international law when the General Assembly of the United Nations adopted the Declaration of the Rights of the Child in 1959 and stated that the best interests of the child was the paramount consideration in enacting laws for children.[746]

Article 3 of the UNCRC introduced it as a new principle of interpretation in international law stipulating that the best interests of the child should be a primary consideration in all actions concerning children.[747] "By virtue of this principle, the solutions resulting in an improvement of the psychophysical well-being of the child must be favoured; the guarantee of the maximum protection of the right to personal identity also complies with this principle."[748] This confirmed the rights-based approach where a child is seen as being entitled to a full range of human rights.[749] The Committee on the Rights of the Child published their 14th general comment, which explicitly states that the best interests principle is a threefold concept existing "as a substantive right, a fundamental interpretative legal principle and as a rule of procedure".[750] The ACRWC also contains the principle of the best interests of the child in article 4, which highlights that in *all* matters concerning the child the best interests of the child shall be *the*

[745] Mills "Failing children: The courts' disregard of the best interests of the child in *Le Roux v Dey*" 131 2014 *The South African Law Journal* 847-863, 849.
[746] Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.
[747] Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.
[748] Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.
[749] Cocco "Do adopted children have a right to know their biological siblings?" Vol 4 No. 2 2018 *The Italian Law Journal* 541-542.
[750] Committee on the Rights of the Child "General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (a 3 par 1)" CRC/C/GC/14 at 4, available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

primary consideration. This is a much stronger right than provided for in the UNCRC. Even though the best interests of the child has been elevated to the supreme issue in any matter concerning the child[751] it does not mean that it will always prevail and that other constitutional rights must be ignored.[752] The Committee on the Rights of the Child stated that procedural guarantees were required in the assessment and determination of the best interests of the child.[753] In other words, the justification for a decision must show that the right has been taken into account,[754] and what criteria was used and how the child's interests have been weighed against other considerations.[755] The best interests of the child should be seen as a point of departure.[756] In the instance of the child's right to knowledge of his or her origins versus the child's right to life, the child's right to life has been proved to be in the best interests of the child. The criteria used was the weighing and balancing of the right to knowledge of one's origins as composed by a number of rights (the right to freedom of association in section 18; the right to bodily and psychological integrity in section 12; the right to human dignity in section 10; the right to a name and a nationality from birth in section 28(1)(*a*), the right to family care and parental care in section 28(1)(*b*) and finally the best interests of the child in section 28(2)) against the factors as listed in the limitation clause section 36. Any interpretation

[751] Heaton "An individualized, contextualised and child-centered determination of the child's best interests, and the implications of such an approach in the South African context" 34 (2) 2009 *Journal for Juridical Science* 1.
[752] In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) par 55 the court held that s 28(2), like other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36 limitation clause.
[753] Mills "Failing children: The courts' disregard of the best interests of the child in *Le Roux v Dey*" 131 2014 *The South African Law Journal* 847-863, 858.
[754] Committee on the Rights of the Child "General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (a 3 par 1)" CRC/C/GC/14 at 4, available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf; Mills "Failing children: The courts' disregard of the best interests of the child in *Le Roux v Dey*" 131 2014 *The South African Law Journal* 847-863, 858.
[755] Committee on the Rights of the Child "General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (a 3 par 1)" CRC/C/GC/14 at 4, available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf; Mills "Failing children: The courts' disregard of the best interests of the child in *Le Roux v Dey*" 2014 131 *The South African Law Journal* 847-863, 858.
[756] Skweyiya J in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 3 SA 274 (CC) para 207-215.

of the best interests of the child must be consistent with the spirit of the entire UNCRC, while the other articles of the UNCRC must inform and guide all decisions.[757] Therefore, it is important throughout the process of establishing the best interest of the child that the other rights in the UNCRC should also be considered.[758] In this instance, the child's right to life in the UNCRC article 6 was also considered in determining the best interests of the child and found to supersede the right to knowledge of origins, as there can be no origins without life.

[757] Mills "Failing children: The courts' disregard of the best interests of the child in *Le Roux v Dey*" 131 2014 *The South African Law Journal* 847-863, 860.
[758] Mills "Failing children: The courts' disregard of the best interests of the child in *Le Roux v Dey*" 131 2014 *The South African Law Journal* 847-863, 860.

CHAPTER SIX: UNMARRIED FATHERS' RIGHTS IN THE ABANDONMENT OF INFANTS

6.1 INTRODUCTION

In the relinquishment or abandonment of infants in most cases the mother, and not the father, is relinquishing the infant. As a result, fathers are deprived of their right to the adoption of their children. In instances of confidential relinquishment of a child, a mother may deny her child the knowledge of who she is and thereby also prevent the child from knowing who the father is.[1] What happens to the rights of the father?[2] Does he have rights when his child is relinquished? In the US for nearly a century, the Supreme Court has recognized the right of a parent to care for and have control over his or her children.[3] In this chapter, the position of unwed fathers or unmarried fathers will be analysed to determine how the law can safeguard those rights. The reason for dealing with the unwed father's rights relate to article 9(3) of the UN Convention on the Rights of the Child, which requires state parties to respect the child's right to contact with *both* parents, while article 18(1) of the UN Convention on the Rights of the Child urges state parties to recognise the principle that *both* parents have common responsibilities for the upbringing of the child.[4] Married fathers have parental responsibilities

[1] Freeman and Margaria "Who and what is a mother? Maternity, responsibility and liberty" Vol 13 2012 *Theoretical Inquiries in Law* 153, 166; The authors opine that if a mother can deny her child knowledge of who she is, she is also preventing the child knowledge of who the father is. They state that the anonymity rule protects the interests of adults and not those of the yet-to-be-born child. This thesis disagrees with this proposal in that the yet-to-be-born child is in fact being protected through the bargaining power of anonymity as a mechanism to ensure the protection of the life of the child.

[2] According to German law, the father (being unaware of the pregnancy) will not be able to exercise any of his rights in respect of the child, this is due to the fact that Germany does not have a putative father registry; See also Budzikiewicz and Vonk "Legal motherhood and parental responsibility: A comparative study on the tensions between scientific knowledge, social reality and personal identity" (17) 2 2015 *European Journal of Law Reform* 227-228 where the authors point out that in general the father will be unable to exercise his rights because he is unaware of the pregnancy and the mother is not required to leave identifying information about the father and even if she does it is not placed on the record of origin but will be separately handed to the adoption agency instead. The child will be able to obtain this information in terms of s 9b(2) AdVermiG or through a corresponding right against the Federal Office of Family Affairs and Civil Society Functions; see fn 227 of Chapter 3 German law.

[3] *Meyer v Nebraska* 262 US 390, 399-400 (1923); Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J.* 833, 842.

[4] According to Louw "The constitutionality of a biological father's recognition as a parent" (13) 2010 *PER/PELJ* 3, 156 the UNCRC has been held to enjoy a heightened status in the South African legal framework for two important reasons: (a) Convention rights pertaining to children have been constitutionalized in s 28 of the Constitution, thereby giving the UNCRC legal significance in South Africa. (b) Specific provisions (such as s 233 and s 39(1)(*b*)) in the Constitution require courts to consider international law in their deliberations. In addition the Children's Act now states as one of its objectives the realization of the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.

and rights in terms of section 20 of the Children's Act 38 of 2005 and thus do not need to do anything to acquire these rights, it is for that reason that the position of married fathers will not be discussed. Unmarried fathers, on the other hand, attain parental responsibilities and rights after having complied with the requirements in section 21 of the Children's Act and are often in a more vulnerable position with regard to their children than married fathers. Unmarried fathers have no say in respect of the child prior to having obtained section 21 rights. The answer given today to the question why fathers should have rights at all is that these rights are for the benefit of the child.[5] Parents now have rights in order to protect the children and to enable them to fulfil their duties towards their children.[6] According to Deech however, to award unmarried fathers the same rights as married fathers would be to discriminate against mothers subjecting them to unmarried fathers' rights and the legal disadvantages of marriage, outside of marriage.[7] The state of Georgia permits the abandonment of newborns solely by genetic mothers regardless of the interests of fathers[8] and this not only bars any later legal parenthood for biological fathers who are willing and fit to parent, but also those who may have attained the right to parent through marriage.[9] Most states allow either of the parents to relinquish the child to a designated safe haven provider however, most of the time relinquishment is done by

[5] This according to Deech is also flawed, criticizing the Hohfeldian analysis of rights in that if we assume children have rights then how are these rights enforceable by them? Deech "The rights of fathers: Social and biological concepts of parenthood" in Eekelaar and Šarčević (eds) *Parenthood in Modern Society Legal and Social Issues for the Twenty-First Century* (1993) 23.

[6] Deech "The rights of fathers: Social and biological concepts of parenthood" in Eekelaar and Šarčević (eds) *Parenthood in Modern Society Legal and Social Issues for the Twenty-First Century* (1993) 23.

[7] Deech also makes the case that the absent unmarried father, as contrasted with the cohabiting father should not automatically be entitled to parental responsibilities and rights. Deech "The rights of fathers: Social and biological concepts of parenthood" in Eekelaar and Šarčević (eds) *Parenthood in Modern Society Legal and Social Issues for the Twenty-First Century* (1993) 30.

[8] Such as the safe haven laws of Georgia in Ann. Code s 19-10A-4 which only permits the mother to relinquish the infant. However, see chapter 4 US law par 4.2.1 where Texas safe haven law (Texas Family Code section 262.302) allows the voluntary relinquishment of a child by the child's parent, that includes the father; Also see par 4.3.1 where Californian safe haven law allows in California Penal Code 271.5 allows the safe relinquishment of a child by a parent or person with lawful custody. This again includes the father. The Nebraska Revised Statute is very liberal in that in s 29-121 it provides that *no person* shall be prosecuted for leaving a child thirty days old or younger in the custody of an employee on duty at a hospital. This also includes the father, see par 4.4.1 in this respect.

[9] Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 211.

mothers. Mothers are not required to reveal the identity of the fathers upon relinquishing their infants through the use of baby safes or to baby safe haven providers.[10] Safe havens are generally exclusively employed by mothers and the reality is the biological fathers of these children may be interested in raising their children.[11] Parness and Clarke Arado point out that there are no duties imposed on hospital personnel or on the government officers at birth or shortly after to locate the biological fathers of children born to unwed mothers.[12] They further state that "safe haven laws also promote the social norm that women can comparably terminate the actual or potential child rearing interests of men before and after birth".[13] Once an infant is relinquished to a safe haven or in a baby safe, certain procedures will take place to locate the mother and a case of abandonment will be opened at the police station.[14] Should no information arise as to the whereabouts of the mother, the child will be declared legally adoptable.[15] The use of safe haven laws results in the loss of a child to a biological father and the loss of a biological father to a child.[16] In the context of adoption, the father's right to know of the existence of his child is vital.[17] Any parental responsibilities and rights held by parents are

[10] Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 213.
[11] Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 213.
[12] Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 229.
[13] Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 214.
[14] Information provided by Operations Director of Door of Hope Children's Mission 29/03/2018 Nadene Grabham.
[15] Information provided by Operations Director of Door of Hope Children's Mission 29/03/2018 Nadene Grabham.
[16] Parness and Arado "Safe haven, adoption and birth record laws: where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 215; There are both federal and some constitutional protections see *Heart of Adoptions Inc. v J.A.* 963 So. 2d 189, 207 (Fla. 2007) federal due process and Florida's independent right to privacy clause protect an inchoate interest in the opportunity to develop a parent-child relationship for an unwed genetic father whose child is placed for adoption; See also a New Jersey law N.J. STAT.ANN. S9:17-40 (West 2007) stating that a parent and child relationship extends equally to every child and every parent regardless of the marital status of the parents; In support of fathers' rights is also a child's interest in knowing his or her origins see Besson "Enforcing a child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" 21 2007 *Int'l J.L.,Pol'y And The Family* 137, 138-39.
[17] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky.L.J*. 949, 955.

terminated upon the adoption of that child by a third party.[18] Adoption is seen as final, thereafter the unwed father does not have any rights to the child. In addition, the adoption may be rescinded but such rescission will only be granted if it is in the best interests of the child.[19] The impact of this on the unwed father's right to know of the existence of his child is immense.[20] Once the child is adopted the unwed father loses any right he may have had to know his child.[21] Learning of the existence of his child after the adoption has taken place is an even more devastating situation, which could traumatise the father.[22] The unwed father could also be left wondering whether a child is in fact his after learning that a woman he had sexual relations with has relinquished a child for adoption and that adoption has taken place.[23] This uncertainty may haunt the unwed father for the rest of his life.[24] It is important to emphasise at this juncture that this chapter is specifically dealing with the fewer unwed fathers who have an interest in knowing their children. In the majority of abandonment cases in South Africa, the unwed father first abandons the mother before she subsequently proceeds to abandon the child.[25] The purpose of this chapter is to investigate the potential for protection of the rights of the fewer unwed

[18] See s 242(1)(*a*) of the Children's Act 38 of 2005; Unless the child is being adopted by a step-parent, in that case the other biological parent retains his or her parental responsibilities and rights.

[19] See s 243 of the Children's Act, specifically s 243(3)(*b*), which deals with rescission by a parent who did not consent to the adoption but whose consent was required.

[20] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky.L.J*. 949, 956-957; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 901.

[21] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky.L.J*. 949, 956-957; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 901.

[22] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky.L.J*. 949, 956-957; *Lehr v Robertson* 463 US 269-72 the dissenting opinion of Judge White says even if the child is not surrendered for adoption by the unwed mother, there is no guarantee that an unwed father will be able to develop a meaningful relationship with his child; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 901.

[23] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky.L.J*. 949, 957; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 901.

[24] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky.L.J*. 949, 957; In terms of s 234(1)(*a*) of the Children's Act 38 of 2005 states for post-adoption agreements to provide for communication and visitation after the adoption is approved however, if a unwed father is unaware of the existence of the child he will not be able to enter into such a post-adoption agreement.

[25] Blackie (National Adoption Coalition of South Africa Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014 7.

fathers who wish to have parental responsibilities and rights in respect of their children, but whose children are relinquished through baby safes or baby safe haven providers. Due to the fact that there exists fewer interested unwed fathers, the potential solution will be weighed against this factor. To introduce a law to protect the rights of a very small group of individuals, at the expense of the best interests of the child, would nullify the ultimate aim of safe haven, baby safe, confidential birth or anonymous birth laws, which is not only to save the life of the infant but also to provide that infant with a family as soon as practically possible. However, with the increased protection afforded to unmarried fathers, for instance section 21 of the Children's Act 38 of 2005, it is necessary to explore ways in which unmarried fathers' rights can be safeguarded in instances where safe relinquishment is enforced.

6.1.1 Defining parental responsibilities and rights

According to section 18(1) of the Children's Act 38 of 2005 a person may either have full or specific parental responsibilities and rights in respect of a child. Such parental responsibilities and rights consists of the parental responsibility and right to care for the child; to maintain contact with the child; to act as a guardian of the child and to contribute to the maintenance of the child. In terms of section 19(1) the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child and, according to section 20, the married father of a child has full parental responsibilities and rights in respect of the child - "*(a)* if he is married to the child's mother; or *(b)* if he was married to the child's mother at- (i) the time of the child's conception; (ii) the time of the child's birth; or (iii) any time between the child's conception and birth." Research findings conducted by the National Adoption Coalition of South Africa stipulates that the different kinds of abandoning mothers

include women who have been abandoned by their boyfriends or the father of their child,[26] thus illustrating that in the abandonment of children the parties (mother and father) are usually unmarried. Therefore, it is important to place particular focus on the parental responsibilities and rights of unmarried fathers. The granting of responsibilities and rights to unmarried fathers was not the usual practice. The next section will investigate the creation of these responsibilities and rights of fathers prior to the introduction of the Children's Act.

6.2 POSITION SURROUNDING PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS PRIOR TO THE COMING INTO EFFECT OF THE CHILDREN'S ACT 38 OF 2005

Prior to the commencement of the Children's Act 38 of 2005 "unmarried fathers were not awarded or allowed to have 'automatic' rights to their children".[27] The "South African courts consistently upheld the exclusionary rules of the Roman-Dutch law against unmarried fathers".[28] Some of these exclusionary rules are illustrated in decisions such as *Douglas v Mayers*[29] where the court held that the father has no inherent right of access[30] or custody[31] to his child and that he may only claim access if he can prove that it will be in the best interests of the child.[32] Further, in *B v P*[33], the appellant approached the court to obtain access to his

[26] Boniface "Revolutionary changes to the parent-child relationship in South Africa: End of the revolution for the 'unmarried father'?" 2009 *Speculum Juris* 1; Blackie (National Adoption Coalition of South Africa Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014 7.
[27] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 32.
[28] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 32; for some of these exclusionary rules see *Docrat v Bhayat* 1932 (TPD) 125; *Dunscombe v Willies* 1982 3 SA (D) 311; *Douglas v Mayers* 1987 1 SA 910 (ZS); *F v L* 1987 4 SA 525 (W); *B v P* 1991 4 SA 113 (T).
[29] 1987 1 SA 910 (ZS); South African Law Commission Report on "The Rights of a Father in Respect of his Illegitimate Child" project 79 July 1994 20.
[30] Now referred to as contact in terms of the Children's Act 38 of 2005.
[31] Now referred to as care in terms of the Children's Act 38 of 2005.
[32] This Zimbabwean case only served as persuasive authority in SA courts and was mentioned in *Van Erk v Holmer* 1992 2 SA 636 (W) 647G by Van Zyl J.
[33] 1991 4 All SA 421 (T).

daughter believing that the respondent, her mother, was preventing such access. Kirk-Cohen J, agreeing with the judgment in *F v L*,[34] made the statement that guardianship and custody of an illegitimate child are vested in the mother and that the father has no right of access.[35] The court went on to say that in certain circumstances the father of an illegitimate child, like other parties, "may approach the court for an order limiting the mother's right of custody by granting him access to his child and, in an appropriate case, the court may deprive a mother of her custody".[36] Ultimately, the court followed the approach in *Van Oudenhove v Grüber*[37] by confirming that an applicant must prove that it is in the best interests of the children to have access granted to the parent and such access will not unfairly interfere with the mother's right of custody, this should be proved on a balance of probabilities.[38] Here the court treated the unmarried father like any other interested party, in the sense that he could approach the court like any other interested party, if he could show that it would be in the best interests of the child.[39] In *Bethell v Bland*[40] in this matter the maternal grandfather applied for custody of a child born outside of marriage, this application was countered by the paternal grandparents who applied for custody.[41] The unmarried biological father intervened.[42] The unmarried father was considered

[34] *F v L and Another*; *D v L and Another* 1987 4 SA 525 (W); see Boberg "The would-be father" (17) 1988 *Businessman's Law* 112-115 states that this presumption applies until the contrary is proved and criticizes the court's approach as being out of touch with social realities, which require that the truth about the paternity of children be revealed, see 115.
[35] *B v P* 1991 4 SA 113 (T) 422; Boniface "Revolutionary changes to the parent-child relationship in South Africa: End of the revolution for the 'unmarried father'?" 2009 *Speculum Juris* 1
[36] *B v P* 1991 4 SA 113 (T) 422.
[37] 1981 4 SA 857 (AD). In this case the father was applying for a variation of a custody order to take the children to Austria for a year. The court a quo allowed such variation without considering the best interests of the children and the mother appealed to the Supreme Court after the Full Court of the Eastern Cape division refused her appeal. Her appeal was successful and upheld in the Supreme Court.
[38] *B v P* 1991 4 SA 113 (T) 425-426.
[39] Goldberg "The right of access of a father of an extramarital child: visited again" 1993 *SALJ* 265.
[40] 1996 2 SA 194 (W).
[41] *Bethell v Bland* 1996 2 SA 194 (W) 197; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 33.
[42] *Bethell v Bland* 1996 2 SA 194 (W) 197; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 33.

a third party in a special position due to his biological link to his child.[43] The court ruled that it was in the child's best interests for custody to be awarded to the unmarried biological father.[44]

In *F v L* the applicant wanted the child to be declared his natural offspring although the respondent was married at the time of the birth of the child.[45] The court held that a father acquires parental authority in three instances.[46] One, through birth from a valid marriage, secondly through legitimation and lastly through adoption.[47] The mother acquires her parental authority by reason of birth.[48] Therefore, in this case the applicant did not acquire parental authority over the child and as a result had no *prima facie* right of access, as access was seen as an incidence of parental authority.[49]

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[43] *Bethell v Bland* 1996 2 SA 194 (W) 209G; Louw *Acquisition of Parental Responsibilities* (LLD thesis UP 2009) at 90; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 33.

[44] *Bethell v Bland* 1996 2 SA 194 (W) 210H; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 33.

[45] *F v L and Another*; *D v L and Another* 1987 4 SA 525 (W) 526.

[46] *F v L and Another*; *D v L and Another* 1987 4 SA 525 (W) 527.

[47] *F v L and Another*; *D v L and Another* 1987 4 SA 525 (W) 527; for criticism on this see Boberg "The would-be father" 1988 (17) *Businessman's Law* 112-115.

[48] Also see Panayiota "The Position of unmarried fathers in South Africa: an investigation with reference to a case study" (Masters dissertation, Unisa November) 2006 par 3.2.

[49] In this regard see Boberg *Law of Persons and the Family* (1977) 337, who was of the opinion that a father has no right of access to an illegitimate child except in so far as he has to maintain the child however with regard to the presumption of *pater es quem nuptia demonstrant* Boberg in Boberg "The would-be father" (17) 1988 *Businessman's Law* 112-115 provides that the presumption exists until the contrary is proven.; Spiro *The Law of Parent and Child* (1985) 458 was of the opinion that a natural father should have access where it is in the best interests of a child; Barnard, Cronje and Olivier *Die Suid-Afrikaanse Persone en Familiereg* (1986) 50 and Bosman and Eckard (eds) *Welsynsreg* (1982) 171 were of the opinion that the father of an illegitimate child is entitled to reasonable access to such child and their viewpoints are supported by the matters of *Mathews v Haswari* 1937 WLD 110 and *Wilson v Ely* 1914 WR 34, in which the court granted access rights to the fathers of illegitimate children; Thomas "Investigation into the legal position of illegitimate children" 1985 *De Rebus* 336, 341 was of the opinion that a natural father who shows a sense of responsibility by acknowledging his illegitimate child should also acquire a right of access to such child; Jordaan "Biologiese vaderskap: Moet dit altyd seëvier?" 1988 *THRHR* 392, 393-394 suggested that a flexible approach, determined on a case by case basis, be adopted using the best interests of the child in order to determine whether the father has the right of access to his illegitimate child; see also Labuschagne "Toegangsregte van die natuurlike vader tot sy buite-egtelike kind" 1990 *TSAR* 778, 785; Eckard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 122, 124 stressed that the access rights of a natural father to his illegitimate child should be reconsidered on the basis of what the child needs, she emphasized that children need both parents in order to develop an identity; An inherent right of access that can be taken away if abused was addressed by Ohannessian and Steyn "To see or not to see? – that is the question. (The right of access of a natural father to his minor illegitimate child)" 1991 *THRHR* 254.; Sonnekus and van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 232 where the authors expressed their opposition to granting automatic rights of

In summary, in terms of South African common law, the mother of a child born out of wedlock was the sole guardian of such child and had sole custody of such child.[50] Thus, the father of an extra-marital child had no parental authority over such child and no right of access.[51] The Guardianship Act 192 of 1993 did not change this position and maintained that a woman shall be the guardian of her minor children born outside of marriage.[52]

Van Erk v Holmer[53] was the first case that deviated from the position that an unmarried father has no inherent right of access to his illegitimate child.[54] Judge van Zyl stated that a right of access by the natural father of a child born out of wedlock should only be removed if it is not in the best interests of the child, therefore it should be automatic.[55] In this case an unmarried father applied to have access to his child.[56] It was referred to the family advocate for

access to fathers of illegitimate children; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 213.

[50] *Ex parte Van Dam* 1973 2 SA 182 (W) 330; *Dhanabakium v Subramanian and Another* 1943 AD 160 166; also see *Calitz v Calitz* 1939 AD 56, *Dunscombe v Willies* 1982 3 SA 311 (D), *Ley v Ley's Executors and Others* 1951 3 SA 186 (AD), *Stock v Stock* 1981 3 SA 1280 (AD); Boniface *Revolutionary changes to the parent-child relationship in South Africa with specific reference to guardianship, care and contact* (LLD thesis, UP 2007) 182-186; Robinson, Human, Boshoff *Introduction to South African Family Law* (2005) 183; Boniface "Revolutionary changes to the parent-child relationship in South Africa: End of the revolution for the 'unmarried father'?" 2009 *Speculum Juris* 3.

[51] Also see Panayiota *The Position of Unmarried Fathers in South Africa: An Investigation with Reference to a Case Study* (Masters Dissertation, Unisa November 2006) par 3.2.

[52] s 1(1) Guardianship Act 1993, the effect of this act was to provide the mother with the same parental power as previously solely held by the father as head of the home in instances where the child is born inside of marriage, rendering both parties competent to act independently in respect of the child; also see Panayiota *The Position of Unmarried Fathers in South Africa: An Investigation with Reference to a Case Study* (Masters Dissertation, Unisa November 2006) par 3.2.

[53] 1992 4 All SA 345 (W); The applicant is the natural father of an illegitimate minor son. He has brought an application for an order that he be granted reasonable access to the child in view of the refusal by the respondent, the mother of the child to allow him to visit or see the child at all; Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 565, in analysing the decision of the court in van *Erk v Holmer* the author stated that the emphasis of the court should be on the rights of the child and states "to bestow an inherent right of access on a father who has maintained no relationship with the mother and child and who has made no effort either to voluntarily acknowledge paternity or to discharge his obligations thereto, is, in my view, to place the interest of an unmarried father above the welfare of a child", see 567; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 34.

[54] Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 565; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 34.

[55] *Van Erk v Holmer* 1992 4 All SA 345 (W) 359(2).

[56] *Van Erk v Holmer* 1992 4 All SA 345 (W) 345; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 34.

recommendation.[57] The family advocate recommended that the father be afforded access in certain defined aspects and this recommendation was accepted by the court.[58] Judge Van Zyl referred to the decision of *Douglas v Mayers*[59] where the court's approach was based on the child's right to see the father rather than on the father's right of access.[60] Judge Van Zyl also referred to the fact that the common law's silence on the father's right of access to his illegitimate child does not mean that such a right does not exist.[61] He went on to provide that this right should only be removed if shown not to be in the best interests of the child.[62] Van Zyl J concluded that there should be no distinction between legitimate and illegitimate children and therefore also not between the fathers of those children.[63] This decision was later rejected by the court in *B v S*[64] where Howie JA stated that the common law clearly provides what a father's position is regarding access, although it does not do so expressly but through

[57] *Van Erk v Holmer* 1992 4 All SA 345 (W) 345; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 34.

[58] *Van Erk v Holmer* 1992 4 All SA 345 (W) 345; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 34.

[59] 1987 1 SA 910 (Z).

[60] *Van Erk v Holmer* 1992 4 All SA 345 (W) 349; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 34.

[61] *Van Erk v Holmer* 1992 4 All SA 345 (W) 357; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 34.

[62] *Van Erk v Holmer* 1992 4 All SA 345 (W) 358 and 359; South African Law Commission Report on "The Rights of a Father in Respect of his Illegitimate Child" project 79 July 1994 59; also discussed in Sonnekus and Van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 232; Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 565; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 35.

[63] *Van Erk v Holmer* 1992 4 All SA 345 (W) 359. This judgment afforded the unmarried father an inherent right of access to his child; South African Law Commission Report on "The Rights of a Father in Respect of his Illegitimate Child" project 79 July 1994 20; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 35.

[64] [1995] 4 All SA 392 (AD). This is an appeal against the decision of Spoelstra J in the Witwatersrand Local Division dismissing the appellant's application for the grant of access to his minor illegitimate son. Respondent is the boy's mother. The appellant was relying on the court's decision in *Van Erk v Holmer* that an inherent right of access of the unmarried father to his illegitimate child exists; South African Law Commission Report on "The Rights of a Father in Respect of his Illegitimate Child" project 79 July 1994 24; Germany did away with the difference between legitimate and illegitimate children on 1 July 1998, in this regard see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 114.

implication.[65] Howie JA expressed that it is not the job of the courts to legislate but only to expound where the law does have a sufficiently clear answer.[66] The right to access depends on parental authority, which an unmarried father does not have, but may be granted if in the best interests of the child.[67] Finally, Howie JA held that an inherent right of access can only be dealt with by the legislature and not by the courts.[68] Clark noted that the court should affirm the right of access of an unmarried father who is willing to establish his paternity and consequently his duty of support, if it is in the child's best interests.[69] Clark went on to say that the onus should rest on the father and highlighted the fact that access may place the child's interests in an inferior position to the rights of the father due to bad parenting by fathers.[70] She then stated that courts should be slow to award fathers an automatic inherent right of access, as this would place the burden of proof on mothers to show why access should not be allowed.[71] Reasonable access should only be awarded where the father proves himself.[72] The court in *S v S*[73] also disagreed with the decision of *Van Erk v Holmer* and stated "that [the fact that] no single authority can be found anywhere to the effect that a father has a right of access to an extra-marital child is a strong indication that no such right exists".[74]

[65] *B v S* [1995] 4 All SA 392 (AD) 398.
[66] *B v S* [1995] 4 All SA 392 (AD) 398; Goldberg "The right of access of a father of an extramarital child: visited again" 1993 *SALJ* at 270 agreed that legislative intervention was needed to aid the unmarried father, but disagreed that the unmarried father should be vested with an automatic inherent right of access; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 38 fn 68.
[67] *B v S* [1995] 4 All SA 392 (AD) 398; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 38.
[68] *B v S* [1995] 4 All SA 392 (AD) 398.
[69] Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 568-569; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 38.
[70] Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 568-569.
[71] Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 568-569; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 38.
[72] Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 568-569.
[73] [1993] 3 All SA 754 (W).
[74] *S v S* [1993] 3 All SA 754 (W) 759; for more criticism on *Van Erk v Holmer* see Clark "Should the unmarried father have an inherent right of access to his child?" 1992 *SAJHR* 565; and see Goldberg "The right of access of a father of an extramarital child: visited again" 1993 *SALJ* 261, 274, who is strongly against granted automatic rights of access to fathers of illegitimate children.

In *Fraser v Children's Court Pretoria North*,[75] a case that hugely influenced the parental responsibilities and rights of unmarried fathers,[76] Fraser, the unmarried father, opposed an application in the Children's Court for the adoption of his child to prospective adoptive parents shortly after birth.[77] Mahomed DP declared section 18(4)(*d*) of the Child Care Act 74 of 1983 (hereinafter referred to as the Child Care Act) to be unconstitutional to the extent that it dispensed with the father's consent for the adoption of his child born out of wedlock while such consent was required in matters concerning the adoption of a child born in wedlock.[78] The court held that this conflicted with the father's right to equality and the child's right to parental care.[79] The Child Care Act section 18(4)(*d*) was then amended by the Child Care Amendment Act 96 of 1996 section 7(b) and by the Adoption Matters Amendment Act 56 of 1998 section 4. The amended section 18(4)(*d*) of the Child Care Act read as follows:

> "(4) A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied-
> (d) that consent to the adoption has been given by both parents of the child, or, if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known as contemplated in section 19A;"

[75] 1997 2 BCLR 153 (CC).
[76] See Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) who asserts the same, 39.
[77] *Fraser v Children's Court* 1997 2 BCLR 153 (CC) 157; Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" (80) 2017 *THRHR* 253-266, 256.
[78] *Fraser v Children's Court* 1997 2 BCLR 153 (CC) 173; Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" (80) 2017 *THRHR* 253-266, 256; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 39.
[79] *Fraser v Children's Court* 1997 2 BCLR 153 (CC) 162, 163; Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" (80) 2017 *THRHR* 253-266, 256.

The Natural Fathers of Children Born out of Wedlock Act 86 of 1997 then emerged with section 2(1) allowing a natural father to a child born out of wedlock to approach the court for an order granting him access rights or guardianship or custody of the child.[80] This application will not be granted unless the court is satisfied that it is in the best interests of the child[81] and if an enquiry has been instituted by the Family Advocate, unless the court has considered the report and recommendations of the Family Advocate.[82] The Natural Fathers of Children Born out of Wedlock Act was created to try to correct section 18(4)(*d*) of the Child Care Act.[83] The unmarried father's position was improved from what it was in the *Van Erk's* decision. Now unmarried fathers could follow a distinct procedure in order to apply to court for access to their children.[84]

6.3 POSITION SURROUNDING PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS AFTER THE INTRODUCTION OF THE CHILDREN'S ACT 38 OF 2005

Prior to the commencement of the Children's Act, unmarried fathers did not have an inherent right of access to their children. Consequently, the South African legal system needed some serious reform with regard to the recognition of the rights of unmarried fathers. As a result, a provision was drafted in the Children's Act to provide unmarried fathers with more parental responsibilities and rights than was enjoyed in terms of the common law.[85] The Children's Act

[80] s 2(2)(*a*) Natural Fathers of Children Born out of Wedlock Act; also see Robinson "Children's rights in a South African Constitution" (6) 1 2003 *PER* 60.
[81] s 2(2)(*a*) Natural Fathers of Children Born out of Wedlock Act; also see Robinson "Children's rights in a South African Constitution" (6) 1 2003 *PER* 61.
[82] s 2(2)(*b*) Natural Fathers of Children Born out of Wedlock Act.
[83] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 41.
[84] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 42; s 2(1) Natural Fathers of Children Born out of Wedlock Act.
[85] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 2.

enhanced the rights of unmarried fathers.[86] The Children's Act does not distinguish between a child born in marriage and one born outside of marriage, previously referred to as an illegitimate child or one born as a result of an extra-marital relationship. However, the Children's Act does distinguish between the parental responsibilities and rights of a married father and those parental responsibilities and rights of an unmarried father.[87] The unmarried father's acquisition of parental responsibilities and rights is dependent on whether or not he fulfils the requirements in section 21 of the Children's act, which provides:

> "21. (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-
> *(a)* if at the time of the child's birth he is living with the mother in a permanent life-partnership;[88] or
> (b) if he, regardless of whether he has lived or is living with the mother-
> (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
> (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
> (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period."

[86] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 29.

[87] s 20 provides "The biological father of a child has full parental responsibilities and rights in respect of the child- *(a)* if he is married to the child's mother; or *(b)* if he was married to the child's mother at- (i) the time of the child's conception; (ii) the time of the child's birth; or (iii) any time between the child's conception and birth"; for more on the constitutionality of the differentiation between maternal parental rights and paternal parental rights see Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ*.

[88] Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 169 points out that s 21(1)(*a*) places a biological father who lived with the mother in a permanent life-partnership at the time of the child's birth in a position to also acquire parental responsibilities and rights automatically in the same way as a father who was married to the mother; However, Louw argues that the criteria for automatic acquisition of parental responsibilities and rights by fathers are vague and therefore makes it difficult to determine with absolute certainty whether a particular father will fall within the ambit of the section. Louw states that the criteria is arbitrary and provides the requirement that the father had to cohabit with the mother "at birth" as one such example. She submits that the uncertainty created by the provisions contained in s 21 outweighs the ostensible protection of children against uncommitted fathers, see 179-180; for a detailed discussion of other problematic provisions in s 21 see Louw *Acquisition of Parental Responsibilities* (LLD Thesis, UP 2009) 117-122; see Sonnekus and Van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 232 where the authors expressed their opposition to granting automatic rights of access to fathers of illegitimate children and laid down certain factors that should be considered secondary to the best interests of the child in determining whether to grant a father rights of access.

An unmarried father went from having no innate right, to having acquired parental responsibilities and rights in respect of his child if certain requirements are fulfilled.[89] Section 21 provides that an unmarried father who has satisfied the requirements in the section will attain the same parental responsibilities and rights as held by the mother.[90] It is important to note that unmarried fathers are not given the same rights as biological mothers[91] or as married fathers.[92] The denial of "automatic" responsibilities and rights to all unmarried fathers was not in line with the right to equality and therefore resulted in the infringement of children's rights

[89] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 30.

[90] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 30; SALRC discussion paper 103 15; Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 164-165, however shows that a biological father must either be or have been married to the mother of the child in terms of s 20 of the Children's Act or show the required commitment in terms of s 21 and therefore biological fathers have different rights than those accorded to biological mothers in terms of s 19. Louw goes on to provide that the reasons for this different treatment of mothers as opposed to biological fathers as legal parents relate to: (a) legal certainty (b) gives effect to the importance of the mother's contribution to the child (for more on this see *Fraser v Children's Court Pretoria North* 1997 2 SA 261 (CC) par 274B and (c) It affords the mother a certain degree of autonomy as far as decisions regarding her child are concerned; Heaton "Family law and the Bill of Rights" in Bill of Rights Compendium (1998) (loose-leaf) (revised 2005) par 3C42.3 mothers are automatically presumed suitable to act in the best interests of the child; see Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 181-182 for a suggestion that it will be easier to show a failure to commit than to prove commitment as required by s 21 of the Children's Act; see Bainham "When is a parent not a parent? Reflections on the unmarried father and his child in English law" 1989 *IJLPF* 208-239, 233 "The father will almost certainly be in a weaker position in arguing that the *status quo* should be disturbed than he would be if he was instead resisting a change in the *status quo*". In other words it will be harder for the father to prove that being accorded parental responsibilities and rights, which will disturb those parental responsibilities and rights of the mother and cause a change in the way in which things currently are, will be in the child's best interests than it will be for him to argue that the current position (if he were accorded parental responsibilities and rights from the start) should not be disturbed.

[91] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 30; Biological mothers acquire full parental responsibilities and rights in respect of the child by reason of birth in terms of s 19(1) of the Children's Act; Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 165 "fathers generally are first subjected to a screening process. If they 'pass' the screening test (by showing the necessary commitment to either the mother or the child) then, and only then, will the law accept and expect them to assume legal responsibilities and rights in respect of their child." Fathers who fail this test are spared the burden of automatic responsibilities and rights as conferred on mothers; see also Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 183 where she states "the limitation of the father's right to be treated equally as a parent may well be an affront to his dignity. This will especially be so in cases in which the father was not aware of his paternity or the mother has refused him the opportunity to develop a relationship with herself or with the child."

[92] Married fathers acquire full parental responsibilities and rights in respect of the child because they are married to the mother in terms of s 20(a) of the Children's Act; Skelton, Carnelley et al *Family law in South Africa* (2010) 245; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 30.

in section 28 of the Constitution.[93] However, according to Beyl section 21 does not indicate how these rights must be implemented once acquired.[94] She does state that the definitions of 'care' and 'contact'[95], the duties of a guardian[96] as well as sections 30[97] and 31(2)[98] indicate how these rights are to be exercised or implemented.[99] What if the unmarried father is prevented from exercising his rights by the child's mother?[100] In these instances these sections do not provide a solution. Beyl suggests that an agreement must be provided right from the outset to explain how parental responsibilities and rights are to be exercised.[101] The Supreme Court of Appeal in *KLVC v SDI*[102] held that section 21 awards the unmarried father automatic rights to his child, however according to Boniface and Rosenberg the unmarried father acquires these rights *subject to* the satisfaction of certain requirements and therefore these rights cannot be regarded as automatic, in other words these rights will only be automatic if the requirements

[93] Constitution of the Republic of South Africa, 1996 see the right to equality in s 9 and rights of children s 28 of the Constitution; Heaton "Parental responsibilities and rights" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 3-12; Pantazis "Access between the father and his illegitimate child" 1996 *SALJ* 14; Bonthuys "Parental rights and responsibilities in the Children's Bill 70D of 2003" 2006 *Stell LR* 487, however, objected against the automatic conferring of parental responsibilities and rights, as she was of the opinion that the unmarried father's rights were not dependent upon the application of the best interests of the child; However, see also Murphy J in *LB v YD* 2009 5 SA 463 (T) par 39 where the court held that it is not required that the best interests of the child standard must be applied before the rights in terms of this section will be awarded to an unmarried father. This judgment was overturned on appeal; Louw *Acquisition of Parental Responsibilities* (LLD Thesis, UP 2009) 98 says that the child's best interests were "built into the criteria for the automatic acquisition of parental responsibilities and rights". This thesis agrees with Bonthuys in respect of the fact that the conferring of parental responsibilities and rights to the unmarried father were not subjected to the best interests of the child and according to this thesis none of the requirements laid down in s 21 reflect the best interests of the child standard but instead are mainly focused on the father contributing towards the upbringing or expenses of raising the child; see also Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ*.

[94] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) at 44.

[95] For the definitions of care and contact see s 1 of the Children's Act.

[96] See s 18(3) of the Children's Act.

[97] This section describes how the co-holders of parental responsibilities and rights should exercise these rights.

[98] This section provides that any co-holder of parental responsibilities and rights should give due consideration to the wishes and views of the other co-holder, before making decisions as contemplated in s 31(b).

[99] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 44.

[100] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 45.

[101] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 45; also see Chapter 3, Regulation 7, Form 4 of the Children's Act General Regulations Regarding Children, 2010 (Social Development Regulations).

[102] [2015] 1 All SA 532 (SCA) 538.

are complied with.[103] In *LB v YD*[104] the court stated that an unmarried father must prove that he is the biological father and he must comply with the requirements in section 21 in order to be entitled to be the co-holder of parental responsibilities and rights.[105] According to Murphy J, the child's best interests will only apply when the unmarried father's responsibilities and rights as co-holder and the extent of those rights, becomes relevant.[106] German law provides that there is no such thing as automatic parental responsibilities and rights of unmarried fathers, instead these fathers have to either apply to be recognised as the father prior to the birth[107] or

[103] Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" (80) 2017 *THRHR* 253-266, 256; According to Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 31 "as section 21 does not confer full parental responsibilities and rights on all unmarried fathers, its provisions would probably satisfy those who advocate the automatic acquisition of responsibilities and rights on the one hand, while leaving dissatisfied those who argue that unmarried fathers should not have responsibilities and rights equal to those of the mother of the child, because the mother still bears a disproportionate child-care burden"; Louw *Acquisition of Parental Responsibilities* (LLD thesis, UP 2009) 97 refers to the acquired rights as "deemed automatic", see her thesis for more on this; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 46 regards these rights as clearly automatic; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) submits "that it should not be necessary for the unmarried father to approach a court to confirm his acquired responsibilities and rights as these have already been afforded to him by operation of the law" and in this respect Bosman-Sadie and Corrie in *A Practical Approach to the Children's Act* (2010) 37 agree; Heaton "Parental responsibilities and rights" in Boezaart *Child Law in South Africa* (2017) 74 finds that no legal action needs to be taken by an unmarried father who has already acquired parental responsibilities and rights; However if he does not comply with the requirements in terms of s 21 he must apply to the court to apply for his rights. In these instances contact, care or guardianship may be assigned to the father in terms of ss 23 and 24 of the Act in Heaton "Parental responsibilities and rights" in Davel and Skelton (eds) *Commentary on the Children's Act* (2012) 3-11.

[104] *LB v YD* 2009 5 SA 463 (T) par 43.

[105] *LB v YD* 2009 5 SA 463 (T) par 43; also see Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 45.

[106] *LB v YD* 2009 5 SA 463 (T) par 43; Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 45; see also Louw *Acquisition of Parental Responsibilities* (LLD thesis, UP 2009) 97-98 which supports this view; Heaton "Parental responsibilities and rights" in Boezaart *Child Law in South Africa* (2017) 78.

[107] s 1594 IV BGB; German law regulates fathers' rights as follows: the family court may award sole custody to the child's father in terms of s 1678 II BGB if this is in the child's interest and there is no prospect that the reason for the suspension of the mother's parental rights will be lifted, this may be done in two instances. First, if the child's parents are not married but the father issued a prenatal recognition statement (in terms of s 1594 IV BGB, recognition may occur prior to birth of the child) that was agreed to by the mother in terms of s 1595 I BGB, or if paternity was established by the court in terms of s 1600 d BGB. In both instances he will have rights of access in terms of s 1684 I BGB. This is only applicable to biological fathers that are also legal fathers in terms of s 1686a BGB. The rights of access of grandparents and siblings is dependent on the existence of a legal bond between them and the child and whether this access would be in the best interests of the child in terms of s 1685 BGB. Once the family court becomes aware of the birth, it will order guardianship over the child in terms of s 1773 BGB. This is done if the child is not under parental authority such as with abandonment in the form of confidential

the court must establish paternity.[108] However, the biological father does have rights of access, provided that there is no other man exercising parental authority over the child and that he is concurrently also the legal father.[109]

The recent Children's Amendment Bill of 2018 proposes changes to section 21, excluding the words in 21(1)(*c*) and (*d*) "in good faith" and "for a reasonable period", thus the biological father may have contributed to the upbringing or towards the expenses for the maintenance of the child in bad faith and for a very short period and that in terms of the Children's Amendment Bill of 2019 would suffice to acquire parental responsibilities and rights in respect of the child. This thesis does not agree with the proposed changes to paragraph (c) and (d), by excluding these words the legislature is opening up the possibility for a father to simply contribute right before an application for parental responsibilities and rights with the purpose of thwarting the mother's rights in respect of the child and not necessarily for the best interests of the child.

birth or if the parents are not entitled to represent the minor in matters of the person or property. Furthermore, a minor will also be assigned a guardian if his marital status cannot be determined. This is the case only if the father's fatherhood could not be motivated so that he is not entitled to custody or if his right to custody is revoked or suspended in terms of s 1674 BGB. The factors the court takes into account in selecting the guardians are: the will of the parents; the personal ties of the child, the child's "kinship" or "affinity", as well as the child's religious confession, all in terms of s 1779 II BGB. During the selection process of finding guardians for the child, the relatives may be heard in terms of s 1779 III S.1 BGB (if it will not lead to significant delays). Grandparents or other relatives may be appointed as guardians. Despite all of the above, the mother's right to anonymity is still guaranteed and respected; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, available at www.comparazionedirittocivile.it, last accessed 2020-02-03; also see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 228; Interestingly, according to German law initially the father of an illegitimate child had no rights regarding such child. The rule was referred to as "ein uneheliches Kind und dessen Vater gelten nicht als verwandt" (an illegitimate child and his father are not regarded as being related to each other). This was abolished in 1969 and eventually the difference between legitimate and illegitimate children in German law was done away with on 1 July 1998, see Blauwhoff *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Rights to Know Their Origins* (2009) 114; in this regard see Turner *Improving the Lot of Children Born Outside of Marriage – A Comparison of Three Recent Reforms: England, New Zealand and West Germany* (1973) 29; see also Forder "Constitutional principle and the establishment of the legal relationship between the child and the non-marital father: A study of Germany, the Netherlands and England" 1993 *International Journal of Law and the Family* 40.

