

# Anonymous relinquishment of infants: tackling the problem

OPINION



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## **Published by the German Ethics Council**

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Title of the original German edition: Das Problem der anonymen Kindesabgabe

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English translation: Philip Slotkin MA Cantab. MITI, London

Layout: Torsten Kulick

Cover design: BartosKersten Printmediendesign, Hamburg

ISBN 978-3-941957-08-4

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# I INTRODUCTION

Infants have been abandoned and killed since the very beginnings of our history. Even today, newborn babies are abandoned in Germany, and only some of them survive; they are relinquished anonymously or left behind at the maternity unit. To assist women in what seems to them to be a hopeless situation of distress, since 1999 a variety of facilities for the anonymous relinquishment of infants have been provided in Germany by denominational and other independent-sector institutions concerned with the welfare of expectant mothers, children and young people, as well as by hospitals. “Baby drops” were installed with the aim of offering women an alternative to the abandonment or killing of their new babies. In addition, the availability of anonymous birth in hospitals was intended to allow women who wished to keep the fact of their maternity secret to deliver their babies with medical assistance, so as to avoid the health risks to mother and child of a medically unaided birth.

Owing to fundamental legal objections, baby drops and anonymous birth have long been the subject of vigorous debate among specialists and politicians. The issue has been addressed in hearings, interpellations and controversial debates in the *Bundestag* (German Federal Parliament) and in the Parliaments of several Federal *Länder*, and have given rise to a number of legislative proposals in the *Bundestag* and the *Bundesrat* (German Federal Council), all of which, however, have come to nothing.

With regard to the practice of providing facilities for the anonymous relinquishment of infants, the German Ethics Council considers there to be a need for ethical as well as legal clarification. The Council wishes to help bring about a situation in which the pregnant women and mothers concerned receive the best possible assistance in their distress and conflicts without at the same time infringing the rights of others – in particular, those of their children.

## II DEFINITIONS

The generic term “anonymous relinquishment of infants” encompasses a variety of forms of assistance whereby pregnant women and mothers are enabled to give birth anonymously and/or to relinquish their child anonymously once born.

An individual woman may wish to remain anonymous with respect to a number of different parties in connection with the birth and/or relinquishment of her child. For instance, she may have an interest in concealing the fact of her maternity from her social group, another of her children or the state, or in remaining anonymous to counsellors or doctors. In terms of the different forms of anonymous infant relinquishment provided, the assumption is usually that a woman will wish to hide her pregnancy or the birth of her child from her social group. However, it may also be precisely the social or family group that pressures her into giving up her child anonymously.

The word “anonymous” is used in the following to mean that the origins of the child and the personal data of his' mother and father (where the father is known) are not documented in the entry of birth at the Registry Office and in adoption proceedings, so that the child in particular is left in ignorance of his origins and biological family.

The following forms of anonymous infant relinquishment exist:

- » **Baby drops:** In the outside wall of an inconspicuous part of a building – usually a hospital – a window-like hatch is provided, with a heated bed for a baby inside. A certain time is allowed for the relinquishing person to depart unobserved and then the on-call staff of the institution are summoned by an alarm, so that the child

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1 For convenience, the masculine form is used where applicable for both sexes throughout this translation [translator's note].



can be received and cared for. The baby drops are usually provided with literature for the relinquishing person, giving information about the availability of help and counselling for mothers and emergency telephone numbers. Baby drops often have other names, such as baby nests, baby cradles or baby baskets.

- » A less frequent variant is **anonymous hand-over** of a child. In this case, an arrangement is made with the relinquishing person to hand over the baby anonymously on a direct person-to-person basis at a specified time.
- » **Anonymous birth:** Some hospitals, usually working together with denominational or other independent-sector institutions, enable pregnant women to give birth anonymously with medical assistance and then to leave the child behind without identifying themselves.
- » **Confidential and/or secret birth:** These terms are not used consistently. In the most common situation, they mean that the mother leaves her name in a sealed envelope, for example at an independent-sector counselling centre, subject to the condition that only her child, having reached the age of 16, may have access to the contents (the “envelope approach”). Where this procedure is followed, the mother’s personal data are as a rule known to the counselling centre that advises her – but the parents’ personal data and/or identity are not disclosed to the Registry Office, the youth welfare office or the adoption agency. However, the term “confidential birth” or “secret birth” is often also used in the case of the non-anonymous relinquishment of a child if, with the aid of a conflicted-pregnancy counselling centre, a state or independent-sector institution providing family, child and youth welfare services and the adoption agency, the birth and adoption of a child are organized in such a way that the mother’s social and/or family group remain unaware of the situation. In such cases, the name of the biological mother is, or where

applicable the parents' names are, documented in the child's birth certificate at the Registry Office and in the adoption proceedings; the biological mother grants her consent to the adoption in accordance with statutory requirements; while the father's consent can be dispensed with subject to specific conditions laid down by law.

- » **Incognito adoption:** This term is sometimes used for adoptions after an anonymous birth by the institutions that provide the relevant facilities. According to the prevailing interpretation of the law currently in force, however, the term relates to the prohibition of disclosure and investigation in relation to adoptions and to the protection of social data stipulated by the *Adoptionsvermittlungsgesetz* (AdVermiG – Adoption Placement Act) (Section 1758 of the *Bürgerliches Gesetzbuch* [BGB – Civil Code] and Section 9d AdVermiG in conjunction with Sections 67 ff. of Book X of the *Sozialgesetzbuch* [SGB – Social Code]).<sup>2</sup>

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2 On this point, see Section IV.6 (The law of adoption).