[108] s 1600 d BGB; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, available at www.comparazionedirittocivile.it last accessed 2020-02-03.

[109] s 1684 I BGB and s 1686a BGB; see Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 23, available at www.comparazionedirittocivile.it last accessed 2020-02-03.

Fortunately this is still subject to mediation in terms of section 21(1)(*f*). The proposed amendment also stipulates that the father could have lived with the mother at conception or any time between conception and birth[110] and thus does away with the previous stipulation that the biological father must be living with the mother at the time of the child's birth in order to acquire parental responsibilities and rights.[111] This thesis is in agreement with this proposed change as it is a more balanced and fair approach to biological fathers who were not living with the mother at the birth of the child, but who were present sometime between conception and birth.

Further, section 231 of the Act ensures the biological father who has no rights of guardianship, or who is not the foster parent of the child, has the ability to apply for the adoption of the child as long as this is done within 30 days:

> "(7) (*a*) The biological father of a child who does not have guardianship in respect of the child in terms of Chapter 3 or the foster parent of a child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption.
> (*b*) A person referred to in paragraph (a) must be regarded as having elected not to apply for the adoption of the child if that person fails to apply for the adoption of the child within 30 days after a notice calling on that person to do so has been served on him or her by the sheriff."

The challenge with this section lies in the fact that the father must be known by the Sheriff and this is only possible if the mother discloses the identity of the father, if she herself is aware of his identity. In addition, section 233 of the act states that "(1) A child may be adopted only if consent for the adoption has been given by (a) each parent of the child regardless of whether the parents are married or not…". The introduction of section 21 and section 233 is a step in the right direction, guaranteeing parental responsibilities and rights of unmarried fathers and

[110] s 21(1)(*a*) Children's Amendment Bill of 2018.
[111] See Heaton "Notes on the proposed amendment of section 21 of the Children's Act 38 of 2005" Vol. 22 2019 *PER* 1-21 for more on the impact of the proposed amendments.

allowing unmarried fathers to have a say in adoption matters. However, in many abandonment cases the biological father is not present and sometimes not even aware of the pregnancy. This poses a challenge to the enforcement by the unmarried father of his parental responsibilities and rights by fulfilling the requirements set out in section 21 and prevents him from exercising his consent in instances where the child is put up for adoption in section 233. As a result, the unmarried father needs to be made aware of the existence of the abandonment and possible adoption of the child.[112] Section 243(1)(*b*) provides a possible solution to an unmarried father who had guardianship of a child who did not consent to the child's adoption. It provides:

> "243. (1) A High Court or children's court may rescind an adoption order on application by-
> *(b)* a parent of the adopted child or other person who had guardianship in respect of the child immediately before the adoption; or"

This section does not provide a solution to the unmarried father who was unaware of the existence and adoption of his child, because it provides that it is applicable to a parent who had guardianship in respect of the child.[113] An unmarried father had no opportunity to acquire parental responsibilities and rights in terms of section 21 because: he was not living with the mother;[114] he did not have the opportunity to consent to or apply to be identified as the child's father;[115] he did not have the opportunity to contribute to the child's upbringing or the ability to attempt to contribute for a reasonable period;[116] and he was not able to contribute towards the maintenance of the child for a reasonable period.[117] All as a result of a lack of knowledge

[112] Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" (80) 2017 *THRHR* 253-266, 257.
[113] Guardianship of a child entails one who has parental responsibilities and rights in respect of the child in terms of s 18 of the act; s 18 "Parental responsibilities and rights 18. (1) A person may have either full or specific parental responsibilities and rights in respect of a child (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right- *(a)* to care for the child;(b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child."
[114] s 21(1)(*a*) of the Children's Act.
[115] s 21(1)(*b*)(i) of the Children's Act.
[116] s 21(1)(*b*)(ii) of the Children's Act.
[117] s 21(1)(*b*)(iii) of the Children's Act.

of the existence of his child. The unmarried father who is without parental responsibilities and rights, can make use of other options to have those rights confirmed.[118] In terms of section 22 of the Children's Act he can enter into an agreement with the mother, he may bring a court application, and lastly he may refer the matter for mediation in terms of section 21(3) of the Children's Act.[119] All of these will be subject to the best interests of the child.[120] Section 243(3)(*b*) further provides that the adoption order may only be rescinded if the parent whose consent was required was not obtained. This section follows on from section 243(1), which states that a rescission application can only be brought by a parent who had guardianship in respect of the child. Ultimately, even if the unmarried father discovers the existence of the child and withholds consent for the adoption of the child, the court may find that such act is not in the child's best interests and consent has been unreasonably withheld and order the adoption to proceed.[121] The solutions discussed above are suited to a father that is aware of the existence of his child, or who becomes aware of the existence of his child, but the question that remains: how will the unmarried father who does not know of the existence of his child, know that his child is placed for adoption or that his child has even been abandoned? This would require a different solution. One such solution may be the introduction of a putative father registry in South Africa. The next section analyses putative father registries and their functioning.

[118] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 48.
[119] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 48; In terms of s 22, Louw *Acquisition of Parental Responsibilities* (LLD Thesis, UP 2009) 307 states that parental responsibilities and rights are conferred and not transferred. The person who is the holder of parental responsibilities and rights retains it jointly with the person on whom it was conferred. Mediation falls outside of the scope of this thesis, for more on this see De Jong "Child-informed mediation and parenting coordination" in Boezaart (ed) *Child Law in South Africa* (2017) 134-164 where the features of mediation are discussed; also see Boniface "Family mediation in South Africa: developments and recommendations" (78) 2015 *THRHR* 397-406.
[120] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013) 48.
[121] s 241(1)(*b*) of the Children's Act.

6.4 USE OF A PUTATIVE FATHER REGISTRY IN THE UNITED STATES OF AMERICA

6.4.1 Defining the putative father

"The term 'legal father' generally refers to a man married to the mother at the time of conception or birth of their child or whose paternity has been otherwise determined by a court of competent jurisdiction."[122] When the parents of a child are not married to one another, states use an array of terms to describe the status of a man who may be the biological father.[123] These terms include the term "putative father", that is a "man who is the alleged biological father of a child but whose paternity has not been legally established".[124] A putative father is also described as "a man who has had sexual relations with a woman to whom he is not married and is therefore [on notice] that such woman may be pregnant as a result of such relations".[125]

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[122] Child Welfare Information Gateway "The rights of unmarried fathers" https://www.childwelfare.gov/pubPDFs/putative.pdf last accessed 2019-01-11; also see Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev*. 1033, 1034 fn 9 where a putative father is defined as the alleged biological father of a child born out of wedlock in terms of the *Black's Law Dictionary* (1999) 623; Further, the Illinois Department of Children and Family Services, "Protect your rights as a father: what is a putative father" available at http://www.state.il.us/dcfs/putative.htm defines a putative father as a "man who may be a child's father, but who was not married to the child's mother before the child was born and has not established the fact that he is the father in a court proceeding".

[123] Child Welfare Information Gateway "The rights of unmarried fathers" available at https://www.childwelfare.gov/pubPDFs/putative.pdf last accessed 2019-01-11; also see Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev*. 1033, 1034 fn 9 where a putative father is defined as the alleged biological father of a child born out of wedlock in terms of the *Black's Law Dictionary* (1999) 623. Further, the Illinois Department of Children and Family Services, "Protect your rights as a father: what is a putative father" at http://www.state.il.us/dcfs/putative.htm defines a putative father as a "man who may be a child's father, but who was not married to the child's mother before the child was born and has not established the fact that he is the father in a court proceeding".

[124] Child Welfare Information Gateway "The rights of unmarried fathers" available at https://www.childwelfare.gov/pubPDFs/putative.pdf last accessed 2019-01-11; also see Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev*. 1033, 1034 fn 9 where a putative father is defined as the alleged biological father of a child born out of wedlock in terms of the *Black's Law Dictionary* (1999) 623. Further, the Illinois Department of Children and Family Services, "Protect Your Rights as a Father: What is a Putative Father" available at http://www.state.il.us/dcfs/putative.htm defines a putative father as a "man who may be a child's father, but who was not married to the child's mother before the child was born and has not established the fact that he is the father in a court proceeding".

[125] Protecting Rights of Unknowing Dads and Fostering Access to Help Encourage Responsibility (Proud Father) Act of 2006 S. 3803, 109th Congress section 440(8); Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 300.

6.4.2 Defining a putative father registry

Putative father registries are for men who are putative fathers. Fathers who are married to the mothers, in other words – presumed fathers, have no need to register with the registry, neither do adjudicated fathers[126] and neither do acknowledged fathers.[127] These fathers will be notified under other state laws as they have absolute rights to notice and consent to adoption.[128] A putative father registry provides the putative father with notice of an adoption or other action in respect of the child and he may either give or refuse consent.[129] The first step for a putative father to assert his rights is to register with a putative father registry. This is done by completing a form with details such as the identity of the mother and or the child and providing his mailing address and mailing it to or handing it to the appropriate state agency.[130] That agency will record the information ideally on the national putative father registry database,[131] but since no national database exists, it is recorded in the relevant state's database.[132] A national database will ensure that the father is notified of any action (adoption or dependency) in respect of the child whether in the father's state of residence or in any other state.[133] There are some state

[126] Where the courts have decreed their paternity at Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 300.
[127] Those who have "executed an affidavit of paternity and filed it with the appropriate state agency"; Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 300.
[128] Such a man is both entitled to custody of and obligated to financially support his child; Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 333.
[129] Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 301; The registry is a database that contains information about the putative father, the mother and the child, see Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1034-1035; for more on this see 750 ILL. COMP. STAT. S 50/12a (2000), which outlines the putative father's rights after registration.
[130] Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 301; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1038.
[131] Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 301; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033; also see Beck "Toward a national putative father registry database" 25 2002 *Harv. J.L. & Pub. Poly* 1031, 1035-36.
[132] Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 301; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033; also see Beck "Toward a national putative father registry database" 25 2002 *Harv. J.L. & Pub. Poly* 1031, 1035-36.
[133] Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338, 301; for more on this see Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1034.

registration time limits, each state varies, however, generally the time limit to register is anytime from the moment of birth to 30 days or more after birth.[134] Registration is charged at a small fee.[135] Mothers are under no obligation to identify fathers or to notify them of the pregnancy or adoption, the obligation lies with the court or adoptive petitioners, they must provide notice to registered putative fathers.[136] There are certain consequences, specific to each state, for not timely registering with the putative father registry.[137] These consequences could include not being notified of adoption proceedings.[138] Once an unwed mother begins adoption proceedings, the registry is searched for a putative father,[139] if a putative father exists he will receive notice of the pending adoption.[140] If he is not found, an affidavit is sent to the interested party stating that no match was located.[141] Lack of knowledge of the pregnancy, birth, or a mother's fraudulent act does not justify late registration or non-registration.[142] Currently no national putative father registry exists, states maintain independent registries, no link between these registries exist and this results in a lack of information sharing between the registries and

[134] Lindsay Biesterfield, Putative Father Registry Table appendix to Beck "A national putative father registry" 2007 *Capital Univ LR* 295-338; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1038, the registration timeline is measured from the date of birth of the child and not from the moment the father became aware of the birth in this regard see *Robert O. v Russell K.*, 604 N.E.2d 99, 103 (N.Y. 1992) where the court stated that even though an unwed father acted promptly once he became aware of the child, he still misconstrued whose timetable is relevant. "Promptness is measured in terms of the baby's life not by the onset of the father's awareness"; However, some registries have established deadline exceptions where the failure to register was not the father's fault in this regard see MINN.STAT. S 259.52. Where the law provides that lack of registration is excused if he can prove that it was not possible for him to register within the required timeframe, it was not his fault, and he registered within ten days after it became possible for him to file.

[135] Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1038; the Illinois Department of Children and Family Services, "Protect your rights as a father: what is a putative father" available at http://www.state.il.us/dcfs/putative.htm.

[136] Beck "Toward a national putative father registry database" 25 2002 *Harv. J.L. & Pub. Poly* 1031, 1035-1036, 1041.

[137] See Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1038 for more on the registration requirements.

[138] See Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1038 for more on the registration requirements.

[139] *J.D.C. v John Doe*, 751 N.E.2d 747, 748 (Ind. App. Ct. 2001) where an unwed mother consented to the adoption of her child. The putative father registry was searched prior to the approval of the adoption.

[140] See 750 ILL.COMP.STAT. S 50/12a (2003).

[141] In *re Paternity of Doe*, 734 N.E.2d 281, 283.

[142] Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1039; see In *re Paternity of Doe*, 734 N.E.2d 281, 283.

fathers' rights not being safeguarded.[143] Various bills have been drafted to enact a national putative father registry, however none have resulted in such a registry being implemented. These bills include: the Proud Father Act or "Protecting Rights of Unknowing Dads and Fostering Access to Help Encourage Responsibility Act of 2006";[144] "The Protecting Adoption and Promoting Responsible Fatherhood Act of 2009";[145] and "Protecting Adoption and Promoting Responsible Fatherhood Act of 2013".[146] The aim of a putative father registry is to safeguard the rights of putative fathers and thereby enabling them to participate in their children's lives.[147] In addition, registries were also created to ensure an unwed father could not challenge an adoption indefinitely because of a lack of notice.[148] Importantly, courts have upheld registries as constitutional.[149]

6.4.3 Unwed biological fathers' rights in the US

[143] In other words registering with a registry in one state will not reflect in another state as for example if a father registers in Illinois but the mother places the child for adoption in Indiana and begins adoption proceedings there, the father's registration in Illinois will not entitle him to notice of the adoption in Indiana. In effect the father would have to register in multiple states to ensure his rights but still how would he know which states to register in, there exists no external searches that a putative father could use within a registry in order to locate a mother who leaves the state; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1035 and 1047, 1048-1052 for more on the implementation of a national putative father registry; see also *Heidbreder v Carton,* 645 N.W. 2d 355, 376 (Minn. 2002) for a similar case where the father registered in a different state to where the adoption was instituted.
[144] s 3803, 109th Congress, 2nd Session.
[145] s 939, 111th Cong. (2009).
[146] H.R. 2439, 113th Cong. (2013).
[147] Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1034 and 1039 fn 61; It is ensured that an unwed father becomes an active participant beyond a biological link. *Lehr v Robertson*, 463 US 248, 265 (1983) where the court "stated that parental rights do not spring full-blown from the biological connection between parent and child".
[148] Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1038; In *Hunter v Doe* (In re J.D.C.), 751 N.E.2d 747, 752 the court said that the putative father's failure to register with the register was implied consent in an adoption, preventing him from contesting to the adoption indefinitely.
[149] *Lehr v Robertson* 463 US 248 (1983) 265.

Prior to 1972 unwed fathers in the US had no rights to custody of their children.[150] Early Illinois adoption laws did not include the unwed father in the definition of "parent"[151] and therefore his consent was not required in adoption proceedings, he was viewed as the irresponsible, absent parent, unwilling to assume his responsibility for the child by marrying the child's mother.[152] In 1972 in the case of *Stanley v Illinois*[153], the US Supreme Court confronted the exclusion of unwed fathers from the definition of parent in state statutes.[154] In this case, the children of an unwed father were declared dependents of the state, upon the death of the mother, without any hearing on the parental fitness of the unwed father or without any proof of

[150] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 711; Korn "The struggle for the child: preserving 'the family' in adoption disputes between biological parents and third parties" 72 1994 *N.C. L. Rev.* 1279, 1286-1290; *Stanley v Illinois*, 405 US 645, 655 (1972).

[151] "Parent" included the "father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent". Ill. Rev. Stat., c. 37, s 701—14; also see *Stanley v Illinois*, 405 US 645 (1972) 650; "Adoption is the statutory process of terminating a child's legal rights and duties toward the natural parents and substituting similar rights and duties toward adoptive parents" *Black's Law Dictionary* (1999) 50 in this regard see Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1035-1036 fn 22; *Stanley v Illinois*, 405 US 645, 655 (1972) where the court stated that it is unaware "of any sociological data justifying the assumption that a child reared by its biological father is less likely to receive a proper upbringing than one raised by his natural father who was married to the mother , or that the stigma of illegitimacy is so pervasive it requires adoption by strangers…"; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1037.

[152] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 711; Korn "The struggle for the child: Preserving 'the family' in adoption disputes between Biological parents and third parties" 72 1994 *N.C. L. Rev.* 1279, 1297; Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J.* 939, 941; *Stanley v Illinois*, 405 US 645, 655 (1972) where the court stated that it is unaware "of any sociological data justifying the assumption that a child reared by its biological father is less likely to receive a proper upbringing than one raised by his natural father who was married to the mother , or that the stigma of illegitimacy is so pervasive it requires adoption by strangers…"; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1037.

[153] 405 US 645 (1972); also discussed in Mason *From Father's Property to Children's Rights the History of Child Custody in the United States* (1994) 145-148.

[154] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 711; Hamilton "The unwed father and the right to know of his child's existence" 76 1988 *Ky. L. J.* 949 (discussing the unwed father's rights with respect to his biological children); Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev.* 207 at 208; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 886; Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 943; also discussed in Mason *From Father's Property to Children's Rights the History of Child Custody in the United States* (1994) 145-148.

neglect.[155] The irrebuttable presumption under Illinois law presumed every unwed father to be unfit to raise his biological child and he could be deprived of custody before any hearing to determine his fitness.[156] Only unmarried fathers were presumed unfit. The father challenged this presumption as it violated his constitutional rights to due process and equal protection under the law.[157] The Illinois Supreme Court denied Stanley the equal protection claim on the basis that he could be separated from his children because he was not married to the mother and therefore his actual parental fitness was irrelevant.[158] Stanley's only recourse was to adopt his children, however, in adoption proceedings he would be treated as a stranger and would not stand to benefit as the children's father.[159] According to Illinois law, the children of all parents can removed from them in neglect proceedings after receiving notice, a hearing, and evidence of parental unfitness, the situation was different with an unwed father.[160] The State would

[155] *Stanley v Illinois* 405 U.S. 645 (1972) at 646; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1037; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 886; also see Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

[156] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 712; *Stanley v Illinois* 405 US 645 (1972) 650 and 646; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1037; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885; also see Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

[157] Swingle "Rights of unwed fathers and the best interests of the child: can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 712; *Stanley v Illinois* 405 US 645 (1972) 650 and 647; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1037; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 states the Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law"; The Fourteenth Amendment encompasses a parent's liberty interest in the custody, care, and control of their children; see also US CONST. amend. XIV, S 1; also see Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

[158] *Stanley v Illinois* 405 US 645 (1972) 647; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885-886; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *IND. L.J.* 939, 943-945.

[159] *Stanley v Illinois* 405 US 645 (1972) 648; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885-886; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *IND. L.J.* 939, 943-945.

[160] *Stanley v Illinois* 405 US 645 (1972) 648; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885-886; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

presume unfitness once it was established that the father was not married to the mother.[161] Thus "the State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect".[162] The US Supreme Court held that it is contrary to the Equal Protection Clause to refuse Stanley a hearing on his parental fitness while giving such a hearing to other parents prior to removing children from their custody.[163] It also held that the Due Process Clause prescribes that Stanley, be given a hearing to determine his parental fitness, it is also required by the Equal Protection Clause to give such protection to unmarried fathers.[164] Swingle provides that Stanley marked the Supreme Court's first significant recognition of the constitutional protection of the parental rights of unwed fathers by ensuring that unwed fathers will receive a hearing concerning parental fitness before their parental rights can be terminated.[165] However, the court did state that:

> "the Illinois Supreme Court correctly held that the State may constitutionally distinguish between unwed fathers and unwed mothers. Illinois' different treatment of the two is part of

[161] *Stanley v Illinois* 405 US 645 (1972) 650; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885-886; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

[162] *Stanley v Illinois* 405 US 645 (1972) 658; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885-886; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

[163] *Stanley v Illinois* 405 U.S. 645 (1972) 658; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1037; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885-886; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

[164] *Stanley v Illinois* 405 US 645 (1972) 660; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1037; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885-886; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 943-945.

[165] Swingle "Rights of unwed fathers and the best interests of the child: can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 713; *Stanley v Illinois* 405 US 645 (1972) 658; Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev.* 207, 208; see also Illinois Probate Act provision 755 ILL.COMP.STAT. 5/11-7 (1993) where it states that parents have equal powers, rights and duties concerning the minor; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 886; for more on this see Meyer, "Family ties: Solving the constitutional dilemma of the faultless father" 41 1999 *ARIZ. L. Rev*. 753, 759; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *IND. L.J.* 939, 943-945.

> that State's statutory scheme for protecting the welfare of illegitimate children. In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. It held that unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood."[166]

Thus not changing the definition of parent to include unwed fathers. The court in *Stanley* left certain matters unresolved, such as whether and to what extent unwed fathers have any rights in adoption of their children. If the child is given up for adoption, must the unwed father be notified? Does the unwed father need to consent to the adoption of his child? If he does not consent, does this amount to an absolute veto to the adoption? What if the identity of the father is known but he cannot be located?[167] In *Quilloin v Walcott,*[168] which dealt with the constitutionality of an adoption statute that highlighted that under Georgia law the consent of each living parent is required for the adoption of a child born in wedlock, this includes a divorced or separated parent who has not been adjudicated as an unfit parent or voluntarily surrendered their rights.[169] In contrast, section 74–403(3) and 74–203 of the Georgia Code provides that only the mother's consent is required for the adoption of a child born out of wedlock.[170] If the father has legitimated the child pursuant to section 74-103 of the Code, he

[166] *Stanley v Illinois* 405 US 645 (1972) 665; also see *Nguyen v INS* 533 US 53 (2001) 62-63 where the court said (after listing a few differences) "that the imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective"; see also *Dubay v Wells*, 442 F. Supp. 2d 404,406 (E.D. Mich. 2006) where it was highlighted that there's no constitutional right for a man to terminate child support duties, though a woman has the right to abort; For the differences between married and unmarried men see case of *Michael H v Gerald D*., 491 US 110 (1989) where the US Supreme Court allowed states to create irrebuttable presumptions of paternity for the husband within marital couples and no such provisions for unmarried men in heterosexual couples; This is in line with South African law that relies on the presumption that the husband of the wife is the father of the child, in Latin referred to as *pater est quem nuptiae demonstrant* for more on this see *F v L* 1987 4 All SA 308 (W); Boberg "The would-be father" (17) 1988 *Businessman's Law* 112-115 states that this presumption applies until the contrary is proved.
[167] These questions are highlighted by Hamilton "The unwed father and the right to know of his child's existence" 76 1987-1988 *Ky. L. J.* 949, 951-952.
[168] 434 US 246 (1978).
[169] *Quilloin v Walcott* 434 US 246 (1978) 246.
[170] Also discussed in Lenell *A Study of Factors that Influence Parental Involvement among African American Unwed Fathers in Georgia* (PhD Thesis Whitney M. Young Junior School of Social Work May 2007).

may acquire a veto authority over the adoption.[171] Alternatively, he must marry the mother and declare the child as his own.[172] These provisions were used to deny the unwed father from preventing the adoption of the child by the stepfather.[173] The unwed father, relying on the court's decision in *Stanley*, claimed that section 74–203 and 74–403(3), in this instance violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment that if he was not found to be an unfit parent, he could veto the adoption of his child.[174] The Supreme Court of Georgia confirmed the decision of the trial court and held that due to the best interests of the child the unwed father's substantive rights under the due process clause were not infringed.[175] The adoption of the child was not by new people but only into the existing family unit, by the stepfather, further the unwed father was not seeking custody of the child.[176] The court held that equal protection principles do not require the court to regard unwed fathers the same as divorced fathers, since differences between these two do exist.[177] The question the US Supreme Court had to deal with was whether the unwed father's interests were adequately protected by a "best interests of the child" standard, in view of the powers granted to wed fathers by

[171] *Quilloin v Walcott* 434 US 246 (1978) 246; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.
[172] *Quilloin v Walcott* 434 US 246 (1978) 246; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.
[173] *Quilloin v Walcott* 434 US 246 (1978) 246; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 886-887; also see Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J*. 939, 946-949.
[174] *Quilloin v Walcott* 434 US 246 (1978) 253; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.
[175] See *Quilloin v Walcott* 434 US 246 (1978) 248-254; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.
[176] See *Quilloin v Walcott* 434 US 246 (1978) 248-254; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.
[177] *Quilloin v Walcott* 434 US 246 (1978) 248-254.

Georgian law.[178] The US Supreme Court examined this issue first under the Due Process Clause and then under the Equal Protection Clause.[179] The court held that the Due Process Clause would be contravened if, without showing of parental unfitness and solely for the best interests of the child, the court broke up an existing family.[180] This was however not the case in this instance, therefore the denial of legitimation and the adoption by the stepfather were in the best interests of the child.[181] With reference to the principles of equal protection, the court held that differences existed between the unwed father and a married or divorced father and that in this case especially the unwed father never assumed any of the responsibility over the care, daily supervision, education and protection of the child.[182] Therefore, the US Supreme Court held that sections 74–203 and 74–403(3) did not dispossess the unwed father of his rights under the Due Process and Equal Protection Clauses.[183] Therefore, Quilloin's constitutional rights were

[178] See *Quilloin v Walcott* 434 US 246 (1978) 248-254; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.

[179] *Quilloin v Walcott* 434 US 246 (1978) 254; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; The US "Supreme Court has held that a parent's right to make decisions concerning the custody, care, and control of his or her children is protected by the Fourteenth Amendment's Due Process Clause" see *Santosky v Kramer*, 455 US 753 and *Meyer v Nebraska* 262 US 390, 399 (1923); also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.

[180] *Quilloin v Walcott* 434 US 246 (1978) 255; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; The US "Supreme Court has held that a parent's right to make decisions concerning the custody, care, and control of his or her children is protected by the Fourteenth Amendment's Due Process Clause" see *Santosky v Kramer*, 455 US 753 and *Meyer v Nebraska* 262 US 390, 399 (1923); also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.

[181] See *Quilloin v Walcott* 434 US 246 (1978) 255; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.

[182] *Quilloin v Walcott* 434 US 246 (1978) 255; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.

[183] *Quilloin v Walcott* 434 US 246 (1978) 255-256; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; The US "Supreme Court has held that a parent's right to make decisions concerning the custody, care, and control of his or her children is protected by the Fourteenth Amendment's Due Process Clause" see *Santosky v Kramer*, 455 US 753 and *Meyer v Nebraska* 262 US 390, 399 (1923); also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.

not violated by the court denying him absolute veto authority over the adoption of his child.[184] The matter of *Quilloin* demonstrated that an "unwed father may have less protection when the biological mother is part of the family unit adopting the child".[185] Similarly, in the matter of *Caban v Mohammed*[186] the mother and the stepfather applied to adopt the children and the application was granted. The appellant Caban is appealing based on the New York laws' differentiation between wed and unwed parents, which violates the Equal Protection Clause of the Fourteenth Amendment.[187] Second, the appellant contends that this Court's decision in *Quilloin v Walcott* recognised that unwed natural fathers have a due process right to maintain a relationship with their children if they have not been found to be unfit.[188] Section 111 of the New York Domestic Relations Law provided that only the consent of the mother is required in adoption when the child is born out of wedlock. Thus, the mother could withhold her consent to adoption whereas the father could not unless he could show that the adoption was not in the best interests of the children.[189] Therefore, it is clear that section 111 treats unmarried parents

[184] *Quilloin v Walcott* 434 US 246 (1978) 256; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 886-887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 946-949.

[185] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 715; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 886.

[186] 441 U.S. 380 (1979).

[187] *Caban v Mohammed* 441 US 380 (1979) 393-394; Iuga "*Caban v Mohammed*" 14 2004 *J. Contemp. Legal Issues* 275, 278, the court agreed that promoting the adoption of illegitimate children is an important purpose but the statute's unqualified distinction between unwed mothers (who controlled the adoption decision) and unwed fathers (who had no control) was not "structured reasonably" to further these ends; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 949-951.

[188] *Caban v Mohammed* 441 US 380 (1979) 393-394; Iuga "*Caban v Mohammed*" 14 2004 *J. Contemp. Legal Issues* 275, 278, the court agreed that promoting the adoption of illegitimate children is an important purpose but the statute's unqualified distinction between unwed mothers (who controlled the adoption decision) and unwed fathers (who had no control) was not "structured reasonably" to further these ends; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J*. 939, 949-951.

[189] *Caban v Mohammed* 441 US 380 (1979) 393-394; Iuga "*Caban v Mohammed*" 14 2004 *J. Contemp. Legal Issues* 275, 278, the court agreed that promoting the adoption of illegitimate children is an important purpose but the statute's unqualified distinction between unwed mothers (who controlled the adoption decision) and unwed fathers (who had no control) was not "structured reasonably" to further these ends; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J*. 939, 949-951.

differently according to their sex.[190] The purpose behind section 111 of the New York Domestic Relations Law was stated in *re Malpica-Orsini,*[191] as the "furthering of the interests of illegitimate children, for whom adoption often is the best course". The court concluded:

> "require the consent of fathers of children born out of wedlock . . . , or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded."[192]

The US Supreme court held that this amounts to unfair gender-based judgments and that "no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under section 111 bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children".[193] The court held that section 111 excludes loving fathers from participating in the important decision whether their children get adopted and allows alienated mothers to terminate the rights of fathers without a valid basis.[194] The court concluded that to make this distinction between unwed mothers and unwed fathers, does not correlate to the State's asserted interests[195] and reversed the judgment of the New York Court of Appeals. In the dissenting opinion Justice Stewart had a different view and held that the "welfare of illegitimate children is of far greater importance than the opinion of the Court

[190] *Caban v Mohammed* 441 US 380 (1979) 393-394; Iuga "*Caban v Mohammed*" 14 2004 *J. Contemp. Legal Issues* 275, 278, the court agreed that promoting the adoption of illegitimate children is an important purpose but the statute's unqualified distinction between unwed mothers (who controlled the adoption decision) and unwed fathers (who had no control) was not "structured reasonably" to further these ends; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 949-951.
[191] 36 N.Y.2d 568, 370 N.Y.S.2d 511, 331 N.E.2d 486 (1975).
[192] 36 N.Y.2d, at 572, 370 N.Y.S.2d, at 516, 331 N.E.2d, 489.
[193] *Caban v Mohammed* 441 US 380 (1979) 393-394; Iuga "*Caban v Mohammed*" 14 2004 *J. Contemp. Legal Issues* 275, 278, the court agreed that promoting the adoption of illegitimate children is an important purpose but the statute's unqualified distinction between unwed mothers (who controlled the adoption decision) and unwed fathers (who had no control) was not "structured reasonably" to further these ends; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 949-951.
[194] *Caban v Mohammed* 441 US 380 (1979) 394; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 949-951.
[195] *Caban v Mohammed* 441 U.S. 380 (1979) 394; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 949-951.

would suggest".[196] It held that the unwed father who has established a relationship with his child born out of wedlock should participate in adoption proceedings and this should only be denied if the court finds that adoption will be in the child's best interests.[197] The minority judgment held that there exists a difference between the *Stanley* case and this case because in *Stanley* a presumption in terms of Illinois law existed that the unwed father is an unfit parent, whereas in terms of New York law no such presumption exists.[198] The minority went on to state that a constitutionally valid ground to differentiate between the unwed mother and unwed father exists as a result of the absence of a legal tie with the mother, meaning no marriage relationship or previous marriage relationship.[199] "The decision to withhold from the unwed father the power to veto an adoption by the natural mother and her husband may well reflect a judgment that the putative father should not be able arbitrarily to withhold the benefit of legitimacy from his children."[200] Biology is not the only factor used to determine whether parental rights should be granted.[201] Customarily, marriage is the method by which a relationship is created with the child.[202] The minority of the court first dealt with the equal protection challenge brought by the appellant and held that distinctions because of gender are not always invalid, "when men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated.".[203] The court went on to hold that the social reality is that the mother is easily identifiable whereas this is not the

[196] *Caban v Mohammed* 441 US 380 (1979) 397; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[197] *Caban v Mohammed* 441 US 380 (1979) 397; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[198] *Caban v Mohammed* 441 US 380 (1979) 397; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[199] *Caban v Mohammed* 441 US 380 (1979) 397; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[200] *Caban v Mohammed* 441 US 380 (1979) 397; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[201] *Caban v Mohammed* 441 US 380 (1979) 398; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[202] *Caban v Mohammed* 441 US 380 (1979) 398; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[203] *Caban v Mohammed* 441 US 380 (1979) 398; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.

case with the father.[204] According to the court, the majority of States have in their statutes identified persons whose consent is required for a valid adoption.[205] The court held that the implication of requiring the consent of both unwed parents would be that if one unwed parent withholds his or her consent the illegitimate child remains illegitimate and as a result the statute does not discriminate on the basis of sex.[206] Here the legislature has achieved its aim to expedite adoptions of illegitimate children after considering the interests of all parties involved, thus the gender-based differentiation is warranted.[207] The adoption process would be delayed and made more complicated if the consent of the unwed father were also necessary in an adoption application.[208] The court held that the rule that only the mother's consent is required is justified because fewer interested unwed fathers exist as opposed to the number of uninterested unwed fathers.[209]

In respect of the due process issue the minority of the court stated that an adoption decree that terminates the relationship between unwed father and child is constitutionally justifiable by a finding of neglect or abandonment therefore in the court's opinion it will also be justified where the adoption will be in the best interests of the child.[210] The court held that the unwed father took no steps to legitimate the child and therefore the natural family unit was already destroyed.[211] The court conceded that these reasons may not be enough to destroy the

[204] *Caban v Mohammed* 441 US 380 (1979) 398; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[205] *Caban v Mohammed* 441 US 380 (1979) 399; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[206] *Caban v Mohammed* 441 US 380 (1979) 400; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[207] *Caban v Mohammed* 441 US 380 (1979) 401 and 403; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[208] *Caban v Mohammed* 441 US 380 (1979) 408; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[209] *Caban v Mohammed* 441 US 380 (1979) 410-412; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[210] *Caban v Mohammed* 441 US 380 (1979) 415; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[211] *Caban v Mohammed* 441 US 380 (1979) 415; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.

relationship between unwed father and child but contributes by providing a valid ground for this decision.[212] This thesis agrees with the majority decision of the court in declaring section 111 of the New York Domestic Relations Law unconstitutional. Only requiring the consent of the mother in instances of adoption and not the consent of the unwed father is an unfair gender-based discrimination. More than that, it overlooks the possibility that the father wants a relationship with his child and strips him of this right based on a pre-determined norm that unwed fathers "do not want anything to do with their children". The Supreme Court in *Caban* and *Quilloin* thus determined that the entitlement of a birth father of an out-of-wedlock child to withhold consent to a proposed adoption is dependent upon the essence of his contact and relationship with the child, including how frequently he visited the child and to what degree he supported the child.[213] In response to the judgment in *Caban* the legislature amended section 111 of the New York Domestic Relations law to require the consent of unwed fathers (whether adults or minors) if certain criteria has been met.[214] The legislature established two tests. One test for when the child is more than six months old and another for when the child is less than six months old.

> "(d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting

[212] *Caban v Mohammed* 441 US 380 (1979) 415; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 949-951.
[213] Scheinkman Supplementary Practice Commentaries s 111 of the New York Domestic Relations law.
[214] Scheinkman Supplementary Practice Commentaries s 111 of the New York Domestic Relations law.

such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child."[215]

The requirements imposed in section 111(1)(*e*) for consent rights for the father of a child born out of wedlock of less than six months old stipulating that "the father must have lived openly with the child or the child's mother for a continuous period of six months" was declared unconstitutional.[216] The initial reasoning behind this section, with specific reference to newborn infants, is the fact that many children are put up for adoption days after birth and that would leave the father with no opportunity to demonstrate a real commitment to the child by visiting or communicating with the child. As a result, the legislature drafted section 111(1)(*e*) to determine whether the unwed father attempted to create a family unit six months prior to the child's placement.[217] The requirements for consent rights for an unwed father of a child more

[215] s 111 New York Domestic Relations law.

[216] *Matter of Raquel Marie X*., 76 N.Y.2d 387, 559 N.Y.S.2d 855, 559 N.E.2d 418 (1990), *cert. denied*, 111 S.Ct. 517, 498 US 984, 112 L.Ed.2d 528, *on remand* 173 A.D.2d 709, 570 N.Y.S.2d 604 (2nd Dept. 1991) the court invalidated the entire s 111(1)(*e*) even though only (i) was found to be unconstitutional, this because they did not want the other two requirements to stand alone so they proceeded to invalidate the entire section; Scheinkman Supplementary Practice Commentaries section 111 New York Domestic Relations law C111:1: Consent to Adoption--Whose Consent Required.

[217] Scheinkman Supplementary Practice Commentaries section 111 New York Domestic Relations law C111:3: Consent to Adoption unwed father of child under six months old; Arcaro "No more secret adoptions: providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev.* 449,

than six months of age, in section 111(1)(*d*) have been judicially enforced as it makes allowance for the possibility that the father may be hindered in his efforts to comply with the statute by the actions of persons having custody.[218] The facts of each case will determine whether the father qualifies for consent rights and this cannot be determined by way of summary judgment.[219] The court will not grant the right to veto a proposed adoption to an unwed father who was slow to show an interest in the child and then did so merely to block the adoption.[220] Another important matter is that of *Lehr v Robertson*[221] where the unwed biological father claimed "that the Due Process and Equal Protection Clauses of the Fourteenth Amendment gave him an absolute right to notice and an opportunity to be heard before the child may be adopted".[222] The child was adopted by her stepfather on March 7, 1979.[223] Lehr contended that the adoption order was invalid because he was not given advanced notice of the adoption proceeding.[224] The appellant did not enter his name into the putative father registry maintained by the state of New York.[225] New York law also requires notice of adoption proceedings to be

455, "The differing approaches to adoptions of newborn children and children over the age of six months are presumably justified by the fact there may be sufficient evidence to support the existence of a relationship with an older child where that may not be true of a newborn child"; also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 961-962, "The problem with the 'relationship' standard is that it places putative fathers in an almost no-win situation in cases involving newborn children", 961.

[218] Scheinkman Supplementary Practice Commentaries section 111 New York Domestic Relations law C111:1: Consent to Adoption--Whose Consent Required; C111:2: Consent to Adoption--Unwed Father of Child More Than Six Months Old.

[219] In *Matter of M.*, 39 A.D.3d 754, 833 N.Y.S.2d 248 (2nd Dept. 2007) where a summary judgment was reversed to look at the specific facts of the case.

[220] In *Matter of Sergio LL*, 269 A.D.2d 699, 703 N.Y.S.2d 310 (3rd Dept. 2000).

[221] 103 S.Ct.2985 No. 81-1756 Argued dec.7, 1982, decided June 27, 1983; also discussed in Mason *From Father's Property to Children's Rights the History of Child Custody in the United States* (1994) 145-148; Deech "The rights of fathers: social and biological concepts of parenthood" in Eekelaar and Šarčević (eds) *Parenthood in Modern Society Legal and Social Issues for the Twenty-First Century* (1993) 20; South African Law Commission Report on "The Rights of a Father in Respect of his Illegitimate Child" project 79 July 1994 20.

[222] *Lehr v Robertson*, 463 US 248 (1983) 248.

[223] *Lehr v Robertson*, 463 US 248 (1983) 248.

[224] *Lehr v Robertson*, 463 US 248 (1983) 248.

[225] *Lehr v Robertson*, 463 US 248 (1983) 250-251. A "man who files with the putative father registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child"; also discussed in Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 238; see also Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1040; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.

given to other categories of fathers but the Appellant did not fall into any of those categories.[226] The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law".[227] The court held that there is a clear "difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case".[228] An unwed father acquires substantial protection under the due process clause where he shows a full commitment to the responsibilities of parenthood by "coming forward to participate in the rearing of his child,"[229] and in doing so he acts as a father to his child.[230] However, the court went on to provide that a mere "biological link does not merit equivalent constitutional protection" and judges do not

[226] *Lehr v Robertson*, 463 US 248 (1983) 251. Adjudicated fathers: "those identified as the father on the birth certificate; those who live openly with the mother and the child and hold themselves to be the father; those identified as the father in a sworn statement and those married to the child's mother before the child was six months old."

[227] *Lehr v Robertson*, 463 US 248 (1983) 256; also discussed in Parness and Arado "Safe haven, adoption and birth record laws: where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 238; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1040; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J*. 833, 842-843; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; The US "Supreme Court has held that a parent's right to make decisions concerning the custody, care, and control of his or her children is protected by the Fourteenth Amendment's Due Process Clause" see *Santosky v Kramer*, 455 US 753 and *Meyer v Nebraska* 262 US 390, 399 (1923); also see Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J*. 939, 951-955.

[228] *Lehr v Robertson*, 463 US 248 (1983) 261; *Caban v Mohammed* 441 US 380 (1979) 392; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; The US "Supreme Court has held that a parent's right to make decisions concerning the custody, care, and control of his or her children is protected by the Fourteenth Amendment's Due Process Clause" see *Santosky v Kramer* 455 US 753 and *Meyer v Nebraska* 262 US 390, 399 (1923); also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 951-955.

[229] *Caban v Mohammed* 441 US 380 (1979) 392; for more on the Due Process clause see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885 and for more on *Quilloin* see 886-887; The US "Supreme Court has held that a parent's right to make decisions concerning the custody, care, and control of his or her children is protected by the Fourteenth Amendment's Due Process Clause" see *Santosky v Kramer*, 455 US 753 and *Meyer v Nebraska* 262 U.S. 390, 399 (1923); also see Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 951-955.

[230] *Lehr v Robertson*, 463 US 248 (1983) 261; also discussed in Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 238; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev.* 1033, 1040; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J*. 833, 842-843; also discussed in Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J*. 939, 951-955.

create nor do they sever bonds.[231] Emotional connections are established through daily contact.[232] Biology provides a platform for the father to develop a relationship with his offspring.[233] The US Supreme Court went on to support the existence of the putative father registry by stating: "If this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control."[234] The court said that the father cannot criticise the law on the basis of his ignorance of it.[235] The New York legislature pointed out that making the notice requirement more flexible would complicate the adoption process and threaten the privacy interests of unwed mothers, creating a risk of unnecessary controversy and hindering the finality of adoption decrees.[236] The appellant

[231] *Lehr v Robertson*, 463 US 248 (1983) 261; also discussed in Parness and Arado "Safe haven, adoption and birth record laws: where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 238; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. Rev*. 1033, 1040; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L.J*. 833, 842-843; for more on the Biology-plus requirement see Strasser "The often illusory protections of "biology plus": On the Supreme Court's parental rights jurisprudence" 13 2007 *Tex. J. C.L. & C.R*. 31, 58-59; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 951-955; Deech "The rights of fathers: Social and biological concepts of parenthood" in Eekelaar and Šarčević (eds) *Parenthood in Modern Society Legal and Social Issues for the Twenty-First Century* (1993) 20.

[232] *Lehr v Robertson*, 463 US 248 (1983) 261; also discussed in Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 238; Moore "Implementing a national putative father registry by utilizing existing federal/state collaborative databases" 36 2002-2003 *J. Marshall L. rev*. 1033, 1040; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J*. 833, 842-843; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 951-955.

[233] *Lehr v Robertson*, 463 US 248 (1983) 262; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J*. 833, 842-843; also discussed in Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J*. 939, 951-955.

[234] *Lehr v Robertson*, 463 US 248 (1983) 264; Seymore "Grasping fatherhood in abortion and adoption" 68 May 2017 *Hastings Law Journal* 817, 854; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J*. 833, 842-843; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J*. 939, 951-955.

[235] *Lehr v Robertson*, 463 US 248 (1983) 264; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J*. 833, 842-843; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 951-955.

[236] *Lehr v Robertson*, 463 US 248 (1983) 264; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J*. 833, 842-

thought that, because he filed affiliation proceedings in another court, he was entitled to notice of the adoption.[237] However, the US Supreme Court held that parties must comply with all the procedural requirements and do so correctly, this in order to facilitate the speedy adoption of young children.[238] Therefore the court found no basis for his claim that his constitutional rights were infringed upon.[239] With regard to the appellant's claim that his rights have been violated in terms of the Equal Protection clause the court referred to the matter of *Caban* where the court held that denying the father a veto right over the adoption, especially since he had admitted paternity and helped to rear the children, violated the Equal Protection Clause.[240] The court in *Caban* made it clear that if the father had not "come forward to participate in the rearing of his child, nothing in the Equal Protection clause would preclude the state from withholding from him the privilege of vetoing the adoption of that child".[241]

In contrast in *Lehr*, the appellant did not establish a relationship with the child, therefore the Equal Protection clause does not prevent a state from assigning different rights to each

843; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.

[237] *Lehr v Robertson*, 463 US 248 (1983) 264; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 842-843; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.

[238] *Lehr v Robertson*, 463 US 248 (1983) 265; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 842-843; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 951-955.