## III THE PRACTICAL SITUATION

### III.1 History

Considered in historical terms, the anonymous relinquishment of infants is nothing new. As long ago as in the fifth century, precursors of institutionalized anonymous infant relinquishment existed in the form of marble basins placed at church doors so that babies could be deposited in them.<sup>3</sup> From the twelfth to the nineteenth centuries, many convents<sup>4</sup> and orphanages in Europe had revolving cribs in which a baby could be placed from the outside and transferred anonymously to the interior of the building. The aim of these facilities was to reduce the large number of drownings and abandonments of newborn babies by unmarried mothers. In addition, the child was intended to be spared the disgrace of an illegitimate birth and the mother enabled to cleanse herself of her lapse by giving away her “bastard”.<sup>5</sup> The year 1784 saw the establishment of a foundling and lying-in hospital in Vienna, which for the first time made it possible for women to give birth anonymously.<sup>6</sup>

Since the Middle Ages the reported number of children relinquished at foundling hospitals has increased whenever these institutions had a facility for anonymous relinquishment.<sup>7</sup> In particular, the substantial geographical differences in

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3 See Mielitz 2006, 46.

4 Whereas the Protestant churches took the view that an unmarried mother was responsible for the care and nurture of her child, the Catholic attitude was that such mothers were substantially unfit to perform this function, so that it was up to society to concern itself with the child (see Mielitz 2006, 53). One of the few exceptions in predominantly Protestant areas was Hamburg, where a revolving crib was provided in 1709 (see Mielitz 2006, 51).

5 See Mielitz 2006, 47; for other sources, see for example Scheiwe 2001, 368-373; Frank/Helms 2001, 1340.

6 See Pawlowsky 2001.

7 The number of infants abandoned increased by a third when the revolving crib at Milan's *Ospedale Maggiore* was established in 1689. Hundreds of foundlings had to be cared for after the establishment of revolving cribs in Hamburg in 1709, Kassel in 1764 and Mainz in 1811. Once these facilities were abolished, the relinquishment of infants also ceased. See Mielitz 2006, 51.

the numbers of abandoned infants are attributed in the literature to the stimulation of demand by the existence of foundling institutions.<sup>8</sup> Large numbers of abandoned children are recorded only in locations with a history of foundling hospitals extending over several centuries.<sup>9</sup> Specifically, the number of relinquished infants increased whenever foundling hospitals publicized their willingness to accept infants and to provide them with good care.<sup>10</sup>

During the course of the Enlightenment, foundling hospitals and revolving cribs were called into question, because they seemed unfit for their purpose of preventing the killing of children. Indeed, they were felt positively to encourage the abandonment of infants.<sup>11</sup> Some unmarried mothers also abused the facilities by relinquishing their babies in them, only to take them back subsequently as paid wet nurses. Furthermore, some of the infants relinquished were legitimate children, for whom the facilities were not intended. These free-rider effects and the striking increase in the number of foundlings were other reasons why the idea of revolving cribs came increasingly to be rejected, and they were abolished during the course of the nineteenth century. It had been feared that their abolition would result in an increase in the number of children abandoned and killed, but this did not happen.

The number of infant killings has been in decline throughout Europe since the end of the nineteenth century. According to Germany's crime statistics, as many as 153 newborn babies were killed by unmarried mothers in 1954; this figure had fallen to 55 in 1971 and to only 20 in 1997. Figures for the killing of newborns have not been recorded since 1998, because

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8 See *ibid.* on the stimulation of demand by foundling hospitals and for evidence of the stimulation of demand as indicated by the uneven geographical distribution of numbers of abandoned infants.

9 See Mielitz 2006, 51. In France in 1780, for example, there were reportedly some 250 revolving cribs, in which up to 130 000 infants per year were deposited. Evidence of this figure exists for 1830. See Stürmann 2007, 76.

10 See Mielitz 2006, 51.

11 Bentheim 2008a, 4.

the specific offence<sup>12</sup> of the killing of an illegitimate child after birth was then abolished, the act being included among homicides in general.

### III.2 The practice of anonymous relinquishment of infants in Germany

Facilities for the anonymous relinquishment of infants have existed in Germany since 1999, although exact figures are not available. There are currently thought to be some 80 baby drops<sup>13</sup> and about 130 clinics offering anonymous birth.<sup>14</sup> In the years after 1999, the number of baby drops initially increased, partly as a result of public advertising campaigns by their operators, the support of prominent figures and extensive, at first almost entirely positive media coverage; critical voices came to be heard only gradually. It is unclear what triggered the introduction of the facilities for anonymous infant relinquishment.<sup>15</sup> The killing of newborn babies and the abandonment of infants had not hitherto been seen as a social problem in need of urgent solution. Furthermore, the recorded crime figures

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12 Section 217 of the *Strafgesetzbuch* (StGB – Criminal Code), old version; the more lenient sentencing provided for in Section 217 StGB applied only to unmarried women.

13 According to *SterniPark*, there were 96 baby drops in December 2008 (see Moysich 2008). In the press release of the same date, *SterniPark* mentions 91 baby drops (see *SterniPark* 2008).

14 See Bentheim 2008b, 1.

15 According to the literature, the establishment of facilities for the anonymous relinquishment of babies coincided in time with the withdrawal from the Catholic counselling centres of the counselling certificate in compulsory pregnancy counselling required for the termination of a pregnancy; the affected counselling centres then acquired a new function by providing facilities for anonymous birth and baby drops, enabling them to work with women in distress (see, for example, Bott 2007, 33). In a 2004 survey by Kuhn, the most frequent reasons given by providers of baby drops for establishing their facilities were reports of the abandonment and killing of newborn babies (42%); public or political pressure (20%), the provision of an alternative option (17%) and reports of other providers of baby drops (16%) were other important motivations for establishing a baby drop (see Kuhn 2005, 290).

and other statistics indicated that such acts were in constant decline at the time.

Facilities for the anonymous relinquishment of infants are provided by denominational and other independent-sector institutions offering welfare services for pregnant women, children and young people and by confessional and other clinics. The *Sonnenblume* mother-and-child hostel opened in Bernau, near Berlin, as long ago as in July 1999, assuring pregnant women and mothers of anonymity. The first facilities for anonymous infant relinquishment to become publicly known were established by the *Sozialdienst katholischer Frauen* (SkF – Catholic Women’s Welfare Service) in Bavaria, which initiated the *Moses-Projekt* in August 1999, initially offering anonymous person-to-person handover and, a year later, the possibility of anonymous birth too.<sup>16</sup> In April 2000, the *SterniPark* Association in Hamburg set up the first baby drop; it later also provided facilities for anonymous birth under the *Findelbaby* (foundling baby) project.<sup>17</sup>

Depending on the level of equipment, the installation of a baby drop costs between 20 000 and 80 000 euro.<sup>18</sup> Additional costs are incurred for maintenance of the technical facilities and for the on-call staff. The projects are predominantly funded by donations, from the clinics’ budgets and, to some extent, from local-authority youth welfare resources. No Federal funds have been, or are, used for the establishment and operation of baby drops.<sup>19</sup>

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16 Currently, the state-recognized conflicted-pregnancy counselling centres of *Donum Vitae e. V.* offer counselling, support and assistance throughout the territory of Bavaria in the *Moses-Projekt* to women who wish to give birth, or have given birth, anonymously. There are 18 establishments with over 50 local branches (see Eichhorn 2009, 2).

17 See BStMAS 2007, 15. The study was commissioned from Bamberg University’s State Institute of Family Research by the Bavarian Family Ministry. It addresses the practical experience of the *Moses-Projekt* on the basis of a selection of 30 individual cases, using the notes and recollections of anonymous-birth counsellors (see BStMAS 2007, 43 ff.).

18 See Swientek 2007a, 15.

19 See *Bundesregierung* (Federal Government) 2007, 28.

The installation of baby drops and the provision of facilities for anonymous birth have been seen by their providers from the beginning as directed towards the protection of life, since the facilities for anonymous relinquishment of infants were intended to prevent the killing and abandonment of newborn babies. According to the providers, they were supposed to *supplement* the existing officially available forms of assistance (that is, those provided under current law, such as the family, child and youth welfare services offered by independent-sector and public institutions under the provisions of SGB VIII, and not to be an *alternative* to these; it was assumed that the women who took advantage of the facilities for anonymous relinquishment of infants were not reached by the officially available services.<sup>20</sup>

### **III.2.1 The social assistance system for pregnant women and mothers provided for by current legislation (the “official” assistance system)**

Counselling and help for pregnant women, mothers and fathers are provided by the authorities of the *Länder*, rural and urban districts, youth welfare offices, marriage and family counselling centres, adoption agencies and other public and independent-sector youth welfare institutions under the law governing child and youth welfare (SGB VIII). An important component of these forms of assistance, the provision of which can commence while a woman is still pregnant, is the availability of counselling and assistance under the *Schwangerschaftskonfliktgesetz* (SchKG – Conflicted Pregnancy Act).<sup>21</sup> The Federal Republic currently has just under 2000 conflicted-pregnancy counselling centres, at which women and men can obtain advice on all the available forms of assistance and

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<sup>20</sup> See Kuhn 2005, 123.

<sup>21</sup> On this point, see Section IV.7 (The Conflicted Pregnancy Act).

legal entitlements for expectant mothers and families. When claiming their entitlements for assistance, pregnant women are supported and helped by the counselling centres, for example with seeking accommodation, finding a place in a mother-and-child institution, childcare, placement in foster families and pre-adoptive care. Other possible forms of assistance may be available under the provisions governing maternity and maternity benefits, parental benefits, parental leave, child benefit and placement for adoption.

The Conflicted Pregnancy Act provides that pregnant women are legally entitled to anonymous counselling. This means that, even without the availability of facilities for anonymous infant relinquishment, easy – i.e. initially anonymous – access to counselling is available via the many different kinds of assistance for persons in situations of distress and conflict, and that these forms of assistance can be taken up confidentially.

In the advice they provide on the legal and psychological aspects of an adoption, the adoption agencies guarantee confidentiality to all parties involved. For instance, counselling need not be provided at the counselling centre itself, but may also be given at another location chosen by the person concerned.<sup>22</sup> If parents decide to put up their child for adoption, there are various possible forms of “incognito adoption”,<sup>23</sup> extending even to open forms.

In incognito adoption, maximum possible confidentiality and an embargo on information apply before, during and after the placement process. Should the child subsequently wish to make contact with his biological parents or the parents with their biological offspring, the right of those concerned to information or self-determination is taken into account by, in the former case, first asking the parent whether she/he consents to the contact; in the latter case, the adoptive parents

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<sup>22</sup> On this point, see Herpich-Behrens 2008, 18.

<sup>23</sup> See Section IV.6 (The law of adoption).



are themselves asked, or, in the case of an adult adoptee, the adoptee himself is also asked.<sup>24</sup>

From the age of 16,<sup>25</sup> the child may inspect not only the original entry of birth at the Registry Office, but also, with professional direction from the adoption agency, the adoption placement documents; in practice, this facility is eagerly taken up.

On the basis of practical experience with adoptions and according to the findings of adoption research,<sup>26</sup> semi-open or open forms of adoption are also applied, but only with the consent of all concerned. This means that the parties make each other's acquaintance through the intermediary of the adoption agency either under a pseudonym or with complete disclosure of their names and addresses. Information on the subsequent development of the child is exchanged, as well as, sometimes, presents and photographs on birthdays, holidays and other special days, either through the adoption agency under the protection of the pseudonym, or, in the case of open adoption, directly between the various parties. The different forms of adoption are not subject to statutory regulation and are in practice used in a variety of ways. The procedure differs from case to case.

The number of children put up for adoption is constantly declining. According to the official statistics, there were a total of 4201 adoptions in 2008;<sup>27</sup> that is less than half the number that took place in 1993. In particular, fewer and fewer healthy children are put up for adoption in infancy.<sup>28</sup> However, the

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<sup>24</sup> See Wiemann 2008, 10.

<sup>25</sup> The accepting parents also have prior access to the data on the child's parentage. As a part of their duty to ensure their child's welfare, it is their responsibility to decide when, and to what extent, this information is imparted to him.