[239] *Lehr v Robertson*, 463 US 248 (1983) 265; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 842-843; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 951-955.

[240] *Lehr v Robertson*, 463 US 248 (1983) 267; Cornett "Remembering the endangered 'child': limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 842-843; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 887; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.

[241] *Caban v Mohammed* 441 US 380 (1979) 392.

parent.[242] Therefore, the court affirmed the decision of the New York Court of Appeals.[243] In the dissenting opinion of the court, Justice White and the other dissenting judges held that the court has to look at the nature of the interest at stake, which is the interest that a natural parent has in his or her child, and that has been recognised for a long time and afforded constitutional protection.[244] "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is … a commanding one."[245] The minority of the court found that Lehr had in fact tried to establish a relationship with his child, but for the actions of the mother and held that the biological connection between parent and child is not as insignificant as the majority of the court suggests.[246] The court went on to provide that the approach adopted by the state must demonstrate a reasonable attempt to determine the identity of the putative father and to give him adequate notice.[247] The mother knew the exact location of the father and he was thus entitled to due process as well as the right to be heard, which is of "little worth unless one is informed that the matter is pending and can choose for oneself whether to take the next step or not[248] namely to appear or default, acquiesce or contest."[249] The minority of the court held that it makes little sense to deny providing notice to a father who has not placed his name on a registry but who has instead filed a paternity suit and who has notified the adoption court of

[242] *Lehr v Robertson*, 463 US 248 (1983) 272 and 273; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 951-955.
[243] *Lehr v Robertson*, 463 US 248 (1983) 272 and 273; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L.J.* 939, 951-955.
[244] *Lehr v Robertson*, 463 US 248 (1983) 272 and 273; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.
[245] *Lassiter v Department of Social Services* 452 US 18, 27, 101 S.Ct. 2153, 2160, 68 L.Ed.2d 640 (1981).
[246] *Lehr v Robertson*, 463 US 248 (1983) 272 and 273; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.
[247] *Lehr v Robertson*, 463 US 248 (1983) 272 and 273; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.
[248] *Lehr v Robertson*, 463 US 248 (1983) 273; also discussed in Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J.* 939, 951-955; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 885; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.
[249] *Schroeder v City of New York*, 371 US 208, 212, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962), quoting *Mullane v Central Hanover Trust Co.*, 339 US 306, 314, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950).

his action and his interest.[250] "It is the sheerest formalism to deny him a hearing because he informed the State in the wrong manner."[251] The minority of the court further held that because his identity and whereabouts were known, denying him a hearing and notice were not serving a legitimate state interest.[252] This thesis agrees with the minority of the court in *Lehr*. Filing a paternity suite should be construed as an even more positive step in establishing a link with his child than registering with a registry. The majority of the court should have viewed the unwed father's action as a definitive step in asserting his rights, as opposed to merely discounting it on the basis that it was procedurally incorrect.

In each of the discussed cases, the unwed father knew of his child's existence. One aspect the courts did not deal with was an unwed father's rights in respect of his newborn child with whom he was unable to establish a relationship due to the short time frame and who has now been put up for adoption without his knowledge or consent. In the section to follow these and other problem areas identified with fathers' rights and putative father registries are discussed, as well as instances where the father does not know of his child's existence.

6.4.4 Problems identified with putative father registries

A putative father registry imputes upon the unmarried father a knowledge of the registry and where and how to register, more importantly it also imputes upon the unmarried father the knowledge of the existence of the child.[253] In most instances, this is not the case. Further, as evidenced in the US where there is no national putative father registry, confusion can exist as

[250] *Lehr v Robertson*, 463 US 248 (1983) 275; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.
[251] *Lehr v Robertson*, 463 US 248 (1983) 275; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.
[252] *Lehr v Robertson*, 463 US 248 (1983) 275; also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 951-955.
[253] *In re Adoption of Baby E.Z.*, 266 P.3d 702, 704-05 (Utah 2011); Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465.

to where to file if the birth mother leaves her original place of residence.[254] If the establishment of a putative father registry is to succeed in South Africa, it will have to be a national registry. This would entail that, no matter in which province a mother abandons a child, after seeing the advertisement in a local newspaper, the unmarried father may assert his rights by registering with the putative father registry. In addition, registration with a putative father registry does not guarantee the unmarried father parental rights. In terms of the Children's Act 38 of 2005 the unmarried father of a child born out of wedlock must adhere to section 21 in order to acquire parental responsibilities and rights over the child. Registration with the putative father registry gives the unmarried father the right to receive notice concerning any adoption proceedings involving the child prior to the child being placed for adoption and as soon as possible after the child has been abandoned.

In the US, the unmarried father will only be able to challenge the adoption if he can show that it is in the child's best interests.[255] A similar approach should be adopted in South Africa, where the child's best interests are of paramount consideration in all matters concerning the child, and the granting of an unwed father parental responsibilities and rights would be dependent on the best interests of the child and section 21 of the Children's Act.[256] Various questions arise, such as whether a father who registered with the putative father registry will only acquire the right

[254] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465; for more on this see *In re Adoption of Baby E.Z.*, 266 P.3d 702, 704-05 (Utah 2011) in which an unwed father "filed custody and visitation proceedings in Virginia and also filed in the Virginia putative father registry. The prospective adoptive parents filed a petition for adoption in Utah. Although the Virginia court granted the biological father custody of Baby E.Z., the Utah courts held that he had not strictly complied with the Utah adoption statutes and thus could not block the adoption."

[255] Seymore "Grasping fatherhood in abortion and adoption" 68 2017 *Hastings Law Journal* 817, 855; Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 962 disagrees with the use of the best interests of the child standard and provides that the "detriment" standard would better serve the interests of putative fathers by requiring the court to find that it would be to the child's detriment to be placed with the putative father. This thesis disagrees with this approach because although something may not be to the child's detriment, it may not necessarily be in the child's best interests either. A detriment approach will also be contrary to the approach adopted in terms of the South African Constitution which provides that the best interests of the child are of paramount importance in every matter concerning the child and this in terms of s 28(2).

[256] s 28(2) of the Constitution of the Republic of South Africa.

to notification of adoption proceedings or whether he will acquire parental responsibilities and rights by registration with the putative father registry. This thesis proposes that an approach similar to the one adopted in the US be implemented, where the father only has an opportunity to acquire parental responsibilities and rights in terms of section 21 of the Children's Act subsequent to registration.[257] There are one of two ways in which putative father registries can function. Firstly, a father may be expected to register after having sexual relations with a woman on the assumption of pregnancy, or secondly, a father is first notified of the relinquishment of his child and thereafter may assert his rights by registering.

Putative registries also referred to as paternity registries sometimes provide men with as little as five days after the birth of the child to file.[258] The problem arises if the man does not know about the pregnancy or birth, and then these timelines can be construed as unreasonable.[259] One commentator provides:

> "The notion that an unwed male should intuitively know that when he engages in sexual intercourse with an unmarried woman he must also contact the state and report this private conduct to preserve a claim to his offspring holds no place in the history and traditions of American jurisprudence. The legislative presumption that unwed fathers are presumed to know of their obligation to register is not only inconsistent with deeply imbedded notions of privacy, but also unrealistic."[260]

[257] See also chapter 8 conclusion chapter's recommendations.
[258] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465.
[259] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465.
[260] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465; In *Heidbeder v Carton* 645 N.W. 2d 355 (Minn. 2002) a genetic father was told by an Iowa attorney that an adoption of a child, conceived to an unwed Iowa couple needed the father's consent. But the mother, while pregnant had moved to Minnesota and did not tell the father. A Minnesota adoption was sustained over the father's objection because the father had not filed with the Minnesota paternity registry within 30 days of birth, as was required by Minnesota law. The father filed with the registry on the same day on which he learned of the child's birth but it was 31 days after the birth and therefore the court concluded that the mother had no fiduciary duty to tell the father and thus there was no fraud (since the mother informed the father that she would not give the child up for adoption); see *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) where the failure to register in a timely fashion will be excused if other steps towards parenthood are taken.

In some states, a lack of knowledge is no excuse for failure to register.[261] These registries to some extent do require the cooperation of the mother, whether it be that she submits information regarding the father or some basic information about herself, an accurate search of the registry can only be conducted with some basic information of either of the parties at the very least.[262] In this respect a putative father registry will not function effectively with the use of baby safes because mothers are not required to leave any information, they in fact have no contact with anyone prior to or during the relinquishment of their children whereas a form of anonymous birth or confidential birth makes provision for some information to be left. Furthermore, safe havens will also facilitate the use of a putative father registry as there is contact between the relinquishing mother and the person receiving the child. A further problem experienced with the putative father registries in the US is the lack of publicising its existence, "while ignorance of the law is no excuse, the law cannot serve its purpose without the unwed father's knowledge of its existence".[263]

According to Seymore the putative father registry as a remedy offers little protection for various reasons.[264] Firstly, Seymore suggests that only a national putative father registry will be effective in assuring fathers' rights.[265] Secondly, all potential fathers should be entitled to

[261] Florida takes the position that a man, "by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur ...." FLA. STAT. ANN. § 63.088(1) (2016). Thus, the father is presumed to know that he needs to file with the registry; Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev.* 449, 465.

[262] It is proposed that an advertisement be placed in a local newspaper after a child is abandoned, a father that recognises the description of the child as being his child may then start by registering with the putative father registry. The next step he is required to take involves acquiring section 21 parental responsibilities and rights but only after a DNA test has been done. Once he is proven to be the father and has acquired parental responsibilities and rights then he may either consent or refuse consent to adoption (logically after having done all the steps the father actually intends to assume care of the child and thus withholds consent to his child's adoption).

[263] Aizpuru "Protecting the unwed father's opportunity to parent: A survey of paternity registry statutes" 18 1999 *Rev. Litig.* 703, 727; Swingle "Rights of unwed fathers and the best interests of the child: can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 759.

[264] Seymore "Grasping fatherhood in abortion and adoption" 68 2017 *Hastings Law Journal* 817, 864.

[265] Seymore "Grasping fatherhood in abortion and adoption" 68 2017 *Hastings Law Journal* 817, 865.

actual notice of the adoption through personal service.[266] In the case of abandoned children, notifying the fathers in each and every case will prove difficult and will cause for a delay in the adoption proceedings. Thirdly, fathers' action or inaction during pregnancy should not exclude them from parenthood, especially in the instance of a lack of knowledge of the pregnancy and birth.[267] Lastly, Seymore pointed out that jurisdictions should recognise "causes of action for fraud and tortious interference with parental rights brought against adoption professionals".[268] According to Arcaro when a child has entered the world it is easy to determine the actions of an unwed father, whether he wants to create a legal relationship with his offspring, it is even possible to determine whether the unwed father has made an effort to create a legally protected parent-child relationship.[269] However, examining the parent-child relationship during the mother's pregnancy is much more challenging.[270] Thus, according to Arcaro, for unwed biological fathers the legal question would be one of timing.[271] When, after conception, can the law rightly determine whether the father grasped the opportunity of parenthood and responsibility towards the child?[272] In instances where the unwed father is unaware of the fact of the pregnancy it will not be any easier for him to prove that he is interested in assuming responsibility for his offspring and a different approach will need to be

[266] Texas statutes now exclude personal service TEX.FAM. CODE ANN. S 161.002(c-1) (2015); also discussed in Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 955-964; also see Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465.

[267] Seymore "Grasping fatherhood in abortion and adoption" 68 2017 *Hastings Law Journal* 817, 866; for more on the action or inaction of fathers during pregnancy see Brandt "Cautionary tales of adoption: Addressing the litigation crisis at the moment of adoption" 4 2005 *Whittier J. Child & Fam. Advoc* 187, 196; Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 955-964.

[268] For more on this see Seymore "Grasping fatherhood in abortion and adoption" 68 2017 *Hastings Law Journal* 817, 866; Parness and Arado refer to this case throughout in "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 228.

[269] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 455 and 456.

[270] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 456; Helms and Spence "Take notice unwed fathers: An unwed mother's right to privacy in adoption proceedings" 20 1 2005 *Wis.Women's L.J* 38-39; Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 955-964.

[271] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 456; Lehr 463 U.S. 248, 262 (1983).

[272] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 456.

developed where the registry is used effectively.[273] If a putative father has registered with a putative father registry, any adoption agent must search the registry and notify the father of a possible adoption.[274] After notification the father can choose whether he wants to play a role in the child's life.[275] The US Supreme Court in all of the above cases has made it clear that an unwed biological father "must come forward promptly to assume the responsibilities of parenthood through his own intentional conduct that reflects a voluntary desire to be legally responsible for his offspring".[276] According to the court in *Stanley, Quilloin, Caban* and *Lehr*, the father is afforded constitutional protection when he develops a relationship with the child and accepts some responsibility over the child's future.[277] All of these cases have one common thread, which, according to Arcaro, served to bind responsible fathers to their children and that is the biological connection between father and child only becomes worthy of constitutional protection *if* the biological father develops it into a full and enduring relationship.[278]

The United States Supreme Court has taken a defined stance after these decisions and Arcaro sums it up as firstly, natural parents have a fundamental liberty interest in the care, custody and management of their children and that the rights to conceive and raise your own children are

[273] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 456.
[274] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 456.
[275] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 456.
[276] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 456; *Caban v Mohammed* 441 US 380 (1979) 392; Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J.* 939, 955-964.
[277] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 459; *Caban v Mohammed* 441 US 380 (1979) 392; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 887; Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 955-964.
[278] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 461; see *Adoption of Kelsey S*., 823 P.2d 1216, 1228 (Cal. 1992) (en banc); Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 955-964.

essential.[279] Secondly, parents are presumptively fit, absent a showing of unfitness, and this is so whether they are married or unmarried.[280] Lastly, a state may not deprive an unwed father of the right to custody and care of his children without first providing him with notice and then conducting a hearing to determine his parental fitness.[281]

In the State of Florida the putative father registry was introduced after the Adoption Act of 2001 received criticism for placing considerable legal burdens on a birth mother when she put her child up for adoption.[282] All the responsibility rested with the birth mother in respect of locating and notifying the biological father of the adoption.[283] One facet that caused for humiliation and insensitivity towards the birth mother was the fact that, in some instances where she had more than one sexual partner, she had to publish the names of all the men she had intercourse with at around the time of conception.[284] These notice provisions were held unconstitutional by Florida's Fourth District Court of Appeal[285] and in 2003 the Florida

[279] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 461-462; see as an example *Santosky v Kramer* 455 US 745, 753 (1982); see also *Stanley v Illinios*, 405 US 651 where the court cited *Meyer v Nebraska*, 262 US 390, 399 (1923).
[280] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 461-462; *Prince v Massachusetts*, 321 US 158, 166 (1944).
[281] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 462; *Stanley v Illinios*, 405 US 649.
[282] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 463-464; Binstock "Not if, but when?: Dismantling the Florida Adoption Act of 2001" 10 2004 *Cardozo Women's L. J*. 625, 628.
[283] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 463-464; FLA. STAT. ANN. S 63.088(5); Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J*. 939, 955-964.
[284] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 463-464; FLA. STAT. ANN. S63.088(5); Hill "Putative fathers and parental interests: a search for protection" 65 1990 *Ind. L. J*. 939, 955-964 the author still suggests that the unwed mother should inform the court of the identity of the father, even though it may expose her to embarrassment the author suggests that such embarrassment is outweighed by the putative father's interests in obtaining notice and is also outweighed by the child's interest in having a relationship with his or her biological father. The author further suggests that disclosure serves the state's interest in assuring a stable and final adoption decree. This thesis determines that the mother's embarrassment should not be deemed lightly since forced disclosure could prevent women from making use of baby safes or baby safe havens.
[285] *G.P. v State*, 842 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2003); These notification laws were insensitive and humiliating and regarded as an unconstitutional interference with a birth mother's right to privacy and decisional autonomy see Binstock "Not if, but when?: Dismantling the Florida Adoption Act of 2001" 10 2004 *Cardozo Women's L. J*. 625, 629.

legislature created the Florida Putative Father Registry which shifted the responsibility of the right to receive notification of a pending adoption onto the birth father.[286] The main feature of the registry was timely registration, which would preserve the father's right to receive actual notice of an adoption.[287] An unwed biological father was deemed to be on notice that a birth and possible adoption could occur after sexual intercourse with a woman and, as a result, he had an affirmative duty to protect his rights.[288] He was presumed to know that he must register with the Florida Putative Father Registry.[289] Registration was the first step in converting his undeveloped interest into a constitutionally protected relationship.[290] If he failed to register, he had no rights to the child, it was deemed a waiver of rights.[291] To expect a man to register without actual knowledge of a pregnancy but purely registering "in case" the woman he had sexual intercourse with is pregnant was one of the chief criticisms levelled against the Florida Putative Father Registry.[292] It was inconsistent with the rights to privacy and, according to Arcaro, unrealistic.[293] This thesis agrees with the position taken by Arcaro, it is unrealistic to expect a man to know that he should register purely based on his sexual relations with a woman.

[286] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 464; FLA. STAT. ANN. S63.054.
[287] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 464; FLA. STAT. ANN. S63.054.
[288] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465; FLA.STAT.ANN. S63.088(1); Parness and Arado refer to this case throughout in "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 230 "should women lie about genetic ties, there is little recourse for the many genetic fathers interested in parenting who come forward late, even if they acted as soon as they learned of the births of their offspring."
[289] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465; FLA.STAT.ANN. S63.053(2).
[290] Arcaro "No more secret adoptions: providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465; FLA.STAT.ANN. S63.062(2)(b).
[291] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465; FLA.STAT.ANN. S63.054(1); A claim of paternity could also not be filed where already a petition is filed for the termination of parental rights or after the mother gave her consent to an adoption in this regard see s 63.062(2)(b).
[292] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465.
[293] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 465.

This position changed with the matter of *Heart of Adoptions Inc.*[294] In this matter the Supreme Court of Florida concluded that the Second District disregarded the clear intent of the legislature with regard to section 63.062(2)(d),[295] which is the fact that an unwed father who does not comply with its requirements is deemed to have waived and surrendered any rights in relation to the child.[296] Therefore, non-registration is seen as a waiving of rights.[297] Excusing an unwed father from the registry requirements would disturb the entire statutory scheme.[298] The fundamental question the court sought to answer was under what circumstances an adoption entity is required to notify an unwed biological father of how to assert his rights in an adoption.[299] The court found that the Notice of Adoption Plan Under Act[300] contained inconsistent language that granted an adoption entity a discretion to decide whether to inform the father of a pending adoption and this in effect rendered the actual intention of the legislature (to provide him with notice) null and void.[301] The court concluded that as a matter of statutory stipulations adoption entities must notify unwed biological fathers of the intended adoption plan along with information of the putative father registry and affidavit requirements.[302] The

[294] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007).
[295] FLA. STAT. ANN.
[296] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 478; *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 197.
[297] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 478; *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 197.
[298] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 478; *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 197.
[299] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 198.
[300] FLA. STAT. ANN. s 63.062(3)(a) "an adoption agency *may* [own emphasis] serve upon any unmarried biological father identified by the mother or identified by a diligent search of the Florida Putative Father Registry, or upon an entity whose consent is required, a notice of intended adoption plan at any time prior to the placement of the child in the adoptive home".
[301] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 198-199; Parness and Arado refer to this case throughout in "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 221 fn 77 also see fn 43 on 215.
[302] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 200; Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 480.

court found this to be the intent of the legislature when it read chapter 63 of the statute.[303] Chief Justice Lewis recognised the opportunity the biological father has in developing a relationship with his offspring as the constitutionally protected undeveloped interest contrary to regarding only the "developed relationship" as the constitutionally protected interest.[304] Therefore, the unwed biological father must be given the opportunity to assert his rights. This thesis agrees with recognising the "potential" for a relationship between the father and child as worthy of protection, especially in the realm of newborn abandonment where all that the unmarried father has is "potential" for a relationship and no "actual" relationship. Furthermore, Chief Justice Lewis regarded the privacy clause "as a separate legal basis for the protection of an unwed biological father's opportunity to develop a substantial relationship".[305] In summary the court ruled "that unwed biological fathers are entitled to receive actual notice of intended adoption plans and that they have thirty days to register with the Florida putative father registry after having received such notice".[306] This thesis suggests that it is a better construction to require the unwed biological father to be notified of an intended adoption of his child before requiring him to register with a putative father registry. It is however not the most practical solution as expecting each father to be notified of each abandoned child of a possible adoption of that child will hinder the adoption process or even prevent the adoption of the child altogether because locating that father will be a challenge. One of the major criticisms of the putative father registry is the lack of knowledge of the existence of this registry, but this can be solved by increased awareness of the registry and its requirements. Requiring an adoption agency to

[303] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 200; Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 479.
[304] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 205; Parness and Clarke Arado refer to this case throughout in "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 221 fn 77 also see fn 43 on 215.
[305] Florida Right of Privacy Clause states that "every natural person has the right to be let alone and free from governmental intrusion into the person's private life." FLA. CONST. art 1, s 23; *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 206.
[306] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 202.

notify the father of ways in which he is able to assert his rights, will better safeguard his rights,[307] but will not always serve the best interests of the child as a protracted adoption process may result. In summary an unwed father now, after *Heart of Adoptions Inc*. has the right to receive notice about the putative father registry and intended adoption proceedings. Prior to *Heart of Adoptions Inc*., the unwed father was presumed to know about his obligation to register and therefore fraud committed by the mother or the adoption agent could not be a defence for failing to register it was his responsibility to prevent fraud.[308] However, now that an unwed father has a right to actual notice of the registry requirements, it would presumptively constitute fraud to violate that right.[309] Importantly, each case must be judged on a case by case basis and should never be judged rigidly without considering why the specific father failed to register. The unanswered question is how a father's commitment would be demonstrated if the child is not yet born and if the father has no knowledge of the pregnancy. In the South African context how will the section 21 acquisition of parental responsibilities and rights apply to an unwed biological father in that instance? If the unwed biological father is not aware of the fact of the pregnancy, measuring him according to his support of the mother during her pregnancy

[307] In the instance where the father does not want to be contacted or does not want any parental responsibilities and rights in respect of the child failing to register will terminate all of his parental rights. In South Africa if a woman is raped according to s 236(3)(*c*) of the Children's Act the perpetrator has no parental responsibilities and rights in respect of the child and thus will not be notified by the adoption agent of the proposed adoption of the child. The same for incest in terms of s 236(3)(*b*). Where the parent of a child is a child then the adoption agency will have to notify the guardian of that child-parent who in terms of the Children's Act is also the guardian of the child in terms of s 233(1)(a). PFR presupposes voluntary relinquishment where one on one contact between the mother and the receiving person is possible. With baby safes PFR are not a viable solution as mothers anonymously and without detection leaves the infant without providing any information.

[308] See Utah Code. Ann. S 78-30-4.15(3) (2002); see also *Doe v Queen*, 552 S.E. 2d 761 (S.C. 2001).

[309] Arcaro "No more secret adoptions: providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 482; Up until 1964 Florida did not respect a father's right to his illegitimate child see in this regard *Clement v Banks*, 159 So. 2d 892, 893 (Fla. Dist. Ct. App. 1964). However this position changed and by the late 1990's consent from any parent who's consent was not obtained, was required in this regard see FLA.STAT.ANN S63.062(3) (1997); Craig "Establishing the biological rights doctrine to protect unwed fathers in contested adoptions" 25 1998 *Fla. St. U. L. Rev* 391, 420; Mckenna "To unknown male: Notice of plan for adoption in the Florida 2001 Adoption Act" 79 2004 *Notre Dame L. Rev*. 789, 792 n 11 prior to the 2001 Adoption Act Florida law required notice only when the father's location or identity were known; Parness and Arado refer to this case throughout in "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev.* 207, 228 where reference is made to Utah legislatures that declared that unwed fathers deceived by mothers can pursue civil or criminal penalties in accordance with existing law but also concluded that fraud is no defense to strict compliance and may not serve to undo an adoption see Utah Code Ann. S 78-30-4.15(2) (2002).

is not a possibility. Furthermore, even if the unwed biological father is aware of the pregnancy and does attempt to support the unborn child, his ability to render support is dependent on the mother's willingness to accept such support. The father's support, or lack thereof, is a question of fact. Should he be aware of the pregnancy, how he treats the mother pre-birth is demonstrative of his commitment towards the child. According to *Heart of Adoptions Inc*. the father's chance to develop a relationship with his offspring is a constitutionally protected interest and thus he must in actual fact be given the opportunity to develop the relationship.[310] According to the court in *Heart of Adoptions Inc.* the opportunity starts when the unwed father receives notice of the intended adoption of his child.[311] It could also start once he discovers that the mother is pregnant. Thus an important question is: when does the opportunity to develop a relationship begin? Does it begin at the time the unwed biological father is notified of the intended adoption and putative father registry, or when the pregnancy comes to his attention? This thesis suggests that the opportunity of the unwed biological father to develop a relationship with his offspring starts at either one of the two scenarios, whichever happens first.[312] Finally, the court in *Raquel* held that an unwed biological father who intervenes in an intended adoption must be prepared to assume full care of the child and not just prevent an adoption by others.[313] In other words, the unwed biological father should not aim to thwart the adoption process but he should be prepared to be the primary carer of his child.

[310] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 202.
[311] *Heart of Adoptions, Inc. v J.A.,* 963 So. 2d 189, 206 (Fla. 2007) 202; see also Parness and Arado refer to this case throughout in "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev.* 207, 221 fn 77 also see fn 43 on 215.
[312] Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* suggests that fathers should be accorded with rights and responsibilities and these rights and responsibilities should be removed if the father concerned does not make use of an opportunity to develop his relationship with his child. According to Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 181 "It is only in those instances in which a parent fails to make use of a given opportunity to develop a relationship with his or her child that the responsibility entrusted to the particular parent should be limited or denied. In this way, a negative outcome is not anticipated or prejudged — each parent would have to take responsibility for his or her own lack of commitment to the child"; see also Eckhard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 131.
[313] *In re Raquel Marie X*, 559 N.E.2d at 428; Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 488.

A possible challenge arises where an unwed biological father seizes the opportunity to establish a relationship with his offspring but fails to register with the putative father registry. This problem goes hand in hand with the time at which the opportunity to establish a relationship begins. If he has established a relationship with his offspring but has failed to register with the putative father registry his failure to register is irrelevant, provided his behaviour remains consistent with maintaining a relationship with his offspring and unless his behaviour amounts to an outright denial of parental responsibilities and rights. Thus, non-registration where a father has established a relationship with his offspring should not terminate his parental responsibilities and rights. Should he not be aware of the fact of the pregnancy and be served with actual notice of an intended adoption as well as notice of the putative father registry then the "opportunity clock"[314] starts ticking at the time of notice. Registration will then be one of the determining factors, but not the sole determinant of whether he establishes or shows willingness to establish a relationship with his offspring. Therefore, in the one instance, registration with the putative father registry will not play a role, while in the other it will.

Another possible challenge arises if an unwed biological father registers with the putative father registry but fails to provide any form of support to the mother thereafter. Will he be said to have established a relationship with his offspring? This thesis proposes that the answer is "no" – he will not be entitled to parental responsibilities and rights. Therefore, it is important that the putative father registry is but one of the determining factors to be taken into account in assessing a father's acquisition of parental responsibilities and rights and not the sole determinant. This is to avoid arbitrary decisions that fail to reflect the true facts of the case.

[314] Arcaro "No more secret adoptions: Providing unwed biological fathers with actual notice of the Florida putative father registry" 37 2008 *Cap. U. L. Rev*. 449, 487; *Heart of Adoptions, Inc. v J.A.*, 963 So. 2d 189, 206 (Fla. 2007) at 202; FLA.STAT.ANN. S 63.062(2)(b)(3) (West 2005).

What happens when the mother puts the child up for adoption at infancy without informing the unwed father, and the father has no opportunity to establish a relationship with the child? The Illinois Supreme Court dealt with this in the matter of *Baby Richard I*[315] where the biological father claimed that the adoption of his son by a third party couple, was invalid because he never consented to the adoption.[316] The mother refused to reveal the name of the biological father to the adoptive parents and informed the biological father that the child had died at birth.[317] The biological father did not believe that the child had died and searched for the child, by the time he located the child 57 days had passed since the birth.[318] The trial court held that by clear and convincing evidence the biological father was an unfit parent because he failed to show interest in the child within the first 30 days of the child's life.[319] Due to the finding of unfitness the biological father's consent was not required for the adoption of the child.[320] The Illinois Appellate Court upheld the trial court's finding of parental unfitness.[321]Justice Rizzi concluded that the best interests of the child standard controlled the outcome of the case and thus exposed the confusion surrounding the application of the law in adoption matters.[322] Justice Heiple in the Illinois Supreme Court dismissed the Illinois Appellate Court's decision and reversed its

[315] *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994).
[316] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 728; *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994) 648 and 649.
[317] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 729; *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994) 649 and 650.
[318] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 730; *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994) 649.
[319] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 730; *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994) 649.
[320] Ill. COMP. STAT. ANN. Ch. 750 s 50/8(a)(1) (West 1993) amended 1994, the consent of an unfit parent is not required in adoption proceedings.
[321] *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994) 648, 654; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 891-892.
[322] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 730; Justice Rizzi further stated that "[i]f there is a conflict between Richard's best interest and the rights and interests of his parents, whomever they may be, the rights and interests of the parents must yield and allow the best interest of Richard to pass through and prevail. This tenet allows for no exception". *In re Doe*, 627 N.E.2d 652.

ruling.[323] The court held that evidence did not support the ruling that the biological father failed to show a reasonable degree of interest within the first 30 days.[324] The father had made the necessary effort to discover the existence of his child, further the mother frustrated the biological father's efforts and the attorney of the adoptive parents made no effort to locate him.[325] The court found that the biological father was not given the opportunity to establish a relationship with the child and as a result could not discharge any parental duties.[326] Lastly, the court stated that the best interests of the child standard should not have been applied because the parental rights of the father had not been properly terminated.[327] Justice McMorrow concurring with Justice Heiple found that the first step before terminating parental rights and before applying the best interests of the child standard is to find the biological parent unfit by clear and convincing evidence.[328] In this case, according to Justice McMorrow there was no clear and convincing evidence that the biological father was unfit.[329] As a result on the 16th of June 1994 the Illinois Supreme Court ordered Baby Richard be removed, at this stage he was three years old and the only home he knew was the home of his adoptive parents.[330] In direct response to this case, the Illinois General Assembly amended the Adoption Act effective from 3 July 1994, introducing a putative father registry.[331] Under the Amended Adoption Act, a

[323] *Baby Richard I*, 638 N.E.2d 182.
[324] *Baby Richard I*, 638 N.E.2d 182; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 892.
[325] *Baby Richard I*, 638 N.E.2d 182; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 892.
[326] *Baby Richard I*, 638 N.E.2d 181; Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev.* 207, 231 fn 187 where failures to inquire into genetic fatherhood, however, do result at times in undoing adoptions when biological fathers are successful at showing no fault and have an adequate interest in parenthood, leading to children being removed from adoptive parents (the only parents they have known) and returned to their biological parents; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev*. 877, 892.
[327] *Baby Richard I*, 638 N.E.2d 181.
[328] *Baby Richard I*, 638 N.E.2d 183-86; *In re Adoption of Syck* 562 N.E.2d 174 (Ill. 1990) where the court determined that parental fitness must be determined before courts apply the best interests of the child standard.
[329] *Baby Richard I*, 638 N.E.2d 186.
[330] *Baby Richard I*, 638 N.E.2d 182.
[331] Swingle "Rights of unwed fathers and the best interests of the child: can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 735; Adoption Act Amendments § 975, 1994 I11. Legis. Serv. 403-17 (West) (codified as amended at ILL. COMP. STAT. ANN. ch. 750, §§ 50/1, 50/8, 50/11, 50/12a, 50/12.1, 50/20, 50/20a, 50/20b

putative father is entitled to grant or withhold consent to an adoption only if he participates in the care of the child, regardless of whether he was aware of paternity or of the child's birth.[332] Even if the putative father is not entitled to grant or withhold consent to the proposed adoption, he may still be entitled to receive notice on condition that he registers with the putative father registry.[333] The point of his attendance of adoption proceedings will be to present evidence on the best interests of the child.[334] The amended act also stipulated that should the mother claim she knows no more details regarding that father, the adoptive parents can take her word for it and have no further duty to discover the father's identity.[335] Even so, the adoptive parents must still search the putative father registry to determine whether the biological father has registered.[336] The amended act also places greater emphasis on the best interests of the child. Should the adoption petition be abandoned, the court will still have to conduct a custody hearing to determine which party should retain custody of the child based upon the child's best interests.[337]

Certain problems have been identified with the Amended Adoption Act. Firstly, how can a putative father participate in the care of the child if he is unaware of the child's birth? Secondly, the act stipulates that the adoptive parents can take the word of the mother (provided by affidavit) regarding the father and his whereabouts, but this is the exact issue the court had in

(West Supp. 1995)); The dissenting opinion of Justice Tully indicated that he predicted that the law needed changes.

[332] ILL. COMP. STAT. ANN. ch. 750 s50/8 and s50/12.1(g)(3) which states that a lack of knowledge of the pregnancy and birth is not a reason enough for the failure to register.

[333] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 736.

[334] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 737; Ill. COMP .STAT. ANN. ch. 750, s 50/12a(1.5).

[335] ILL. COMP. STAT. ANN. ch. 750 s 50/11.

[336] ILL. COMP. STAT. ANN. ch. 750 s 50/11.

[337] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 739.

Baby Richard I where the mother lied to the father and to the adoptive parents. Thus, the Amended Act should state that the adoptive parents must search the registry in every instance regardless of the contents of the affidavit provided by the mother.[338] This is also what ultimately caused Baby Richard to be removed after he spent three years with his adoptive parents. Thirdly, the language used for the search of the putative father registry is non-mandatory in that it states: "…an interested party *may* request that the Department search the Registry to determine whether a putative father is registered in relation to a child who is or may be the subject of an adoption petition could be located" (own emphasis added). This wording suggests that the interested party may also choose *not* to search the registry, which creates the same problem as experienced in *Baby Richard I*. In *Baby Richard II*[339] the court reaffirmed the biological father's full and complete custody of Richard but in this instance Justice Miller and McMorrow dissented, providing that a vacated adoption does not automatically grant custody to the biological parent, a separate custody hearing must still be conducted to determine the best interests of Richard.[340] Therefore, this thesis does not agree with the assertion by Swingle that the Illinois Amended Adoption Act successfully balances complicated issues and will help to avoid future tragedies.[341]

The act and accompanying case law has demonstrated that a mere biological relationship between an unwed father and his child is insufficient to establish a protected liberty interest in his relationship with his child.[342] The biological relationship between father and child provides

[338] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 757.
[339] *Baby Richard II*, No. 78101, 1995 WL 80012.
[340] *Baby Richard II*, No. 78101, 1995 WL 80012 18 and 20.
[341] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 747.
[342] Also reiterated in *Lehr v Robertson* 463 US 248, 262 (1983).

the father with an opportunity to establish a relationship.[343] *In Heart of Adoptions Inc.* the court said the opportunity to establish a relationship in itself is constitutionally protected. Swingle makes a statement contrary to what was said by the court in *Heart of Adoptions Inc*. "If a father fails to seize this opportunity, and merely registers with the Putative Father Registry, he simply has not indicated an interest which is worthy of constitutional protection."[344] However, Swingle makes this statement prior to the *Heart of Adoptions Inc*. matter, which was decided in 2007.

Since, according to the court in *Heart of Adoptions Inc*., the opportunity to establish a relationship with the child is constitutionally protected, but what about the father's right to know that his child exists? Is that also protected?[345] This thesis suggests that the father's right to know of the existence of his child is protected through the notice requirement, namely that he is required to be notified that there is a pending adoption and also in this notification he is informed of how he may assert his rights.[346] The right to know may still go unprotected in states that do not require notice to or consent by the unwed father even when his identity is known and disclosed to all parties concerned.[347] In the State of Florida the unwed father must first be notified of his obligation to register before he is required to register with the putative father registry, therefore it may definitively be said that the unwed father has a right to know that his child exists. However, in the State of Illinois, the father is presumed to know of the existence of the putative father registry and of his obligation to register. Thus, in the State of

[343] Zinman "Father knows best: The unwed father's right to raise his infant surrendered for adoption" 60 1992 *Fordham L. Rev*. 971, 997 "The genetic bond between father and child gives them a shared heritage and a common ancestry, and it presents the biological father with a unique opportunity to develop a meaningful relationship with his own offspring".

[344] Swingle "Rights of unwed fathers and the best interests of the child: Can these competing interests be harmonized? Illinois' putative father registry provides and answer" 26 1994-1995 *Loyola University Chicago Law Journal* 703-759, 752.

[345] This question was asked in Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J*. 949, 953-954.

[346] This is in line with Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J*. 949, 971 that states "the question of whether the right to know is constitutionally protected is essentially a question of whether some form of 'notice' of paternity is required by the Constitution".

[347] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 955.

Illinois the unwed father has no right to know of the existence of his child because the burden is on him to find out that his child exists. If the unwed father has a right to know of the existence of his child, such right is very difficult to safeguard in instances where the mother genuinely does not know of his location or alternatively, where the mother refuses to reveal the identity or location of the father.[348] Without some sort of protection provided to the unwed father, the unwed mother stands in a more advantageous position with respect to the child than the unwed father.[349] According to the South African Children's Act 38 of 2005 both the consent of the father and the mother is required for the adoption of the child, regardless of whether the parents are married or not.[350] However, the consent of a parent is not necessary if the whereabouts of that parent cannot be established, identity is unknown or the parent has abandoned the child.[351] In this instance, a mother can claim that she does not know the whereabouts or the identity of the father and his consent will not be required, alternatively the mother can abandon the child through a safe and the consent of neither of the parents will be required in the adoption of the child. Further, section 236(3)(*a*) provides that if the parent is the biological father, his consent is not necessary if he is not married to the mother "at the time of conception or at any time thereafter and has not acknowledged in a manner set out in subsection (4) that he is the father of the child".[352] The question is how can he acknowledge that he is the father in terms of subsection (4) if he is unaware of the pregnancy or birth of the child? According to Hamilton, the father's opportunity to develop a relationship with his child and to avail himself of whatever

[348] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 955; Where the mother genuinely does not know the identity or location of the father, it does not preclude the father from his right to know, he still maintains his right.
[349] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 987.
[350] s 233 of the Children's Act 38 of 2005.
[351] s 236(1)(*b*) of the Children's Act 38 of 2005.
[352] s 236(4) provides: "(4) A person referred to in subsection (3) (*a*) can for the purposes of that subsection acknowledge that he is the biological father of a child—(*a*) by giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court before the child reaches the age of six months; (*b*) by voluntarily paying maintenance in respect of the child; (*c*) by paying damages in terms of customary law; or (*d*) by causing particulars of himself to be entered in the registration of birth of the child in terms of section 10(1)(*b*) or section 11 (4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992)."

constitutional rights might accompany such relationship is cut off, unless he is informed of the child's existence.[353] However, Hamilton states that the right to know is a passive right in that it encompasses only an unwed father's right to be informed of his child's existence and does not necessarily allow him to interfere in the relationship of the mother and the child or the adoptive parents and the child.[354] Ultimately, in deciding whether to protect the right of the father to know about the existence of his child the best interests of the child should be a paramount consideration and in this respect a few aspects require consideration:

> "(1) encouraging an unwed mother to surrender her child for adoption when it would be in the child's best interest; (2) encouraging the unwed mother to retain custody of the child when it would be in the child's best interest; (3) placing the child with the person or persons best suited to promote the child's best interest; (4) carrying out the adoption procedure with maximum efficiency and minimum administrative burden; (5) ensuring finality in adoption orders; and (6) providing stability in a child's life following an adoption."[355]

Firstly, the policy would be thwarted if the unwed mother decides not to put the child up for adoption simply because she would have to identify the unwed father.[356] This weighs against granting the father the right to know. Secondly, encouraging the mother to keep her child, if that is in the child's best interests, would also be compromised if the state required the mother to inform the unwed father of the child's existence and she, as a result, decides to put the child up for adoption because she does not want to have any contact with the unwed father.[357] Consequently, the best interests of the child will not be served by granting the unwed father the right to know. If the right to know is limited to the adoption context, then the unwed fathers of all abandonment cases will have the right to know of the existence of their children because

[353] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 988-989.
[354] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 989-990.
[355] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 992-992.
[356] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 993.
[357] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 993.

these children, after some time, are declared legally adoptable.[358] This would not be practically possible where the child is abandoned through a baby safe or if the mother chooses not to provide information regarding the father at the time of relinquishment to a safe haven provider. Third, if the father was required to be informed of the existence of his child in instances where the state wants to place the child with persons best suited to promote the child's best interests.[359] In this case, the father may want to adopt the child instead of the child being placed with other persons, this would not be contrary to the best interests of the child, depending on the father's situation and ability to care for the child. Consequently, the right to know will be promoted. Fourth, a very important consideration is the efficiency of the adoption process and the fact that locating the father in order to notify him of his child's existence prior to every adoption will cause considerable delay in the adoption process and add to the amount of procedural steps before an adoption is finalised.[360] It is not in the best interests of a child for the adoption process to be protracted. Hamilton states that in instances where the mother knows the location of the unwed father, it would not negatively impact in the efficiency and convenience of the adoption process.[361] What Hamilton fails to address is not whether the mother knows but whether she is willing to disclose this information. If she knows but is unwilling and the state determines that the father does have a right to know of the existence of his child, then that would place an obligation on the state to locate the father and that would cause for a protracted adoption process. Hamilton does however find that the state interest in promoting efficient adoptions

[358] See detailed explanation by Nadene Grabham; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 897 where Cooper mentions that actual notice will be impossible to meet.
[359] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 994-995.
[360] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 995-996.
[361] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 995-996.

weighs against protecting the right to know.[362] Fifth, the state interest in ensuring the finality of adoption orders, according to Hamilton, is not challenged because if the unwed father finds out about the existence of the child subsequent to the adoption he cannot do anything as his right to know is merely a passive right.[363] This notion is incorrect, as was discussed above in the *Baby Richard* case, an adoption may be rescinded if an unwed father was not notified of the existence of his child prior to the actual adoption. Also in terms of South African law the Children's Act section 243(3)(*b*) states that an adoption may be rescinded by a parent of the child whose consent was required for the order of adoption to be made but whose consent was not obtained.[364] Therefore, Hamilton says the state interest in promoting the finality of adoption orders will be served *if* the father has a right to know because he will be notified of the existence of his child *prior* to any adoption of that child and thus will take any necessary steps required *prior* to the finalisation of any adoption order.[365] This thesis agrees with the fact that if the father knows prior to the adoption, he will be less likely to interfere thereafter and the finality of the adoption order can thus be ensured. What if the father is never located? Will the child still be regarded as legally adoptable? With this unanswered question this thesis cannot agree with Hamilton's assertion that the state's interest will be promoted through the right to know. Lastly, the state has an interest in ensuring the child's post-adoption life is as stable as possible, Hamilton states that this will only be the case if the father is told of the child's existence prior to the adoption, as he will be less likely to disrupt the child's post-adoption life than if he found out after the adoption.[366] Hamilton concludes that the father has the right to know in view of

[362] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 995-996; Cooper also expresses how the right to know will impair adoptions Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 897.
[363] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 996.
[364] s 243(1)(*b*) requires the parent who brings the application to be one that has guardianship in respect of the child. Thus, this parent is presumed to have known of the existence of the child and does not include a parent who did not know of the existence of the child.
[365] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 997-998.
[366] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 997-998.

the analysis of all the factors in favour of the right to know and basis the conclusion on the equal protection clause's policy against gender discrimination.[367] This thesis disagrees with the conclusion that the father's right to know should be protected. A protracted adoption process will not be in the best interests of a child. In addition, discouraging a woman from making a decision based on the best interests of the child, such as adoption or keeping the child, will be thwarted if the father's right to know were protected. Hamilton provides that "if a right to know statute would detrimentally infringe upon one or more of the identified state interests, the attempt to protect the right to know should perhaps be abandoned".[368] As determined above, the right to know does in fact infringe upon many state interests and therefore should be abandoned. Hamilton goes on to state "If it would open the floodgates to undesirable consequences, such ramifications might counsel against its enactment".[369] This thesis proposes that enacting a law where the father's right to know the existence of his child is recognised, would place a considerable burden on the state to locate the father in each and every case where a child is abandoned and then placed for adoption. However, enacting a putative father registry and allowing a father to register after seeing an advertisement placed in a newspaper ensures that only fathers who want to assume care of their children, who are serious about being involved and a part of the child's life will come forward and register. It places the burden on the unwed father and not on the state and therefore will not cause for the prolonging of adoption procedures, because if the unwed father does not come forward it will be presumed that he is not interested in attaining parental responsibilities and rights. It is important that the putative father registry is advertised and widely publicised to create awareness of its existence to avoid non-registration because of a lack of awareness. Without according the right to know of the existence of his child to the unwed father, this thesis proposes that the abandonment of the

[367] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 1001.
[368] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 1007.
[369] Hamilton "The unwed father and the right to know of his child's existence" 76 1987/1988 *Ky. L. J.* 949, 1007.

child should be publicised on a public platform, which will inform any possible unwed father that a child has been abandoned and the steps he can take in order to ensure his rights such as to file with the putative father registry.[370] It is possible that this type of constructive notice will not reach the unwed unknown father but actual notice to each and every unwed unknown father would be an impossible requirement to meet.[371] In addition, Cooper notes that "if the court were to require actual notice, the process of adoption for the abandoned newborn would be seriously impaired. Actual notice may never be achieved and this would mean that the child may never be eligible for adoption because the requirements to terminate parental rights would never be met".[372] In order for the putative father registry to function properly, it requires some information to be left by the mother. Cooper proposes that "all safe haven laws should include provisions asking the mother to give some information so that the father can be identified".[373] Since baby safes are completely anonymous and require no such information, a putative father registry has little chance of success. However, with the use of safe haven laws, where a baby is personally relinquished not in a safe in a wall but to a designated provider, the putative father registry may stand to succeed as here a mother may be requested for certain information before leaving. The same holds true for laws surrounding confidential birth and anonymous birth, where nothing prevents the hospital from requesting non-identifying information that may lead to a successful search of the putative father registry. If the unwed father receives constructive notice through a public platform of an abandoned newborn, registering with the registry will

[370] Cooper also expresses how the right to know will impair adoptions Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 896 this is referred to as constructive notice which is usually given via publication in widely circulated newspapers. The publication contains information that a baby has been abandoned, any identifying information about the baby, and information about how to assert a claim of parental rights. Delaware for example requires publishing a notice in a statewide newspaper; see DEL. CODE. ANN. tit. 16, s 907A(h) (Supp. 2002).