<sup>26</sup> Wiemann 2007, 98-113; Swientek 2007b, 117-127; Herpich-Behrens 2007, 145-159.

<sup>27</sup> *Statistisches Bundesamt* (Federal Statistical Office) 2009; this figure includes adoptions of stepchildren but excludes intercountry adoptions.

<sup>28</sup> The relevant number fell from 207 in 1991 to 74 in 1999; see Singer 2008, 56. See also Paulitz 2006, 2.

proportion of adopted infants and toddlers with unknown marital status of the surrendering parents is increasing.<sup>29</sup>

### III.2.2 Counselling in the context of anonymous infant relinquishment

With regard to anonymous birth, according to the Federal Government's response to a major interpellation,<sup>30</sup> the *Länder* state that abundant counselling is given, as well as information on other available forms of counselling and assistance.<sup>31</sup> Counselling is given by the counselling centres that offer anonymous birth in cooperation with a hospital, by doctors and also by health care chaplaincy.

Information leaflets on the availability of help and counselling are generally provided at baby drops for the relinquishing women. The advice and information in this literature always emphasizes that the women can give up their anonymity if they so desire. It is impossible to determine what effect the advice and information have on a woman's subsequent decision, as the decision process is complex.<sup>32</sup>

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29 For instance, the number of such children ranged between one and seven throughout the years 1991 to 2003. However, this number increased to 51 in 2004 (Federal Statistical Office, statistics on child and youth welfare 2001 to 2006; Singer 2008, 61). The adoption statistics are based on the date of the court decision on the adoption, which is preceded by a trial period of not less than one year of pre-adoptive care.

30 In May 2007, the FDP (Free Democratic Party) parliamentary group and other deputies presented a Major Interpellation on evaluation of the experience of anonymous birth and baby drops to the Federal Government (*Bundestag* printed paper 16/5489), to which the Federal Government responded (*Bundestag* printed paper 16/7220) in November 2007 on the basis of a request for information made to the *Länder*, providers of baby drops and anonymous birth facilities, as well as the central associations of independent-sector organizations providing welfare services.

31 See *Bundesregierung* 2007, 24.

32 See *Bundesregierung* 2007, 3 ff.

### III.2.3 Other information on anonymous birth

Some Federal *Länder* have already included, or intend to include, information on the availability of facilities for anonymous relinquishment of infants in school curricula.<sup>33</sup> The issue is, or is to be, covered in health education and in biology, ethics and social-science lessons. In Mecklenburg-Western Pomerania, for instance, sex education in biology lessons includes information on the possibility of anonymous birth and the availability of facilities for leaving a child in a baby drop. The ethical aspects are to be addressed in religious-education and philosophy classes.

### III.2.4 Reasons for using infant relinquishment facilities

The mothers who use the facilities provided for the anonymous relinquishment of infants evidently belong to all social classes. The following reasons emerge from cases where the details became known because the mothers who gave birth anonymously or whose child was found in a baby drop either came forward themselves or were discovered through investigation:<sup>34</sup>

- » Partner relationship problems and fear of partner
- » Threats of violence
- » A partnerless mother's feeling of being unable to cope
- » Inability to cope with another child
- » Family pressure or fear of family members

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<sup>33</sup> See *Bundesregierung* 2007, 6.

<sup>34</sup> See Kuhn 2005, 307; *Bundesregierung* 2007, 10 f.; BStMAS 2007, 49. However, there may also be other reasons for using baby drops. For example, in Berlin a DNA test showed that three siblings had been deposited in a baby drop between 2001 and 2007. These children had the same father and almost certainly the same mother too (alternatively, the mothers might have been sisters). In this case, the baby drop was manifestly used as an instrument of family planning. See Herpich-Behrens 2008, 20.

- » Children of extramarital paternity
- » Shame
- » Financial problems
- » Problems of addiction
- » Concealed pregnancies
- » Unwanted pregnancies
- » Concealment of a rape
- » Fear of measures under aliens legislation
- » Illegal residence without health insurance
- » Fear of job loss and long-term unemployment
- » Fear of discrimination if the child is put up for adoption

In one study, clinics were requested to specify the target groups they had in mind when introducing provision for anonymous birth. The results showed that the providers hoped to reach the following women by means of this provision:<sup>35</sup>

- » Women in (extreme) situations of distress
- » Women intending to abandon or kill their baby
- » Pregnant women intending to have an abortion
- » Pregnant women who would give birth without assistance
- » Women with denied or concealed pregnancies
- » Expectant mothers with no prospects
- » Women wishing to remain anonymous

This clearly shows that, while the providers are on the one hand envisaging women who find themselves in a situation of distress, on the other hand they also consider a valid reason to be a woman's desire for anonymity even if she does not say why she wishes to remain anonymous.

Analysis of cases that have become known shows, too, that the parties with respect to whom anonymity concerning infant relinquishment is to be preserved may in practice not be those contemplated by the providers. Women who gave birth

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35 See Kuhn 2005, 335 ff.

anonymously were often accompanied by female or male friends, parents or partners.<sup>36</sup> Again, in a few cases in which the background to the leaving of a child in a baby drop was established, it was found that the relinquishing women were accompanied by others or were not present at all when the child was relinquished.<sup>37</sup>

### III.2.5 When the mother takes the child back

A not inconsiderable proportion of the women who give birth anonymously or deposit their child in a baby drop decide, days or sometimes even weeks afterwards, to live with their child after all.

The providers' brochures and public communications usually state that women (or parents) can take the child back up to a eight weeks<sup>38</sup> after anonymous relinquishment. However, there are no provisions of any kind on how children deposited days or weeks earlier in a baby drop are to be returned to women or parents and on how the mother's identity is to be verified. A high proportion of providers evidently do not insist on a DNA test, and decide on the mother's identity on the basis of other criteria. The deciding element may be, for example, the woman's behaviour or witnesses who confirm her pregnancy.<sup>39</sup>

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36 According to Swientek's material, this was so in 20% of cases; the relevant proportion in Kuhn's 2004 study was 28% (see Swientek 2007c, 118; Kuhn 2005, 343).

37 See, for example, Köhler 2008; Herpich-Behrens 2008, 20 f.

38 On this period, see Section IV.6 (The law of adoption).

39 In a survey of 19 providers who had found 52 children in their baby drops up to the date of the survey, seven of these children having been returned (Kuhn 2005, 310 f.), it was found that five providers (14%) rejected DNA testing and 20% were unaware of it. Those who did not require a DNA test stated that they confirmed the mother's status by means of identifying elements left in the baby drop or of witness statements on the pregnancy, or alternatively on the basis of the mother's credibility. According to Kuhn's study (2005, 311), 46% of the providers interviewed stated that the youth welfare office was expected to confirm the mother's "capacity to raise the child" before returning him; the remainder said that this was not the case or that they did not know.

Some drops allow a footprint or handprint<sup>40</sup> to be made for identification of the child before placing in the drop. The extent to which providers allow for the possibility that “proofs” of this kind might be transferred to another person is unknown. Again, infants initially relinquished anonymously are in many cases manifestly returned to the mother without the involvement of the youth welfare office responsible for assessing risks to children’s welfare.

### **III.2.6 Effect of the availability of facilities for anonymous relinquishment of infants on the abandonment and killing of newborn babies**

Are mothers who kill their babies or leave them to die in fact capable, having regard to their psychological state, of making use of facilities such as anonymous birth or baby drops? The answer to this question is particularly relevant to an assessment of these facilities. Studies in the field of forensic psychiatry<sup>41</sup> suggest that women who kill their newborn babies are not reached by the availability of facilities such as anonymous birth, anonymous handover or baby drops. According to these studies, these women’s psychodynamic situation precludes the planning and active problem-solving necessary for the use of these facilities. They often kill their babies in a state of emotional upheaval when they are surprised by the birth and then panic, having denied their pregnancy to themselves.

The total number of newborn babies killed has not been accurately determined. However, according to Anke Rohde, Head of Gynaecological Psychosomatics at Bonn University Women’s Clinic, it can be assumed to be lower than the

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40 In Hanover, an artificial flower is placed in the baby drop and its counterpart is retained by the hospital at which the drop is located (see Swientek 2007b, 167).

41 On this point, see Rohde 2008, 50. Other literature is cited in Swientek 2007b, 118.

number of denied pregnancies. In the cases known to Professor Rohde, the survival or death of the child was determined in each case by chance factors and not by the availability of a baby drop or an anonymous birth facility in the vicinity.<sup>42</sup>

On the basis of the information from the *Länder*, it is impossible to say, for any region, to what extent the establishment of baby drops and the availability of anonymous birth facilities influence the number of infants abandoned or killed. Furthermore, according to the Federal Government's response to the major interpellation, the killing and abandonment of infants are rare events, so that, for this reason alone, it is impossible to establish statistically significant correlations between anonymous birth and baby drops on the one hand and the criminal offences mentioned on the other.<sup>43</sup> It is at any rate clear that the number of newborn babies killed and abandoned since the introduction of anonymous relinquishment facilities had not decreased.<sup>44</sup>

The following (minimum) figures emerge from a study by *terre des hommes*<sup>45</sup> based on complete consideration of all press reports on newborn babies found dead or alive:

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42 See Rohde 2008, 51.

43 See *Bundesregierung* 2007, 25.

44 However, many cases no doubt go unrecorded.

45 *Terre des hommes* 2009.

Number of abandoned newborn babies found dead or alive (year-on-year comparison, 1999-2009) <sup>a</sup>											
	1999 <sup>a</sup>	2000 <sup>a</sup>	2001 <sup>a</sup>	2002 <sup>a</sup>	2003 <sup>a</sup>	2004 <sup>a</sup>	2005 <sup>a</sup>	2006	2007	2008	2009 (to 10 Nov.)
Found dead	21	17	17	20	31	19	20	32 <sup>b</sup>	26 <sup>c</sup>	29 <sup>d</sup>	20
Found alive	13	11	14	14	12	14	9	6	10	8	12
Unclear	-	4	-	-	-	-	-	-	-	1 <sup>e</sup>	-
<b>Total</b>	<b>34</b>	<b>32</b>	<b>31</b>	<b>34</b>	<b>43</b>	<b>33</b>	<b>29</b>	<b>38</b>	<b>36</b>	<b>38</b>	<b>32</b>

- a: For 1999-2005, the number of newborn babies found dead but killed in previous years is not separately recorded or specified.
- b: Five of the newborns found dead in 2006 were killed in years prior to 2006.
- c: Ten of the newborns found dead in 2007 were killed in years prior to 2007.
- d: Six of the newborns found dead in 2008 were killed in 2007 or in the 1980s.
- e: Grevenbroich (September 2008): one mother stated that she abandoned her baby after it was born in hospital, but no trace of the child was ever found.



### III.2.7 Estimated numbers of anonymously relinquished foundlings

There are no exact figures for the number of children born anonymously or deposited in baby drops for the Federal Republic as a whole since 1999. One reason is that many providers of anonymous infant relinquishment facilities are not prepared to furnish information on the number of children left with them anonymously. It is estimated that, since the introduction of anonymous child relinquishment facilities, 300 to 500 children have effectively become foundlings with permanently anonymous origins. The estimate is based on non-representative surveys from 2002, 2004 and 2006.<sup>46</sup> More children have been relinquished anonymously since then, so that present-day estimates would presumably be significantly higher.

The following individual cases have been reported:

In Berlin,<sup>47</sup> a total of 60 infants were relinquished anonymously from the time of introduction of the facilities (in 2000) to the end of 2008, compared with one or two foundlings per year in the period before anonymous relinquishment facilities were made available in that administration. The number of foundlings where anonymous birth or baby drops were not used has not fallen since their introduction.