[371] Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 897.

[372] Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 897.

[373] Any facts the mother provides can be helpful in the search of the putative father registry see Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 901.

be only one of the ways in which he can assert his rights. He will also be obliged to meet the other requirements as laid down by the notice, in order to obtain the right to refuse consent to adoption and assume care of the child himself, should that be his aim. Very important is the issue of when unwed fathers should be given constructive notice. At the moment of abandonment or at the proposed adoption of the child? This thesis proposes that the unwed father be given constructive notice soon after the child is abandoned for the purpose that, should the father wish to assume care of the child, this process may be expedited through immediate notification. Obviously a search by the state of the putative father registry does not serve as total assurance that the father will be located, a search of the putative father registry is limited to those who have registered with it.[374] It could occur that the unwed father has established an emotional bond with the child and even lived with the child but failed to register with the registry. In this instance constructive notice will serve to protect the father's rights. He may also file with the registry simply on suspicion that his child may, or has already been, relinquished to a designated provider without first waiting for constructive notice.

6.5 CONCLUSION

Initially, in the state of Florida, after sexual intercourse the unmarried father was presumed to know that he must register with the putative father registry if he suspected that the woman may be pregnant. Failure to register was deemed a waiver of his parental rights. This approach was highly criticised as placing an unreasonable burden and expectation on the man to register after each and every sexual relationship with a woman in order to safeguard his rights in respect of a "potential" child. Fortunately, this position changed with the matter of *Heart of Adoptions Inc*,[375] where the court decided that the unmarried father is first entitled to receive notice of the

[374] Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 898.
[375] *Heart of Adoptions, Inc. v J.A.*, 963 So. 2d 189, 206 (Fla. 2007); see also par 6.4.4 above.

actual adoption prior to being required to register with the putative father registry. It is this second construction that this thesis proposes as a possible safeguard to unmarried fathers' rights in South Africa. When a child is abandoned in South Africa, it is usually preceded by the abandonment of the mother by her boyfriend,[376] as a result unmarried fathers of abandoned children seldom search for or exercise their rights to their children. However, it is the responsibility of the state to ensure the legal protection of the rights of the minority of unmarried fathers who may want a relationship with their children. In so doing, legal certainty will be created in the realm of child abandonment simply put where an unmarried father has not registered with the putative father registry he will be presumed to have relinquished his parental rights to the child. A putative father registry can only function effectively if the mother leaves certain identifying information regarding the father, if she knows who the father is, and if she is willing to disclose information about the father. Despite this, ways in which this registry can be implemented when baby safes are employed and no information about the father is available, will be discussed below. Firstly, certain aspects in child abandonment which pose a threat to fathers' rights have to be addressed, such as if the mother genuinely does not know information about the father, or knows very little information about the father, not enough to locate him in the registry – this will pose a threat to the father's rights.[377] If the mother refuses to disclose the information regarding the father for whatever reason, this will also pose a threat to the father's rights.[378] Further, if the mother makes use of a baby safe where no information

[376] Blackie (National Adoption Coalition of South Africa Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa".

[377] Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 959 the author suggests that if the mother is unable to name the father because she herself does not know his identity, she should not be penalised.

[378] See also Louw "The constitutionality of a biological father's recognition as a parent" (13) 3 2010 *PER/PELJ* 183 where she states "the limitation of the father's right to be treated equally as a parent may well be an affront to his dignity. This will especially be so in cases in which the father was not aware of his paternity or the mother has refused him the opportunity to develop a relationship with herself or with the child".

about herself or the father is required, then the father's rights will also be threatened.[379] Another factor is that the mother's use of a baby safe or another safe method of abandonment is motivated by her ability to stay anonymous, providing information about the father will compromise the mother's anonymity.[380] Lastly, the father will also not be able to assert his rights where he is unaware of the pregnancy or birth. Ultimately, the rights of the father are dependent on full disclosure by the mother. This thesis proposes that in these instances the best interests of the child should be weighed up against the rights of the unwed father, bearing in mind that the unwed father as yet has no parental responsibilities and rights until he has satisfied the requirements in section 21 of the Children's Act. Importantly, an unwed father cannot acquire these rights without first being granted the opportunity to do so. How do we reconcile the two? Section 28(2) of the Constitution states that the best interests of the child is of paramount consideration in every matter concerning the child. The fact that the child's best interests are paramount does not mean that it is absolute.[381] These rights cannot simply override the rights of the unmarried father automatically or cause for his rights to be ignored and regarded as unimportant.[382] It cannot "unduly obliterate other valuable and constitutionally protected interests".[383] The best interests standard will also in some instances limit the father's constitutional rights.[384] According to Langa DCJ in *De Reuck v Director of Public Prosecutions* section 28(2) "is subject to reasonable and justifiable limitations in compliance with section 36 and that constitutional rights are mutually interrelated and interdependent".[385] Carpenter stated

[379] If the child was conceived through rape or incest, the father will in any event not be entitled to any parental responsibilities and rights in respect of the child and as a result will not be notified of the child's abandonment and proposed adoption; see section 236(3)(*b*) and (*c*) of the Children's Act.
[380] Which is exactly what will be threatened if we force disclosure as suggested by Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 959.
[381] *S v M (Centre for Child law as Amicus Curiae)* 2007 2 SACR 539 (CC) par 26.
[382] Bekink "'Child divorce': A break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents" Vol. 15 No. 1 2012 *PER* 191.
[383] *S v M (Centre for Child law as Amicus Curiae)* 2007 2 SACR 539 (CC) par 25.
[384] Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, UP 2013) 5-6.
[385] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* confirmed by Langa DCJ 2004 1 SA 406 (CC) par 54; also see Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific*

that the rights of an unmarried father may be limited when the best interests of a child demands it, however the limitation must be in line with the limitation clause.[386] The unmarried father does not have his parental rights protected by the Constitution but enjoys protection through certain fundamental rights as guaranteed to all.[387] These rights include the right to equality in section 9 and the right to human dignity in section 10.[388] Rights are not absolute, they may be infringed if it is in line with the limitation clause, and the infringement must serve a legitimate purpose and must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[389] It is in the best interests of the child to know his or her father but it is also in the best interests of the child to be born in safety and his or her right to life to be preserved. The infringement of the unmarried father's rights in this context would be to relinquish the child to safety rather than the child's abandonment in an unsafe location that could lead to the child's death or serious injury. Parness and Arado claim the only way to better protect paternal interests and rights, as well as to provide legal fathers for all newborns would be to eliminate laws which allow at-will maternal abandonments.[390] This thesis disagrees with the authors' opinions and reiterates that the best interests of the child is of paramount consideration and preserving the life of the newborn is in the child's best interests. It has been stated, that the right of a mother to unilaterally decide to place a child for adoption through any of these mechanisms, baby safes, anonymous birth or confidential birth is an extension of a

Reference to the Parental Responsibilities and Rights of Unmarried Fathers (LLM Dissertation, UP 2013) 18 where this is quoted.

[386] Carpenter "Constitutionally protected rights for parents" 2008 *TSAR* 402.

[387] Carpenter "Constitutionally protected rights for parents" 2008 *TSAR* 402.

[388] Carpenter "Constitutionally protected rights for parents" 2008 *TSAR* 402.

[389] s 36 limitation clause of the Constitution of the Republic of South Africa.

[390] Parness and Arado "Safe haven, adoption and birth record laws: Where are the daddies?" 36 2007 *Cap. U. L. Rev*. 207, 248; see also Sanger "Infant safe haven laws: legislating the culture of life" 106 2006 *Colum. L. Rev.* 753, 765 and 789-90; Oren "Thwarted fathers or pop-up pops?: How to determine when putative fathers can block the adoption of their newborn children" 40 2006 *Fam. L. Q.* 153, 189 where it was stated "infant abandonment laws are of questionable constitutional validity as they create thwarted fathers by legal design who do not enjoy even a modicum of procedural due process".

mother's reproductive autonomy.[391] Chambers has argued that it is a part of a mother's autonomy and dignity and should be exercised exclusively.[392] Chambers continues that, if a mother were required to obtain the permission of the father prior to relinquishing a child, the mother would instead opt to abort.[393] Relinquishment should not be seen as abandonment, but as an act of caring for the child.[394] This view is not held by Fenton-Glynn who provides that the right of a child to be cared for by his or her parents is not based on the particular sex of the parent, that mothers do not have the right to choose to exclude fathers and that ultimately it is not the mother's right to decide how the child's right to know and be cared for by his or her parents should be exercised.[395]

In response to these views, it is proposed that instead of eliminating a system designed to safeguard children's best interests, a mechanism designed to protect the unmarried father's rights should be developed to function in conjunction with safe relinquishment, thus it must function in conjunction with the method employed to safeguard the child's best interests.[396] Cornett states that safe haven laws may produce real legal issues in the realm of unwed,

[391] In this respect see Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 190; Chambers "Newborn adoption: Birth mothers, genetic fathers, and reproductive autonomy" 26 2010 *Canadian Journal of Family Law* 339, 343-345.
[392] In this respect see Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 191-192; Chambers "Newborn adoption: Birth mothers, genetic fathers, and reproductive autonomy" 26 2010 *Canadian Journal of Family Law* 339, 343-345.
[393] In this respect see Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 190-191; Chambers "Newborn adoption: Birth mothers, genetic fathers, and reproductive autonomy" 26 2010 *Canadian Journal of Family Law* 339, 343-345.
[394] See the English case of *Watson v Nikolaisen* 1955 2 QB 286 where the court decided that placing the child up for adoption is not abandonment.
[395] Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 191.
[396] Cornett argues that protecting the rights of a non-abandoning parent is likely in the best interests of a child; Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 854.

unidentified fathers whose rights are jeopardised once the mother abandons the child.[397] This thesis proposes that a national putative father registry will assist in eliminating those legal issues and will give unmarried fathers a chance to establish their claims to parenthood.[398] However, a putative father registry is not without criticism, such as the real purpose it serves besides placing another "to-do" on the list of unmarried fathers, in addition to having to comply with section 21 of the Children's Act. Unmarried fathers of abandoned infants would have to now assert their rights by registering with a registry and not only by attempting to comply with section 21. This could be viewed as a hindrance, as opposed to a help to unmarried fathers. Further, where the mother has left a baby in a baby safe without any information whatsoever, a description of the child and information about when and where the child was left is insufficient for a father to make a positive identification and in most instances he will not know that it is his child that was abandoned and thus in all likelihood, he will not register with the putative father registry. In this instance the father also has a slim chance of actually seeing the newspaper advertisement in the first place. Furthermore, a putative father registry does not guarantee an unmarried father any parental responsibilities and rights to his child, it simply allows him to alert adoption agencies that his consent is necessary in any adoption matter pertaining to the child. The advantage of having a putative father registry is that an unmarried father is able to alert any adoption agency, through simple registration at any child welfare organisation, that he is interested in obtaining parental responsibilities and rights in respect of the child, and thus prevent the adoption of his child without his knowledge.

[397] Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 838.

[398] Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 847 states that parents who are never given a chance to establish their claims to parenthood can be silently robbed of any opportunity to exert their parental rights. However, with safe haven laws the burden remains high on unwed fathers to take an active role in discovering pregnancies and possible abandonments.

Cornett proposes that the time allowed for unwed fathers to assert their rights should be increased and that the locations where parents can abandon their children be limited.[399] It is submitted that increasing the time allowed for unwed fathers to assert their parental rights will prolong the adoption process and as a result more children will end up institutionalised for longer periods.[400] Furthermore, limiting the amount of safe places where infants may be abandoned will limit the reach of this life saving mechanism and render it ineffective.[401] Cornett concludes by providing that "Though the availability of safe haven laws may threaten a non-abandoning parent's parental rights, there is no apparent alternative for protecting newborns in immediate danger".[402]

In conclusion the guarantee of anonymity of the mother, although an infringement of the father's possible future rights, ensures the safety of the child.[403] Thus, a national putative father registry should be established to protect fathers' rights, but it should not be strictly applied, namely if the mother does not know identifying information regarding the father or she refuses to provide such information her decision should be respected in light of the possible alternative, which is unsafe abandonment.[404] If the mother provides identifying information of the father

[399] Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 848.
[400] The New York legislature pointed out that a more open-ended notice requirement would complicate the adoption process by threatening the privacy interests of unwed mothers, creating a risk of unnecessary controversy and impairing the finality of adoption decrees, see *Lehr v Robertson*, 463 US 248 (1983) 264.
[401] These points will be discussed further in the concluding chapter 8.
[402] Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 848.
[403] "Without anonymity, the laws would lose any appeal they have to desperate parents seeking to abandon their children." Cornett "Remembering the endangered 'child': Limiting the definition of 'safe haven' and looking beyond the safe haven law framework" 98 2009-2010 *Ky. L. J.* 833, 847; Raum and Skaare "Encouraging abandonment: The trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D. L. Rev.* 511, 513-514; "It is the anonymity requirement that creates a due process issue for fathers. Since the babies are anonymously abandoned, it becomes impossible to gather information regarding the identity of the father of the child in order to provide him with notice proceedings regarding the termination of his parental rights"; Cooper "Fathers are parents too: Challenging safe haven laws with procedural due process" 31 2002-2003 *Hofstra L. Rev.* 877, 884 and "Safe haven laws raise concerns that the mother's anonymity endangers or eliminates the rights of fathers who may not know that they have children", 895.
[404] Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 959 provides that should a mother simply refuse to provide details of the father that she should be compelled to provide this

then he should be notified that a child has been born and relinquished to a specific organisation and he should also be informed of the steps to take in order to assert his rights, one of which is to register with the putative father registry. If the mother refuses to provide any information regarding the father then an advertisement should be published in a local newspaper indicating that a child has been relinquished, where the child was relinquished, a description of the child, and any other necessary information including non-identifying information concerning the mother, if this information is available.[405] Furthermore, the advertisement should describe the steps that must be taken by anyone claiming to be the father of the child, the first of which consists of registering with the putative father registry.

> "The child is the biggest winner in the nationalization of a putative father registry, because either the child is assured of an earnest father who wishes to participate in its custodial care and financial support or the child is assured of a prompt placement with an adoptive family with a home study attesting to their fitness to parent."[406]

information or the placement of the child should be denied. This thesis disagrees with this approach suggested by Hill as it may result in women not making use of baby safes or baby safe havens.

[405] Hill "Putative fathers and parental interests: A search for protection" 65 1990 *Ind. L. J.* 939, 960 suggests that the notice should include the names of the mother and of the putative father, the date of the child's birth and the city in which the child was born. This thesis proposes that the name of the mother should not be published as this will deter mothers from making use of baby safes or baby safe havens.

[406] Beck "A national putative father registry" 2007 *Capital U. L. R* 300.

PART FOUR: A SOUTH AFRICAN LAW PERSPECTIVE WITH A BRIEF STUDY OF THE LAWS OF NAMIBIA

CHAPTER 7: THE ABANDONMENT OF INFANTS, A SOUTH AFRICAN LAW PERSPECTIVE

7.1 INTRODUCTION

In 2010, 3500 babies were abandoned.[1] 200 of these in Johannesburg and Soweto monthly and from this 200 only 60 were found alive.[2] No more recent statistics are available but a few current cases, all occurring in 2019, of infants abandoned in unsafe locations will be mentioned.[3] On the 11th of March a security guard patrolling Jan Smuts road in Port Shepstone found an infant abandoned at the side of the road,[4] a similar scene was repeated on the 14th of March when a seven-month old was found abandoned outside a house in Black Hill.[5] Fetuses are also discovered in drains,[6] washed down from rivers,[7] dumped next to schools,[8] or left at the side of the road.[9] Another common method is dumping a foetus wrapped in a refuse bag.[10] These are but a few cases that have been reported. Many more cases go unreported. The above depicts a dire situation in a country where the law does not provide a solution. The current South African laws are reactive in that they punish the crime of abandonment, but they fail to

[1] Blackie (National Adoption Coalition of South Africa fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014.

[2] Blackie (National Adoption Coalition of South Africa Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014.

[3] Blackie (Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014.

[4] Naidoo "Newborn found dumped in Port Shepstone" available at https://southcoastherald.co.za/346430/newborn-found-dumped/ 15 March 2019 *South Coast Herald* last accessed 2020-02-05.

[5] Goldswain "Baby boy abandoned in Black Hill" available at https://witbanknews.co.za/124638/baby-boy-abandoned-black-hill/ 15 March 2019 *Witbank News* last accessed 2020-02-05.

[6] Singh "Durban workers find dumped foetus while unblocking sewer" 15 March 2019 *Times Live* available at https://www.timeslive.co.za/news/south-africa/2019-03-15-breaking--baby-thrown-into-drain-in-durban/?fbclid=IwAR3DtkDvWUPCWPIOJFr-L0E4hyDeFMv42I-opxUQaagjMxG6DxC7L932tyc, last accessed 2020-02-05, this foetus was discovered on the 15th of March 2019.

[7] Baillache "Baby's body discovered in Doonside" 12 March 2019 *South Coast Sun* available at https://southcoastsun.co.za/137213/babys-body-discovered-doonside/?fbclid=IwAR10A5eMLBhrog0dAXmLRJyzWGzdvOcEhKuvfWNaPPYt3DuyeTh4UH4TCkM#.Xleu8YWRCoQ.hootsuite, last accessed 2020-02-05, the foetus was discovered on the 12th of March.

[8] Mphelane "Newborn baby found dumped next to a passage in Meadowlands Zone 4" 11 March 2019 *Soweto Urban* available at https://sowetourban.co.za/57559/newborn-baby-found-dumped-next-passage-meadowlands-zone-4/ last accessed 2020-02-05.

[9] Masilela "Body of a baby found near Birch road" 7 March 2019 *Benoni City Times* available at https://benonicitytimes.co.za/338802/body-of-baby-found-near-birch-road/ last accessed 2020-02-05.

[10] Matsena "Newborn baby found in plastic bag, north police search for mother" 15 March 2019 *Pretoria North Rekord* available at https://rekordnorth.co.za/146791/north-newborn-baby-found-dumped-police-search-mother/ last accessed 2020-02-05.

provide a safe alternative that will prevent the act of unsafe abandonment. The social imagery of the abandoning mother depicts a woman oppressed by the baby's father or their families; tormented by rape, incest or forced prostitution;[11] living in extreme poverty or living with her parents. The shame of the pregnancy proves to be too onerous to risk exposure,[12] as a result she refuses to go where she may be identified or shamed thus she delivers the baby by herself and in a desperate bid to avoid exposure, abandons the baby in an unsafe location.[13] In May 2017, the South African Law Reform Commission (SALRC) embarked on an investigation into the child's right to knowledge of his or her biological origins in Draft Issue Paper 32, Project 140. Chapter 6 of this issue paper dealt with an abandoned child and the question was posed by the SALRC whether an abandoned child has the right to knowledge of his or her biological origins. The SALRC also investigated various proposed solutions to child abandonment in South Africa, specifically analysing baby hatches and confidential birth in Germany and safe haven laws in the US. Since publishing this issue paper, no further progression on Project 140 has been made by the SALRC.

[11] Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343-354; Rosenberg "The illegality of baby safes as a hindrance to women who want to relinquish their parental rights" Vol. 1 No. 4 October 2015 *Athens Journal of Law* 210.

[12] Rosenberg "The illegality of baby safes as a hindrance to women who want to relinquish their parental rights" Vol. 1 No. 4 October 2015 *Athens Journal of Law* 210.

[13] See Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 2, available at www.comparazionedirittocivile.it where, although these reasons are cited, the author reminds us that women who abandon their children cannot be typecast easily; Appell "Safe havens to abandon babies, part II: The fit" 6 1 2002 *Adoption Quarterly* 61 and 62; Willenbacher "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth" 18 2004 *International Journal of Law, Policy and the Family* 343 and 346; Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health* 20, the authors state that "young pregnant women are often scared of what their own mother and their boyfriend will say and whether the boyfriend will abandon them.," the authors prove that all the younger women in their study concealed their pregnancies and 70% of them reported fear of abandonment as their motive; also see Hirvonen *Pregnancy as a Choice of an Adolescent: An Ethnographic Study on Pregnancy among Adolescents under 18 Years of Age; The Forthcoming Parenthood, the Circumstances in their Life and Visits to Maternity Clinics* (2000) 72, 111-114 [in Finnish, English Summary]; according to Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 the risk of a child being killed by its mother within the first 24 hours of its birth is highest if the mother is young, 524.

In this chapter, the Children's Act 38 of 2005 as it pertains to the abandonment of children is discussed. Further, the Children's Amendment Bill of 29 October 2018 as well as the latest version of 2019[14] which contain the proposed amendments of the definitions of orphaned and abandoned children are also discussed. Both of these bills are discussed as some amendments that were initially proposed were deleted from the recent bill and therefore the effect of this deletion deserves deliberation. The other available options besides abandonment include abortion and adoption. Both these options, as well as their shortcomings, are dealt with briefly in this chapter. In addition, the two bills mentioned above are discussed in light of the proposed amendments to the provisions relating to adoption. Finally, Namibian law relating to baby safe havens are discussed because at the end of January 2019 Namibia enacted its own baby safe haven laws. The shortcomings and benefits of the Namibian law are addressed in order to determine an African approach to and perspective on these laws.

7.2 BRIEF HISTORICAL OVERVIEW OF INFANT ABANDONMENT AND INFANTICIDE

Before discussing the current Children's Act 38 of 2005, that governs the abandonment of children in South Africa, it is necessary to briefly discuss the development of the laws surrounding the abandonment of children and the laws governing concealment of birth. The historical component in Chapter 2 focusses on the development of the South African law generally as well as more specifically on the Roman family, Roman-Dutch family and the various forms of abandonment which occurred during those times. This chapter picks up from that point by discussing more particularly the act of abandonment and infanticide as crimes and

[14] Draft Children's Amendment Bill, 2019 was published as Government Notice No 244 dated 25 February 2019 in Government Gazette No 42248 of the same date.

their regulation in English law. It then discusses the development of the South African law pertaining to abandonment and infanticide and how South African law was influenced by the various laws which pre-dated it. The discussion includes both abandonment and infanticide, because in some cases abandonment can be aimed at committing infanticide and in others abandonment is aimed at securing a better life for the newborn child.

The practice of infanticide dates back to the Roman civilization and the reasons behind the commission of this crime also dates back to Roman civilization.[15] Some of these reasons include children born out of wedlock; female children; excess children; economic conservation; deformed children and population control.[16] According to Roman law, infanticide was committed by either a family member strangling the infant[17] or the infant was drowned or

[15] Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 117-118 who states that it dates back to 700BC; However, this practice existed in 1440 BC in Exodus 1:15-22 where the King of Egypt ordered the Hebrew midwives to kill all the Hebrew male children; also see Matthew 2:16-18 around 70 AD where King Herod sent soldiers to put to death all the male children in Bethlehem and in all that area who were two years old and under, however the motivation behind these killings were different to those discussed in this chapter; see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L. J.* 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: Are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: Less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); for more on Roman law and its history see Thomas *Introduction to Roman Law* (1986) 1; Tellegen-Couperus *A Short History of Roman Law* (1993) 3-140; Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[16] Voirol "Hush little baby; don't say a word: Saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 118; Moseley "The history of infanticide in Western society" 1 1986 *Issues L. & Med*. 345, 346 states that the reasons for the murder of "normal" but unwanted children changed little throughout the ages. Moseley also goes on to deal with each of the reasons for infanticide see 350-351; Thomas *Introduction to Roman Law* (1986) 1; Tellegen-Couperus *A Short History of Roman Law* (1993) 3-140.

[17] Wilkinson "Classical approaches to population and family planning" Vol. 4 No. 3 1978 *Population and Development Review* 450; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Boswell "*Expositio* and *oblatio*: the abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (2004) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19.

simply abandoned.[18] In some instances the motivation behind exposure or abandonment was to afford the infant the opportunity to be found and raised by someone willing and able to do so.[19] As a result, the infant was left in a place and time where he or she could be easily located.[20] According to Moseley, the usual method of infanticide was exposure of the unwanted child.[21] The *paterfamilias* was the head of the family and could decide whether or not the child should live.[22] If the *paterfamilias* refused to recognise an infant, the infant could be disowned and exposed.[23] Furthermore, according to the law of the Twelve Tables, a baby who was terribly deformed at birth could be put to death.[24] Infanticide by the decision of the father was initially

[18] Rawson "Children in the Roman familia" in Rawson (ed) *The Family in Ancient Rome: New Perspectives* (1986) 172; Voirol "Hush little baby; don't say a word: Saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 117; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Boswell "*Expositio* and *oblatio*: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (2004) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19.

[19] Rawson "Children in the Roman familia" in Rawson (ed) *The Family in Ancient Rome: New Perspectives* (1986) 172; Wilkinson "Classical approaches to population and family planning" Vol. 4 No. 3 1978 *Population and Development Review* 450; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Boswell "*Expositio* and *oblatio*: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (2004) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19.

[20] Wilkinson "Classical approaches to population and family planning" Vol. 4 No. 3 1978 *Population and Development Review* 450; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Boswell "*Expositio* and *oblatio*: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (2004) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19.

[21] Moseley "The history of infanticide in Western society" 1 1986 *Issues L. & Med*. 345, 349; Boswell "*Expositio* and *oblatio*: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (2004) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19.

[22] Borkowski and Du Plessis *Text Book on Roman Law* (2015) 114; Wilkinson "Classical approaches to population and family planning" Vol. 4 No. 3 1978 *Population and Development Review* 439-455; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 118; Moseley "The history of infanticide in Western society" 1 1986 *Issues L. & Med*. 345, 349; Boswell "*Expositio* and *oblatio*: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (2004) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19; Muirhead *Historical Introduction to the Private Law of Rome* (2017) 26.

[23] Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) 101-102 (digitally printed version 2007); Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Boswell "*Expositio* and *oblatio*: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Gardner *Family and Familia in Roman Law and Life* (2004) 1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 19; Bennett "Exposure of infants in ancient Rome" 1923 *The Classical Journal* 347 states that there is no documented case in which a father refused to raise his child. He therefore finds this practice to be purely formal; see chapter 2 historical chapter for more on this.

[24] Cicero *De Legibus* 3 8 19; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; see historical chapter 2 par 2.6.2 where severely deformed children were

not a crime because of the father's absolute power over his family. At the end of the Republican era the *Lex Pompeia de Parricidio*, regarded the killing of a child, as murder.[25] The law became intolerant of the acts of infanticide and exposure and with the rise of Christianity regarding human life as sacred, infanticide was treated as murder.[26] Eventually in 318 A.D., Emperor Constantine decreed that the killing of a child constituted a crime called *parricidium*[27] and years later infanticide became an offence in Roman law that was punishable by death.[28] With the development of Canon law by the Roman Catholic Church the formalism of Roman law was abolished. The lives of both adults and children were regarded as sacred and thus

regarded as "monstrum" and not endowed with a human soul, magistrates could therefore authorise their strangulation. Later on mothers had to wait a number of years to establish whether they these children been endowed with intelligence before being able to kill them; see Voet Vol.1 1.6.13; Boswell "*Expositio* and *oblatio*: The abandonment of children and the ancient and medieval family" 89 1 1984 *The American Historical Review* 10-33; Kaser *Roman Private Law* (1984) 75; Buckland *A Textbook of Roman Law from Augustus to Justinian* third edition (1963) (digitally printed version 2007) 101-102; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189.

[25] *D* 8 8 2; Buckland *A Textbook of Roman Law from Augustus to Justinian* (2019) 103; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189.

[26] Langer "Infanticide: A historical survey" 1974 *History of Childhood Quarterly* 355; Voirol "Hush little baby; don't say a word: Saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 118; Wu "Culture is no defence for infanticide" 2003 *American University Journal of Gender, Social Policy and the Law* 979; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; according to the crime of infanticide, which formed part of the broader crime of parricide, four elements needed to be proved in order for someone to be found guilty of this crime. The first was the fact that birth must have occurred, secondly the child was born alive, thirdly, the child was killed intentionally or negligently and fourthly the crime was committed. In terms of these requirements as seen in Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1259. [Bk. 48 tit. 9] the child must have been born alive, there is no mention of the instance if a child has a physical deformity, it is therefore assumed that the killing of "a child", *any* child born alive is sufficient to warrant the crime of infanticide. This is contrary to the position according to Roman-Dutch law where killing a severely deformed child was not regarded as murder see Van der Linden *Koopmans Handboek* (1806) 2 5 2; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 182-185; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189.

[27] *C* 9 17 1; Borkowski and Du Plessis *Text Book on Roman Law* (2015) 115; Voirol "Hush little baby; don't say a word: Saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 118; Langer "Infanticide: A historical survey" 1974 *History of Childhood Quarterly* 355; Moseley "The history of infanticide in western society" 1 1986 *Issues L. & Med.* 345, 352; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Buckland *A Textbook of Roman Law from Augustus to Justinian* third edition (1963) (digitally printed version 2007) 101-102 ; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189.

[28] Although offenders were seldom prosecuted according to Borkowski and Du Plessis *Text Book on Roman Law* (2015) 114; Thomas *Introduction to Roman Law* (1986) 415; see also Langer "Infanticide: A historical survey" 1974 *History of Childhood Quarterly* 355; Moseley "The history of infanticide in western society" 1 1986 *Issues L. & Med.* 345, 351; see chapter 2 historical component for the method of punishment used as determined by the Codex Theodosianus; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174-175 and 178-182; Buckland *A Textbook of Roman Law from Augustus to Justinian* (2019) 101-102; Frier and McGinn *A Casebook on Roman Family Law* (2004) 189.

infanticide was regarded as a crime. For more on the Roman law's approach to infant abandonment refer to chapter 2, the historical component.

Similar to what was practiced under Roman law, under Roman-Dutch law there also existed two reasons for abandoning a child. The first was with the intention of killing the child[29] and the second without the intention of killing it but leaving it in a place where it could be found and raised by other people.[30] Abandoning a child with the intention of killing it was punishable by death.[31] Further, according to Grotius deformed infants lacked a soul and could therefore be killed by immediate suffocation.[32] The killing of someone with a soul was regarded as murder.[33] According to Voet, deformed infants could be strangled or drowned with immunity from consequence.[34] Moorman concurred that the death penalty could be imposed for killing a child except if the child was deformed.[35] Van der Keessel agreed with Grotius that a severely deformed child had no spirit and should be killed, however he stated that this should be done

[29] Van Leeuwen 4 34 3; Burchell and Milton *Principles of Criminal Law* (2007) 673 (Note: the new addition, namely Burchell *Principles of Criminal Law* (2016) does not provide this definition); Hunt and Milton *South African Criminal Law and Procedure* (1990) 366; Snyman *Criminal Law* (2014) 444; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185; Wessels *History of Roman-Dutch Law* (1908 reprint 2015) 419–420; Spiro *Law of Parent and Child* (1985) 4.

[30] Decker *Simon van Leeuwen's Commentaries on Roman-Dutch Law* (revised and edited, with notes by Decker and translated from the original Dutch by Kotzé (1923) 4 34 3; Snyman *Criminal Law* (2014) 444; *R v Oliphant* 1950 1 SA 48 (O); Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 182-185; Wessels *History of Roman-Dutch Law* (1908 reprint 2015) 419–420; Spiro *Law of Parent and Child* (1985) 4.

[31] Burchell and Milton *Principles of Criminal Law* (2007) 673; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185; Wessels *History of Roman-Dutch Law* (1908 reprint 2015) 419-420; Spiro *Law of Parent and Child* (1985) 4.

[32] Grotius *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (1939) 1 3 5; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.

[33] Matthaeus 48 5 6; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.

[34] Voet *Commentarius ad Pandectas* 1 6 13 (see Gane *The Selective Voet Being the Commentary on the Pandects* (1955)); Moorman agreed with Voet see Moorman 2 3 1, 2 6 9, 2 6 14, 2 6 16 & 2 6 19; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.

[35] Moorman 2 3 1, 2 6 9, 2 6 14, 2 6 16 & 2 6 19; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.

only after consultation with an official and skilled doctors[36] and therefore they should not be killed immediately.[37] In summary, it was not regarded as murder to kill a deformed baby.[38]

Leeuwen drew a distinction between the killing of an infant, regarded as the crime of parricide, and the exposing of an infant.[39] Women who killed their infants were strangled with a cord that was tied to a stake[40] and those who exposed their infants were punished less severely by being whipped, branded or expelled.[41] Furthermore, Leeuwen distinguished between those who left their infants in places where they were more likely to be found and those who left their infants in places that could lead to their deaths.[42] Again, the punishment would be less severe if the infant was left in a place where it could be easily found, versus the instance where the infant was left in an uninhabited place.[43] Van der Linden agreed that if a child was exposed (*te vondeling leggen*) with the purpose of killing the child then it was regarded as murder and the punishment was the death penalty.[44] In instances where exposure was not done with the intention to kill the child (*onvoorzigtige doodslag*) the guilty party would be punished less

[36] Van der Keessel Praelectiones 1 3 5 (Van Warmelo, Coertze and Gonin (eds) *Van der Keessel: Praelectiones Iuris Hoedierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* (1961)); Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[37] Also see Van der Linden *Koopmans Handboek* (1806) 2 5 2; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[38] Van der Linden *Koopmans Handboek* (1806) 2 5 2; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[39] Leeuwen 4 34 3; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[40] Leeuwen 4 34 3; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[41] Leeuwen 4 34 3; Furthermore, for a full discussion on the crime of parricide and its punishment see chapter 2 historical component paragraph 2.8; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185; All of the provisions regarding infanticide as a form of parricide also apply to the father regardless of whether he was a part of the plan of the mother or acted independently. It also applied to any other accomplices as stated in Mommsen, Krueger, Watson *The Digest of Justinian* Vol. 4 (1985) D. 48.9.6, D. 48.9.1; Van der Keessel *Praelectiones Ad Jus Criminale, (Lectures on Criminal Law)* (1973) 1295, Appendix to tit. 9 a 111 [Tit. 7 a 9 in the new Code].
[42] Leeuwen 4 34 3; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[43] Huber *Heedensdaegse Rechtsgeleertheyt* 6 13 33-34; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[44] Van der Linden 2 5 12; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.

severely.[45] In summary Roman-Dutch authors were opposed to killing healthy babies.[46] The crime of parricide, also known as infanticide, was punished more severely than exposure. For more on the Roman-Dutch position regarding the abandonment of children see chapter 2, the historical component.

7.2.1 History of infant abandonment and infanticide in English law

In respect of infanticide, South African law relied heavily on English law and as a result English law influenced legal development in this field.[47] The first English statute dealing directly with the concealment of birth was in 1623[48] which read:

> "WHEREAS many lewd Women that have been delivered of Bastard Children, to avoid their Shame, and to escape Punishment, do secretly bury or conceal the Death of their Children, and after, if the Child be found dead, the said Women do allege, that the said Child was born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said Child or Children were murdered by the said Women, their lewd Mothers, or by their Assent or Procurement: II. For the Preventing therefore of this great Mischief…That if any Woman…be delivered of any Issue of her Body, Male or Female, which being born alive, should by the Laws of this Realm be a Bastard, and that the endeavor privately, either by drowning or secret burying thereof, or any other Way, either by herself or the procuring of others, so to conceal the Death thereof, as that it may not come to Light, whether it were born alive or not, but be concealed: In every such case the said Mother can make Proof by One Witness at the least, that the Child (whose Death was by her so intended to be concealed) was born dead."

[45] Van der Linden 2 5 12-13; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[46] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 182-185.
[47] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 185; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (1999) 95; Edwards *The History of South African Law: An Outline* (1996) 76-83.
[48] Statute 21 Jac I c 27; Radzinowicz *A History of English Criminal Law* Vol 1 (1948) 430-433; Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732; Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 220.

This Act placed the onus on the mother to prove that the child was a stillborn and was thus contrary to "innocent until proven guilty".[49] Further, the offence related only to illegitimate children.[50] The penalty for concealment of birth was death but the courts seldom sentenced the mother to death.[51] Radzinowicz provides that the court would acquit the mother if it could be proved that she called for assistance, confessed or had any items belonging to the child in her possession.[52] She was also acquitted if the child was born prematurely.[53] A conviction was hard-won as the court required evidence that the child was born alive.[54]

The Malicious Shooting or Stabbing Act of 1803[55] amended the statute of 1623 to bring it in line with the principles of English criminal jurisprudence, it shifted the onus from the accused (to prove that the child was stillborn) to the prosecution to prove a live birth occured.[56] There was now a presumption that the child was born dead. A finding of guilt on the basis of

[49] Radzinowicz *A History of English Criminal Law* Vol 1 (1948) 431; Davies "Child-killing in English law" 1937 1 (3) *Modern LR* 203, 213; Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732, 733; Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson, and Richards *Birth Rites and Rights* (2011) 220.

[50] Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 214; The Offences Against the Person Act 1828 later extended the offence to legitimate children.

[51] Radzinowicz *A History of English Criminal Law* Vol 1 (1948) 434; Jackson "The trial of Harriet Vooght: Continuity and change in the history of infanticide" in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment 1550-2000* (2002) 4; Rabin "Bodies of evidence, states of mind: Infanticide, emotion and sensibility in eighteenth-century England" in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment 1550-2000* (2002) 77; see also Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 220, many women were acquitted on the basis of the so-called "benefit of linen" defence.

[52] These items belonging to the child served as an indication that the mother prepared for the child and therefore did not kill the child; see Radzinowicz *A History of English Criminal Law* Vol 1 (1948) 434; Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732, 733.

[53] Radzinowicz *A History of English Criminal Law* Vol 1 (1948) 434; Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732, 733.

[54] Radzinowicz *A History of English Criminal Law* Vol 1 (1948) 434; Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732, 733.

[55] 43 Geo III c 58; also referred to as Lord Ellenborough's Act, 1803; see Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 214; Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 220.

[56] Radzinowicz *A History of English Criminal Law* Vol 1 (1948) 436; Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732, 733; Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 214. This Act provided that trials of women charged with murder of their bastard children "shall proceed and be governed by such and the like rules of evidence and of presumption as are by Law used and allowed to take place in respect to other trials for murder".

concealment of birth was made a competent alternative verdict on a charge of murder or infanticide.[57] Importantly, concealment of birth was dependent on the prior charge of murder put differently it was not an independent substantive offence and it was limited to illegitimate children.[58] The Malicious Shooting or Stabbing Act of 1803 which also provided for the offences of administering medication in order to cause a miscarriage was then replaced by the Offences Against the Person Act 1828.[59] This Act extended the provisions governing the procurement of a miscarriage to include any means and not only medicines or poisons and furthermore it also extended the crime of concealment of birth to all children, both legitimate and illegitimate.[60] Another significant aspect of this Act was that in respect of the crime of concealment of birth it provided "it shall not be necessary to prove whether the child died before, at, or after birth,"[61] which influenced the definition of concealment of birth currently applied in South African law.[62] Furthermore, the alternative verdict provisions of the 1803 Act were retained.[63] Throughout the nineteenth century various suggestions were made by Criminal Law Commissioners to improve the Act. Some related to extending the offence of concealment of birth to both permanent and temporary disposition by adding the words "by any secret burying or otherwise disposing" secondly, by making third parties indictable for the offence

[57] Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732, 733; Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 213; On acquittal on the charge of murder the jury could find the accused guilty of concealment of birth and sentence the accused with two years imprisonment, see Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 214; Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 220, this lesser charge of concealment of birth was punishable by two years imprisonment.

[58] This was the group of children that were victims of infanticide according to the law Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 214. Currently according to South African law the phrase "born out of wedlock" is used and has replaced the term "illegitimate" child by the Child Care Amendment Act 96 of 1996 amending the Child Care Act 74 of 1983.

[59] 9 Geo IV c 31 s 14; Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 214.

[60] Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 214.

[61] South African law adopted its provisions on concealment of birth from this English Act referred to as the Offences Against the Person Act 1828. s 113 of the South African General Law Amendment Act 46 of 1935 provides in subsection 1 "whether the child died before, during or after birth" subsection 2 provides "A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of".

[62] See s 113 of the General Law Amendment Act, 1935 (Act 46 of 1935).

[63] See Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 215.

and lastly by making the crime of concealment of birth its own separate substantive offence and thereby eliminating it as an alternative verdict.[64] The Offences Against the Person Act of 1861 incorporated some of these suggestions. Section 60 of the Offences Against the Person Act of 1861 provided:

> "If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years."

The words "by any secret disposition" were adopted and the offence was extended to include "every person" and not just the mother.[65] It was also no longer dependent on a charge of murder as it was now regarded as its own independent substantive offence, but a proviso allowed a verdict of concealment to still be an alternative to a charge of murder.[66] Furthermore, section 27 of the Offences Against the Person Act of 1861[67] stated:

> "Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude."

This act shows that abandonment and exposure were also regarded as their own separate offences. Sometimes mothers would be charged with murder or infanticide as opposed to concealment of birth.[68] Infanticide also frequently came in the form of baby-farming, according

[64] See Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 215.
[65] See Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 215.
[66] See Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 215; This proviso was however later repealed by the Criminal Law Act of 1967.
[67] 24 and 25 Vict. C. 100.
[68] South African law does have a crime of infanticide in terms of s 239 of the Criminal Procedure Act 51 of 1977 and in this way reflecting the English law on infanticide.

to Badassy[69] baby-farming was considered to be "infanticide by neglect,"[70] "infanticide for hire"[71] or a "veiled form of infanticide".[72] In general it was the care of children in exchange for money,[73] however these baby-farm houses would neglect and murder infants to increase their profit margins.[74] This practice led to the introduction of the Infant Life Protection Act in the

[69] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 1; see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: Are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: Less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); see generally Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[70] Ward "Legislating for human nature: Legal responses to infanticide, 1860-1938" in Jackson (ed) *Infanticide – Historical Perspectives on Child Murder and Concealment 1550-2000* (2002) 249-269.

[71] Homrighaus "Baby farming: The care of illegitimate children in England, 1860-1943" (Unpublished Dissertation (PhD University of North Carolina, 2003); Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 225.

[72] Besant *The Law of Population: Its Consequences, and Its Bearing upon Human Conduct and Morals* (1877) 22.

[73] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 2; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 186; see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: Less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[74] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 2; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 186 where she discusses the fact that the professional nurses who would take care of the children were "referred to as killer nurses since they quickly got rid of the babies in their charge"; see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); see also Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 225, where the author points out that deaths on baby farms were estimated to be as high as 90%, the author further points out that baby farms were seen as a national scandal, populated by children of women who lacked maternal affection but at the same time they were crucial to the livelihood of women who made use of them, enabling them to take up employment; see also Greaves *Observations on some of the Causes of Infanticide. Transactions of the Manchester*

British Parliament in 1872.[75] This Act provided that all households which had more than one child under the age of one in the charge of a nurse or day care provider for more than twenty-four hours had to register[76] and that all deaths including still-births had to be reported immediately and an inquest was to be held on every body of an infant that died in one of these houses.[77]

The Infanticide Act was introduced in 1922[78] in Britain in order to abate the effects of the law towards mothers who kill their newborns as a result of the effects of childbirth.[79] This Act reduced the charge of murder to manslaughter upon proving that the woman suffered from mental disturbance due to childbirth at the time she committed the offence against the newborn.[80] Furthermore, in terms of this Act even in the instance of the murder of an infant by

Statistical Society (1863) 1-24; Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[75] Langer "Infanticide: A historical survey" 1974 *History of Childhood Quarterly* 361; Silverman "Mismatched attitudes about neonatal death" Vol. 11 No.6 (Dec. 1981) *The Hastings Center Report* 13; s 27 of the Offences against the Person Act 1861, persons charged with the abandonment or exposure of a child under the age of two, which jeopardised its health or life, had to be punished with penal servitude; South Africa also implemented an Infant Life Protection Act to provide for the better protection of infant life and to prevent baby-farming, similar to its English counterpart; in this respect see the Infant Life Protection Act of 1907.

[76] Infant Life Protection Act 1872 (35 & 36 Vict) CHAPTER 38 s 2.

[77] Infant Life Protection Act 1872 (35 & 36 Vict) CHAPTER 38 s 8.

[78] *Current Law Statutes Annotated* 1960 [1960 (12 & 13 Geo. 5) CHAPTER 18 at 1920].

[79] Particularly for women who suffered the psychological effects after birth; Ashworth *Principles of Criminal Law* (2008) 280; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 186; Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594; see also Davies "Child-killing in English law" 1 (3) 1937 *Modern LR* 203, 218 for the statistics on infanticide and concealment of birth. In 1834 the number of committals for trial for concealment of birth was 44 and this had increased in 1857-61 to a staggering 522, despite this there were only 39 convictions for infanticide between 1849 and 1864 and since 1849 no women had been executed for infanticide. The problem as stated by Davies (at 219) was that "Juries will not convict whilst infanticide is punished capitally"; Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*.

[80] Infanticide Act of 1922 ss 1-3; Voirol "Hush little baby; don't say a word: Saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 119.

its mother a conviction of concealment of birth could be brought in terms of section 60 of the Offences Against the Person Act of 1861.[81] The Infanticide Act of 1922 read as follows:

> "1. Conviction for infanticide in certain cases.
> (1) Where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child.
> (2) Where upon the trial of a woman for the murder of her newly-born child, the jury are of opinion that she by any wilful act or omission caused its but that at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and that by reason thereof the balance of her mind was then disturbed, the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.
> (3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a newly-born child to return a verdict of manslaughter, or a verdict of guilty but insane, or a verdict of concealment of birth, in pursuance of section sixty of the Offences against the Person Act, 1861.
> (4) The said section sixty shall apply in the case of the acquittal of a woman upon indictment for infanticide as it applies upon the acquittal of a woman for murder, and upon the trial of any person over the age of sixteen for infanticide it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under section twelve of the Children's Act, 1908, to find the accused guilty of such an offence, and in that case that section shall apply accordingly."[82]

The 1922 Act was repealed by the Infanticide Act of 1938[83] and two significant changes were implemented by the said Act. Firstly, the 1922 Act concerned the woman causing the death of her *newly-born* child, this was altered by the 1938 Act to read "a child under the age of twelve

[81] The Offences Against the Person Act section 60 was repealed by the Criminal Law Act of 1967; see s 1(3) of the Infanticide Act 1922.
[82] Act of 20 July 1922 (text as originally enacted).
[83] 1938 (1 and 2 Geo. 6 C. 36); "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 220.

months"[84] and secondly the 1938 Act now extends to women who are suffering from the effects of lactation and not only to women suffering from the effects of childbirth as in the original 1922 Act. Similarly to the 1922 Act, the jury may, instead of returning a verdict of murder or manslaughter, now return a verdict of infanticide.[85] Importantly, in terms of the act, infanticide is possible by both commission as well as omission. Commission refers to direct violence whereas with omission the infant is neglected or abandoned whilst the mother is in a rattled or frightened state.[86]

7.2.2 History of infant abandonment and infanticide in South African law

South African law has been influenced largely by Roman-Dutch and English law in the area of infanticide.[87] The case of Susanna van Bengale was one of the earliest reports of infanticide.[88] She strangled her infant who was ill and as a result was condemned to death. Her breasts were ripped from her body with red-hot irons and burnt to ashes, following which she suffered the punishment of the sack.[89] During the 1830s the punishment for both child murder and other forms of murder was the death sentence.[90] One of the main reasons for infanticide was due to

[84] s 1(1) of the Infanticide Act 1938; Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 220.
[85] s 1(2) of the Infanticide Act 1938 and s 1(2) of the Infanticide Act of 1922; Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 220.
[86] Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health* 16; also see Bonnet "Adoption at birth: Prevention against abandonment or neonaticide" 1993 17 *Child Abuse Neglect* 501-513; Suffocation has been the most frequently used method of active killing, see Resnick "Murder of the newborn: A psychiatric review of neonaticide" 126 1970 *Am J Psychiatry* 1414-1420.
[87] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188.
[88] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188; Böeseken *Slaves and Free Blacks at the Cape 1658-1700* (1977) 31; Leibbrandt *Precis of the Archives of the Cape of Good Hope Journal, 1662-1670* (1901) 308-309.
[89] Böeseken *Slaves and Free Blacks at the Cape 1658-1700* (1977) 31; Wagenaer (compiled by Leibbrandt) *Precis of the Archives of the Cape of Good Hope Journal, 1662-1670* (1901) 308-309; also see historical chapter on the punishment in respect of the crime of parricide/infanticide.
[90] Van der Spuy "Infanticide, slavery and the politics of reproduction at Cape Colony, South Africa, in the 1820s" in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (2002 reprinted 2005) 131; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188.

infants being born out of wedlock.[91] In 1845 legislation was enacted to create the crime of concealment of birth and thereby have women convicted of concealment of birth instead of murder, which meant that they were no longer subject to the death penalty. This legislation is referred to as Ordinance 10 of 1845[92] an ordinance for punishing the concealment of the birth of children and applied exclusively to mothers who committed this act.[93] This Act sentenced women to imprisonment for a period not exceeding five years.[94] This Act was patterned after the English Offences Against the Person Act of 1861. In the matter of *Rex v Adams*[95], decided in 1903, the mother, Christina Adams, was charged with the crime of attempted murder or in the alternative the crime of exposing and abandoning her infant boy (*crimen expositionis infantis*) on a farm in Cape Town.[96] She pleaded not guilty.[97] Judge Maasdorp pointed out that the crime of *crimen expositionis infantis* was well-known as a crime in terms of the common law[98] and was made a crime in England by statute.[99] The jury found the mother guilty of the alternative crime of abandoning and exposing an infant and sentenced her to imprisonment and hard labour for nine months.[100] According to Van der Westhuizen "there were no decided cases after the Adams case where the accused was charged with *crimen expositionis infantis*".[101] The

[91] Many of these cases of infanticide were reported in the rural districts of Cape Town; Scully "Narratives of infanticide in the aftermath of slave emancipation in the nineteenth-century Cape Colony, South Africa" 1996 *Canadian Journal of African Studies* 88-89; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188.
[92] Also referred to as Cape Ordinance 10 of 1845.
[93] This was taken from the English Statute referred to as the Offences Against the Person Act of 1861 s 60, which provided for the crime of concealment of birth emphasising the fact that South African law was largely influenced by English law.
[94] Moving away from the imposition of the death penalty; Ordinance 10 of 1845 s 2.
[95] (1903) 20 SC 556.
[96] (1903) 20 SC 556.
[97] (1903) 20 SC 556.
[98] Snyman *Criminal Law* (2014) 444.
[99] (1903) 20 SC 557; Although only established at a later stage, the crime of exposing an infant was also made a crime in South Africa by statute, specifically s 258(d) of the Criminal Procedure Act 51 of 1977 which provides: "If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but— "(d)in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth".
[100] (1903) 20 SC 557.
[101] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188; also see Snyman *Criminal Law* (2014) 444-445, this crime included cases where someone abandoned a child without the intention of killing the child, in a place where it was likely to be found and secondly it included cases

charge of concealment of birth was used instead. The Natal Colony adopted the Cape Ordinance and this was called Ordinance 22 of 1846. In the Orange Free State the offence of concealment of birth was introduced through Ordinance 1 of 1868 and later it was defined in Chapter 141 of the Wetboek of the Orange Free State. In the Transkei (Eastern Cape province) customary law continued to apply to "natives" subject to direction by the British High Commissioner[102] therefore in 1886 the Native Territories Penal Code was enacted to apply to all people within the Transkei territory. When South Africa became a Union this code was largely applied in South African criminal law.[103] The Native Territories Penal Code section 149 dealt with the crime of concealment of birth by providing:

> "Whoever disposes of the dead body of any child in any manner, with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or with a fine, or both."

The crime of concealment of birth was introduced to the Transvaal by Law 4 of 1892.[104] The crime under most statutes could only be committed by the mother but there were two exceptions. In the Transvaal the offender could only be an unmarried or deserted mother but in terms of the Native Territories Penal Code the crime could be committed by any person.[105] The

where someone abandoned a child with the intention of killing the child or negligently abandoned the child, without regard for the child's survival. The most important reason according to Snyman why prosecutions for this crime are rare is if the child dies the person can be charged with murder or culpable homicide. If death does not result then the person may be charged with attempted murder if he or she foresees the possibility that the child may die, even if the child does not; see Snyman *Criminal Law* (2014) 445 fn 46 where Snyman submits that in the matter of *Meleka* 1965 2 SA 774 (T), X could have been charged with this crime.

[102] Himonga, Nhlapo, Maithufi, Weeks, Mofokeng and Ndima *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* (2015) 9.

[103] For more on this see Koyana *The Influence of the Native Territories Penal Code on South African Criminal Law* (LLD, UNISA October 1988).

[104] See Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 734; see Snyman *Criminal Law* (2014) 432 where it is pointed out that the person committing the crime need not necessarily be the mother of the child.

[105] See Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 734.

original Orange Free State Ordinance did not provide that it was not necessary to prove whether the child died before, during or after birth however, all the other statutes provided this.[106] All of these statutes were finally consolidated in section 113 of the General Law Amendment Act 46 of 1935 discussed hereunder.

In the Western Cape the Infant Life Protection Act 1907 — "To Provide for the Better Protection of Infant Life" was assented to on the 26th of July of 1907.[107] The Act handled instances where infants were taken into the care of nurses or other caretakers for a period longer than three days and for compensation. It required those taking infants (under the age of seven years) into their custody to notify the Resident Magistrate of the full details of every child received as well as the amount of the reward received for caring for such infant.[108] This Act was developed to better regulate these houses and prevent the practice of "baby-farming" and to prevent infant deaths.[109] Baby-farming was seen to be as a result of the high number of illegitimate children birthed by white women.[110] In the Transvaal, similar concerns about baby-farming plagued the authorities[111] and in 1908 the Transvaal Colony published a report — the

[106] See Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 734.
[107] A Dr. Anderson of Cape Town was reportedly largely responsible for the enactment of this Act as he lobbied for legislation for the protection of children, see Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 26-27; Burman and Naude "Bearing a bastard: The social consequences of illegitimacy in Cape Town, 1896-1939" Vol. 17 No. 3 Sep 1991 *Journal of Southern African Studies* 394.
[108] s 1 Infant Life Protection Act 1907.
[109] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 9; This act was taken from the British Infant Life Protection Act of 1872 which was designed to prevent baby-farming, and stated that all households which had more than one child under the age of one in the charge of a nurse or daycare provider for more than twenty-four hours had to register; see par 2.3.
[110] Consideration was only taken of the white population, see Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 17.
[111] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 8; for more on infanticide see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L. J.* 683, 685 ; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical

Indigency Commission of 1906 to 1908 which dealt with, among other things the high rate of illegitimate infant mortality and how this is connected to infanticide.[112] In some instances women placed their children in foster homes or baby-farms as a result of poverty.[113] Women needed to earn a living and could not take their children with them to work.[114] Some women opted for foster homes or baby-farms whilst others used abandonment, murder or adoption to

reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[112] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 18; for more on infanticide see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev*. 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: Are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[113] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 20; for more on infanticide see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[114] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 20; for more on infanticide see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

permanently get rid of their children.[115] The Indigency Commission recommended that an Infant Life Protection Act be passed which would make registration a prerequisite for persons who took care of infants.[116] As a result in 1909 the Transvaal Colony passed the Infant Life Protection Act 24 of 1909, which took effect on the 1st of January 1910.[117] There are two differences between the Transvaal Act and the Cape Act. Firstly, according to the Transvaal Act if an infant is kept by someone other than its parents for longer than three days, such person must notify the magistrate of such fact and such notice which bears the name and full details of the infant must also bear the name and address of the parents of such infant or if the infant is illegitimate, of the mother, this in terms of the section 3. Secondly, another difference exists in terms of section 13 of the Transvaal Act where a magistrate may at any time order the medical examination of any infant and the district surgeon shall have the authority to make such examination. These differences are evidence of the fact that, because the Transvaal Act

[115] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 20; for more on infanticide see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev*. 174, 175 (advocating an earlier Biblical reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[116] Whether the infants were legitimate or illegitimate see Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 21; for more on infanticide see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev*. 174, 175 (advocating an earlier Biblical reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[117] The underlying motivation for the introduction of this Act was also due to the high rates of infant mortality reported by the Medical Health Officers of the different colonies; see Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 26.

followed the Cape Act, the Legislative Assembly of the Transvaal had an opportunity to improve the protection of infants by including these further provisions and in an indirect manner guarantee the infant's right to parental care by requiring the details of the parents. However, in 1911, a year after becoming a Union, this Infant Life Protection Act and the Infant Life Protection Act 1907 of the Cape Colony were consolidated to become the Children's Protection Act 35 of 1913,[118] which was later repealed by the Children's Act 31 of 1937. The Children's Protection Act 35 of 1913 section 3(1) provided for the prevention of cruelty and neglect, which included a person who wilfully abandoned or exposed such child or causes such child to be abandoned or exposed and chapter II of the Act from section 22 contained the provisions relating to the protection of the life of the infant which resembled those provisions of the Infant Life Protection Acts. According to Badassy, despite this legislation "high infant mortality rates continued to plague the state and medical fraternity well into the Union years".[119] It is submitted that this is due to the fact that legislation criminalising abandonment and exposure is not preventative but merely forces mothers to hide their desperation and to become more creative in the methods of abandonment they employed. This is also experienced in the current South African law where criminal sanctions for abandonment exist but it fails to curb its prevalence.[120]

[118] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 23-24; see Lewicki "Can you forgive her?: Legal ambivalence toward infanticide" 8 6 1999 *S. Cal. Interdisciplinary L.J*. 683, 685; see also Barton "When murdering hands rock the cradle: An overview of America's incoherent treatment of infanticidal mothers" 51 1998 *Smu L. Rev.* 591, 594 (claiming Greco-Roman antiquity); Gardner "Postpartum depression defense: are mothers getting away with murder?" 24 1990 *New Eng. L. Rev*. 953, 955 (stressing primitive cultures); but see Dvorak "Neonaticide: less than murder?" 19 1998 *N. Ill U. L. Rev.* 174, 175 (advocating an earlier Biblical reference); Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*; also see Camperio Ciani and Fontanesi "Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample" 36 2012 *Child Abuse and Neglect* 519-527 where the author states that the killing of a child by his or her biological mother has occurred since the start of humankind e.g. Moses in the Bible, in every culture and population, 519.

[119] Badassy *"This Sinister Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930* (2012) 28.

[120] It is also said that the Legislation did not deal with the unsanitary conditions and infectious diseases which infants were exposed to. This falls beyond the scope of this study for more on this see Badassy *"This Sinister*

7.3 OVERVIEW OF CASE LAW AND LEGISLATION GOVERNING CONCEALMENT OF BIRTH AND INFANT ABANDONMENT

The crime of concealment of birth, which comprises of the disposing of a child's body to conceal the fact of its birth, was introduced into South African law by various statutes from 1845 onwards.[121] According to Hoctor and Carnelley all these statutes were based on corresponding English legislation.[122] It is important to note that a charge of concealment of birth as contained in the General Law Amendment Act 46 of 1935, section 113, is invoked if a mother attempts to *conceal* the *body* of an infant. This crime does not cover the act of exposure of an infant because the elements of this crime involves "concealing" the child's "body" as opposed to disposing of a child in an open field, toilet or alongside the road. It also does not cover abandoning a child that is still alive. However, a discussion of this crime is included because it may happen that an infant's body is so severely decomposed that it cannot be determined whether the infant was alive at the time of abandonment, in these instances the police will most often open a case of concealment of birth. Thus concealment of birth does serve as an alternative offence to murder or attempted murder.[123]

7.3.1 Cases based on Cape Ordinance 10 of 1845

In *Rex v Arends*[124] the court decided this matter based on Cape Ordinance 10 of 1845. In this case Dorothy Arends was charged with concealment of birth but Judge Searle held that

Business in Babies" Infanticide, the Perils of Baby-farming Scandals and Infant Life Protection Legislation, South Africa 1890-1930 (2012) 29.

[121] Snyman *Criminal Law* (2014) 432.

[122] Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732; As illustrated above where Ordinance 10 of 1845 borrowed from the Offences Against the Person Act of 1861, also with South Africa's enactment of the Infant Life Protection Act of 1907 emulating the English Infant Life Protection Act of 1872. Further, the creation of the crime of exposing of an infant which only happened in later years in South Africa in terms of s 258(d) of the Criminal Procedure Act 51 of 1977 and which is also governed by the General Law Amendment Act 46 of 1935 s 113.

[123] See s 258 of the Criminal Procedure Act 51 of 1977.

[124] 1913 CPD 194.

"although the birth was concealed, there was no concealment or disposition of the dead body of the child, as is required".[125] The child was in fact alive and well.[126] The judge found that she may have been guilty of some other offence but not of concealment of birth and as a result, both her conviction and sentence were quashed.[127] The court emphasised the fact that a charge of concealment of birth can only succeed under Ordinance 10 of 1845 if the child is dead, the offence is not constituted by the concealment of birth of a living child.[128] In *Rex v Verrooi*[129] Acting Judge President (AJP) Buchanan was faced with a similar set of facts as in *Rex v Arends*. Buchanan AJP stated whether the woman believed that the child was dead or not is immaterial, it must be the *dead* body of a child which is concealed.[130] "It was therefore, not competent for the jury, in returning a verdict of not guilty on the charge of murder to find the prisoner guilty of the statutory offence of concealment of birth."[131] The judge held that the facts of the case did not comply with the requirements of the Ordinance, the verdict of the jury was therefore wrong.[132] By agreement of the full court, the conviction was quashed and the prisoner was released.[133] In the review case of *Rex v Emma Madimetae,*[134] judge Wessels doubted whether this was a case of concealment of birth because he stated "had she told her mistress that she had given birth to a child, there could be no concealment of birth"[135] however, the judge refused to accept the evidence of the accused on her statement to her mistress and therefore decided that to throw a child into a sanitary bucket is *per se* concealment of birth.[136] In *Rex v Moses and Another*[137] judge Gardiner dealt with the fact that Ordinance 10 of 1845 made provision

[125] *Rex v Arends* 1913 CPD 194.
[126] *Rex v Arends* 1913 CPD 194.
[127] *Rex v Arends* 1913 CPD 194.
[128] *Rex v Arends* 1913 CPD 194.
[129] 1913 CPD 864.
[130] *Rex v Verrooi* 1913 CPD 865.
[131] *Rex v Verrooi* 1913 CPD 865.
[132] *Rex v Verrooi* 1913 CPD 865.
[133] *Rex v Verrooi* 1913 CPD 865-866.
[134] 1919 TPD 59.
[135] *Rex v Emma Madimetae* 1919 TPD 60.
[136] *Rex v Emma Madimetae* 1919 TPD 60.
[137] *Rex v Emma Madimetae* 1919 CPD 81.

for the punishment of a woman who, after having delivered a child, conceals its birth by hiding it.[138] The same Ordinance made provision that if such woman should be charged with murder her conviction could instead be one of concealment of birth.[139] The judge pointed out that the Ordinance made no provision for the punishment of anyone other than the mother.[140] The judge cited the case of *Rex v Uys and Senden*[141] where it was held that the person who aided and abetted the mother may be charged alongside the mother however in this instance it was sought to extend this by saying that a person who may be charged with concealment of birth does not have to be the mother or the person who aided or abetted the mother.[142] The fact that a person may be charged with murder does not automatically make him guilty of concealment, he must be capable of being charged with concealment in the first instance and in terms of Ordinance 10 of 1845 it is clear that only the mother can be charged with the crime of concealment of birth,[143] as a result judge Gardiner acquitted the accused persons of the crime of concealment of birth.[144] In *Rex v Williams*[145] the court altered a sentence of six months imprisonment with hard labour for the crime of concealment of birth to one of three weeks with hard labour on the grounds that the previous sentence was too severe in light of the fact that the accused was a young girl of 15 years of age and alleged that the "child got mixed up with the after-birth".[146] In *Rex v Van Room and Another*[147] again the question of whether anyone besides the mother

[138] *Rex v Emma Madimetae* 1919 CPD 81.
[139] *Rex v Emma Madimetae* 1919 CPD 81.
[140] *Rex v Emma Madimetae* 1919 CPD 81-82.
[141] 1911 CPD 211.
[142] *Rex v Uys and Senden* 1919 CPD 81-82.
[143] *Rex v Uys and Senden* 1919 CPD 82.
[144] *Rex v Uys and Senden* 1919 CPD 82 the court stated that it is possible in the Transkeian Territories to succeed with a charge of concealment of birth of a child against any person other than the mother in terms of the Native Territories Penal Code Act No. 24 of 1886 s 149 that provides "*Whoever* disposes of the dead body of any child in any manner, with intent to conceal the fact of its birth, whether the child died before, during, or after, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or with fine, or both." The judge further said that a charge of murder could also be brought against a person that was not the mother or that did not aid or abet the mother in terms of s 235 of the Criminal Procedure and Evidence Act 31 of 1917.
[145] 1920 EDL 80.
[146] *Rex v Williams* 1920 EDL 81.
[147] 1920 CPD 695.

can be charged with the crime of concealment of birth came up and judge Searle held that a person cannot be charged as an accessory to the crime of concealment of birth *if the mother is acquitted of the crime*.[148] The statement "if the mother is acquitted of the crime" indicates that there is a possibility that someone other than the mother may be charged with concealment of birth if the mother is found guilty.[149] This is contrary to the decision in *Rex v Moses and Another* where the court said only the mother can be charged with the crime of concealment of birth.[150]

7.3.2 Cases based on the General Law Amendment Act 46 of 1935

The Native Territories Penal Code No. 24 of 1886[151] was deleted by Proclamation 43 of 1936 and replaced by the General Law Amendment Act 46 of 1935. The cases that follow are discussed based on this replacement. In *Rex v Dali*[152] the court decided that it may impose a sentence of imprisonment without the option of a fine, the court pointed out that under the old Cape Ordinance 10 of 1845 the Court had no power to sentence a person convicted of concealment of birth to pay a fine but could only sentence such a person to imprisonment. However, under the General Law Amendment Act 46 of 1935,[153] which replaced the Cape Ordinance, the Courts were given the power to issue a fine instead of a sentence to imprisonment.[154] In terms of the General Law Amendment Act 46 of 1935 one of the requirements that has to be satisfied for a charge of concealment of birth is the disposal of a

[148] *Rex v Van Room and Another* 1920 CPD 696.
[149] Therefore the conviction and sentence of both accused persons were set aside *Rex v Van Room and Another* 1920 CPD 696; The person committing the crime need not necessarily be the mother of the child, it may be any person see Snyman *Criminal Law* (2014) 432.
[150] However see Snyman *Criminal Law* (2014) 432 where it is stated that today in terms of s 113 of the General Law Amendment Act 46 of 1935 any person can commit this crime, much the same as what was applied in the Transkeian territories according to the Native Territories Penal Code Act No. 24 of 1886 see fn 138 supra.
[151] Also referred to as the Transkeian Territories Penal Code.
[152] 1943 EDL 1.
[153] s 113(1).
[154] *Rex v Dali* 1943 EDL 2.

dead body of the child.[155] In *Rex v Lequila*[156] the accused had given birth to a child in the veld where she left it. The court found on review that she had not committed an offence as the child was found alive.[157] The court stated that based on section 113 of Act 46 of 1935 to constitute the offence of concealment of birth the thing disposed of must be the dead body of a child, the child however, was fit and well and being cared for by its mother, the accused.[158] It was ordered that both the conviction and sentence be set aside.[159] In *Rex v Dema*[160] the accused's child died shortly after birth, she then placed the child in a wooden box which stood in front of her bed.[161] The court relied on section 113 of the General Law Amendment Act which uses the word 'disposes'[162] and held that 'disposes' means an act involving some measure of permanence and merely placing a body easily locatable and in full view is not disposing of it.[163] Therefore the court found the accused not guilty of the crime of concealment of birth.[164] In *S v Bengu*[165] the court held that without a body it was not possible to convict the accused of murder or of exposure.[166] In sentencing women for the crime of concealment of birth the courts consider the emotional state that a woman was in when she killed her infant, this is illustrative of the more sympathetic approach towards the perpetrator,[167] as opposed to the death penalty initially being

[155] See *Rex v Oliphant* 1950 1 SA 48 (O).
[156] 1945 EDL 8.
[157] *Rex v Lequila* 1945 EDL 8.
[158] *Rex v Lequila* 1945 EDL 8.
[159] *Rex v Lequila* 1945 EDL 8.
[160] 1947 1 SA 599 (E).
[161] *Rex v Dema* 1947 1 SA 599 (E).
[162] *Rex v Dema* 1947 1 SA 600 (E).
[163] *Rex v Dema* 1947 1 SA 600 (E).
[164] *Rex v Dema* 1947 1 SA 600 (E); In *Rex v Smith* 1918 CPD 260 it was held that transporting a corpse in a suitcase from one place to another amounted to disposal. In *S v Molefe* 2012 2 SACR 574 (GNP) the mother had lied to a sister at a clinic that she had given birth to a child, however the court did not consider this to be "disposal"; Snyman *Criminal Law* (2014) 432.
[165] [1965] 1 All SA 395 (N).
[166] *S v Bengu* [1965] 1 All SA 395 (N).
[167] *S v De Bellocq* 1975 3 SA 538 (T); Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 189.

pronounced in such cases.[168] This sympathetic approach was evident in cases such as *S v De Bellocq.*[169]

With the abandonment of children there are various related crimes that exist either in terms of common law or through statute, such as the crime of concealment of birth, exposure of infants and infanticide.[170] These are besides the actual offence of child abandonment as contained in section 305(3)(*b*) of the Children's Act 38 of 2005. Concealment of birth in terms of South African law was unknown in our common law and was largely influenced by English law as well as Roman-Dutch law.[171] Section 113 of the General Law Amendment Act 46 of 1935 according to the judge in *Rex v Oliphant* echoed English law "The language here employed [s 113] has been borrowed largely from the relevant English Acts".[172] According to Van der Westhuizen "[T]his is an example how English law was received into South African law and became part of South African law. In this way the legislature confirmed that the English law forms part of our law".[173] With regard to the crime of the exposure of an infant, Van der Westhuizen provides that although English law was applied the court still referred to Roman-Dutch sources such as Matthaeus II, Leeuwen and Carpzovius to prove that the crime *crimen infantis expositionis*[174] exists in South African law and that this crime is now a statutory crime

[168] Van der Spuy "Infanticide, slavery and the politics of reproduction at Cape Colony, South Africa, in the 1820s" in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (2002 reprinted 2005) 131; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188; see par 2.4 where this is discussed.

[169] *S v De Bellocq* 1975 3 SA 538 (T).

[170] Or neonaticide which is the killing of the infant within its first 24 hours of life, which forms part of a larger concept of infanticide, which is the killing of an infant within the first year of its life; in this regard see Putkonen, Weizmann-Henelius, Collander, Santtila and Eronen "Neonaticides may be more preventable and heterogenous that previously thought — neonaticides in Finland 1980-2000" 2007 *Archives of Women's Mental Health*.

[171] This crime existed since the Ordinance of 1845; see Snyman *Criminal Law* (2014) 432.

[172] Such as the Offences Against the Person Act of 1861 which originated from its predecessors the Malicious Shooting or Stabbing Act of 1803 and the very start of concealment of birth in the act of 1623 (21 Jac I c 27); *Rex v Oliphant* 1950 1 SA 48 (O) 51; Concealment of birth is now also in the Criminal Procedure Act 51 of 1977 section 239, however prior to this Act there was the Criminal Procedure Act 56 of 1955 Group IV 3rd Schedule, which dealt with the disposing of the body of a child with intent to conceal the fact of its birth and this was dealt with both in terms of s 334 and s 334, which dealt with imprisonment for corrective training and imprisonment for the prevention of crime respectively.

[173] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 189.

[174] This existed in Roman-Dutch law and included firstly cases where someone abandoned a child to avoid parental responsibilities but with no intention to kill the child and secondly where someone abandoned a child with the intent to kill the child. The only reported case, according to Snyman, where someone was charged and convicted

in our law in terms of section 258 of the Criminal Procedure Act 51 of 1977.[175] Therefore the crime of the exposure of a child in terms of South African law is a blend of Roman-Dutch and English law.[176] In *S v Jokasi*,[177] a Zimbabwean case, the judge held that it would be better for a separate crime of infanticide to exist, as the penalty for infanticide would be more fitting instead of convicting the mother of murder and thereby imposing the severe penalty that accompanies such a conviction.[178] The current position in South African law is that, in addition to the crime of exposure, infanticide is a separate statutory crime provided for in section 239 of the Criminal Procedure Act 51 of 1977.[179] Subsection 1 deals with the infanticide aspect namely the killing of a newly-born child. Subsection two, which deals with the concealment of birth aspect, provides that it will not be necessary to prove whether the child died before, at or after birth, echoing the provisions of the General Law Amendment Act:

> "239. Evidence on charge of infanticide or concealment of birth.—(1) At criminal proceedings at which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.
> (2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth."

The crime of infanticide is distinguished from the crime of concealment of birth. The act of killing the newborn amounts to infanticide,[180] whereas disposing of the body of a newborn

of this crime was *R v Adams* 1903 20 SC 556; Snyman *Criminal Law* (2014) 444-445; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 190.
[175] The crime of exposure of an infant is contained in section 258(d) of the Criminal Procedure Act 51 of 1977; Snyman *Criminal Law* (2014) 444.
[176] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 189.
[177] 1987 1 SA 431 (ZCS).
[178] *S v Jokasi* 1987 1 SA 431 (ZCS) 434 and 435.
[179] Different to the situation in the United States where infanticide is charged as either murder or manslaughter; see Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of dumpster baby statutes" 5 2002 *T.M. Cooley J. Prac. & Clinical L.* 115, 124-125; Hoctor *Criminal law in South Africa* (2017) 98 where the author questions the need for this crime; see Kemp, Walker et al *Criminal law in South Africa* (2013) 275 where the authors point out that the elements of infanticide are the same as those for murder.
[180] Kemp and Walker et al *Criminal Law in South Africa* (2013) 275.

amounts to concealment of birth.[181] Therefore, with the concealment of birth, the child must already be dead, as opposed to exposure where the child must be alive at the time of exposure. Killing the child first and then dumping the body of the child will not amount to concealment of birth but to infanticide or alternatively murder.[182] According to the court in *S v Jokasi* the separate crime of infanticide takes into account the circumstances faced by the mother such as emotional hardships:[183]

> "Furthermore it is now thought that mental disturbance following childbirth is not confined exclusively to the effects of giving birth. The Royal College of Psychiatrists described to us four types of circumstances any of which may lead to a disturbed balance of mind... which... would not come within s 4 of the Mental Health Act of 1959. They are the following:
> (1) overwhelming stress from the social environment being highlighted by the birth of a baby, with the emphasis on the unsuitability of the accommodation etc.;
> (2) overwhelming stress from an additional member to a household struggling with poverty;
> (3) psychological injury, and pressures and stress from a husband or other member of a family from the mother's incapacity to arrange the demands of the extra member of the family;
> (4) failure of bonding between mother and child through illness or disability which impairs the development of the mother's capacity to care for the infant."

[181] s 113 General Law Amendment Act 46 of 1935.
[182] Snyman *Criminal Law* (2014) 432 states that the crime of concealment of birth is not a crime against life, it is only applicable if the child is already dead. If a living child is left or exposed then the party may be guilty of the common law crime of exposing an infant; see Hoctor *Criminal Law in South Africa* (2017) 98 where the author states that there is no need for a separate crime of infanticide as every instance of the intentional killing of an infant is murder; Kemp and Walker et al *Criminal Law in South Africa* (2013) 275.
[183] *S v Jokasi* 1987 1 SA 431 (ZCS) 435, quoting the Fourteenth Report of the (English) Criminal A Law Revision Committee published by HMSO as Cmnd 7844 in March 1980; Zimbabwe, Botswana and Lesotho have separate crimes of infanticide. In Zimbabwe a woman who kills her child within six months of the child's birth, which is seen as a time when her mind is disturbed as a result of giving birth, will be liable for infanticide and to imprisonment not exceeding five years; see the Zimbabwean Infanticide Act 27 of 1990; also See Ministry of Gender Equality and Child Welfare, Legal Assistance Centre, UNICEF The Draft Child Care and Protection Act Issues for Public Debate Booklet 2 http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert2.pdf last accessed 2020-02-06.

A person abandoning a child may be charged with murder and attempted murder.[184] The negligent abandonment of a child who dies can also lead to a charge of culpable homicide.[185] However, if a charge of murder or attempted murder cannot be proved the accused may be found guilty of an alternate offence such as the offence of exposing an infant or concealment of birth.[186] In this respect section 258 of the Criminal Procedure Act 51 of 1977 provides:

> "Murder and attempted murder
> If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but-
> *(a)* the offence of culpable homicide;
> *(b)* the offence of assault with intent to do grievous bodily harm;
> *(c)* the offence of robbery;
> *(d)* in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;
> *(e)* the offence of common assault;
> *(f)* the offence of public violence; or
> *(g)* the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,
> the accused may be found guilty of the offence so proved."

In most cases of abandonment in South Africa, as illustrated at the start of this chapter, the baby is abandoned and the mother is unknown, therefore it is impossible to make an arrest based on the charges laid out in section 258 of the Criminal Procedure Act 51 of 1977 or in

[184] Hunt and Milton *South African Criminal Law and Procedure* (1990) 366; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 190; Snyman *Criminal Law* (2014) 432; According to Vorster "Is abandonment murder?" 13 June 2019 *Daily Maverick* when the police find an abandoned child that is dead they assume that the child was stillborn and dumped unless there are obvious signs of murder. The police then proceed to open a case of concealment of birth for dead abandoned babies rather than investigating it as murder; see s 6 of this chapter where the same approach is followed according to Namibian law.

[185] Criminal Procedure Act 51 of 1977 s 259(c); Hunt and Milton *South African Criminal Law and Procedure* (1990) 366; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 190; see s 6 of this chapter where the same approach is followed according to Namibian law; Snyman *Criminal Law* (2014) 432; if a child is simply abandoned and does not die the person may be charged with the common law crime of exposure, see Snyman *Criminal Law* (2014) 432.

[186] There exists a fine line between these offences as can be seen in section 258(d) where both can serve as an alternative to murder or attempted murder; It is submitted that concealment of birth in this instance is used as an alternative where it cannot be determined whether the child died due to exposure or prior to exposure.

terms of section 239, which provides for both infanticide and concealment of birth. In terms of the crime of concealment of birth the General Law Amendment Act was amended by the Judicial Matters Amendment Act 66 of 2008 to include the words "newly born" child as opposed to just "child" used previously. The amendment also removed the onus placed on the accused to prove the lack of intent to conceal the child's birth and thus departing from the usual presumption of innocence until proven guilty, which was according to Hoctor[187] and Snyman[188] unconstitutional. The deletion of the offending provision ensured constitutionality.[189] The initial placing of the onus on the accused mirrored the provisions of the English Statute of 1623.

Hoctor and Carnelley note that the concealment of a child's body is also a violation of the Births and Deaths Registration Act 51 of 1992.[190] From the above it is clear that several parallel offences exist, some of which impose a higher sentence than the three years imposed by a sentence for concealment of birth. However, according to Hoctor and Carnelley this does not weaken the need for the concealment offence, which primary purpose is to aid state investigation of infant death.[191] Currently, no statistics exist with regard to the number of children abandoned annually and reliance is placed on the statistics from 2010 gathered by the National Adoption Coalition of South Africa. Part of the problem lies in the concealment of the body of the newborn. When a newborn's body is concealed it impedes forensic examination

[187] Hoctor, Milton, Cowling *South African Criminal Law and Procedure* Vol III 1997 D2-10.
[188] Snyman *Criminal Law* (2014) 433.
[189] This was similar to the English Act of 1623 (21 Jac I c 27), which although the woman did not need to prove the lack of intent to conceal the child's birth, it required the woman to prove that the child was born dead and thus also placed the onus on the woman and was also contrary to the principle of "innocent until proven guilty".
[190] "It makes no difference whether the child is alive at birth as the Act makes provision for criminal liability for both a failure to register live births in terms of s 9(1) and still-births in terms of s 18"; see Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 743; Heaton *The South African Law of Persons* (2017) 8 where the registration of birth of an abandoned and orphaned child is discussed. In respect of an abandoned child an enquiry is held by a social worker in terms of the Children's Act 38 of 2005, see s 12(1) of the Act. Thereafter, notice of birth is given by the social worker, who assigns names for the child. The same applies in respect of an orphan; see also Boezaart *Law of Persons* (2016) 28; Barratt *A Law of Persons and the Family* (2017) 33.
[191] Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 743.

of the body and prevents the determination of how and when death occurred and thus the issue of criminal liability goes unanswered.[192] Hoctor and Carnelley provide that section 113 of the General Law Amendment Act heeds fair warning of criminal liability and is constitutionally sound.[193] They go on to provide that it is founded upon the significant need to properly investigate the death of a vulnerable group in society, namely newborn children, and is thus necessary.[194] They do however opine that empathy for the accused (more often than not the child's mother) should, as history illustrates, be taken into account.[195] Stevens deals with the problematic aspects of this offence which is that "dispose" and "body of a child" are not defined in the Act.[196] These problematic aspects are discussed in detail below.

7.3.3 Challenges with the crime of concealment of birth

7.3.3.1 *S v Molefe* 2012 2 SACR 574 (GNP)

The first reported case to deal with the crime of concealment of birth since 1980 is *S v Molefe*.[197] In this case the accused an adult female, was convicted in the Magistrates' Court of Bloemhof on a charge of concealment of birth in terms of section 113(1), (2) and (3) of the Act

[192] Supreme Court of Canada *R v Levkovic* 2013 SCC 25; also see Mathew, Abrahams, Jewkes, Martin, Lombard "The epidemiology of child homicides in South Africa" 31 May 2013 *Bulletin of the World Health Organisation* 562-568 3 where four cases of abandonment were excluded from the subgroup because of the decomposition of the bodies the causes of death could not be determined; Du Toit-Prinsloo, Pickles and Saayman "Managing the remains of fetuses and abandoned infants: A call to urgently review South African law and medicolegal practice" June 2016, Vol. 106, No. 6 *SAMJ Medicine and the Law* "However, in respect of all possible criminal offences (concealment of birth, exposure or murder), postmortem examination of remains can be very challenging and even rendered fruitless as a result of decomposition, postmortem trauma or predation" and "A criminal charge may not follow simply because essential forensic evidence could not be objectively established" 579.

[193] Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 743-744.

[194] Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 744.

[195] Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 744.

[196] Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 145; also discussed in Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 732.

[197] *S v Molefe* 2012 2 SACR 574 (GNP); see Stevens "Assessing the interpretation of the elements of "dispose" and "child" for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP)" 2014 *Obiter* 147.

in that she had unlawfully and with the intent to conceal the fact of the birth of the child, attempted to dispose of the body of the child.[198] She pleaded guilty and stated that she denied to a sister at a clinic that she had given birth to a stillborn child.[199] She further stated that when she was confronted by police she showed them the body of the child in a bucket in her house.[200] It was determined that the child was prematurely born and was dead at the time of its birth.[201] The Director of Public Prosecutions (DPP) did not give written authorisation for the prosecution of the crime.[202] The Magistrate convicted the accused but referred the matter for special review on the grounds that the DPP did not give written authorisation for the prosecution to take place.[203]

On review, Judge Rabie set aside the conviction due to the fact that no written authorisation for prosecution was obtained and this was viewed as a mandatory prerequisite.[204] It was also held that the conviction could not be sustained in respect of the essential elements of the offence of concealment of birth.[205] The Judge held that the accused did not comply with the elements of the offence as she did not dispose of the body of the newborn.[206] Only lying to the sister is not admitting to an essential element of the offence.[207] It was held that "disposing" required some act or measure of permanence, and not merely leaving the body of the child in a place where it may easily be found.[208] Judge Rabie then went on to discuss another reason why the conviction had to be set aside, this related to the definition of "child" for the purposes of section

[198] *S v Molefe* 2012 2 SACR 574 (GNP) 574-575.
[199] *S v Molefe* 2012 2 SACR 574 (GNP) 575; Snyman *Criminal Law* (2014) 432 fn 134.
[200] *S v Molefe* 2012 2 SACR 574 (GNP) 575.
[201] *S v Molefe* 2012 2 SACR 574 (GNP) 575.
[202] *S v Molefe* 2012 2 SACR 574 (GNP) 576.
[203] *S v Molefe* 2012 2 SACR 574 (GNP) 576.
[204] *S v Molefe* 2012 2 SACR 574 (GNP) 576.
[205] *S v Molefe* 2012 2 SACR 574 (GNP) 577.
[206] *S v Molefe* 2012 2 SACR 574 (GNP) 577.
[207] *S v Molefe* 2012 2 SACR 574 (GNP) 577.
[208] *S v Molefe* 2012 2 SACR 574 (GNP) 577; also see *R v Dema* 1947 1 SA 599 (E) 600 where the court held that some measure of permanence is required and to place a body on the floor or on a table or bed is not sufficient. It must be placed somewhere where it is intended to remain.

113 of the Act.[209] Here the judge held that there must be evidence that the foetus had the probability of being born alive and as such was a viable child.[210] The court referred to the matter of *S v Jasi*[211] which held that a "child" is one who reached a certain stage of development, which renders the child capable of being born alive and to have independent circulation from its mother, and this is so regardless of the duration of the pregnancy.[212]

7.3.3.1.1 The element of "disposal"

Firstly, this judgment confirms that there has to be a degree of permanence in order to comply with this offence[213] and therefore Stevens surmises that placing the body of a child in a bag next to a rubbish bin in a public street will thus not amount to "dispose" in terms of section 113 of the Act because it could be argued that there would not be a measure of permanence involved.[214] This poses a problem, as discussed at the start of this chapter[215] what if a body of a dead infant is found in an open field, toilet, drain, or rubbish dump, doorstep or next to the road? It may be safely assumed that the required permanence will be lacking in these instances and thus a charge and conviction of the crime of concealment of birth will not be possible.[216] In *S v Jasi* there was a degree of permanence involved because the accused placed the dead body of the child in a plastic bag and threw it in a toilet pit. Here the intent to conceal the fact of the child's birth could be inferred.[217] Another case where "permanence" could be inferred was the matter of *S v Smith*[218] where it was held that the transportation of the body from one

[209] *S v Molefe* 2012 2 SACR 574 (GNP) 578.
[210] *S v Molefe* 2012 2 SACR 574 (GNP) 578.
[211] 1994 1 SACR 568 (Z).
[212] *S v Jasi* 1994 1 SACR 568 (Z) para 574A-B, 578; see par 7.3.3.1.2 below for a discussion on the element of "child".
[213] Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 147.
[214] Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 147.
[215] See par 1.
[216] Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 147.
[217] Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 147.
[218] 1918 CPD 260.

place to another amounted to disposal. Furthermore, in this case the actions of the accused in cleaning the floor and hiding the body amounted to intent to conceal the fact of its birth.[219] As a result merely placing a child's body in an easily accessible area will not suffice for a charge of concealment of birth in terms of the Act. However, according to Snyman, the disposal of a child's body must be accompanied by a certain intention, that is to conceal the fact of its birth.[220] If this intention is present then it follows that the intention to dispose of the body of the child is also present.[221] If Snyman's approach is followed it will be easier to prove disposal where the body of a child is disposed in an open field or any of the areas listed above.

7.3.3.1.2 The element of "child"

In *S v Molefe* Judge Rabie held that the foetus or child must have reached a stage of development where it was capable of being born alive and exist separate from its mother.[222] The court in *casu* referred to the Zimbabwean decision of Chief Justice Van Rhyn in *S v Manngo*[223] where it was held that the offence of concealment of birth cannot be committed "unless the child had arrived at that stage of maturity at the time of birth that it might have been born a living child".[224] In the *S v Jasi* judgment heavy reliance was placed on the viability of

[219] Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 148.
[220] Snyman *Criminal Law* (2014) 432.
[221] Snyman *Criminal Law* (2014) 432.
[222] *S v Molefe* 2012 (2) SACR 574 (GNP) 578; Snyman *Criminal Law* (2014) 432; also see *R v Matthews* 1943 CPD 8 where the court held that a foetus qualifies as a child for the purposes of the act only if it has reached a stage of development that its existence apart from its mother is a reasonable probability; *S v Manngo* 1980 3 SA 1041 (V) the foetus was only three months old and therefore the crime cannot be committed in respect of it, it has not reached a stage of maturity to be born alive.
[223] 1980 3 SA 1041 (V) 1041; see Snyman *Criminal Law* (2014) 432.
[224] In this respect see also *R v Matthews* 1943 CPD 8 9 as well as *S v Madombwe* 1977 3 SA 1008 (R); In *R v Berriman* 1854 6 Cox CC 388 Judge Erle held in respect of the crime of concealment of birth "this offence cannot be committed unless the child has arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it would have been born alive." "If she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may perhaps, be safely assumed that, under seven months, the great probability is that the child would not be born alive"; Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 736 provide that this case added to the confusion in respect of the definition of child; see Boezaart *The Law of Persons* (2016) 12-13 where the different

the foetus, and its separate and independent existence from its mother, this as opposed to the reasoning of the court in *S v Madombwe* where a "child" was a foetus of not fewer than 28 weeks old.[225] Thus, duration of pregnancy and viability are not necessarily the same thing.[226] The Births and Deaths Registration Act 51 of 1992 defines a stillborn child as one who existed for "at least 26 weeks *intra uterine* but showed no signs of life after complete birth".[227] Milton and Fuller[228] suggest that due to the connection between the crime of concealment of birth and the registration of births the best approach would be to regard a child as "any being whose birth required registration in terms of the legislation governing registration of births".[229] This approach accords with the viability option as relied upon by the court in *S v Jasi*. The term "birth" is not used consistently throughout legislation, for example section 239(1) of the Criminal Procedure Act 51 of 1977 states that the child has been born if he or she has breathed,

requirements for live birth are discussed; see also Carnelley, Skelton et al *Law of Persons in South Africa* (2019) 22; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32; see also Heaton *The South African Law of Persons* (2017) 7; Boezaart *Child Law in South Africa* (2017) 4-6.

[225] See Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 149.