At the *St. Anna Hospital* in Herne, the availability of anonymous birth was taken up by 22 women in the period from March 2000 to May 2008. Of these, four subsequently gave up their anonymity after counselling.<sup>48</sup>

*SterniPark* Hamburg reports that over a nine-year period, 36 infants were deposited in baby drops and 320 babies were born anonymously. In 2008, 28 women were enabled to give birth anonymously, while 13 of them took their children back.<sup>49</sup> The Federal Government's response to the major interpellation,

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46 See Swientek 2007a, 18.

47 Exact figures exist for Berlin (see Herpich-Behrens 2008, 19).

48 Neuerburg 2008, 16.

49 *SterniPark* 2008.

involving data up to about June 2007, shows that, in the cases of 284 “children cared for by SterniPark”, 148 mothers decided to take their child back; hence 136 children must have remained anonymous.

In a survey by Kuhn in 2004,<sup>50</sup> a total of 40 out of 69 providers furnished information on the take-up of baby drops.<sup>51</sup> For the period 2000 to 2004, it was found that 21 out of 40 baby drops remained unused, while 19 providers reported a total of 52 relinquished infants, of which seven were given back.

Forty-four out of 75 clinics responded to the question on anonymous births.<sup>52</sup> Of these, 14 reported no anonymous births up to the date of the survey in 2004. The remaining clinics stated that they had enabled a total of 181 women to give birth anonymously. Fifty-two of these mothers decided after the birth to live with their child, two children were adopted officially – i.e. not anonymously – while 101 remained permanently anonymous. No information is available on the remaining 26 children.

Both historically and in the present situation, there are indications that, at times of economic stringency, a larger number of children are relinquished anonymously if the relevant facilities exist and are known of.<sup>53</sup>

No information on the number of disabled children was supplied by the providers, although such children are also left in baby drops. The following figures are based on incomplete, isolated evidence. In Berlin, a six-month-old spastic infant and a two-month-old Down’s syndrome baby were found in a baby drop.<sup>54</sup> Three severely disabled infants were relinquished anonymously at *SterniPark* up to 2003.<sup>55</sup> In addition, a child

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50 See Kuhn 2005, 307 f.

51 Twenty-two providers failed to respond at all to Kuhn’s survey, while seven specifically refused to answer the question about take-up. By the evaluation of personal accounts, media reports, etc., Kuhn concludes that at least 50 more children were left in baby drops. See Kuhn 2005, footnote 692, p. 308.

52 See Kuhn 2005, 340 f.

53 With regard to the current situation, this is demonstrated by Haak 2009.

54 Herpich-Behrens 2008, 20.

55 Mück-Raab 2003, quoted after Benda 2003, 534.

with severe brain damage was relinquished at another location.<sup>56</sup>

Sometimes, infants are found dead in or outside a baby drop. According to press reports, in the Federal Republic as a whole, since 2002 two dead infants have been found outside a baby drop and two dead infants have been deposited in a baby drop.<sup>57</sup>

### III.2.8 The experience of institutions providing facilities for the anonymous relinquishment of infants

On the basis of its experience, the SkF Cologne<sup>58</sup> takes the view that women who kill their children on account of their life situations and psychological state can probably not be reached either by baby drops or through the availability of anonymous birth.<sup>59</sup> However, according to SkF Cologne, women in a situation of acute psychological and/or social distress that makes it necessary for them to conceal the fact of their maternity from their social group<sup>60</sup> could be reached by a three-step process: anonymous access, confidential birth and incognito adoption. The provision of anonymous access is intended to make it easy for women to seek counselling. During the course of counselling, an attempt could then be made to obtain the woman's

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56 See Swientek 2007c, 146.

57 A baby that had been stabbed to death was found in a baby drop in Berlin in 2002 (see Schnedelbach/Treichel 2002). An already dead baby was placed in a drop in Karlsruhe in 2008 (*Welt Online* 2008). In 2006, a baby that had died of wounds inflicted after birth was found outside a baby drop in Dresden (*Die Welt* 2006). A baby that had died from lack of care and hypothermia was found outside a baby drop in Hanover in 2008 (*Welt Online* 2008).

58 On the information that follows, see Kleine 2008, 8.

59 *Ibid.*; Thoma 2008, 4; Neuerburg 2008, 17.

60 However, evaluation of cases that have become known clearly indicates that, in at least a third of these cases, the pregnancy or birth was known to the mother's social or family group and that it was precisely the members of this group who pressured the mother into relinquishing her child anonymously (see Herpich-Behrens 2008, 20 f.; Swientek 2008, 22).

data with a view to the future availability of information on the child's parentage, while the pregnancy and birth remained concealed from her social group. The hope was that the outcome of the counselling process would be a decision by the woman to live with her child, to have it taken into care, or to put the child up for open or incognito adoption. Of course, the possibility could not be ruled out that even an extended counselling process might fail to induce the woman to give up her anonymity. Experience showed, however, that three out of four women gave up their anonymity during the course of counselling.<sup>61</sup> SkF Cologne assumes that most of those concerned belong to the group with access to counselling. It is estimated, again by SkF Cologne, that other women – manifestly because of their traumatized state – are unable to declare themselves in a personal contact situation, so that they could be reached only by baby drops.

In 2004, the Federal Association of the SkF decided not to establish any new baby drops, but to retain the existing facilities.<sup>62</sup> Other providers,<sup>63</sup> on the other hand, welcome the establishment of further baby drops. Six new drops were reported in the period 2008 to mid-2009.<sup>64</sup> However, some of these providers themselves regard baby drops as a second-best solution and consider anonymous birth to be a better way of rendering assistance.<sup>65</sup> The experience of one of these providers, which also attempts to use counselling and care so as to induce the mothers concerned to live with their child or to give up their anonymity at least with respect to the child, also suggests that a high proportion of women disclose their identity during the course of counselling.<sup>66</sup>

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61 See Thoma 2008, 3. Different figures are given in *SterniPark* 2007, where some 50% are stated to have given up their anonymity; according to Neurerburg 2008, 16, only four out of 22 women gave up their anonymity after counselling.

62 See Thoma 2008, 5.

63 For example *SterniPark* (see Moysich 2008).

64 See Moysich 2008; *Frankfurter Rundschau* 2009.

65 *SterniPark* 2008.

66 *Ibid.*

At the *St. Anna Hospital* in Herne, too, facilities for anonymous birth are provided, with the aim of providing women in distress with psychological counselling and medical advice and of enabling them to give birth under humane conditions and subject to appropriate medical standards.<sup>67</sup> Changing the mother's mind on her decision to remain anonymous is another objective, which, however, according to the experience gained in Herne from 2000 to 2008, cannot easily be achieved. The Herne approach is as follows:

- » Arrival and counselling at the maternity clinic
- » Medical examinations and advice
- » Psychosocial counselling
- » Delivery and care during the post-partum period
- » Placement of newborn babies with prospective adoptive parents via the SkF or the Hospital's social worker, sometimes with the cooperation of the youth welfare office, who seek trained applicant couples or try to arrange organized temporary care
- » Mothers have a period of at least eight weeks, but in principle of up to a year, to revoke their decision, because it is only after one year that the adoption is finalized by the Local Court
- » Notification of the anonymous birth to the Registry Office
- » Women who give birth anonymously are presented with a questionnaire requesting a minimum of information about themselves and the reasons for their decision; questions about the child's father as well as the mother are included.

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67 On this point and on the following, see Neuerburg 2008, 16.

### III.2.9 The experience of the state child and youth welfare centres

Further light is cast on the practice of anonymous birth and baby drops by the view of the youth welfare offices and adoption agencies. In Berlin, the youth welfare offices require facilities that provide for the anonymous relinquishment of infants to report each anonymously relinquished child to them forthwith. Each child notified in this way is immediately given an official guardian, responsible for acting in the child's interests to undertake investigations and gather information providing indications as to the child's parentage. In about a third of cases of anonymous infant relinquishment, it has been possible to establish the background in this way.<sup>68</sup>

Following analysis of the cases of which it is aware, the Berlin *Land* youth welfare office finds that the problem situations of women who make use of the facilities for anonymous infant relinquishment are no different from those used by women who go to official counselling centres. Not a single situation of distress could not have been resolved by legal means. There was no risk of a child being killed in any of the cases for which information became available.<sup>69</sup> This shows that the utilization of anonymous child relinquishment facilities is not limited to the narrow target group originally assumed by their providers, but that they also attract other women with unwanted pregnancies who do not know how to handle their situation.<sup>70</sup> According to Ulrike Herpich-Behrens, the former head of Berlin's *Land* youth welfare office and now head of the department responsible inter alia for child and youth welfare and adoption in the relevant Senate of the *Land* of Berlin, this means that the anonymous child relinquishment facilities compete with the official assistance provided by the child and youth welfare centres and the healthcare system, thus undermining and devaluing these

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68 See Herpich-Behrens 2008, 19.

69 See *Bundesregierung* 2007, 10 f.

70 See Herpich-Behrens 2007, 149.

in the long term because they offer a seemingly simpler solution. In the experience of the *Land* youth welfare office's adoption agency, mothers wishing to give up their children see baby drops and anonymous birth as officially sanctioned alternatives and contemplate them as possible options.<sup>71</sup>

Experience with the practice of anonymous infant relinquishment suggests to the youth welfare office that mothers are not helped permanently to deal with their situation by such relinquishment. The relief afforded by anonymity and non-liability to criminal proceedings after the child has been given away is stated to be outweighed by the resulting pain:

Mothers in situations of distress and crisis need counselling and support, as well as protection from making rash decisions. The last thing they need in such a situation is anonymity. An anonymous facility such as a baby drop is positively counterproductive, because it entices those concerned to act precipitously. Rather than being a last resort, baby drops are a trap into which the mother, in particular, leaps.<sup>72</sup>

In the view of the youth welfare office at Halle/Saale, women who make use of facilities for anonymous infant relinquishment are concerned not to have to declare themselves and not to be required to expose themselves to a counselling process. These women would have been able to avail themselves of the existing legal counselling facilities if there had been no provision for anonymous birth.<sup>73</sup>

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71 Herpich-Behrens 2007, 149 f.

72 Herpich-Behrens 2007, 153 [translated by P. Slotkin].

73 *Bundesregierung* 2007, 11.

### III.2.10 Psychological consequences of anonymous infant relinquishment

The effects of the anonymous relinquishment of an infant on the relinquishing mother and on the child have not yet been studied. However, comparable data from France (“Generation X”), as well as information from the field of adoption research, can reasonably be applied to the situation of the children concerned. It is even assumed that the known problems of adoption are exacerbated in the case of anonymous relinquishment.

Putting up a child for adoption, whether or not anonymously, is a decision with lifelong repercussions for both mothers and children. The context of the birth and the circumstances that lead to the option to use anonymous facilities are only part of the problem.<sup>74</sup> The relinquishing mothers often retain a sense of guilt throughout their lives, feeling that they have failed by giving up their child. Some 90% of the women questioned are convinced that relinquishing their child was a negative decision which they would never repeat; about 70% suffer from psychological and psychosomatic disorders, such as unintended sterility; and roughly half of these women have struggled for many years with severe depression and/or suicidal thoughts. Nor, owing to their guilt feelings, have the women been able to talk about their problems.<sup>75</sup> Many relinquishing mothers wait all their lives to hear from their children. If they do make contact, it often represents the beginning of a long period of working together on each party’s wounds, expectations and insecurity.

Mothers who relinquish their children anonymously, on the other hand, have no prospect of ever finding their child again at a later date. The possibility of working through the relinquishment of their child is also rendered more difficult

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74 See Herpich-Behrens 2008, 19.