[226] These conflicting approaches were considered by Sibanda J in *S v Muguti* 1998 JOL 2684 (ZH) which referred to them as mutually destructive schools of thought as to the meaning of the word "child" para 12-13 and 13-14. The court went on to favour the approach in *Madombwe* (consistent with South African sources) as opposed to the decision in *Jasi* (consistent with English law); Van der Vyfer and Joubert *Persone en Familiereg* (1991) 59; see Boezaart *The Law of Persons* (2016) 12-13 who agrees with the exclusion of the requirement of viability in assigning legal subjectivity at birth. The implication of viability as an added requirement is that if the child is born but medically has no chance of survival, the child is not recognised as a legal subject even if he or she is completely separated from the mother's body and lives for some time. However, it is not seen as a requirement for the assignment of legal subjectivity in terms of South African law; see Heaton *The South African Law of Persons* (2017) 7; also see Boezaart *Child Law in South Africa* (2017) 6; see Van Heerden, Cockrell and Keightley *Boberg's Law of Persons and the Family* (1999) 29 fn 3 where viability is discussed and most authors agree that it should not be a separate requirement for birth as the moment when legal subjectivity starts.

[227] s 1; Heaton *The South African Law of Persons* (2017) 8 where the registration of birth of an abandoned and orphaned child is discussed. In respect of an abandoned child an enquiry is held by a social worker in terms of the Children's Act 38 of 2005, see s 12(1) of the Act. Thereafter, notice of birth is given by the social worker, who assigns names for the child. The same applies in respect of an orphan; see also Boezaart *Law of Persons* (2016) 28; Barratt *Law of Persons and the Family* (2017) 33.

[228] Milton and Fuller *South African Criminal Law and Procedure Vol III Statutory Offences* (1971) 271 cited with approval in *S v Manngo* 1980 3 SA 1041 (V).

[229] Hoctor and Carnelley "The purpose and ambit of the offence of concealment of birth *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 *Obiter* 737; see the Registration of Births and Deaths Registration Act 51 of 1992; also see Hoctor, Milton, Cowling *SA Criminal Law and Procedure* Vol III 1997 D2-9; Heaton *The South African Law of Persons* (2017) 8 where the registration of birth of an abandoned and orphaned child is discussed; In respect of an abandoned child an enquiry is held by a social worker in terms of the Children's Act 38 of 2005, see s 12(1) of the Act. Thereafter, notice of birth is given by the social worker, who assigns names for the child. The same applies in respect of an orphan; see also Boezaart *Law of Persons* (2016) 28; Barratt *Law of Persons and the Family* (2017) 33; see Appell "Certifying identity" 42 XXX 2014 *Capital University Law Review* 34 on the birth certificate as family creator and gatekeeper.

it need not have been independent circulation and it is not necessary for the child to have been completely separated from its mother's body. Here birth is narrowly defined and depends on the presence or absence of one specific sign of life which is breathing.[230] This is contrary to the court's decision in *S v Jasi* where reliance was placed on separate and independent existence of the foetus apart from its mother. However, in terms of section 1(1) of the Births and Deaths Registration Act 51 of 1992 the definition of birth intends a child born "alive". No specific sign of life is required and thus any sign of life will suffice to validate a birth for the purposes of registration.[231] Therefore a wider meaning of birth is given in the Birth and Deaths Registration Act than that which is given in the Criminal Procedure Act, albeit only for the purposes of registration.[232] Another challenge to the definition of birth are the requirements that need to be satisfied in order for legal subjectivity to be granted. In order for legal subjectivity to be granted certain common law requirements must be satisfied such as the fact that the foetus must be separate from the mother's body[233] and the foetus must have lived independently after separation.[234] Some authors believe that viability should be a third requirement for the granting

[230] Boezaart *The Law of Persons* (2016) 12; see also Carnelley and Skelton et al *Law of Persons in South Africa* (2019) 22; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.

[231] Boezaart *The Law of Persons* (2016) 12; see also Carnelley and Skelton et al *Law of Persons in South Africa* (2019) 22; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32; see Heaton *The South African Law of Persons* (2017) 8 where the registration of birth of an abandoned and orphaned child is discussed. In respect of an abandoned child an enquiry is held by a social worker in terms of the Children's Act 38 of 2005, see s 12(1) of the Act. Thereafter, notice of birth is given by the social worker, who assigns names for the child. The same applies in respect of an orphan; see also Boezaart *Law of Persons* (2016) 28; Barratt *Law of Persons and the Family* (2017) 33.

[232] Boezaart *The Law of Persons* (2016) 12; see also Carnelley and Skelton et al *Law of Persons in South Africa* (2019) 22; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.

[233] Cutting of the umbilical cord is not necessary and completion of birth is also not influenced by the use of scientific aids; see Boezaart *The Law of Persons* (2016) 13; Voet 1 5 5; D 25 4 1 1, 35 2 9 1; C 6 29 3; Again this is different to s 239 of the Criminal Procedure Act 51 of 1977 which provides that the only requirement is breathing and such breathing need not be independent and the foetus need not have been completely separated from its mother's body; see also Carnelley and Skelton et al *Law of Persons in South Africa* (2019) 22; Heaton *The South African Law of Persons* (2017) 7; Boezaart *Child Law in South Africa* (2017) 4-5.

[234] Even if only for a moment, here medical evidence is used to determine whether there was any sign of life; see Boezaart *The Law of Persons* (2016) 13; also see D 50 16 129; C 6 29 3; see also Carnelley and Skelton et al *Law of Persons in South Africa* (2019) 22; Heaton *The South African Law of Persons* (2017) 7; Boezaart *Child Law in South Africa* (2017) 4-5.

of legal subjectivity at birth and others such as Boezaart disagree with this proposal.[235] The court in *Molefe* was not clear as to what the legal position is in South Africa, Judge Rabie referred to both the maturity at the time of birth as well as the 28 week gestation period, thus adopting a somewhat confusing approach.[236] Can a foetus that only has a 25 week gestation period, but that shows signs of being sufficiently mature, be regarded as a "child" in terms of the crime of concealment of birth? The preferred approach in terms of South African law according to the authors is the one adopted in *Madombwe*, which provides that the child must be older than 28 weeks in order to be regarded as a "child".[237] With regard to legal subjectivity in South African law viability does not play a role in the assignment thereof.[238]

This thesis finds the law on concealment of birth to be ineffective for three reasons. Firstly, the *S v Molefe* matter is the first reported case of concealment of birth since 1980. This is not evidence of the fact that concealment is not occurring, quite the contrary, the discovery of the bodies of newborns are a regular occurrence. This is instead evidence of the fact that this crime is not being prosecuted.[239] Therefore this thesis poses the question "what is the purpose of a law that is not being enforced against mothers who commit this offence?". Secondly, the issue of "permanence" is an important one that needs addressing. According to media reports, babies are frequently abandoned in unsafe places, drains, rubbish dumps, open fields and toilets are

[235] Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* (1982) 385; Boezaart *The Law of Persons* (2016) 13; see also Carnelley and Skelton et al *Law of Persons in South Africa* (2019) 22; Heaton *The South African Law of Persons* (2017) 7.
[236] *S v Molefe* 2012 2 SACR 574 (GNP) 578.
[237] This is the general trend see *Rance v Mid-Downs Health Authority* 1991 1 ALL ER 801 (QBD) 817-819 where the British Parliament created a rebuttable presumption that a child older than 28 weeks is capable of being born alive; see also *C v S* 1987 1 All ER 1230 1242; see *S v Mshumpa and Another* 2008 1 SACR 126 (E) for more on the "viability" aspect.
[238] Boezaart *Child Law* (2017) 13; Heaton *The South African Law of Persons* (2017) 7; Carnelley and Skelton et al *Law of Persons in South Africa* (2019) 23; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.
[239] It is submitted that prosecutions are rare because persons who commit this crime are instead charged with murder, culpable homicide or attempted murder alternatively because persons who commit this crime are not easily locatable; see Snyman *Criminal Law* (2014) 432.

common examples and according to Stevens placing the body of a child in a bag next to a rubbish bin in a public street will not amount to "dispose" for purposes of section 113 of the Act,[240] thus the abandonment of babies at the mentioned places will in all probability not amount to disposal either. This is a further indication that the law surrounding concealment of birth cannot be used to effectively prosecute such an offence as the requirements of disposal are too stringent.[241] Lastly, the issue of viability at 28 weeks or the ability to survive independently from its mother is an obstacle in determining the definition of a "child" and the court in *S v Molefe* has failed to answer as to which approach is followed. This serves as an obstacle because if a child's body is discovered and is sufficiently intact for a forensic examination to be conducted it could be found that the child did in actual fact breathe but was younger than 28 weeks. Will the Director of Public Prosecutions (DPP) in this instance order a prosecution in terms of section 113 on the basis that the child lived independently from its mother or will the DPP decline to prosecute on the grounds that the child was younger than 28 weeks? The Act refers to the body of a newly born child but goes no further to define such a child. This thesis avers that this law is not serving its intended purpose, it is neither a deterrent to would be "concealers" (thereby saving the life of the child in certain instances where the child is alive before being killed and then concealed), nor does it appear that it is being implemented because of the uncertainty regarding the "permanence" aspect of disposal and the uncertainty surrounding the definition of a "child". Furthermore, the overwhelming rate of infant abandonment, and a shortage of police to investigate each and every case, renders the application of the law on concealment of birth, infanticide and exposure[242], almost an impossible task.

[240] Stevens "Assessing the Interpretation of the elements of 'dispose' and 'child' for purposes of establishing the offence concealment of birth – *S v Molefe* 2012 (2) SACR 574 (GNP) 2014 *Obiter* 147.
[241] However see Snyman *Criminal Law* (2014) 432 where the author mentions that disposal only needs to be accompanied by intention to conceal the fact of the infant's birth for it to amount to disposal.
[242] Where a living child is abandoned in life threatening circumstances; see Snyman *Criminal Law* (2014) 444.

7.4 INFANT ABANDONMENT IN TERMS OF THE CHILDREN'S ACT 38 OF 2005

7.4.1 The Current Children's Act 38 of 2005

Section 1 of the Children's Act 38 of 2005 (hereinafter referred to as the Children's Act) defines "abandoned" as:

> "'abandoned', in relation to a child, means a child who—
> (*a*) has obviously been deserted by the parent, guardian or caregiver;
> or
> (*b*) has, for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least three months;"

It also defines "orphan" as a child with no surviving parent that cares for him or her. In section 150(1)(*a*) of the Act an abandoned and orphaned child is included in the definition of a "child in need of care and protection" by stating that "a child is in need of protection if such a child has been abandoned or orphaned and does not have the ability to support him or herself and such inability is readily apparent". Section 236 of the Act provides that consent by a parent or guardian to the adoption of a child is not required "if the parent or guardian has abandoned the child, or the whereabouts of that parent or guardian cannot be established, or the identity of that parent or guardian is unknown".[243] A person who abandons a child may be charged in terms of section 305 of the Act, which provides:

> "(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person—
> (*a*) abuses or deliberately neglects the child; or
> (*b*) abandons the child."

[243] s 236(1)(*b*).

Such a person may also be guilty in terms of subsection 4 which states: "A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance." A person found guilty of the abandonment of a child may be liable to a fine or to imprisonment not exceeding ten years or to both in terms of subsection 6 and if found guilty of this more than once he or she may be liable to imprisonment of up to 20 years in terms of subsection 7. Further provisions that deal with abandoned children are section 157(3) which stipulate that "a very young child who has been orphaned or abandoned by its parents must be made available for adoption in the prescribed manner and within the prescribed period except when this is not in the best interests of the child".[244] In terms of section 160 of the Act the Minister may make regulations prescribing procedures to determine whether a child has been abandoned or orphaned.[245] If a child has been abandoned by his or her biological parents the children's court may place the child in foster care with a family member,[246] and parental rights and responsibilities may be granted to a foster parent.[247] Lastly, an abandoned child is also regarded as "adoptable" in terms of section 230(3)(*c*) of the Act.

Thus the law prescribes the process that should be followed once a child has been abandoned however section 186(2)(*a*) states that the child *may* (own emphasis) be placed in foster care with a family member. If an infant is abandoned, in most cases the identity of the family members and their whereabouts are unknown, therefore placement with a family member becomes impossible. Section 157(3) provides that an orphaned or abandoned child *must* (own emphasis) be made available for adoption. In terms of these provisions, it seems that trying to

[244] See the next section on the Draft Children's Amendment Bill for the proposed amendment of this section, discussed below.
[245] s 160(c); also see s 253(a) of the Act; see procedures conducted by the Door of Hope after a child has been abandoned.
[246] s 186(2)(*a*).
[247] s 188(3)(*a*).

place the child in foster care is not a prerequisite as the word "may" is used whereas the law commands the placing of these children up for adoption with the word "must". This is not reflective of the current situation with the practice of adoption being inhibited.[248] This is discussed hereunder.[249]

7.4.2 The Draft Children's Amendment Bill 2018 and 2019[250]

Two versions of the bill are discussed below as in some cases the first draft bill had proposed changes that were removed in the latest draft bill. The implications of this removal, whether positive or negative, are also analysed. The Draft Children's Amendment Bill of 2018[251] is referred to as the first draft bill and the Draft Children's Amendment Bill of 2019 is referred to as the latest draft bill.[252] Only the relevant sections as it pertains to abandoned and sometimes orphaned children are discussed. Further, only the relevant sections where an amendment has been proposed are dealt with.

7.4.2.1 Definition of "abandoned"

> "'abandoned', in relation to a child, means a child who—
> (*a*) has obviously been deserted by the parent, guardian or caregiver; or
> (*b*) has, for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least three months;"

The first draft bill is proposing a change to the definition of "abandoned" by including provision (c) which provides that the child must have "no knowledge as to the whereabouts of the parent, guardian or caregiver". The latest draft bill tables a further change in the definition

[248] Draft Children's Amendment Bill 2019.
[249] Heaton *The South African Law of Persons* (2017) 8 where the registration of birth of an abandoned and orphaned child is discussed. In respect of an abandoned child an enquiry is held by a social worker in terms of the Children's Act 38 of 2005, see s 12(1) of the Act. Thereafter, notice of birth is given by the social worker, who assigns names for the child. The same applies in respect of an orphan; see also Boezaart *Law of Persons* (2016) 28; Barratt *Law of Persons and the Family* (2017) 33.
[250] As of 3 December 2019 this Bill has not been tabled in Parliament.
[251] Vol. 640 29 October 2018 No. 42005.
[252] Draft Children's Amendment Bill, 2019 was published as Government Notice No 244 dated 25 February 2019 in Government Gazette No 42248 of the same date.

of an abandoned child provision (c), which it further extended to include the fact that the relevant authorities are also unable to ascertain the whereabouts of the parent, guardian or caregiver. The latter definition provides alternatives from subsections (a) to (c), they do not all need to be met or satisfied for a child to be defined as an abandoned child. Therefore, it is sufficient if only one of the requirements are met in order for a child to be classified as an abandoned child.[253]

7.4.2.2 Definition of "orphan"

"'orphan' means a child who has no surviving parent caring for him or her;"

The first draft bill limits the definition of orphan to a child "whose biological or adoptive parents are dead", which requires that both parents should be dead. The latest draft bill rectified this by specifying "whose parent or both parents are deceased". This extends the definition of an orphan to include a child who has lost only one parent[254] but fails to mention "adoptive parents" as previously stated in the first draft bill. However, it is clear from the definition of "parent" in the Children's Act that it already includes adoptive parents, therefore there was no need to include adoptive parents in this provision. According to Boezaart, the words "caring for him or her" already extended the original definition to both double orphans as well as single

[253] Boezaart *Child Law in South Africa* (2017) 205-209 discusses an abandoned child as a child in need of care and protection. This is ultimately determined by a social worker see s 155(2) of the Children's Act 38 of 2005.

[254] See Vorster "Regressive and deeply flawed, the Children's Amendment Bill is rushed to the new parliament" 29 May 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-05-29-regressive-and-deeply-flawed-the-childrens-amendment-bill-is-rushed-to-the-new-parliament/?fbclid=IwAR2N-ctuM_2a-yY-lVEvSpj1lyMkSMWlHVv-UcYDxPrBf_JpYQZTY73s6A0 last accessed on 2019-06-24, where she states: "On the contrary, in its current form, the bill could make the problem worse because the wording of the revised bill extends the definition of an orphan to legally include all children who have lost one or both parents. The impact is that the already overburdened foster care system could now grow to include as many as 1.4 million children (the number of children classified as orphans and eligible under that definition)"; However, in this regard see Boezaart *Child Law in South Africa* (2017) 206 who points out that in fact the words "caring for him or her", in the original act prior to the Draft Amendment Bill, already included both double orphans as well as single orphans because it included the situation where either the biological mother or father has died but the surviving parent is not caring for the child; This affects a significant amount of children see Hall, Richter, Mokomane and Lake (eds) *South African Child Gauge* (2018) 132; Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Lewis states that adoption in all probability seems like a quicker and cheaper way of solving the problems of the care system (referring to the care system in England and Wales) than trying to improve the foster care system; Lewis "Adoption: The nature of policy shifts in England and Wales, 1972-2002" in Bainham *Parents and Children* (2008) 567.

orphans, therefore it is submitted that the legislature in this regard just clarified an existing position.[255]

7.4.2.3 Section 150(1)(*a*) – child in need of care and protection

> "150. Child in need of care and protection. — (1) A child is in need of care and protection if such a child—
>
> *(a)* has been abandoned or orphaned and does not have the ability to support himself or herself and such inability is readily apparent;"

There is a proposed amendment to section 150(1)(*a*) which in terms of the first draft bill will limit the definition of children in need of care and protection to exclude those that are in the care of a family member. However, the latest draft bill completely cancels any changes previously suggested in the first draft bill to section 150(1)(*a*) thus leaving the ambit of a child in need of care and protection wide enough to include a child who may be in familial care.[256]

7.4.2.4 Section 157(3) – court orders to be aimed at securing stability in child's life

[255] Boezaart *Child Law in South Africa* (2017) 206.

[256] See Boezaart *Child Law in South Africa* (2017) 207-209 and 210; Two cases were decided that influenced the inclusion of children in familial care under the definition of a child in need of care and protection. These cases concerned orphans living with an aunt (SS case) and grandmother (Manana case) and the court placed the children in formal foster care with their family members and awarded foster care grants in respect of each of the children. *SS v Presiding Officer of the Children's Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) and *Manana v The Presiding Officer of the Children's Court: District of Krugersdorp* 2013 4 SA 379 (GSJ); For the implications of this see Pieterse, Chairperson of the NACSA "Understanding proposed amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica*, available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; also see Vorster "Regressive and deeply flawed, the Children's Amendment Bill is rushed to the new parliament" 29 May 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-05-29-regressive-and-deeply-flawed-the-childrens-amendment-bill-is-rushed-to-the-new-parliament/?fbclid=IwAR2N-ctuM_2a-yY-lVEvSpj1lyMkSMWlHVv-UcYDxPrBf_JpYQZTY73s6A0 last accessed on 2019-06-24, where she states "If the clause, which was thoroughly negotiated with children's rights groups and present in the version of the bill published in the Government Gazette in October had been retained, it would have freed children in kinship care from being included in the foster care system and its accompanying court orders, social worker supervision, and massive delays in accessing a social grant"; see also Proudlock and Rohrs "Recent developments in law and policy affecting children" in Hall et al (eds) *South African Child Gauge* (2018) 18 which commented on the initial proposed amendment of s 150(1)(*a*), such amendment would have complemented the Social Assistance Amendment Bill which aims to provide more accessible financial support to relatives caring for orphans as these relatives would have been able to access the Child Support Grant without the child being placed in alternative care by the social worker. However, now the proposed amendments to this section have been discarded.

> "(3) A very young child who has been orphaned or abandoned by its parents must be made available for adoption in the prescribed manner and within the prescribed period except when this is not in the best interests of the child."

In terms of the first draft bill it is proposed that the words "a very young" be removed and replaced with the words "less than three years of age". The latest draft bill suggests the additional removal of the words "by its parents" thus acknowledging the fact that a child may be abandoned by its guardians, foster parents or a caregiver and not necessarily only by its parents.[257]

7.4.2.5 Section 186(2) – duration of foster care placement

> "(2) A children's court may, despite the provisions of section 159 (1) (a) regarding the duration of a court order and after having considered the need for creating stability in the child's life, place a child in foster care with a family member for more than two years, extend such an order for more than two years at a time or order that the foster care placement subsists until the child turns 18 years, if—
> *(a)* the child has been abandoned by the biological parents; or"

In terms of the first draft bill, a proposal was made to remove the words "for more than two years, extend such an order for more than two years at a time" and this position stayed the same with the latest draft bill. The result of this amendment is that there would be no renewal of foster care orders, they will remain in place indefinitely but inspections will be conducted annually to monitor and evaluate the placement.[258]

[257] Boezaart *Child Law in South Africa* (2017) 172; see also reg 56 of the Children's Act 38 of 2005 which provides specific guidelines to the social worker to determine whether the child has been orphaned or abandoned. Certain express requirements include the placement of an advertisement in a local newspaper, the procurement of death certificates of parents and an affidavit testifying to the abandonment of the child to be complied with before any child may be considered orphaned or abandoned.

[258] See s 186(3) of the Draft Children's Amendment Bill 2018 for the changes from one visit every two years by a social service practitioner to once a year, this pertains to children placed in foster care; This is in line with reg 55(2) which tries to establish a more permanent placement option to secure stability in the child's life, foster care is the first choice in this regard; also see Boezaart *Child Law in South Africa* (2017) 209, where the author opines that the foster care system has primarily been used for poverty alleviation since the early 2000s where relatives, taking care of orphaned children, were encouraged to apply for foster care grants; also see Proudlock and Rohrs "Recent developments in law and policy affecting children" in Hall et al (eds) *South African Child Gauge* (2018) 14, 15 where the draft Child Care and Protection policy is discussed, making foster care grants an early

7.5 OTHER AVAILABLE OPTIONS BESIDES INFANT ABANDONMENT

Hereunder the options available in lieu of abandonment and in terms of the South African law are briefly discussed. These options include adoption as well as abortion. As this is not the focus of this thesis these options are only dealt with briefly, outlining that they exist; their content; their flaws (why are they not being utilised) and any proposed amendments by the Draft Children's Amendment Bills.

7.5.1 Adoption

In terms of South African law, adoption is regulated by the Children's Act 38 of 2005 chapter 15 sections 228 to 253. The purposes of adoption as outlined by the Act in section 229 include to:

> "(*a*) protect and nurture children by providing a safe, healthy environment with positive support; and
> *(b)* promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime."

"Adoption involves the legal transfer of a child, who then becomes the responsibility of its new adoptive parents."[259] In terms of section 230(3)(*c*) a child is regarded as adoptable if the child has been abandoned. This assessment is made by a social worker[260] and adoption is possible if it is determined to be in the best interests of the child.[261] In terms of an abandoned child the

intervention system; also see Hall and Sambu "Income poverty, unemployment and social grants" in Hall et al (eds) *South African Child Gauge* (2018) 137; for more on the effects of long-term fostering see Schofield "Parental responsibility and parenting – the needs of accommodated children in long-term foster-care" 12 2000 *Child and Family Law Quarterly* 345-361.

[259] Lewis "Adoption: The nature of policy shifts in England and Wales, 1972-2002" in Bainham *Parents and Children* (2008) 567.

[260] s 230(2) of the Children's Act 38 of 2005; Domingo "Adoption, artificial fertilization and surrogate motherhood" in Barratt *Law of Persons and the Family* (2017) 210-211; for more on the history of adoption legislation in South Africa see Ferreira "The origin of adoption in South Africa" 13 2 2007 *Fundamina* 1-10; Boezaart *Child Law in South Africa* (2017) 164.

[261] s 230(1)(*a*) of the Children's Act 38 of 2005; Domingo "Adoption, artificial fertilization and surrogate motherhood" in Barratt *Law of Persons and the Family* (2017) 210-211; for more on the history of adoption

child is usually abandoned by the mother and as a result the father is either unaware of the existence of the child, or the father who becomes aware of the existence and abandonment of his child, needs recourse and this is provided for in section 231 of the Act.[262]

> "(7) (*a*) The biological father of a child who does not have guardianship in respect of the child in terms of Chapter 3 or the foster parent of a child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption.
> (*b*) A person referred to in paragraph (a) must be regarded as having elected not to apply for the adoption of the child if that person fails to apply for the adoption of the child within 30 days after a notice calling on that person to do so has been served on him or her by the sheriff."

This section gives the father 30 days within which to apply to adopt his child[263] but only functions in its intended purpose if the father is aware of the existence of his child or made aware by the Sheriff, who in terms of this section must notify the father. This in turn requires the Sheriff to have knowledge of who the father is, such knowledge must be provided by the mother.[264] However, in most instances this does not occur because abandonment is illegal and

legislation in South Africa see Ferreira "The origin of adoption in South Africa" 13 2 2007 *Fundamina* 1-10; Boezaart *Child Law in South Africa* (2017) 164; also see Woodhouse "'Are you my mother?': Conceptualizing children's identity rights in transracial adoptions" in Buss and Maclean *The Law and Child Development* (2010) 353, where the best interests of a child in respect of adoption are discussed.

[262] Bearing in mind that the position of the biological father in terms of s 233(1)(*a*) is that his consent to adoption will be required unless he is a rapist or incestuous father or his parental responsibilities and rights have been terminated in terms of the definition of "parent" in s 1(1) of the act. His consent will be dispensed with if he falls within the categories of parents listed in s 236(1)(*a*)-(*f*). An unmarried father may qualify as a "parent" in s 1(1) even if he has no acquired parental responsibilities and rights. Ultimately whether the consent of the father is a prerequisite will be determined by s 236(3)(*a*), which provides that a biological father's consent is not necessary if he is not married to the mother and has not acknowledged paternity of the child. He can acknowledge paternity in terms of s 236(4)(*a*)-(*d*); It is suggested by Louw that the original principle established by the Child Care Act, that an unmarried father may give or withhold consent to adoption only if he has acknowledged paternity of the child and taken some responsibility for the child, has been retained but expanded, see Louw Boezaart *Child Law in South Africa* (2017) 177; Domingo "Adoption, artificial fertilization and surrogate motherhood" in Barratt *Law of Persons and the Family* (2017) 210-211; also see Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (LLM Dissertation, University of Pretoria July 2013).

[263] Refer to chapter 6 on Unmarried Father's Rights paragraph 6.3 for a full exposition of the relevant sections that pertain to fathers in adoption.

[264] Also see s 236(3)(*a*) where the consent of an unmarried biological father is dispensed with if he was not married to the mother at conception, or at any time thereafter and has not acknowledged in the manner set out in subsection 4 that he is the biological father.

thus the mother opts to abandon anonymously for fear of prosecution.[265] Therefore in instances of abandonment, the father's consent is dispensed with on account of the mother's abandonment.[266]

Section 233 of the Act discusses consent to adoption and specifies that a child may be adopted if the consent for that adoption has been obtained from his or her parents provided that, where the parent is a minor, then such minor is assisted by a parent or guardian.[267] This thesis asks the question why a minor must obtain the consent of a parent or guardian in the instance of adoption, but no such consent is required in the termination of her pregnancy? This is discussed below.

Adoption is not seen as an option by many young women experiencing unplanned pregnancies due to the fear of being disowned or being forced into keeping the child and thus jeopardising their future.[268] With 20% of teenage pregnancies being as a result of rape and 60% of pregnant teens as a result of being coerced into having sexual intercourse with older men,[269] it may be deduced that some abandonments are those done by minors. Although no statistics exist as to

[265] See presentation by National Adoption Coalition of South Africa 2017 Child Protection Week 28 May-3 June Presentation where it was found that the number of anonymous abandonments have increased between 2013 and 2016 (sent to the author by a member of NACSA).
[266] s 236 of the Children's Act 38 of 2005.
[267] s 233(1)(*a*) of the Children's Act; This is juxtaposed to the position in the US where no consent is required for the placing up for adoption of a child by a parent who is a minor but that same minor requires consent in order to terminate her pregnancy, in this respect see Peck *Adoption Laws in the United States: Summary of the Development of Adoption Legislation and Significant Features of Adoption Statutes, with the Text of Selected Laws* (1925); Manian "Minors, parents, and minor parents" vol. 81 no. 1 Winter 2016 *Missouri Law Review* 127-204, 143, "Forty states and the District of Columbia allow minors to relinquish their infants for adoption, either explicitly by statute or by making no distinction between minor parents and adult parents. Five states require minors to be represented by legal counsel in adoption hearings but have no requirement for involving the minor's parents. Of the remaining five states, only four require parental consent to adoption of their minor's infant, and one state requires parental notification"; see also the criticism of this at Manian "Minors, parents, and minor parents" vol. 81 no. 1 Winter 2016 *Missouri Law Review* 127-204, 160; see also Seymore "Sixteen and pregnant: Minors' consent in abortion and adoption" Issue 1 Vol. 25 2013 *Yale Journal of Law and Feminism* 128, 138.
[268] Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014) 10.
[269] Blackie (Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014, 4.

the number of teenage girls abandoning their infants, in the current legal dispensation it may be said that a pregnant minor would rather opt to abandon than to disclose the fact of the pregnancy to a parent or guardian in order to get the necessary consent for adoption.[270] This is highlighted by the fact that even in instances where the parent is over 18 some state parties insist on the assistance and knowledge of the parents or guardians of the consenting party (the mother).[271] This was the case when a young biological mother attempted suicide when a local department official disclosed to her parents that she was pregnant and intended to place the baby for adoption.[272] This case gives an indication of how "controversial consented adoptions are in South Africa, and the significant clash between traditional values and the law".[273] According to Louw the requirement that the minor must be assisted by a guardian in adoption

[270] See Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014) 10.

[271] Louw in Boezaart *Child Law in South Africa* (2017) 178; Domingo "Adoption, artificial fertilization and surrogate motherhood" in Barratt *Law of Persons and the Family* (2017) 210-211; Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26; Pieterse, Chairperson of the NACSA "Understanding proposed amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02 where Blackie points out "cases of nurses contacting a birth mother's extended family clandestinely to advise them that their daughter was placing her child up for adoption, and advising them to come and claim the child. This was despite the women being above the age of 18, and well within their rights to make this decision for herself." Further incidents such as "nurses refusing to contact the adoption social worker who had been counselling the birth mother, and treating these social workers with hostility, accusing them of child trafficking. There was even a case where a young mother was refused pain medication after a caesarean section because she had decided to place her child up for adoption and was being 'punished' for this. When I queried this behaviour, I was advised that the greatest concern in assisting in the process of adoption is the fear of angering the ancestors, being found 'guilty by association', and being punished accordingly."

[272] For more on the legal requirements for an adoption see Louw in Boezaart *Child Law in South Africa* (2017) 178; for the actual story see Vorster "Adoption-related amendments to the Children's Act: the arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26.

[273]Vorster "Adoption-related amendments to the Children's Act: the arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed on 2019-06-26; Louw in Boezaart *Child Law in South Africa* (2017) 178; Pieterse, Chairperson of the NACSA "Understanding proposed amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.

cases has revived the legal position enunciated in *Dhanabakium v Subramanian.*[274] This is the case despite the fact that the legislature has throughout the previous enactment of legislation, namely the Children's Act 33 of 1960 section 71(2)(*d*)(i)[275] and the Child Care Act 74 of 1983 section 18(4)(*d*),[276] tried to quash the precedent created by this judgment.[277] In terms of section 233(1)(*a*) of the current Children's Act the word assistance is used. "Assistance" means to help, to aid, to support. Does it presuppose an advisory role, merely informing the minor of her various options and the consequences thereof, or does it insinuate that the parent or guardian has to make the decision for the minor? The approach in South Africa has leaned more towards the latter where the consent from a parent or guardian of the minor is a requirement to place a child up for adoption. The element of "consent", albeit in respect of the termination of pregnancies, was addressed by the court in *Christian Lawyers Association v Minster of Health*

[274] 1943 AD 160, 166-168. In this case a minor consented to the adoption of her child, she later requested for a rescission of the adoption order on the grounds that she was an unmarried minor that was not assisted by a parent or guardian in granting such consent and she was unaware of what such consent entailed. The majority of the court led by Tindall JA held that the language of s 69(2) par (*d*)(i) of Act 31 of 1937 does not justify the inference that the legislature intended that the mother who is a minor should be competent, without the assistance of her guardian, to agree to the order of adoption. The court referred to the common law which stated that a minor cannot bind himself by contract without the assistance of his guardian subject to certain qualifications, (in this regard reference was made to Grotius 1.8.5, 3.1.26.). A minor cannot make his position worse without the authority of his father or guardian (Voet 39.5.7). The court went on to state that one should interpret a statute in line with the common law and not against it, unless that statute is aimed at altering the common law. The court concluded that therefore the appellant's consent to the adoption order was of no force and effect and ordered the restoration of the order rescinding the adoption. The dissenting opinion of Centlivres JA expressed the opinion that when a statute requires the "consent" of a person there is no implication that a minor's consent will carry no weight because he or she was not assisted by a parent or guardian. The judge went on to provide that an adoption is not done by means of a contract but through an application to the Children's Court and all that it requires is the consent of the parents. If it were done through a contract then the assistance of the parent or guardian would be necessary. Consent implies a willingness on the part of the person whose consent is required. The mother's consent is sufficient compliance with the Act. The judge went on to point out that the fact that the parents of a minor mother of an illegitimate child are not given any right to apply to a Children's Court for the rescission of an order of adoption indicates that the consent of those parents is not required before an order of adoption is made, see 169-171; also see Louw in Boezaart *Child Law in South Africa* (2017) 178.

[275] Which provides that a children's court shall not grant an application for adoption unless it is satisfied that "consent to the adoption has been given by both parents of the child, or if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be"; Louw in Boezaart *Child Law in South Africa* (2017) 178.

[276] "(4) A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied (d) that consent to the adoption has been given by both parents of the child, or, if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor or a married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known as contemplated in section 19A"; Louw in Boezaart *Child Law in South Africa* (2017) 178.

[277] Louw in Boezaart *Child Law in South Africa* (2017) 178.

(Reproductive Health Alliance as Amicus Curiae),[278] where the court decided that the consent of a minor, with or without the advice of a parent or guardian, for the termination of her pregnancy is sufficient.[279] This decision was based on various rights in the Bill of Rights. The court held that a woman even one under the age of 18 may choose to terminate her pregnancy as this is protected by section 12(2)(*a*) of the Constitution which includes the ability to make decisions regarding reproduction.[280] The court referred to *R v Morgentaler*[281] where the Canadian Supreme Court, similarly to the US, held that the woman's right to determine the fate of her own pregnancy enjoyed constitutional protection. This thesis submits that determining the "fate" or outcome of her pregnancy extends to deciding to give birth and subsequent thereto, to place the child up for adoption.[282] Next, the court referred to the right to human dignity in section 10 and the right to personal privacy in section 14 and held that the right of a woman to choose to terminate her pregnancy or not, are enshrined by these rights.[283] Does refusing a woman under the age of 18 the right to give her child up for adoption infringe on her dignity?

[278] *Christian Lawyers Association v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T); also see Robinson "The legal nature of the embryo: legal subject or legal object?" (21) 2018 *PER /PELJ* 13 where this case is mentioned.
[279] *Christian Lawyers Association v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T); also see Robinson "The legal nature of the embryo: legal subject or legal object?" (21) 2018 *PER /PELJ* 13 where this case is mentioned.
[280] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 48.
[281] (2) (1988) DLR (4th) 385.
[282] See the following matter in support of this contention *Suchita Srivastava v Chandigarh Administration AIR* 2010 SC 235 at par 11, the Supreme Court of India applied a 21 in the following manner: "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under art. 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However in the case of pregnant women there is also a 'compelling state' interest; in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled"; also see *AB and Another v Minister of Social Development* 2017 3 BCLR 267 (CC) par 305; The right to privacy was extended in *Eisenstaedt v Baird* 405 US (1972) par 154, protecting the right to use contraceptives for unmarried individuals, where it was recognised that the government should not intrude on the right of the individual to choose to bear or beget a child.
[283] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 48.

Referring to the matter of *Casey v Planned Parenthood of South Eastern Pennsylvania*[284] the court said that US law affords constitutional protection to those:

> "personal decisions relating to marriage, procreation, contraception, family relationship, child rearing and education . . . These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[285]

In view of this, a decision whether to place a child up for adoption qualifies as a personal decision relating to procreation, family relationship and child rearing, that is the choice to have the child reared by another. Therefore this deeply personal decision would be central to one's personal dignity. With regard to the right to privacy, as enunciated in section 14 of the South African Constitution, the court referred to the decision in *Roe v Wade*[286] and said the "fight" of personal privacy is broad enough to encompass a woman's right to choose whether or not to terminate her pregnancy.[287] It is submitted that the right to personal privacy is therefore broad enough to encompass a minor's choice to give birth to her child and then to place her child up for adoption. The court further referred to section 9(1) of the Constitution providing that everyone is equal before the law and has the right to equal protection and benefit of the law and to section 9(3), which deals with the prevention of unfair discrimination against anyone on the grounds of "age".[288] The court followed this up by stating that "any distinction between women on the grounds of their age, would invade these rights".[289] This thesis proposes that any

[284] (1992) 120 Led 2d 674.
[285] *Casey v Planned Parenthood of South Eastern Pennsylvania* (1992) 120 Led 2d 674, 698.
[286] (1972) 35 Led 2ed 147 the US Supreme Court; and quoting Judge Brennan in *Eisenstad v Baird* (1972) 31 L ed 2ed 349, 364 "If the right of privacy means anything, it is the right of the individual, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"; see also *Casey v Planned Parenthood of South Eastern Pennsylvania* (1992) 120 Led 2d 674.
[287] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 42.
[288] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 48.
[289] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 48.

limitation upon the freedom of any minor woman under the age of 18 to consent to the adoption of her child, constitutes a limitation of her fundamental rights, and such limitation would have to be justified in terms of the limitation clause section 36 because it would amount to a distinction against a woman on the basis of age.[290] Therefore, the requirement that a minor must be assisted by a parent or guardian when choosing to place her child up for adoption is an infringement of her right to human dignity, right to privacy, her right to make reproductive choices and her right to equality. The court emphasised that the legislature did not set age as a yardstick for the ability of the girl to consent to the termination of her pregnancy, but rather placed its focus on the true position of each and every girl or woman and their individual circumstances.[291] If a girl is a minor, she is advised to consult with her parent or guardian, so as to make her consent informed, but is not refused termination of her pregnancy should she choose not to consult with her parent or guardian.[292] The court rounded its decision off by saying:

> "The argument that the provisions of the Act which are under attack are unconstitutional because they do not cater for the interest of the child is unsustainable. The legislative choice opted for in the Act serves the best interest of the pregnant girl child (section 28(2)) because it is flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age based approach that takes no account, little or inadequate account of her individual peculiarities. However even if the plaintiff was to establish that the age based control or regulation is in the interest of the child, that would not be enough, the plaintiff has to go further and establish that the legislative choice adopted in the Act (which is based on informed consent) is in fact unjustifiable and unconstitutional."[293]

[290] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 48.
[291] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 49.
[292] For more on this see *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 49.
[293] *Christian Lawyers Association v Minster of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T) 48.

Therefore, instead of placing the age of majority as a yardstick for the consent to adoption, the individual circumstances of each and every women should be taken into account in deciding whether they need assistance in giving that consent.[294]

Finally, a child may be adopted without the consent of the parent or guardian if, in terms of section 236, the parent or guardian "(*b*) has abandoned the child, or if the whereabouts of that parent or guardian cannot be established, or if the identity of that parent or guardian is unknown". The notice required in terms of section 238[295] of the Act is dispensed with in the case of abandonments.

7.5.1.1 Adoption in the Draft Children's Amendment Bill 2018 and 2019

7.5.1.1.1 Section 249(2)(*b*) to (*g*) – no consideration in respect of adoption

The recent proposed amendments of the Draft Children's Amendment Bill 2019 recommend the deletion of the provisions in section 249(2)(*b*) to (*g*) of the Act. The implication is that a professional may not charge fees in return for rendering services in respect of adoption, these professionals include lawyers, psychologists, the Central Authority of the Republic,[296] child

[294] See Manian "Minors, parents, and minor parents" vol. 81 no.1 Winter 2016 *Missouri Law Review* 127-204, 143 for more on the consent requirement, as well an analysis on the approach adopted in some US states where no consent of a parent or guardian of a minor is required for the adoption of a minor's child but conversely consent for abortion from the minor's parents is required; see also Seymore "Sixteen and pregnant: Minors' consent in abortion and adoption" Issue 1 Vol. 25 2013 *Yale Journal of Law and Feminism* 138; Peck *Adoption Laws in the United States: Summary of the Development of Adoption Legislation and Significant Features of Adoption Statutes, with the Text of Selected Laws* (1925).

[295] s 238 reads: "Notice to be given of proposed adoption**.**—(1) When a child becomes available for adoption, the presiding officer must without delay cause the sheriff to serve a notice on each person whose consent to the adoption is required in terms of section 233. (2) The notice must— (*a*) inform the person whose consent is sought of the proposed adoption of the child; and (*b*) request that person either to consent to or to withhold consent for the adoption, or, if that person is the biological father of the child to whom the mother is not married, request him to consent to or withhold consent for the adoption, or to apply in terms of section 239 for the adoption of the child. (3) If a person on whom a notice in terms of subsection (1) has been served fails to comply with a request contained in the notice within 30 days, that person must be regarded as having consented to the adoption."

[296] The Central Authority of the Republic is a body established in terms of the Hague Convention on Civil Aspects of International Child Abduction of 25 October 1980 in which case the office of the Chief Family Advocate assumes that role. The Central Authority in terms of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is the Department of Social Development. The Role of the Central Authority in respect of Intercountry Adoption is to: regulate and monitor inter-country adoptions; accredit child protection organizations to provide inter-country adoption services; approve adoption

protection organisations which provide adoption and inter-country adoption services, organs of state and other prescribed persons.[297] Since there will be no form of income for these persons listed in section 249(2)(*b*) to (*g*), they may cease to exist.[298] Pauline Maaga, Acting Deputy Director General of Social Welfare stated in an interview, that "government isn't prohibiting private social workers and social workers at Child Protection Organisations (CPOs) from providing adoptions, it is simply stopping them from charging fees".[299] "They may apply for funding for performing an adoption as a designated child protection service from the Provincial Department of Social Development in terms of section 150(1) of the Children's Act."[300] Pieterse provides that applying for funding is not a workable solution as most CPOs have unsuccessfully applied for funding, she also goes on to state that this amendment will in fact cause a decline in the adoption rates and adoption will be inaccessible since the number of adoption service providers will be prejudiced.[301] The result will be that these private social workers and those at CPOs will, through the prohibition of charging fees, be prevented from operating and thus inevitably cease to exist.[302] The challenges experienced pertaining to

working agreements with foreign countries; prevent improper financial gain by service providers; see http://www.justice.gov.za/hague/inter-country-adopt.html last accessed 2019-08-08.

[297] See also Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02.

[298] For more information on this change and how it will affect adoption in South Africa see Vorster "Adoption-related amendments to the Children's Act: the arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26; Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.

[299] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 38.

[300] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 38.

[301] Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02.

[302] This was suggested by Vorster "Adoption-related amendments to the Children's Act: the arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26; Pieterse, Chairperson of the NACSA

adoption are as a result of an inadequate system, the employment of unskilled staff and not in the legal representatives used to defend children's rights.[303] "The lopsided emphasis on the monetary gain will have aggravating consequences and implications for the well-being and rights of children."[304] According to Kempen this is an infringement of a child's constitutional and common law rights.[305] The representation of children by professionals are to ensure that their best interests are protected and this is especially the case in adoption proceedings.[306] Courts need to deal with specialists such as lawyers, social workers and psychologists who guide the courts (children's court and high court) on dealing with children's rights but according to Fourie this is being done away with by the legislature because remuneration for the provision of these services is involved.[307] Fourie continues that courts are dependent on this service by professionals "since courts are not in a position to take a decision about the child's best interests without the input of professionals who represent the child in order to make a more informed decision about each individual case".[308] Therefore, how will the best interests of the child in each individual case be determined without the input of these professionals? The Department of Social Development (DSD) is now training its own 889 social workers, to render

"Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.

[303] Kempen quoting Fourie, in "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 36. Fourie also stated that it is not in the child's interest to fix a problem by creating an even bigger problem.

[304] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 36.

[305] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 36 more particularly the child's rights in terms of s 28 of the Constitution which provides that every child has the right to family care or parental care or appropriate alternative care when removed from the family environment and this is enforced by s 6(2) of the Children's Act which provides that "... all proceedings, actions or decisions in a matter concerning a child must (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights."

[306] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 36.

[307] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 37.

[308] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 37.

adoptions.[309] The DSD argued that the proposed changes are because adoption is a designated child protection service as provided for in section 105(5) of the Children's Act and therefore fees should not be charged as it is a child protection measure and not a trade.[310] The DSD mentioned that it is concerned that because of the fees charged, children are rather placed for adoption than an attempt at their reunification with existing family members, fostering and guardianship.[311] This has been pointed out to show that government's "first prize child protection strategy" is in fact fostering, while adoption is seen as a last resort.[312] Next the DSD stated that they wish to grant access to adoption to the poor as well.[313] These arguments are refuted by Wolfson Vorster who provides that children's rights activists maintain that currently the poor do have access to adoption since social workers have been legally permitted to perform

[309] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 38.
[310] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 37.
[311] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 38; see also Vorster "Adoption-related amendments to the Children's Act: the arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26; Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.
[312] See also Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26; Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.
[313] Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 38; see also Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26; Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.

adoptions since 2017 with the second amendment of the Children's Act.[314] She goes on to state the reason why so few adoptions were carried out by the department since 2017 is because only a few social workers had the necessary skill to do so.[315] Further, Blackie states that the poor in rural communities opt for fostering, rather than formal adoption based on the foster care grant that is much more[316] than would be accessed through the child support grant after a formal adoption.[317] In addition, in cultural terms adoptions are not accepted and that is why fostering is preferred.[318] Not only does adoption ensure stability in the child's life, but the state's responsibility for financially supporting that child is also lessened. Long term institutionalisation is not in the best interests of the child.[319] Not only did the DSD itself prescribe the fees that should be charged by professionals, but these fees were closely observed

[314] Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26.

[315] Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26; Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02.

[316] R920 for a foster care grant versus R380 for a child support grant; see Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.

[317] Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.

[318] Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02, where Blackie points out that adoption is seen as giving away a gift that was given by the ancestors and this could render the woman infertile in future. It is seen as a slight on the ancestors. Also abandoning a child is difficult because it cannot be determined who the child's ancestors are, however a mother is more inclined to do that than to opt for adoption because adoption removes the rights and any "link" the mother may have to the child. Blackie suggests an *ubigile* ceremony that involves all parties, "This served as an opportunity for the adopted child to be formally introduced to the ancestors of their new adoptive family, and to ask for their support in ensuring the wellbeing of the child moving forward"; also see Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Dissertation, University of Witwatersrand 2014).

[319] McCall "The consequences of early institutionalization: Can institutions be improved? - should they?" vol. 18 4 2013 *Child and Adolescent Mental Health* 10; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02; also see Woodhouse "'Are you my mother?': Conceptualizing children's identity rights in transracial adoptions" in Buss and Maclean *The Law and Child Development* (2010) 358, for more on the child's identity rights in adoption matters where the author points out that transracial adoption does not pose serious risk of harm to children especially when the only other option is prolonged delays in orphanages and in foster care.

in each adoption matter.[320] Therefore, these proposed amendments may act as obstacles to adoption and will possibly bring adoption, which is already down 50% in the last five years, to a complete stop.[321] Therefore, this thesis proposes that such amendment is not properly motivated and, for the reasons discussed above, is not in the best interests of the child.

7.5.1.1.2 Section 250 – only certain persons allowed to provide adoption services

A further proposed amendment to the adoption provisions is to section 250 of the Act, excluding certain persons who may provide professional services in respect of adoption.[322] This change goes hand in hand with the amendments discussed in paragraph 7.5.1.1.1 above.

7.5.1.1.3 Section 259 – accreditation to provide inter-country adoption services

Furthermore, in respect of inter-country adoptions the proposed amendment has excluded the ability of organisations to charge fees in respect of inter-country adoptions with the deletion of subsection (3) and has excluded the provision of adoption services by professionals such as lawyers and psychologists by the deletion of subsection (4) in section 259. The effect of this change is the same as those provided for in section 249. A limited number of designated accredited child protection organisations provide adoption services.[323] They are approved by

[320] "Blackie (2019) states that the charged fees cover the costs of assessing a child for adoptability; searching and advertising for biological parents if the child has been abandoned; medical assessments (which are not offered free to abandoned children in state hospitals); assessing parents using a range of psychological, medical and legal tools; counselling and preparing the birth mother, the child and the parents for the adoption process; and a mountain of administrative work, court time and post-adoption support" in Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 39; also see Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02.

[321] Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02; Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02.

[322] By the deletion in the Children's Amendment Bill of 2018 of s 250(2) and (3).

[323] Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South

the South African Central Authority (SACA). They provide expert services that are labour intensive and the fees, which allow them to continue functioning, are highly regulated and limited.[324] If the proposed amendments are implemented, these designated CPOs will no longer be able to render these specialised services and it will potentially shut down all inter-country adoptions.[325] Sadly, according to Pieterse, special needs children will be the most affected, as these are the children mainly adopted through inter-country adoptions.[326]

7.5.2 Abortion

Abortion in terms of the Choice on Termination of Pregnancy Act 92 of 1996, as seen with adoption, is one of the legal options available to a woman in lieu of abandoning her child. This section discusses why, as an available option, abortion is not effective and why it is not being utilised by women facing unwanted pregnancies. Only these reasons are discussed and the issue

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Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02; Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26.

[324] Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02; Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26.

[325] Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02; Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26.

[326] Pieterse, Chairperson of the NACSA "Understanding Proposed Amendments to the Children's Amendment Bill" 15 January 2019 *iAfrica* available at https://www.iafrica.com/understanding-proposed-amendments-to-the-childrens-amendment-bill-of-2018/ last accessed 2019-07-02; Blackie "Why adoption is a problem in South Africa" 17 January 2019 *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/ last accessed 2019-07-02; Vorster "Adoption-related amendments to the Children's Act: The arguments and the elephants in the room" 18 February 2019 *Daily Maverick* available at https://www.dailymaverick.co.za/opinionista/2019-02-18-adoption-related-amendments-to-the-childrens-act-the-arguments-and-the-elephants-in-the-room/ last accessed 2019-06-26.

of abortion will not be canvassed fully as it falls outside of the scope of this chapter and thesis. Furthermore, the consent of a father in the termination of a pregnancy is not required, therefore the rights of fathers in this respect will not be addressed.[327]

The Choice on Termination of Pregnancy Act 92 of 1996[328] came into effect on 1 February 1997 and repealed the Abortion and Sterilization Act 2 of 1975[329] in so far as it relates to abortion.[330] In terms of section 2 of the Abortion and Sterilization Act, abortion was prohibited with a penal sanction, except when, for example, it endangered the life of the woman.[331] Today the termination of a pregnancy is legal if done during the first twelve weeks of gestation.[332] A termination of pregnancy may also be conducted from the thirteenth up to the twentieth week of gestation under specific circumstances, which are listed in section 2(1)(*b*)(i) to (iv). After the twentieth week of gestation the medical practitioner must consult with another medical practitioner, registered midwife or a registered nurse and must be of the opinion that the continued pregnancy would endanger the woman's life;[333] would result in severe malformation

[327] For more on the courts denying the father a say in instances of a termination of pregnancy see *Paton v United Kingdom*, Eur. Comm'n H.R., 3 EHRR 408 (1981); also see Fenton-Glynn "Anonymous relinquishment and baby-boxes: life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 191 where the author explains the reproductive autonomy enjoyed by women in abortion is different to those in abandonment. The reproductive autonomy in instances of abortion entail the woman's right to her own body, whereas in instances of abandonment it becomes about her right to refuse motherhood and escape societal roles and obligations imposed on parents.

[328] See Van Oosten "The Choice on Termination of Pregnancy Act: Some comments" 116 1999 *South African Law Journal* 60-76 for comments on this Act.

[329] For more on this Act see also Robinson "The legal nature of the embryo: Legal subject or legal object?" (21) 2018 *PER / PELJ* 14.

[330] s 11(2) of the Choice on Termination of Pregnancy Act; see Van Heerden, Cockrell and Keightley *Boberg's Law of Persons and the Family* (1999) 44 note 28 about the substitution of the term abortion for the term termination of pregnancy; also see Boezaart *Law of Persons* (2016) 26.

[331] s 3 of the Abortion and Sterilization Act 2 of 1975; "Historically, abortion was a criminal offence in English law and it continues to be a criminal offence in some jurisdictions." It has been decriminalized in Australia, the US and the UK; see Parashar and Dominello *The Family in Law* (2017) 374.

[332] s 2(1)(*a*) of the Choice on Termination of Pregnancy Act.

[333] s 1(c)(i); Boezaart *Law of Persons* (2016) 26; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.

of the foetus;[334] or would pose a risk of injury to the foetus.[335] Section 4 of the Act places an obligation on the state to promote non-directive and non-mandatory counselling before and after the termination of the pregnancy.[336]

Contrary to the consent needed where a minor wants to give her child up for adoption in terms of section 233(1)(*a*), no parental consent is required by the minor in order to procure an abortion.[337] Only the informed consent of the pregnant woman herself, regardless of her age, is required unless she is incapable of giving such consent[338] and if the woman is a minor then she is advised to consult with her parent or guardian however, she may not be denied an abortion if she chooses not to consult with them.[339]

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[334] s 1(c)(ii); Boezaart *Law of Persons* (2016) 26; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.

[335] s 1(c)(iii); Boezaart *Law of Persons* (2016) 26; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.

[336] Boezaart *Law of Persons* (2016) 26; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.

[337] s 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996; Boezaart *Law of Persons* (2016) 26; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32; Manian "Minors, parents, and minor parents", vol. 81 no. 1 Winter 2016 *Missouri Law Review* 127-204, 144 allowing the minor to attain judicial bypass should the parents refuse consent; Seymore "Sixteen and pregnant: Minors' consent in abortion and adoption" Issue 1 Vol. 25 2013 *Yale Journal of Law and Feminism* 127.

[338] s 5(4) of the Choice on Termination of Pregnancy Act 92 of 1996; see also Boezaart *Law of Persons* (2016) 26; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32; Very importantly only the consent of the woman is required, the act does not provide that the consent of the father of the child is necessary, for a perspective on this, which falls outside of the scope of this study, see Fox "Abortion decision-making – taking men's needs seriously" in Lee *Abortion Law and the Politics Today* (1998); also see Nolan "Abortion: Should men have a say?" in Lee *Abortion Law and the Politics Today* (1998); see also Hoctor *Criminal Law in South Africa* (2017) 96.

[339] s 5(3) of the Choice on Termination of Pregnancy Act; Boezaart *Law of Persons* (2016) 27; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32; also see Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014) 10; The constitutionality of the consent of the minor was argued in *Christian Lawyers Association v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* [2004] 4 All SA 31 (T), where the court held: "In enacting the Act, the Legislature assumed that there will be women below and above the age of 18 who will be incapable of giving informed consent and for this category the law requires parental or some other assistance in giving the informed consent. The Legislature also recognised that there will be women above and below the age of 18 who are capable of giving informed consent, and for this category the Legislature requires no assistance when they give consent to termination of pregnancy. As to whether a particular individual, irrespective of age, is capable of giving such consent, the Legislature has left the determination of the "factual position" to the medical professional or registered midwife who performs the act. I cannot find that the exercise of this legislative choice is so unreasonable or otherwise flawed that judicial interference is called for in what is essentially a legislative function", at 49; In this respect and with regard to the aspect of uninformed consent, this thesis suggests that Judge PM Mojapelo's statement that the law *requires* parental, or some other assistance to the minor in giving the informed consent, is incorrect. The law does not *require* the minor to obtain parental assistance but merely *advises* the minor to do so. A requirement would presuppose the non-granting of a termination of

A survey conducted on termination of pregnancy among young women shows that only 3% make use of these services even though two thirds of pregnancies are unwanted.[340] In South Africa 50% of abortions are done unsafely.[341] According to Blackie aborting a child in the late stages of pregnancy is regarded as a form of abandonment.[342] Women seek late term abortions because of a lack of support and insufficient or incorrect information.[343] Panday provides the reason legal and safe abortion services are not being used is because of a lack of information about the costs associated with termination, the legal time limit within which to procure an abortion[344], and because of the associated stigma.[345] The stigma and associated judgment with early pregnancy and termination also comes from health staff at hospitals, thus preventing pregnant women from making use of this available option.[346] The procurement of an abortion should not be a women's only option and should not be construed as a solution to abandonment. The statistics mentioned above indicate that majority of women prefer not to make use of this

pregnancy where such consent is lacking, whereas according to the act the minor may choose not to consult with a parent or guardian and if she so chooses she may not be refused the termination of her pregnancy. In this respect, is there really protection for the interests of the uninformed minor? If a minor is uninformed she can still opt to remain uninformed and therefore her best interests are not protected in terms of s 28(2) of the Constitution; Most states in the US require the involvement of at least one parent where the person seeking an abortion is a minor under the age of 18, in this respect see Parashar and Dominello *The Family in Law* (2017) 380 fn 22.

[340] Pettifor, Rees, Kleinscmidt, Steffenson, MacPhail and Hlongwa-Madikizela et al "Young People's Sexual Health in South Africa: HIV Prevalence and Sexual Behaviours from a Nationally Representative Household Survey" 2005 19, 1525-1534; Panday, Makiwane, Ranchod, and Letsoala "Teenage Pregnancy in South Africa: with a Specific Focus on School-Going Learners" 2009 (Child, Youth, Family and Social Development, Human Sciences Research Council) 25; also see Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014) 104.

[341] Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014) 104.

[342] Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014) 104.

[343] Panday, Makiwane, Ranchod, and Letsoala "Teenage Pregnancy in South Africa: With a Specific Focus on School-Going Learners" 2009 (Child, Youth, Family and Social Development, Human Sciences Research Council) 25.

[344] See the Choice on Termination of Pregnancy Act 92 of 1996 s 2; Boezaart *Law of Persons* (2016) 12; Mahler-Coetzee "The beginning of legal personality" in Barratt *Law of Persons and the Family* (2017) 31-32.

[345] Panday, Makiwane, Ranchod, and Letsoala "Teenage Pregnancy in South Africa: With a Specific Focus on School-Going Learners" 2009 (Child, Youth, Family and Social Development, Human Sciences Research Council) 25; also see Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014) 104; for more on this topic see Panday as this topic falls outside of the scope of this study.

[346] Panday, Makiwane, Ranchod, and Letsoala "Teenage Pregnancy in South Africa: With a Specific Focus on School-Going Learners" 2009 (Child, Youth, Family and Social Development, Human Sciences Research Council) 25.

option for differing reasons, one being "stigma". This points to a specific culture or set of beliefs adhered to in South Africa that does not promote the use of abortion. Therefore, encouraging abortion as a possible solution will not reduce the number of infants abandoned. Finally, in view of the above abortion does not serve as a viable solution to curb infant abandonment.[347]

7.6 LOOKING BEYOND SOUTH AFRICA: THE DEVELOPMENT OF SAFE HAVEN LAWS IN NAMIBIA

7.6.1 Previous laws governing the abandonment of infants in Namibia

Namibia has, until this point, been a country which laws pertaining to children has emulated the South African approach. This is because the laws of the Union of South Africa were applied to the territory of Namibia following a mandate delegated by the King of Great Britain.[348] In this regard, consider the fact that the Namibian Children's Act 33 of 1960 was inherited from South Africa.[349] However, in the sphere of developing a solution to unsafe infant abandonment, Namibia has taken the lead. The abandonment of infants is not an occurrence that is unique to South Africa – as pointed out in the previous chapters, it occurs both in Europe and America,[350] as well as in other parts of Africa. Prior to the promulgation of legalisation providing for safe methods of infant abandonment, it is important for purposes of this thesis to include a neighbouring country's perspective and approach to the issue to inform our future laws on the correct model that should be applied in South Africa. In this respect Namibia is analysed. Having newly enacted safe haven laws, Namibia serves as both a positive example as well as

[347] "No society should in the name of the promotion of human rights be forced to leave a woman with abortion as the only apparent safe option", concurring opinion of judge Greve in *Odievre v France*, Application no. 42326/98, Judgment 13 February 2003.
[348] For more on how South African law has influenced Namibian law see Amoo *An Introduction to Namibian Law Materials and Cases* (2018) 60.
[349] For more on how South African law has influenced Namibian law see Amoo *An Introduction to Namibian Law Materials and Cases* (2018) 60.
[350] See the US chapter and also see the chapter on German law.

a warning to carefully consider each aspect of these laws to avoid repercussions such as those experienced in the state of Nebraska.[351]

Namibia's main law on children is the Children's Act 33 of 1960 which was inherited from South Africa at independence.[352] The law reform came as a result of the outdated nature of this law and the fact that it is largely colonial in nature and therefore does not cater to the needs of an African society.[353] In terms of the previous Namibian law, section 18 of the Children's Act 33 of 1960 regards the abandonment of an infant as a crime.[354] Section 18 holds both parents liable for care of the child. Further, the concealment of birth of a child is an offence in terms of section 7 of the General Law Amendment Ordinance 13 of 1962.[355] In addition, similarly to South African law, a parent who abandoned a child could be charged with murder, attempted murder or culpable homicide depending on the circumstances in which the infant was abandoned.[356] Namibia also has the common law crime of "exposing an infant" which consists of abandoning an infant in a life threatening environment.[357]

In the past, a child who was abandoned would be classified as a "child in need of care" in terms of the Children's Act 33 of 1960. The child would be placed in a foster home or a children's home as places of safety pending an enquiry by the Children's Court.[358] After an enquiry the

[351] See US chapter.
[352] Caplan "The Draft Child Care and Protection Act Issues for Public Debate Booklet 2" 2, available at http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert2.pdf last accessed 2020-02-06; Caplan "Revision of Namibia's Draft Child Care and Protection Act Final Report" 2010 (Public Participation in Law Reform) available at https://www.lac.org.na/projects/grap/Pdf/ccpa-revision_of_draft.pdf last accessed 2020-02-06.
[353] See Caplan "The Draft Child Care and Protection Act Issues for Public Debate Booklet 2" 2 available at http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert2.pdf last accessed 2020-02-06; Caplan "Revision of Namibia's Draft Child Care and Protection Act Final Report" 2010 (Public Participation in Law Reform) available at https://www.lac.org.na/projects/grap/Pdf/ccpa-revision_of_draft.pdf last accessed 2020-02-06..
[354] s 305(3)(*b*) of the South African Children's Act 38 of 2005 provides that abandonment of an infant is a crime and in terms of (6) is liable to a fine or imprisonment of a period not exceeding ten years.
[355] In South Africa the offence of concealment of birth is governed by s 113 of the General Law Amendment Act 46 of 1935.
[356] Refer back to s 3 of this chapter for the information on a similar approach in terms of South African law.
[357] Refer back to s 3 of this chapter which provides that South Africa does not have a crime of this nature.
[358] s 26-29 of the Children's Act 33 of 1960.

infant would be placed in a more permanent foster home or children's home[359], a medical examination could be ordered if required and if reunification with the biological parents is not possible, the child would be made available for adoption.[360] This procedure, after a child is abandoned, is similar to the one currently observed in terms of South African law. The Namibian Children's Act 33 of 1960 has been repealed by the Child Care and Protection Act 3 of 2015.

7.6.2 Introduction of safe haven laws in Namibia

Section 227 of the Child Care and Protection Act 3 of 2015, which commenced on 30 January 2019, provides the procedure for dealing with abandoned children left with approved authorities. Subsection 1 of section 227 states that a:

> "parent, guardian or care-giver of a child who abandons the child may not be prosecuted under section 254[361] for such abandonment if the child— (a) is left within the physical control of a person at the premises of a hospital, police station, fire station, school, place of safety, children's home or any other prescribed place; and (b) shows no signs of abuse, neglect or malnutrition."

Further, this section goes on to provide that anyone who finds an abandoned child must report the finding to the police or to a designated social worker.[362] If the finding is reported to the police, the police must immediately inform a designated social worker.[363] The social worker

[359] s 31 of the Children's Act 33 of 1960.
[360] Parental consent for adoption is not necessary if the parent has deserted the child, however, if the parents' whereabouts are known they must be given an opportunity to be heard. See ss 72 and 73 of the Children's Act 33 of 1960.
[361] s 254 "(1) Subject to the provisions of section 227(1), a parent, guardian or other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person- (a) abuses or deliberately neglects the child; or (b) abandons the child, and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. (2) A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment."
[362] s 227(2).
[363] s 227(3).

then has the responsibility to place the child in a place of safety and to start an investigation in terms of section 139 of the Act.[364] In terms of subsection 5 a social worker who has been notified of an abandoned child must call upon any person to claim responsibility for the child through (a) publication in at least one national newspaper circulating in Namibia and in another in the area in which the child was abandoned. Furthermore, the social worker must also cause a radio announcement to be broadcast on at least one national radio station in terms of paragraph b. Section 227 also makes provision for a person who has changed their mind and wishes to reclaim their child, subsection 6 gives the person 60 days from the date on which the child was abandoned. However, in this instance the child will be treated as one in need of protective services in terms of section 131(1)[365] and the social worker will investigate the circumstances surrounding the child and related issues in terms of section 139 of the Act.[366] In respect of adoption, an abandoned child may not be made available for adoption immediately after abandonment. A period of 60 days must expire before such a child may be placed for adoption. The 60 days start running from the date of the newspaper publication or the radio

[364] s 227(4); In terms of s 139 a social worker has 45 days within which to investigate the circumstances surrounding the child and to compile a report that must be submitted to the children's court.

[365] "Child in need of protective services (1) In this Chapter, a child is in need of protective services, if that child- (a) is abandoned or orphaned and has insufficient care or support."

[366] s 139 of the Child Care and Protection Act 3 of 2015 reads as follows: "(3) For purposes of an investigation made under this section, a designated social worker may-

(a) question any person who may have relevant information in order to establish the facts surrounding the circumstances giving rise to the concern;
(b) evaluate the child's family circumstances;
(c) evaluate the child's environmental circumstances;
(d) identify sources who may verify any alleged neglect, maltreatment or abuse of the child;
(e) identify the level of risk to the child's safety or well-being;
(f) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child;
(g) make an assessment of the child's developmental, therapeutic and other needs;
(h) request entry into any premises in order to obtain relevant information;
(i) enter and search any premises without a warrant if there is good reason to believe that the delay involved in obtaining a warrant would prevent the obtaining of relevant information which is critical to the investigation, but search of a building or structure used as residence, may not be carried out without a warrant, unless the owner or occupier of the residence, has consented to the search or the designated social worker on reasonable grounds believes that a warrant will be granted if applied for and that delay in obtaining such warrant would defeat the objects of the search;
(j) be accompanied by a member of the police; and
(k) recommend any appropriate protective measures or intervention as provided for in this Act."

broadcast, whichever is the latest, and also providing that no one has claimed responsibility for the child.[367]

7.6.3 The motivation behind these safe haven laws

The development of these laws in Namibia came as a result of the rise in the number of babies reportedly dumped on a monthly basis. Thirteen babies were dumped or flushed down toilets every month in Windhoek, Namibia in 2008, this according to staff at Gammams Water Care Works in Windhoek,[368] although no official statistics exist, those provided by the police suggest that the problem is a "significant" one.[369] The cases of concealment of birth more than doubled between 2003 and 2007 from 6 to 23 cases, this according to Hubbard who suggests that infanticide and baby abandonment could be on the increase in recent years.[370] The issue in Namibia was so significant that in 1998 the Deputy Minister of Home Affairs urged fathers to take responsibility by finding out from women what happened to their babies. In 2003 the Women's Action for Development (WAD) and the Swapo Party Women's Council and the Swapo Party Youth League speaking out against baby abandonment called for increased government action and that various stakeholders must develop ways to combat this issue.[371] Hubbard cites some reasons for baby abandonment including the following: tradition – having a baby outside of marriage is frowned upon and young women fear rejection from their

[367] s 227(7).

[368] Lewis "Baby dumping on the rise in Namibia" 4 April 2013 available at https://www.voanews.com/africa/baby-dumping-reported-rise-namibia last accessed 2020-02-06; National Planning Commission with support from UNICEF "Children and adolescents in Namibia 2010 a situation analysis" 2010, available at https://www.unicef.org/sitan/files/SitAn_Namibia_2010.pdf 57; Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 3.

[369] Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 1, 6; The Namibian delegation, while presenting the report on the Elimination of All Forms of Discrimination Against Women published in 1995 to the United Nations Committee, conceded that "infanticide is a significant problem in Namibia".

[370] Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 2.

[371] Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 16.

families; being rejected by her partner could lead the woman to dumping her baby because she does not know how to care for the child alone or cannot afford to do so on her own; prostitution – a woman in prostitution will not be able to care for her infant and continue earning a living, as a result she decides to dump the baby; unwanted pregnancies – this could be by young women who may not want to have a baby or who feel that they are not ready for the responsibility; lack of knowledge of other alternatives such as foster care and adoption; HIV/AIDS – the fear that the child may be also be infected and may die soon; the fear of having to leave school and that the child will jeopardise her future.[372] These reasons were confirmed by Diende from the Congress of Democrats at a parliamentary debate in 2007 where she pointed out that little has been said about the fathers of these abandoned children and their role in the resultant abandonment.[373] She also addressed the need for families to be more supportive of these pregnant women and not to reject them.[374] She went further to cite poverty as a cause for baby-dumping and highlighted the issue of younger women seeking older men in order to gain financial support and once the woman finds out that she is pregnant the older man abandons her.[375] HIV/AIDS and impulsive decision-making were also on her list as she emphasised that abortion should not be an option and that this is where familial support is crucial.[376] In this parliamentary debate, the Minister of Gender Equality and Child Welfare

[372] Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 9; These reasons are similar to those cited by Blackie (Fact Sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014; also see Blackie *Sad, Mad and Bad: Exploring Child Abandonment in South Africa* (Masters Dissertation, University of Witwatersrand 2014); These reasons were elaborated on in Namibia's Parliamentary Debate of 2007 after a motion calling for research into the issue of baby dumping was tabled in the National Assembly by Hon Diende from the Congress of Democrats opposition party see Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 10-15; see also Hadžimanović "Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?" 2018 *Gennaio* 2 available at www.comparazionedirittocivile.it.

[373] Hansard, National Assembly, 26 September 2007 (Hon Diende).

[374] Hansard, National Assembly, 26 September 2007 (Hon Diende).

[375] Hansard, National Assembly, 26 September 2007 (Hon Diende).

[376] Hansard, National Assembly, 26 September 2007 (Hon Diende); Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 11.

stated that there is a demand to expand certain services to help desperate women in need.[377] The Deputy Minister of Health stated that a new adolescent-friendly health service was being used to address the problem of baby-dumping through the equipping of health care workers to know how to deal with teenagers more sensitively, this coupled with counselling services for pregnant teens was being developed.[378] Furthermore, the Minister of Home Affairs offered a list of recommendations one of which, among others, pointed out the importance of the right to life of the child as protected by article 6 of the Namibian Constitution.[379] At the end of the parliamentary debate in 2007 no mention was made of a safe haven law specifically to deal with the issue of baby-dumping however the question was left open to the public on how it should be addressed. The Draft Child Care and Protection Act suggested the implementation of safe haven laws and booklet 2, which highlighted the issues for public debate soberly, pointed out the limitations posed by these laws such as considering the rights of biological fathers; children being deprived of the right to know their origins and mothers giving birth in unsafe circumstances. It simultaneously set out the advantages of safe haven laws as helping to reduce the number of infanticides and backstreet abortions and the fact that safe havens could advertise for fathers who might suspect that a baby is theirs to come forward, which gives fathers a chance to care for their children.[380]

7.6.4 Analysis of Namibian law pertaining to safe havens

It is evident that Namibia was facing the issue of baby abandonment or baby-dumping and infanticide as it is referred to for a long time prior to the enactment of the safe haven laws in

[377] Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 11-12.
[378] Hansard, National Assembly, 23 October 2007 (Hon Haingura).
[379] Hansard, National Assembly, 22 November 2007 (Hon Nghidinwa); Hubbard "Baby-dumping and infanticide" 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 14.
[380] Caplan "The Draft Child Care and Protection Act Issues for Public Debate Booklet 2" available at http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert2.pdf last accessed 2020-02-06.

2019. Not only is the parliamentary debate of 2007 evidence of this fact, but the case law dating back to 1941 are also illustrative of this fact.[381] The Namibian safe haven legislation, although aimed at curbing unsafe abandonment, failed to deal with certain pertinent issues such as the maximum age of the child that may be abandoned through the safe haven laws. No mention is made of the age requirement, which could create a problem similar to the one experienced in the state of Nebraska where initially no age requirement was stipulated and this resulted in older children being abandoned by their parents.[382] The law is also not clear as to what procedure to follow should the child show signs of abuse, neglect or malnutrition, although it can be inferred that the person abandoning the child will not enjoy immunity from prosecution. The Namibian safe haven law obviously excludes the possible use of baby safes or baby boxes since it specifies that the child must be left in the physical control of a person at the premises. This could deter desperate women who do not want to face anyone when abandoning their child from using safe havens. It also does not make provision for leaving certain non-identifying, or in some cases even identifying information, to help promote the protection of the child's right to knowledge of his or her origins, although this is optional and the parent will not be forced to leave such information.[383] Further, Namibian law does not specify how it may be verified that someone is the parent of the child when they later seek to reclaim the child in terms of section 227(6). In this instance issuing the parent with a unique number when they abandon the child so that if they wish to reclaim the child they only have to produce the unique number as proof, could be a possible solution.[384] Furthermore, the Namibian safe haven law

[381] The case of Nangombe of Ovamboland, Northern Namibia as summarised by McKittrick and Shingenge "Faithful daughter, murdering mother: Transgression and social control in colonial Namibia" in Woodward, Hayes and Minkley (eds) *Deep Histories: Gender and Colonialism in Southern Africa* (2002) 205-ff; also McKittrick "Faithful daughter, murdering mother: Transgression and social control in colonial Namibia" 40 1999 *The Journal of African History* 265-283; also see *S v Glaco* 1993 NR 141, *S v Shaningwa* 2006 2 NR 552.
[382] See chapter on US laws.
[383] See chapter on the right to life versus the right to knowledge of origins where it was concluded that the right to life supersedes any right to know your origins.
[384] This is an example of what is done in the state of California, in this regard see California Health and Safety Code s 1255.7(b)(1); further see par 4.3.1 of chapter 4 US law.

fails to indicate what happens to mothers who fail to abandon their child safely in accordance with these laws. Should it be assumed that these mothers will be charged with abandonment and face the full force of the law because of the existence of a safe alternative or is there a time period for awareness to be created about these new laws that will still allow for leniency towards mothers? Namibian safe haven laws serve as a reminder to the South African legislature on which aspects of these laws should not be erroneously excluded and which other aspects require deeper consideration and thought. For a properly functioning law that succeeds in its aim to save the lives of infants, factors such as age, procedures and consequences form essential components. Nevertheless, Namibia has taken a step in the right direction by enacting these laws to save the lives of infants being abandoned in life threatening situations.

7.7 CONCLUSION

From Roman times, infanticide and abandonment became less tolerated so much so that, according to Roman-Dutch law, it became punishable by death, depending on where an infant was abandoned.[385] English law saw a change in the attitude of the legislature and the way in which these matters were dealt with by the courts by introducing the crime of infanticide.[386] The recognition of the crime of infanticide saw the infiltration of leniency towards mothers on the grounds of the effects of childbirth and lactation.[387] A verdict of infanticide was less harsh than one of murder.[388] A closer look at South African law saw the pronouncement of the death penalty for the killing or abandonment of infants as there existed no distinction between child murder and other forms of murder.[389] This however changed with the introduction of the crime

[385] See par 2.3 – 2.4 and 2.6 – 2.7 in chapter 2 where the history of abandonment and infanticide in Roman law and Roman-Dutch law is dealt with.
[386] See par 7.2.1 for a look at the history of abandonment and infanticide in English law.
[387] See par 7.2.1; Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 219, medical knowledge of what is now referred to as post-natal depression, took shape in the 19th century where it was first referred to as puerperal insanity.
[388] See for instance the Infanticide Act of 1922 par 7.2.1.
[389] See par 7.2.2.

of concealment of birth,[390] which meant that mothers were no longer subject to the death penalty. The crime of concealment of birth required refining and over the years with each case, the framework of this "new" crime was established. An overview of the case law illustrates the empathy with which matters were adjudicated.[391] The circumstances of the women and their true intent were extracted in each case before a verdict was rendered.[392] In most cases women acted out of desperation and confusion. According to the case law, if a child is found alive then concealment of birth is not a competent verdict.[393] The actions of the accused are crucial in the rendering of such a verdict, if the accused discloses the fact that she gave birth to a child and the location of the child, this negates a charge of concealment because she is not actually "concealing" such birth.[394] Further, concealment of birth can serve as an alternative charge to murder, depending on the circumstances of the case. Another issue that was addressed was the fact that only the mother can be found guilty of the crime of concealment of birth.[395] This does not cater to a situation where someone else, such as the father or grandmother, removes a child from the mother and abandons the child. However, the Children's Act 38 of 2005 section 305(3) provides that anyone may be charged with the abandonment of a child and therefore sufficiently covers this aspect, one can also assume that if this child dies, that murder, attempted murder or culpable homicide may be an appropriate charge. The crime of concealment of birth has not shown to curb abandonment, as the number of concealment of birth cases do not match the estimated number of abandonments, this can be due to a number of factors. Firstly, if a child is found alive it will not amount to concealment of birth. Secondly, if the body of a child

[390] Cape Ordinance 10 of 1845, see par 7.3.
[391] See par 3; *Rex v Arends* 1913 CPD 194; *Rex v Verrooi* 1913 CPD 864; *Rex v Moses and Another* 1919 CPD 81; and see especially *Rex v Williams* 1920 EDL 80 where the court altered a sentence of six months imprisonment with hard labour to one of three weeks with hard labour, on the grounds that the previous sentence was too severe.
[392] See par 3; *Rex v Arends* 1913 CPD 194; *Rex v Verrooi* 1913 CPD 864; *Rex v Moses and Another* 1919 CPD 81; and see especially *Rex v Williams* 1920 EDL 80 where the court altered a sentence of six months imprisonment with hard labour to one of three weeks with hard labour, on the grounds that the previous sentence was too severe.
[393] *Rex v Arends* 1913 CPD 194; also see *Rex v Verrooi* 1913 CPD 864.
[394] *Rex v Emma Madimetae* 1919 TPD 60.
[395] *Rex v Moses and Another* 1919 CPD 81.

is found in an open area such as a toilet, drain or open field then, in terms of the case law analysed above, a charge of concealment of birth may not be appropriate. Lastly, a huge challenge to a charge of concealment of birth is identifying and locating the mother. In terms of South African law, a mother may still be charged with murder, attempted murder or culpable homicide for abandoning her child. South African law does have a separate crime of infanticide contained in section 239 of the Criminal Procedure Act 51 of 1977 this, as suggested by the judge in *S v Jokasi*,[396] takes into account the circumstances of the mother at the time of abandoning the child such as her emotional state, the effects of child birth and lactation.[397] It is submitted that with the proposed implementation of baby safes and safe haven laws and with proper awareness brought to the existence of these laws, if the mother still opts to abandon an infant in an unsafe location, a charge of murder, attempted murder or culpable homicide would be justified and this would as a matter of consequence question the necessity of the separate crimes of concealment of birth and infanticide. Currently, infanticide and concealment of birth function as a less severe measure of dealing with unsafe infant abandonment in the face of no legal safe alternative. In the matter of *S v Molefe*,[398] the court attempted to iron out any uncertainties pertaining to the elements of the crime of concealment of birth, it however did not succeed in providing clarity and left the elements of "disposal" and "child" unresolved. The link between concealment and abandonment exists in that, in order to conceal the existence of the child, the mother abandons that child – in other words *gets rid of, discards, does away with* that child. In some instances the body of a child may be so severely decomposed that it is not known whether that child was still alive at the time of abandonment. In that case a charge of concealment of birth may find application. In terms of the Draft Children's Amendment Bill

[396] 1987 1 SA 431 (ZCS).
[397] Today it is referred to as post-natal depression, see Sclater "Infanticide and insanity in 19th century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 219 for the history of this disease and its recognition as a line of defense in cases of infanticide.
[398] 2012 2 SACR 574 GNP.

of 2018 and 2019 an extended definition of both an "abandoned child" as well as an "orphan" is suggested. The impact of these extensions will be financial in nature, placing an even bigger burden on the state to provide adequate support to these children. With abandonment on the rise, it is easy to deduce that whatever options are available in lieu of abandonment, are not being utilised. Such options include adoption and abortion. An obstacle to adoption, as pointed out in this chapter, is the permission requirement, in that a minor must have the required consent of her parent or guardian should she choose to give her child up for adoption[399] but the same minor does not need the consent of a parent or guardian should she wish to procure an abortion.[400] The accompanying message sent by these laws is that adoption is not an accepted practice and perhaps even treated as a last resort whereas procuring an abortion is preferred. This notion is further supported when looking at the proposed amendments by the Draft Children's Amendment Bill 2018 and 2019.[401] South African law is purely reactive in the realm of the abandonment of infants. Concealment of birth and abandonment cannot be prosecuted if the mother or anyone else cannot be located, thus the current laws prove to be ineffective. Finally, Namibia has developed a safe haven law to curb the issue of unsafe infant abandonment and ultimately to save the lives of infants being dumped.[402] Although these laws are far from perfect and omit some crucial details, it is submitted that this is a step in the right direction. As with many states in the US[403] it is only after initial implementation that the laws may

[399] s 233 of the Children's Act 38 of 2005.
[400] s 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996.
[401] Specifically with reference to the proposed amendment to s 249(2)(*b*) to (*g*), which suggest that no consideration be paid in respect of adoption, which will ultimately cause adoption services to cease to exist; The emphasis on adoption fist came in the 1970s, prompted by the child's right to a family; see Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* (1973); Morgan has argued that adoption should be seen as a public declaration by the family that they are committed to care for the child see Morgan *Adoption and the Care of Children: The British and American Experience* (1998); Lewis "Adoption: The nature of policy shifts in England and Wales, 1972-2002" in Bainham *Parents and Children* (2008) 567; In both the US and the UK it is argued that the state is a bad parent, see Schwartz and Fishman *Kids Raised by the Government* (1999); and research has shown that children prefer adoption as opposed to foster care because of the stability and security it provides see Triselotis and Hill "Contrasting adoption, foster care, and residential rearing" in Brodzinsky and Schechter (ed) *The Psychology of Adoption* 1990.
[402] Child Care and Protection Act of 2015.
[403] See chapter on US law.

subsequently be tailored to meet the needs of the specific state. In fact, these needs may only be amplified after initial implementation. Namibia's laws provide a framework for South Africa in which to develop its own laws. It educates on what not to do in respect of aspects that should not be omitted, but it also largely serves as an example on why these laws *are* important.[404]

[404] See par 7.6.3 on the motivation behind the implementation of these laws in Namibia.

PART FIVE: CONCLUSION AND RECOMMENDATIONS

CHAPTER 8: CONCLUSION

8.1 INTRODUCTION

The purpose of this thesis is to investigate the legalisation of a safe method of infant relinquishment. The use of the word "relinquishment" is indicative of a change in the narrative from one of unsafe abandonment to one of safe relinquishment. This thesis proposes that the term abandonment be used exclusively for situations where it is done unsafely. This will ensure that the stigma associated with "abandonment" is not attached to women who choose to do it in a way that safeguards the lives of their infants and which is prescribed by law. A considerable portion of this study has been dedicated to the historical development of South African law as influenced by Roman-Dutch and English law. The discussion on the Roman family illustrates the advancement from an infant's life being in the hands of the *pater familias* by virtue of him being the head of the household and having the power of life and death[1] over the infant to the

[1] Referred to as the "*ius vitae necisque*". Mommsen, Krueger and Watson *The Digest of Justinian* Vol. 4 (1985) D.48.9.5; Buckland *Textbook of Roman Law From Augustus to Justinian* (digitally printed version 2007) 103.

later years[2] where the killing of an infant was regarded as murder.[3] This curtailment of the power of the *pater familias* was not in respect of any position held by him, he was still regarded as head of his household, this curtailment was symbolic of the development of a regard for the life of an infant. With that being said, it did not mean that the Romans immediately had a high regard for an infant's life, after declaring the killing of an infant to be murder, Roman citizens employed other methods of abandonment such as the sale of children, fostering, substitution, and the exposure of infants.[4] All of these methods were strictly regulated by law, if not expressly prohibited.[5] The same methods were employed in Roman-Dutch law,[6] at times the law making forward strides[7] and at other times, the law returning to the primitive approach as followed by the Romans.[8] The first half of chapter 7 analysed the occurrence of infant abandonment as well as infanticide because in some cases, abandonment is aimed at committing infanticide and in others, abandonment is aimed at securing a better life for the newborn child.[9] As a result, the history of infanticide and abandonment according to English law formed an important aspect of understanding the nature of the current South African law.[10] South African law relied largely on English law in the realm of infanticide.[11] The first English statute dealing directly with the concealment of birth was established in 1623 and it set in motion the development of what was the Offences Against the Person Act of 1861. This set the benchmark for the South African law on concealment of birth, namely Ordinance 10 of 1845.[12]

[2] The power of the head of the household was long obsolete before it was declared void by Constantine in 319/318 AD but eventually in 374 AD the killing of an infant was regarded as murder; see Scott *Corpus Juris Civilis The Civil Law Justinian/Scott, The Code of Justinian* Vol.7 1973 J.C.9.17.1; Frier and McGinn *A Casebook on Roman Family Law* (2004) 191; see also par 2.3 of chapter 2.
[3] See par 2.3 of chapter 2.
[4] See chapter 2 for a discussion on each of these forms of abandonment.
[5] See par 2.4 of chapter 2 more specifically 2.4.1 to 2.4.4.
[6] See par 2.7, more specifically 2.7.1 to 2.7.4 of chapter.
[7] Such as prohibiting fathers from selling their children when facing extreme poverty; see Pharr *The Theodosian Code* (2012) Th.3.3.1; see par 2.7.4 of chapter 2.
[8] See for example the killing of a severely deformed child see par 2.3 of chapter 2.
[9] See para 7.2 and 7.2.1-7.2.4 of chapter 7.
[10] See par 7.2.1 of chapter 7.
[11] Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188.
[12] Which was eventually replaced by the General Law Amendment Act 46 of 1935; see par 7.3.1 and 7.3.2 of chapter 7.

The British Parliament in 1872 also created the Infant Life Protection Act to curb the amount of infant deaths that were occurring in houses that provided care for children in exchange for money.[13] This too was emulated in South African law by the enactment of the Infant Life Protection Act in both the Cape and Transvaal provinces.[14] Finally, Britain created the Infanticide Act of 1922, which was repealed by the Infanticide Act of 1938 and South Africa, once again learning from its British counterpart, adopted this crime into its law under section 239 of the Criminal Procedure Act 51 of 1977.[15] This part of the study illustrated that the initial non-regard for the life of a newly born child changed as societies advanced. Such advancement resulted in more and more protection being offered to infants[16] and even the death penalty being applied where an infant was killed.[17] Not long thereafter, it was found that some women killed their infants as a result of the effects of child birth or lactation,[18] today recognised as post-partum depression. Thus, in addition to the protection offered to infants, the law has also progressively shown an understanding towards women suffering from the side effects that are related to childbirth.

8.2 SUMMARY OF COMPARATIVE LAW

8.2.1 Germany

[13] See chapter 7 par 7.2.1.
[14] See par 7.2.4 of chapter 7, which provides that the Infant Life Protection Acts were eventually consolidated to become the Children's Protection Act 35 of 1913, and this was later repealed by the Children's Act 31 of 1937.
[15] par 7.3.2 of chapter 7.
[16] For instance, in English law the Infant Life Protection Act of 1872 and the Infanticide Acts of 1922 and 1938 and in South African law.
[17] See par 7.2. where, according to English law, the charge for killing a child was the death penalty, although it was seldom enforced; also see par 7.2. where the punishment was the death sentence; see also Van der Spuy "Infanticide, slavery and the politics of reproduction at Cape Colony, South Africa, in the 1820s" in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (2002) 131; Van der Westhuizen "An historical overview of infanticide in South Africa" 15 2009 *Fundamina* 174, 188.
[18] Infanticide Act of 1938 took into account both the effects of childbirth and lactation; see para 7.3.2 and 7.7; Today it is referred to as post-natal depression, see Sclater "Infanticide and Insanity in 19th Century England" in Ebtehaj, Herring, Johnson and Richards *Birth Rites and Rights* (2011) 219 for the history of this disease and its recognition as a line of defense in cases of infanticide.

The study on German law illustrated the existence of three separate systems to stop infant abandonment and infanticide. Baby safes were discussed, which was set-up by the SterniPark Association in April of 2000.[19] Certain negative aspects exist with regard to the use of these safes. These aspects include the infringement of fathers' rights;[20] the pro-longed institutionalisation of children in lieu of adoption; the possibility of child-trafficking;[21] and the inability to identify the biological parents in instances where the child is claimed back. In addition, the lack of provision of medical care to the mother and or counselling services is a concern to its implementation. Furthermore, the relinquishment of older[22], dead or disabled children is also expressed as a fear with the use of these safes.[23]

In response to these aspects, this thesis suggests that in order to safeguard fathers' rights a national putative father registry should be established which would allow fathers to register once they have been notified of the birth of their child. This approach therefore promotes registration subsequent to the notification of the birth, as opposed to registration based on an assumption of pregnancy, as exercised in some states in the US.[24] As discussed in chapter 6,[25] this registry should not be strictly applied as to prevent women from making use of baby safes. This approach recognises that the right to life of the child is of ultimate importance and it is in the best interests of the child to have his or her right to life protected. Ultimately, the rights of the unmarried father may be limited when the best interests of a child demands it.[26] That

[19] This is a hatch in a wall of a charitable institution or home for children, this hatch has an alarm which is triggered once a child is placed inside; see par 3.1.2 and 3.2 of chapter 3.
[20] See chapter 6.
[21] No evidence exists that baby safes have been used to promote child-trafficking or that it will do so in future.
[22] See par 3.2 of chapter 3; also see chapter 4 specifically in the state of Nebraska par 4.4 where older children were relinquished with the introduction of safe haven laws. The state of Nebraska ran into this problem due to the fact that it failed to implement an age limit in respect of children that may be relinquished.
[23] See par 3.2 of chapter 3.
[24] See chapter 6 par 6.4 more specifically 6.4.4.
[25] par 6.4.3 of chapter 6.
[26] Carpenter "Constitutionally protected rights for parents" 2008 *TSAR* 402.

although it is in the child's best interests to know his or her father, it is also in the child's best interests to be born in safety and to have his or her right to life preserved. The mother's right to choose to anonymously abandon her child is protected in her right to bodily integrity in section 12 of the Constitution,[27] which covers the right to make decisions concerning reproduction.[28] The disclosure of the details of the father should be voluntary and no sanction should be imposed if the mother chooses not to make this information available. If the mother provides identifying information of the father, he should be notified that a child has been born and relinquished to a specific organisation. Furthermore, he should be informed of the steps he can take in order to assert his parental responsibilities and rights in respect of the child. However, if the mother refuses to provide identifying information of the father then an ad should be published in a local newspaper containing all the details regarding the birth of the child and non-identifying information of the mother or guardian who relinquished the child. This ad should also include information on the steps, he the father, should follow in order to assert his parental responsibilities and rights in respect of the child, such as to register with the putative father registry. The father should be granted a period of 60 days within which to assert his rights in respect of the child, by registering with the putative father registry that is kept at all child protection agencies and child welfare offices,[29] failing which, the child may be made available for adoption.

[27] In this respect see Fenton-Glynn "Anonymous relinquishment and baby-boxes: Life-saving mechanisms or a violation of human rights?" in Boele-Woelki and Dethloff (eds) *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (2014) 186-197; Chambers "Newborn adoption: Birth mothers, genetic fathers, and reproductive autonomy" 26 2010 *Canadian Journal of Family Law* 339, 343-345.

[28] In this respect note that the father's consent is not required in the woman's choice to terminate a pregnancy, see the Choice on Termination of Pregnancy Act 92 of 1996.

[29] This is the same amount of time granted to a mother in order to change her mind after giving her child up for adoption see s 233(8) of the Children's Act 38 of 2005: "(8) A person referred to in subsection (1) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final."

It is agreed that children who are rescued through the use of a baby safe may end up institutionalised for a long period. This is especially the situation when there is no proper-functioning system of adoption. In this respect, this thesis does not agree with the proposed amendments to the Children's Amendment Bill 2019,[30] as more private adoption agencies would have to stop operating due to being prohibited from charging for their services. Should this Bill be passed and made into law, fewer agencies will perform adoptions which mean that less adoptions will take place. This will have a negative impact on children waiting to be adopted, as more children will remain institutionalised for longer periods.

Furthermore, in the instance where the mother changes her mind and wishes to reclaim the child, a way in which to identify the mother should be established. This can be done by leaving a unique code or number in the form of a bracelet in the baby safe,[31] for the mother or father or guardian to take upon placing the child in the baby safe. Should the mother change her mind[32] she can produce the bracelet containing the unique code as evidence that she is the mother. In this way expensive DNA testing may be avoided. However, if there is any suspicion of abuse or neglect the mother will not be able to reclaim the child.[33] She should also be provided with information informing her of the steps she may take and the time limit she has within which to reclaim her child. If the institution where the child was relinquished still has doubts whether the woman reclaiming the child is in fact the mother, other evidence may be

[30] See the following paragraphs of chapter 7 where the proposed changes are discussed: para 7.5.1.1.1 s 249(2)(*b*) to (*g*) – no consideration in respect of adoption; 7.5.1.1.2 s 250 – only certain persons allowed to provide adoption services; 7.5.1.1.3 s 259 – accreditation to provide inter-country adoption services.

[31] This is an example of what is done in the state of California, in this regard see California Health and Safety Code s 1255.7(b)(1); further see par 4.3. of chapter 4.

[32] Even if the child is relinquished in the baby safe by his or her father or guardian, the mother can still change her mind since the child was relinquished into the safe on her instruction in the first place.

[33] The child will be defined as one in need of care and protection in terms of s 150(i) of the Children's Act 38 of 2005. In this instance the child is removed to a temporary place of safety by a court order following which an investigation must be conducted by a social worker in terms of s 151; see further the Children's Act General Regulations Regarding Children, 2010 reg 33 which provides that a report drafted in terms of s 110(1) of the Children's Act must be made to the provincial department of social development and must comply with Form 22.

produced, such as proof by the hospital where the mother gave birth to the child, or corroborating information from family members or friends who may have been aware. This form of evidence should only be gathered with express permission from the suspected mother. As a last resort, DNA testing may be conducted to determine whether she is in fact the mother.[34]

The provision of counselling services and necessary medical care to the mother is a concern with the implementation of baby safes. A telephone number that the mother may contact for the provision of these services, free of charge, should be left in the safe for her to take, once she has placed the infant inside.

The abandonment of older children occurred in the state of Nebraska when it first introduced its safe haven laws. This was due to the fact that in implementing its laws the state failed to mention the age limit of children that may be relinquished, thus leaving the system susceptible to misuse.[35] Nevertheless, a way in which to prevent these occurrences is to specify an age limit.[36] Is specifying an age limit a guarantee that no child beyond that age will be relinquished? The answer is no, very often the exact age of a child can only be determined upon subsequent medical examination of that child. However, baby safes are of limited size and this will prevent the abandonment of bigger children that may be placed for adoption or fostering instead. The abandonment of dead or disabled children through baby safes cannot be prevented and in

[34] The costs of the DNA testing should be borne by the state.
[35] See chapter 4 par 4.4.
[36] See also par 7.6 of chapter 7 which highlights the fact that Namibia also failed to include an age limit in their baby safe laws.

Hamburg, Germany three severely handicapped children were abandoned in these safes.[37] However, the abandonment of dead children have not been reported.

Anonymous birth is another method used in Germany to curb infant abandonment and infanticide.[38] The first anonymous birth took place in December 2000.[39] Its aim was the same as that of baby safes, to preserve the life of the newborn infant but it was seen as a supplement or alternative to the use of baby safes.[40] In some instances it was viewed as an alternative to abortion and regarded as a more comprehensive means of life protection.[41] Anonymous birth is the same as normal birth in a hospital, the only difference is that a woman does not have to give up her identity.[42] The benefit of this over the use of baby safes is that the woman is provided with essential medical care to protect both her life and the life of the infant. After the birth the mother may leave immediately if fit to do so and the same procedure applies as if the child was delivered in a baby safe.[43]

[37] Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 16; Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 201.

[38] See par 3.3 of chapter 3.

[39] See par 3.1.2 of chapter 3.

[40] See par 3.3 of chapter 3.

[41] See par 3.3 of chapter 3; see also Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 19; see also Wiesner-Berg *Anonyme Kindesabgabe in Deutschland und der Schweiz: Rechtsvergleichende Untersuchung von "Babyklappe", "anonymer Geburt" und "anonymer Ubergabe*" (2009) 9; Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 147-173.

[42] See par 3.3.1 of chapter 3.

[43] The infant receives medical care and then is placed into the care of a family; see Benner *Babyklappe und anonyme Geburt: Ist die Kindesabgabe durch Babyklappe und anonyme Geburt moralisch vetretbar?* (2010) 22; Hamper *Babyklappe und anonyme Geburt, Zur thischen und rechtlichen Problematik unter besonderer Berucksichtigung der Rolle von Arztinnen und Arzten* (2010) 21; According to Nadene Grabham, Operations Director of the Door of Hope Children's Mission in South Africa, the following procedure takes place when a baby is left in a baby box. The baby is left in a baby box any time of the day or night. The baby box is on the same property as a baby house so staff will immediately remove the baby from baby box (staff is alerted by an alarm that is triggered once a baby is placed inside) and do a health check and take photos, weight and measurement and make notes of any marks etc. on the baby's body. They will take the baby's temperature and vital signs. If all is not well, they take the baby to emergencies at a Johannesburg hospital. If all is well, they bath and feed the baby. Within 24 hours they refer the case to their child protection agency such as Abba, Impilo or Child Welfare who will apply at the Children's Court to appoint the Door of Hope as the legal guardian as a Child and Youth Care Centre (CYCC). Due to the fact that they are a CYCC babies are registered in the name of the Door of Hope. They will also place an ad in the local newspaper which will run for 3 months. A case of abandonment is opened

The challenge experienced in implementing anonymous birthing laws, which is the same challenge as with the implementation of baby safes, is the non-protection of the child's right to knowledge of its origins. This was discussed extensively in chapter 5, where firstly the importance of the "right to life" (contained in section 11 of the Constitution), its origins and its limits were addressed.[44] Secondly, this thesis investigated whether the right to knowledge of one's origins indeed exists and it was found that it does, because it forms part of a subset of various rights in the Constitution.[45] These rights include "the right to freedom and security of the person" in section 12; the "right to freedom of association" in section 18; the "right to human dignity" in section 10; "the right to a name and nationality from birth" in section 28(1)(*a*); the "right to family and parental care" in section 28(1)(*b*) and finally the "best interests of a child" in section 28(2). Once it was established that the right to knowledge of origins exists, the limitation of this right through the use of baby safes was deliberated.[46] This right's limitation in terms of the general limitation clause section 36 was therefore discussed.[47] Ultimately, it was found that the limitation of the right to knowledge of one's origins through the use of baby safes or anonymous birth is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" and based on the factors listed in section 36.[48] The basis of this finding is that limiting the right of the child to knowledge of its origins through the use of baby safes serves a legitimate purpose, such purpose is to save

at the local police station by the child protection agency, however, sometimes the Door of Hope's own social worker will open up a case in this respect. If no response is received on the ad and no information is received, then the police case will be closed and the baby becomes legally adoptable. If information is left with the baby in baby box such as a clinic card etc., the social worker will investigate and follow up on any information relating to the mother to try to find her. About 95% of the time, no information is left or the clinic card is left but the page with the mother's details is ripped out. If a name and surname is left with the baby they will use that, if no name and surname is found they will choose a name and surname for the baby. If the police itself brings a baby that was dropped in an unsafe location then in that instance a case of abandonment has already been opened and the police already arrive with a case number.

[44] See par 5.2 of chapter 5.
[45] See para 5.3.2 [5.3.2.1 to 5.3.2.6] of chapter 5.
[46] See par 5.3.3 [5.3.3.1 to 5.3.3.5] of chapter 5.
[47] See par 5.3.3 [5.3.3.1 to 5.3.3.5] of chapter 5.
[48] See par 5.3.4 of chapter 5.

the life of the newborn infant.[49] The extent of the limitation is necessary to save the life of the newborn infant because of the fact that anonymity is a driving factor behind the use of these safes.[50] It was also found that less restrictive means do exist to achieve this purpose[51], such as confidential birth, but that ultimately such means still depend on the permission of the biological mother to disclose her information and therefore do not guarantee the child's right to knowledge of its origins.

A further investigation conducted in chapter 5 was in respect of the biological mother's right to privacy[52] as a competing interest against the child's right to knowledge of its origins.[53] Here too the limitation of the mother's "right to privacy", as done by the child's right to knowledge of its origins, was weighed in terms of the general limitation clause section 36. The finding concluded that limiting the mother's right to privacy would be too far reaching in that it would negatively impact third parties' interests, those of the biological father, the adoptive family and any biological siblings that may exist.[54] Therefore, the extent of the limitation in terms of section 36(1)(*c*) failed as infringing on the privacy rights of others.[55] In conclusion, it was found that the right to life can only be safeguarded if the mother's right to privacy is respected.

The third and final system employed in German law to curb infant abandonment is confidential birth.[56] This was established by the German legislature as a legally regulated alternative to baby

[49] See par 5.3.4 of chapter 5.
[50] Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 317.
[51] See par 5.3.3.5 of chapter 5.
[52] In s 14 of the Bill of Rights, which grants this right to everyone.
[53] See par 5.4 of chapter 5.
[54] See par 5.4.3 of chapter 5.
[55] See par 5.4.2.3 of chapter 5 for this discussion.
[56] See par 3.5 of chapter 3.

safes and anonymous birth. This thesis conducted an analysis of the laws surrounding confidential birth, also specifically the *Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt* (SchwHiAusbauG – Law for the Expansion of the Aid for Pregnant Women and the Regulation of Confidential Birth), which was passed on 7 June 2013.[57] The aim of confidential birth is to promote the child's right to knowledge of its origins. If the mother chooses to make use of confidential birth she must reveal her true identity as well as her date of birth and address. This information is placed in a sealed envelope on top of which is the chosen pseudonym of the mother and the name of the child, date of birth, place of birth and doctor's name.[58] This sealed envelope is kept until the child reaches the age of 16. Once 16 years old, the child may request that the information contained in the sealed envelope, be disclosed. The mother still has the ability to refuse access to the information, but must show a valid reason for such refusal.[59] Although confidential birth helps to assure the child of the right to knowledge of its origins, it has already been established in the previous chapter under discussion that the child's right to life enjoys primacy.[60] The mother's right to refuse the child access to such information means that confidential birth cannot guarantee the child's right to knowledge of origins, it only provides the child with a *possibility* of knowing its origins.

8.2.2 The United States of America

The chapter on US law examined the baby safe haven laws of three states, namely Texas, California and Nebraska. Texas being the forerunner with regard to these laws, California being the state without a putative father registry and lastly Nebraska, which at first permitted children

[57] Schwedler "Die vertrauliche Geburt- EinMeilenstein fur Schwangere in Not?" 5 2014 *NZFam* 194; see par 3.5 of chapter 3.
[58] s 26(1) of para 1 and 2 SchKG.
[59] See par 3.5.1 of chapter 3.
[60] See par 5.6 of chapter 5.

of any age to be relinquished. Safe haven laws require the personal handover of an infant by the biological mother or by a person with lawful custody. In view of the fact that anonymity is a driving factor behind the use of these systems, the very nature of safe haven laws requiring personal handover may pose as a deterrent to would-be relinquishers. Both the Texas Family Code as well as the California Health and Safety Code expressly protect the identities of parents or persons who have lawful custody. However, no mention of confidentiality in this sense is made by the laws of the state of Nebraska.[61] Further, the Texas Family Code provides confidentiality to "a person" who voluntarily delivers a child and does not specify that this person must either be a parent or another person with lawful custody over the child.[62] This leaves the act of surrender open to be performed by any person. Nevertheless, even if the law specifies that relinquishment can only be done by a parent or other person who has lawful custody in respect of the child,[63] how can this be proven where the person's confidentiality is protected? According to the Texas Family Code section 262.302 the designated emergency infant care provider has no duty to detain or pursue the parent unless the infant shows signs of neglect and abuse, therefore even if the emergency infant care provider were suspicious that the person relinquishing the child is not a parent or person with lawful custody, he or she cannot pursue that person. Thus, there is no assurance that the relinquishing person is a parent or a person with lawful custody, even with the necessary laws in place. In Texas the child must be 60 days old or younger,[64] in the state of California the child must be 72 hours old or younger[65] and in Nebraska infants can be up to thirty-days old[66] to be legally relinquished to a safe haven provider. As stated above, the exact age of the child will only be determined upon subsequent

[61] See par 4.4.4 of chapter 4.
[62] Texas Family Code s 262.308 however a rebuttable presumption of this person being the biological parent does exist in terms of s 263.407 of the Texas Family Code; Nebraskan legislation also does not specify who may leave an infant.
[63] California Penal Code s 271.5.
[64] Texas Family Code s 262.302.
[65] California Penal Code s 271.5.
[66] Nebraska Revised Statute s 29-121.

medical examination. Californian law sanctions the instance where a child that is relinquished is more than 72 hours old and under 14 years of age, with one year imprisonment or a thousand dollars fine, or both.[67] How the parent will be prosecuted if the exact age of the child is only determined after confidential relinquishment remains unanswered. Furthermore, no mention of the imposition of sanctions where a child is older than stipulated in the safe haven laws is made in the state of Texas or Nebraska. The lessons learnt from the establishment of baby safe haven laws in the states under discussion is that none of these laws, despite having the other to learn from, are faultless as illustrated by Nebraska where lawmakers failed to consider the age limitations put in place in the state of Texas. Important elements, as discussed above, are not addressed and others, even if addressed, have practical limitations and anomalies that are attributed to the fact that some aspects cannot be controlled through legislation.[68] In the face of the best interests of the child, these anomalies merely have to be accepted as a risk the legislature is willing to take to save the lives of infants.

8.2.3 Lessons from Namibia

In Namibia, safe haven legislation was enacted on 30 January 2019 in section 227(1) of the Child Care and Protection Act 3 of 2015. Here too are numerous shortcomings, despite having the safe haven laws of the US to refer to. Namibian law failed to deal with the maximum age of a child that may be relinquished through the safe haven law.[69] No procedure is specified if the child shows signs of neglect or abuse; the confidentiality of the abandoning person or persons are not dealt with; and how it will be determined that the person wishing to reclaim the

[67] s 271 of the California Penal Code, see par 4.3.3 of chapter 4.
[68] Important elements such as age, or who can relinquish an infant and how will it be determined that that person is who they say they are. These aspects cannot be controlled through legislation i.e. legislation cannot prevent a child older than that stipulated in the laws from being abandoned to a designated safe haven provider. Furthermore, the confidentiality aspect prevents the designated safe haven providers from questioning the relinquishing person and thus prevents them from establishing if the person is in fact the mother, father or a person with lawful custody.
[69] Refer to the state of Nebraska in chapter 4 par 4.4 for the repercussions of not stipulating an age requirement.

child is the parent, guardian or care-giver of the child is also not addressed.[70] Further, what happens to someone who fails to abandon a child safely, within the confines of the new law? Furthermore, the rights of fathers are not alluded to. Namibian safe haven legislation was developed because 13 fetuses were abandoned in toilets or other locations in Windhoek every month. Thus, despite all of its shortcomings, this law indicates a move on the part of the legislature to protect the rights of infants that were being abandoned in life threatening situations.

8.3 RECOMMENDATIONS

8.3.1 Lessons from the above jurisdictions as a basis for the recommendations

It is clear from the above, that Germany started with baby safes, which is unregulated by its law, as a mechanism to prevent unsafe infant abandonment. It was designed to save the lives of newborns by helping desperate women in need. Subsequent to the installation of baby safes was the implementation of anonymous birth and eventually the establishment of confidential birth laws. Thus the law evolved from offering no protection to the child's right to knowledge of its origins, to the implementation of confidential birth laws which offers this protection. Despite the creation of confidential birth laws, baby safes as well as anonymous birth laws still exist, which may be seen as the law catering to the needs of different women. Some women choose not to disclose their identities at all and want no contact with anyone, in which case the baby safe is the perfect fit. Others might choose the medical treatment and safety of a hospital, but still prefer anonymity, in which case anonymous birth is the right fit. Lastly, there are those women who foresee the possibility of reuniting with their child in future and thus prefer

[70] Refer to the suggestion in Californian law, California Health and Safety Code s 1255.7(b)(1); further see par 4.3.of chapter 4.

confidential birth, still in the safety of a hospital. At the same time as baby safes were being established in Germany, baby safe haven laws were being established in the US. These laws took the concept of the baby safe one step further by providing that, instead of placing a baby in a safe, a parent or other person with lawful custody must personally hand the child over to any one of the designated safe haven providers. Although two of the US states under investigation protect the confidentiality of the parent or person with lawful custody, such protection is debatable for a woman handing her child over to a fireman, policeman or a staff member at a hospital in a small town or in a close-knit community. Kuhn provides that the anonymity provided by baby safes is an important factor to gain the trust of women.[71] In both jurisdictions under review these systems were established because of a rise in the number of infant deaths due to unsafe abandonments and consequently their laws are primarily focused on protecting the lives of infants. This, it is submitted, is the common trait that forms the basis of the recommendations to follow.[72]

8.3.2 Existing law as a basis for the recommendations

Currently, the abandonment of children in South Africa is regulated by section 305(3)(*b*) of the Children's Act 38 of 2005, which declares it an offence to abandon a child. Further, the concealment of birth of an infant is dealt with by section 113 of the General Law Amendment Act 46 of 1935 as well as by section 239(2) of the Criminal Procedure Act 51 of 1977 where it is stated that it shall not be necessary to prove whether a child died before or at or after birth.

[71] See chapter 3 par 3.2; Kuhn *Babyklappen und anonyme Geburt. Sozialregulationen und sozialpadagogischer Handlungsbedarf* (2005) 317; see Etheridge "Photos of woman leaving baby at safe haven gate sparks fiery debate" 7 July 2017 *News 24*, available at https://www.news24.com/SouthAfrica/News/photos-of-woman-leaving-baby-at-safe-haven-gate-sparks-fiery-debate-20170707 last accessed on 2019-10-07.

[72] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 15; see chapter 3 par 3.1.1 where it is stated that these safes, as well as anonymous birth, are aimed at the protection of life of infants by preventing the killing and abandonment of these infants; see also chapter 4 par 4.1.2 where the prominent increase in the number of newborn infant deaths signaled that it was time for a new law.

The exposure of an infant is declared a competent verdict in lieu of one of murder or attempted murder in terms of section 258 of the Criminal Procedure Act. Lastly the crime of infanticide, which is the killing of a newly born child, is regulated by section 239(1) of the Criminal Procedure Act. These laws illustrate a reactive approach adopted by the South African law in dealing with infant abandonment and actions related thereto. This restrictive legislation, according to Blackie, is one of the causes of child abandonment.[73] A reactive approach is problematic as it fails to prevent the proliferation of infant abandonment by only punishing and not preventing the action.[74] Punishing the action does not safeguard the lives of infants. The fact that very few women are ever prosecuted for these crimes is also evidence of the fact that these laws, by themselves, are ineffective in that they neither serve as a deterrent nor do they have a retributive function. In view of this, the following recommendations are made for the establishment of a preventative law that will offer a better option to women who wish to relinquish their infants safely. The below recommendations are not mutually exclusive. They can co-exist in order to better serve the needs of women.

8.3.3 First recommendation: The immediate implementation of baby safes

This thesis proposes the establishment of baby safes in order to safeguard the lives of newly born infants. Various baby safes have already been established throughout South Africa but they are operating illegally, outside of any legal framework. It is for this reason that their existence is not widely publicised and their ability to reach women in need is therefore

[73] Blackie (National Adoption Coalition of South Africa Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014.

[74] As experienced in the Netherlands where a baby box was opened in June 2014 after the *Raad voor Strafrechtstoepassing en Jeugdbescherming* (Council for the administration of criminal justice and the protection of juveniles) advised the government to focus their efforts on preventing the act of abandonment rather than prosecuting the act. Advies vondelingenkamer en babyhuis, 30 June 2014, see www.rsj.nl/english last visited on 2019-11-10.

hampered. When legalising these safes, certain provisions should be put in place in order to ensure their proper functioning. Baby safes are the easiest to implement as a starting point in South Africa because only organisations interested in establishing these safes can do so, as opposed to safe haven laws (discussed here below) which will require wider co-operation from all police stations, fire stations, children's homes and non-profit organisations, which will therefore take a longer time to institute. The current procedure followed when a baby is left in a baby safe will now be explained. The baby is left in a baby safe any time of the day or night. The baby safe is on same property as a baby house so that staff will immediately remove the baby from the baby safe (staff are alerted by an alarm that is triggered once a baby is placed inside). The staff do a health check and take photos, weigh and measure the baby and make notes of any marks on the baby's body. They will take the baby's temperature and vital signs. If the baby is not well he or she will be taken to a hospital. If the baby is well, he or she is bathed and fed. Within 24 hours the case is referred to a child protection agency who will apply at the Children's Court to appoint a CYCC (Child and Youth Care Centre) as a legal guardian. They will also place an ad in the local newspaper which will run for 3 months. A case of abandonment is opened at the local police station by the child protection agency, however, sometimes the CYCC's own social worker will open a case in this respect. If no response is received on the ad and no information is received on the mother or father, then the police case will be closed and the baby becomes legally adoptable. If information is left with the baby in the baby safe such as a clinic card, the social worker will investigate and follow up on any information relating to the mother to try to locate her. About 95% of the time no information is left or the clinic card is left but the page with the mother's details is ripped out. If a name and surname is left with the baby they will use that, if no name and surname is found they will choose a name and surname for the baby. If the police itself bring a baby that was dropped in

an unsafe location a case of abandonment has already been opened and the police already arrive with a case number.[75]

With regard to the recommendations below, no case of abandonment will be opened[76] if the biological mother or father[77] or guardian[78] opts to make use of a baby safe to relinquish the child. Furthermore, the social worker will not be permitted to investigate the whereabouts of the mother or relinquishing person based on the information, if any, left in the baby safe as the mother and relinquishing person will be guaranteed anonymity. This is only the case where the child does not show any signs of abuse.[79] These and further proposed provisions are discussed below.

[75] s 12 of the Births and Deaths Registration Act 51 of 1992 provides for the registration of abandoned or orphaned children. "s 12 Notice of birth of abandoned or orphaned child — (1) The notice of birth of an abandoned child which has not yet been given, shall be given, after an enquiry in respect of the child concerned in terms of the Children's Act, by the social worker concerned: Provided that in the event of any parent of the child being traced after the registration of the birth and the particulars in any document or record in respect of the child not being reflected correctly, the Director General may on application, in the prescribed manner, amplify and correct the said particulars. (2) The notice of birth of an orphaned child which does not list any of the persons contemplated in terms of section 9(1), shall be given by a social worker, after conclusion of an enquiry in respect of such child concerned in terms of the Children's Act"; The process for the registration of birth of an orphaned or abandoned child is laid out by Proudlock in *Realising Children's Rights Law Review* (2014) 21-22 as follows: Where a social worker identifies and abandoned or orphaned child the process for the registration of the child's birth is as follows: After the initial court appearance for temporary removal of the child in terms of s 151(1) of the Children's Act, the social worker will request an age estimation of the child by a district surgeon; The age estimation is presented to the court along with the social worker's findings and the court will order the Department of Home Affairs to register the child's birth and to issue a birth certificate; The social worker will then submit this order to the Department of Home Affairs along with the application for registration of births, if the child is older than 30 days, the late registration application should be followed; Only once the Department of Home Affairs has issued the birth certificate can the children's court place the child. Delays occur in the children's court processes as well as in the processes followed by the Department of Home Affairs in issuing these birth certificates. These delays then cause prolonged institutionalisation of children. Furthermore, if the child is not a South African citizen he or she is refused a birth certificate by the Department of Home Affairs despite an order from the children's court; in this respect see Boniface and Rosenberg "The challenges in relation to undocumented abandoned children in South Africa" 2019 *TSAR* 41.

[76] See the procedure followed by Helderberg Baby Saver where Immelman provides that an Incident Report (IR) number should be obtained from the South African Police in lieu of a case number. A case number will cause a case to be opened by the police and result in the conduct of an investigation whereas an IR is all that is needed by the Child Protection Organisation in order to have the court place the baby in care, this is referring to the temporary care of a CYCC or home and not adoption or foster care, which only happens later after a birth certificate is issued, see above.

[77] With consent from the biological mother and upon her instruction.

[78] With consent from the biological mother and upon her instruction.

[79] If the child does show signs of abuse, a report must be drafted in terms of s 110(1) of the Children's Act and in terms of reg 33 of the Children's Act General Regulations Regarding Children, 2010.

8.3.3.1 Relinquishing person

The persons permitted to relinquish the child are the parents or persons acting with the consent and instruction of the mother. This is in order to prevent another person that does not have the consent of the mother from removing the child from the mother's care without her permission and then relinquishing that child through the use of a baby safe. Thus, this law caters to mothers who, for example either concealed the fact of their pregnancies or birth or despite having not concealed their pregnancies or birth, find themselves in desperate situations after having given birth. These women either do not want to care for the child; do not have the means to care for the child or have fear of rejection, abuse or violence. Furthermore, the use of these safes are also open to fathers, acting with the consent and upon the instruction of mothers. Guardians, may also relinquish a child through the use of a baby safe or safe haven law but, similar to the father, only with the consent and upon the instruction of the mother. A safeguard in place to ensure that a child has not been removed from the mother's care without her permission is the ad that is placed in a local newspaper, which will give the parents 60 days (cooling-off period) within which to reclaim the child.

8.3.3.2 Age

Learning from the state of Nebraska, failing to stipulate a maximum age for a child to be relinquished may prove disastrous once these laws are implemented. Most infants that are abandoned unsafely are newborns,[80] with a few exceptions.[81] Age forms an important component of these laws and must be aimed at achieving the purpose of these laws – to save the lives of newly born infants. These laws are not designed to aid a biological mother in

[80] See chapter 7 par 7.1; Namibia has also failed to provide an age limit.
[81] See chapter 7 par 7.1, where a seven month old was abandoned in Black Hill.

abandoning an older child that may be placed for adoption. These laws are designed to aid women who have, for example, concealed their pregnancies from their families, community or partners and now wish to anonymously relinquish the child that they are either unable to care for, or who has been conceived through, but not limited to, rape, forced prostitution or incest.[82]

It is submitted that the appropriate maximum age of a child that may be relinquished in a baby safe is 60 days.[83] What happens if the child is older than 60 days? As mentioned previously, the exact age of an infant can only be determined through subsequent medical examination however, it is submitted that if a child is older than 60 days, but shows no signs of abuse, the mother should not be prosecuted for such relinquishment.[84] This allowance should be in the discretion of the baby safe provider or designated safe haven provider. The mother or relinquishing person will not be guilty of the offence of abandonment should the child be older than the stipulated age but show no signs of abuse.

8.3.3.3 Signs of abuse and immunity from prosecution

In order for a biological mother to enjoy immunity from prosecution for the relinquishment of an infant, the infant must show no signs of abuse. This is a prerequisite in all three US states

[82] For a list of women who are prone to abandoning their infants see Blackie (National Adoption Coalition of South Africa Fact sheet on child abandonment research in South Africa research study) "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 20 May 2014 7 "Women living in extreme poverty, and just surviving from one day to the next; Illegal immigrants with no support structures; Women with no family or support structures; Women who have moved from one relationship to another and their new boyfriend does not want to take care of the child from a previous relationship; Women who have HIV/AIDS; Women who have been raped by a family member (incest is often mentioned), someone in their community or a stranger (multiple perpetrator rape in SA is the highest in world); Women who have been abandoned by their boyfriends; Young teenagers who are still at school; Prostitutes; Alcoholics and drug addicts (usually living on the streets); Women living in rural areas in extreme poverty who travel to the city to abandon." Blackie also highlights the causes of child abandonment to be restrictive legislation, poverty, mass urbanisation, high levels of violence, gender inequality, HIV/AIDS, and diminishing family support.

[83] This is the age limit enforced by the state of Texas, South Carolina and South Dakota.

[84] Note in this regard that the age limit enforced in New Mexico is 90 days and in North Dakota is one year, thus there exists some discretion with regard to the age of the child. Reasonableness should be applied in this regard.

under review. If the infant shows signs of abuse, an investigation may be opened to locate the biological mother and prosecute her in terms of the Children's Act 38 of 2005.[85]

The proposed wording of the relevant section 305(3)(*b*) is as follows:

> "(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person—
>
> (a) abuses or deliberately neglects the child; or
>
> (b) abandons the child, or
>
> *(c) abandons an infant other than in a Baby Safe or other than in terms of the Baby Safe Haven laws, or*
>
> *(d) if such infant of 60 days old or younger is relinquished in a Baby Safe or to a designated Baby Safe Haven provider in terms of the Baby Safe Haven laws but shows signs of abuse.*" (own emphasis)

8.3.3.4 Time limits

Either parent should be given 60 days within which to change his or her mind (the so-called cooling-off period). The time period should start running from the date of the newspaper publication calling for a parent to come forward and assert his or her rights. This is the same time period granted within which to change your mind when consenting to an adoption.[86]

[85] In this case the normal procedure may be followed in terms of the Children's Act where a child is found to have been neglected or abused and the person may be liable for an offence in terms of s 305(3)(*a*); see also reg 33 of the Children's Act General Regulations Regarding Children, 2010 in this regard.

[86] See s 233(8) of the Children's Act 38 of 2005, where it states that a person who has consented to the adoption of a child may withdraw such consent within 60 days, after having signed the consent. However, although the 60 day time period has been adopted from this section, it is important to bear in mind that the relinquishment of a child either through a baby safe or in terms of safe haven laws will preclude the need to obtain consent to adoption in terms of s 233(2) "Subsection (1) excludes a parent or person referred to in section 236 and a child may be adopted without the consent of such parent or person."

Should the biological mother or father not come forward to reclaim the child, the child will be made available for adoption in the normal manner.

8.3.3.5 Reclaiming a child

A parent or person acting with the consent of the mother who relinquishes a child through a baby safe must take a bracelet[87] with a unique code (this code will be assigned to the child). The bracelet must be in the safe and collected by the parent or person upon relinquishing the child. The parent may produce this bracelet to the place where the child was relinquished, when seeking to reclaim the child within the stipulated time period. Furthermore, the time limits and all accompanying information must also be made available to the parent or person acting with consent of the mother at the time of relinquishment by placing this in the baby safe for him or her to obtain. Should the biological mother seek to reclaim the child, the child will not automatically be placed into her care. A social worker should be assigned to investigate her circumstances and the biological mother should be provided with counselling to assist her in establishing a relationship with the child. Government aid or support may also be in the form of grants for food or housing, if the issue is financial in nature. Social workers will require training on how to deal with situations of this nature and in adopting a no-judgment approach in reuniting mother and child. With a shortage of social workers and the Department of Social Development currently training 889 social workers to perform adoptions,[88] it is proposed that more social workers be appointed and trained to deal with safely relinquished children, their

[87] Similar to one assigned to a patient at a hospital; see also chapter 4 where California Health and Safety Code s 1255.7(b)(1) is discussed in this regard.
[88] See chapter 7 par 7.5.1.1.1; also see Kempen "Proposed legislative amendments to the Children's Act to change the adoptive landscape in South Africa drastically" May 2019 *Servamus* 38.

registration of birth, reunification with their biological mother (where this is appropriate) and their adoption (where they have not been reclaimed).

8.3.3.6 Anonymity

The biological parents must be assured of absolute anonymity. These laws can only function effectively if this is guaranteed. This should be the case even if the parents make themselves known to the place where the child was relinquished. Nothing prevents a parent from personally handing over an infant into the care of someone at an organisation or place where a baby safe is provided instead of placing the child in the safe.

8.3.3.7 Voluntary provision of information

The parent or person acting with the consent of the mother may voluntarily provide identifying or non-identifying information about the parents and or the child, concerning the child's medical history or any other relevant information. A form in this respect must be made available in the safe.

8.3.3.8 Termination of parental responsibilities and rights

The biological mother's parental responsibilities and rights are terminated once the 60 day period has elapsed and she has failed to reclaim the child.[89] Since an unmarried father has no

[89] With regard to the parental responsibilities and rights of the biological father note that he must first register with the registry, thereafter he must fulfil the requirements in s 21 of the Children's Act 38 of 2005. s 21 provides: "Parental responsibilities and rights of unmarried fathers.—(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child— (*a*) if at the time of the child's birth he is living with the mother in a permanent life partnership; or (*b*) if he, regardless of whether he has lived or is living with the mother—

parental responsibilities and rights if he has not satisfied section 21 of the Children's Act, his potential to acquire these rights will be terminated if he has not come forward to reclaim the child within the cooling-off period by registering with the putative father registry.

8.3.3.9 Unsafe infant abandonment

Should a parent or parents or a person acting with the consent of the mother, despite the existence of these laws, still choose to unsafely abandon an infant, he, she or they will be charged with the crime of abandonment in terms of section 305(3)(*b*) of the Children's Act 38 of 2005. If the abandonment has led to the death of the child, he, she or they may be charged with infanticide or exposure in terms of the Criminal Procedure Act 51 of 1977.

Therefore, this thesis proposes the following baby safe law to be drafted and inserted into the Children's Act 38 of 2005:

> "**Baby Safes — the following provisions apply in respect of baby safes and also apply in respect of baby safe haven laws –**

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law; (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period." Thus, in most instances, the unmarried biological father cannot satisfy the requirements in (a) because he is not living with the mother in a permanent life partnership; neither has he had the opportunity to contribute towards the child's upbringing or expenses in connection with the maintenance of the child in terms of (*b*)(ii) and (iii) because the child has just been born and immediately been relinquished. However, the father can acquire parental responsibilities and rights in terms of (*b*)(i) by consenting to be identified as the child's father or successfully applying in terms of s 26; s 26 provides: "26. Person claiming paternity.—(1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may— (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 11 (4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or (b) apply to a court for an order confirming his paternity of the child, if the mother— (i) refuses to consent to such amendment; (ii) is incompetent to give consent due to mental illness; (iii) cannot be located; or (iv) is deceased"; s 26(1)(*b*)(iii) is of relevance as it provides that the biological father of the child may apply to court for an order confirming his paternity if the mother cannot be located and this is usually the case if the mother has made use of a baby safe or acted in terms of baby safe haven laws.

1. ***Age and Relinquishing Person*** — An infant of 60 days old or younger may be relinquished in a baby safe, or to a designated safe haven provider, by the parents or persons acting with the consent and instruction of the mother.
2. ***Immunity from Prosecution*** — The parent or person acting with the consent of the mother who relinquishes the child through a baby safe, or to a designated safe haven provider, enjoys immunity from prosecution for abandonment if the child shows no signs of abuse.
3. ***Cooling-off Period*** — The parent has 60 days within which to reclaim the child. This period shall be known as the cooling-off period and starts running from the date of the newspaper publication calling on any parent to reclaim the child.
4. ***Anonymity and Confidentiality*** — A parent who makes use of a baby safe, or a designated safe haven provider, is assured of absolute anonymity and confidentiality.[90] This is the case despite the parent making him or herself known to the baby safe provider or to a designated safe haven provider.
5. ***Voluntary Provision of Information*** — The parent or person acting with consent of the mother may voluntarily provide identifying or non-identifying information concerning themselves and or the child. Such information will be treated with confidentiality.[91]
6. ***Termination of Parental Responsibilities and Rights of Mother*** — The parental responsibilities and rights of the biological mother is terminated once the cooling-off period has elapsed and the biological mother has failed to reclaim the child.
7. ***Legally Adoptable*** — If the biological father has failed to reclaim the child prior to the end of the cooling-off period, any interest he may have acquired in respect of the child terminates and the child is declared legally adoptable. The child will only be considered legally adoptable if both parents have failed to reclaim the child before the end of the cooling-off period.
8. ***Charged with the Crime of Abandonment*** — A parent or person acting with the consent of the mother will be charged with the crime of abandonment in section 305(3)(*b*) of the Children's Act if he or she abandons an infant other than in terms of the provisions of this law."

[90] This is also consistent with the Protection of Personal Information Act 4 of 2013, s 19(1)(*b*) which provides: "A responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent— (b) unlawful access to or processing of personal information"; furthermore subsection 2(b) provides that safeguards must be taken against the risks identified.

[91] This is also consistent with the Protection of Personal Information Act 4 of 2013, s 19(1)(*b*) which provides: "A responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent— (b) unlawful access to or processing of personal information"; furthermore subsection 2(b) provides that safeguards must be taken against the risks identified.

8.3.4 Second recommendation: Safeguarding fathers' rights through a national putative father registry

An ad should be placed in a local newspaper where the non-identifying details of the child is communicated. The ad should specify ways in which the father may assert his rights which is through registering with the putative father registry. Fathers should only register with the putative father registry if they are interested in obtaining parental responsibilities and rights in respect of the child and in assuming primary care of the child. Once a father has registered, he needs to comply with section 21 of the Children's Act 38 of 2005 in order to acquire parental responsibilities and rights. It is submitted that the provision that the father is able to comply with is section 21(1)(*b*)(i), which states that the father can acquire parental responsibilities and rights by consenting to be identified as the child's father or successfully applying in terms of section 26. Section 26 in turn provides that a person who claims to be the biological father of the child, but who is not married to the mother, may apply to a court for an order confirming his paternity of the child, if the mother cannot be located.[92] Failing to register and to comply with section 21 will mean that no parental responsibilities and rights vest in the father and the child will be regarded as adoptable, provided the mother has not sought to reclaim the child. However, the decision whether a biological father should be assigned responsibilities and rights vests with the court.

The purpose of the registry is to alert any children's home or CYCC where the child is received that the child may not be placed for adoption pending the outcome of the father's claim. This registry will be electronic and will be accessible at any child protection organisation, such as Child Welfare South Africa, child protection agencies and adoption agencies nationwide, by

[92] This in terms of s 26(1)(*b*)(iii) of the Children's Act 38 of 2005.

fathers wishing to register. The father will be given 60 days from the date of the ad or 60 days within which to register with the registry from the date that he is notified personally (where the mother leaves identifying information of the father) of his child being relinquished through a baby safe or to a designated safe haven provider, whichever is the latest.[93] Due to the anonymity of the biological mother it will not be possible to have her verify the identity of the father and mere registration with the putative father registry will not be enough to establish biological paternity. Thus a DNA test must be conducted to establish the paternity of the father with certainty, failing which he will not be granted parental responsibilities and rights in respect of the child.

8.3.5 Third recommendation: Amendment of the definition of "abandoned" and the offence of abandonment

The current definition of abandoned reads as follows:[94]

> "'abandoned' , in relation to a child, means a child who—
> (*a*) has obviously been deserted by the parent, guardian or caregiver;
> or
> (*b*) has, for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least three months;"

With the proposed implementation of baby safes the new definition of "abandoned" should read as follows:

> "'abandoned child' means a child who—
> (a) has been deserted by a parent, guardian or care-giver; or
> (b) for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months; or
> (c) has no knowledge as to the whereabouts of the parent, guardian or caregiver and such information cannot be ascertained by the relevant authorities;[95] or

[93] This is the case where the mother has provided information on the father. The mother may also reclaim the child during this 60 day period.
[94] s 1(1) of the Children's Act 38 of 2005.
[95] As proposed by the Children's Amendment Bill of 2019.

(d) *has not been relinquished in a Baby Safe or in terms of the provisions of the Baby Safe Haven laws*."

In respect of the offence of "abandonment", the current provision as contained in section 305 of the Children's Act reads as follows:

> "(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person—
> (*b*) abandons the child…
> (4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance."

The new proposed wording of the offence of child abandonment in section 305(3)(*b*) and 305(4) of the Children's Act 38 of 2005 should read as follows:

> "(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person—
> (a) abuses or deliberately neglects the child; or
> (b) abandons the child, *or*
> *(c) abandons an infant other than through the relinquishment in a Baby Safe or other than in terms of the Baby Safe Haven laws, or*
> *(d) relinquishes an infant in a baby safe or in terms of Baby Safe Haven laws but such infant shows signs of abuse.*
> (4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance, *unless the parent/s or guardian, acting with consent and upon instruction of the mother, has relinquished the child in a Baby Safe or in terms of the provisions of Baby Safe Haven laws, then he or she will not be guilty of an offence in terms of this subsection*."

8.3.6 Fourth recommendation: Amendment of adoption laws in the Children's Act 38 of 2005

Section 236 of the Children's Act 38 of 2005 deals with adoption and when consent to adoption is not required. Subsection one paragraph (*b*) provides that consent to adoption is not required

if the child is abandoned. With the proposed implementation of baby safes and baby safe haven laws, paragraph (*g*) should be added in section 236, which will provide as follows:

> "(1) The consent of a parent or guardian of the child to the adoption of the child, is not necessary if that parent or guardian—
>
> *(g) relinquished the child in a Baby Safe or in terms of the provisions of the Baby Safe Haven laws and has failed to reclaim the child within 60 days.*"

8.3.7 Fifth recommendation: future implementation of safe haven laws

This thesis further proposes the establishment of safe haven laws, which allow for the anonymous relinquishment of an infant to a designated safe haven provider. Designated safe haven providers are hospitals, fire stations, churches, police stations, non-profit organisations, children's homes, places of safety or other prescribed places. Staff at these designated safe havens require training on the procedure to follow in the event of an infant being relinquished into their care and they further require training on how to ensure that the mother's confidentiality is respected and protected. Designated safe havens necessitate appropriate facilities in order to receive infants of 90 days old and younger. Infants, once relinquished to a designated safe haven must be collected by a third party children's home or CYCC (if they were not relinquished to one of these as a designated safe haven provider). In light of this, organisations (CYCCs or children's homes) providing 24 hour assistance where a child is relinquished at a hospital, fire station, police station or church, is essential.

The benefit of safe haven laws is that the infrastructure already exists, that is, fire stations, police stations, churches, places of safety, children's homes or other non-profit organisations already exist and are more widespread than baby safes. The use of fires stations, hospitals, police stations and places of safety as designated safe haven providers will ensure that more locations are available for the safe relinquishment of an infant and this will result in increased

awareness. The proposed provisions governing baby safes in paragraphs 8.3.3.1 to 8.3.3.9 will apply *mutatis mutandis* to baby safe haven laws.

8.3.8 Sixth recommendation: A national advertising campaign

It is recommended that a national advertising campaign be launched to advertise the existence of these laws. Without proper advertising and awareness these laws will prove ineffective.[96]

> "It is better to have a baby delivered safely to a designated provider with no medical history than it is to find this same baby discarded in the trash."[97]
>
> "One's right to life . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[98]
>
> "The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society."[99]

Finally, this thesis concludes and expresses the hope that South African law will be amended to allow for the implementation of baby safes and that this will be followed by the institution

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[96] Deutscher Ethikrat "Anonymous Relinquishment of Infants: Tackling the Problem" 2009 23; Lacci "Statistically speaking: Can safe haven legislation succeed without education?" Vol. 26 No. 4 2006 *Child. Legal Rts. J.* 88, 89, where the author points out that many states failed to develop any sort of plan to advertise these laws and therefore reach women who might leave their babies at a safe haven; Cornett "Remembering the endangered "child": Limiting the definition of "safe haven" and looking beyond the safe haven framework" 98 2009-2010 *Kentucky Law Journal* 833-854 at 839; see also Raum and Skaare "Encouraging abandonment: The trend towards allowing parents to drop off unwanted newborns" 76 2000 *N.D.L. Rev.* 511, 513-14; also see par 4.4 of chapter 4.

[97] Dreyer, Stephanie "Texas' safe haven legislation: Is anonymous, legalized abandonment a viable solution to newborn discardment and death?" Vol. 12 2003 *Texas Journal of Women and the Law* 180.

[98] Jackson J in *West Virginia State Board of Education v Barnette and Others* (1942) 319 US 625, 638.

[99] O' Regan J in *S v Makwanyane* 1995 6 BCLR 665 (CC) par 326.

of baby safe haven laws to protect the most important and fundamental right, which is the right to life.

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