75 See Swientek 2007b, 123.



in the case of anonymity. Firstly, their psychological constellation is more problematic, because:

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.<sup>76</sup>

Secondly, a woman then has much less opportunity to talk about her decision, as the giving up of her anonymity constitutes an additional problem.<sup>77</sup>

For children, it is important to know the identity of the biological parents (or at least of the biological mother), because they can then in principle investigate the circumstances that led to their being given away. The reason why this is so important is that the identity of these children is strongly moulded by the fundamental experience of having been consigned to the care of strangers by their parents or mother. This often leads to profound trauma, lack of self-esteem, fear of repetition, and in many cases even guilt feelings on the part of the children concerned. In this situation, many adoptees live in a state of primal mistrust, with the fear of not being loved, and quite possibly of being abandoned again, with feelings of loneliness, not belonging and self-doubt, with rage, shame and a sense of helplessness, and sometimes also with depression and the risk of suicide.<sup>78</sup> For this reason, if these children can, at a later stage in their lives, try to establish the background to this situation, which they find so puzzling and utterly burdensome, this can be exceptionally significant in providing them with

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<sup>76</sup> Swientek 2007b, 122 [translated by P. Slotkin].

<sup>77</sup> See *ibid.*

<sup>78</sup> See Wiemann 2008, 46.

some prospect of building a stable personal identity. In the first nine months of 2008, the Berlin adoption agency received 250 enquiries from adoptees seeking their roots.<sup>79</sup> Children whose origins are anonymized are robbed once and for all of this possibility, with severe adverse consequences that persist throughout their lives.

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79 See Herpich-Behrens 2008, 19.

## IV STATE OF THE LAW ACCORDING TO NON-CONSTITUTIONAL STATUTES

The anonymous relinquishment of infants is contrary to current law in many respects. This fact is not disputed in the legal literature.<sup>80</sup>

### IV.1 Family law

The concept of parentlessness (even if only temporary) is unknown in German family law. A child's mother is without exception deemed to be the woman who gave birth to that child, no act of acknowledgement or registration being necessary (Section 1591 BGB). The same applies in the case of surrogate motherhood, which is prohibited in Germany. The father is deemed to be the man who is married to the mother at the time of the birth or who has acknowledged his paternity or whose paternity has been established in judicial proceedings (Section 1592 BGB). In the event of acknowledgement or judicial establishment at a later date, this will always be retroactive, effective from the time of the birth. In adoption proceedings, if there is no father pursuant to Section 1592, the man who establishes that he was cohabiting with the mother at the time of conception is deemed to be the father (Section 1747(1) sentence 2 in conjunction with Section 1600d BGB).

The legal relations between parents and child are not subject to private autonomy. In contrast to the situation prevailing in countries such as France, neither the mother nor the father, whether married or unmarried, can lawfully withdraw from the family. The family relationship and the legal relationship

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80 *Bundesregierung* 2007; Benda 2003; Kingreen 2009; Mielitz 2006; Elbel 2007a; Wolf 2006; Neuheuser 2005 and 2008, 29; Benöhr/Muth 2001, 405 ff.; Frank/Helms 2001, 1340 ff.; Scheiwe 2001, 368 ff.; Wolf 2001, 345 ff. and 2003, 112 ff.; Katzenmeier 2005, 1134 ff.; Wagner 2002, 529 ff.; Teubel 2009.

between biological parents and a child can (except by a court judgement in contested paternity proceedings) be annulled only by way of statutory adoption proceedings and the adoption process provided for by the state (Section 1741 ff., 1752 BGB), but then the biological parents are retained as “substitutive parents” to allow for the rare situation in which an adoption has to be revoked (Section 1764(3) BGB).

Although the legal relations between parents and child are not invalidated by anonymous relinquishment, they can no longer be exercised and enforced on account of the anonymity. All the child’s parentage-based family rights, such as his right to be cared for and raised by the parents, his right to maintenance, and his right to inherit, are effectively rendered void. This is incompatible with the system of family law currently in force.

## IV.2 The law governing civil status

The anonymous relinquishment of infants is contrary to the notification requirements provided for by the *Personenstandsgesetz* (PStG – Act on Civil Status).<sup>81</sup> The birth of each child must be notified to the competent Registrar within one week (Sections 18 to 20 PStG as amended on 1 January 2009). The obligation to notify is very important because a child’s parentage and family-law relationships are thereby documented and because the competent state bodies (in particular, the youth welfare office and the Family Court<sup>82</sup> can exercise their

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81 Article 1 of the *Personenstandsrechtsreformgesetz* (Act to Reform the Law on Civil Status) of 19 February 2007, BGBl. I (Federal Law Gazette, Part I), 122. The Act on Civil Status thereby underwent fundamental revision with effect from 1 January 2009.

82 The competent court for these matters ceased to be the Court of Guardianship on 1 September 2009 and is now the Large Family Court (*Gesetz zur Reform des Verfahrens in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* [FGG-RG – Act to Reform Procedure in Family Matters and Non-Contentious Matters], 17 December 2008, BGBl. I No. 61 of 22 December 2008, 2586).

responsibility towards a child only if they are aware of his existence. An unregistered child is non-existent as far as the state is concerned; the “watching” function for the child that is supposed to be exercised by the state (Article 6(2) sentence 2 of the *Grundgesetz* [GG – Basic Law]) is thus effectively rendered void. The information to be given comprises the parents’ names, the place and time of birth and the child’s sex. If the parents’ names are unknown to the person required to furnish the information, the birth must be notified with such data as are known.

Under the amended civil status legislation applicable from 1 January 2009, each parent, if entitled to custody, is required to notify the birth of a child to the Registry Office with priority over other persons who know of the birth. If the parents are prevented from notifying the birth, any other person who was present at the birth or who knows of the birth at first hand is required to effect the notification (Section 19 sentence 1 No. 2 and sentence 2 PStG). In the case of births at a hospital or maternity institution, the head of the institution remains responsible, as before, for notification (Section 20 sentence 1 PStG). The parents and the other persons mentioned are to that extent released from the obligation to notify. However, each parent and all other persons who were present at the birth or who know of the birth at first hand still have an obligation to furnish data which the hospital or maternity institution cannot provide (Section 20 sentence 3 PStG).

Providers of baby drops and institutions which offer facilities for anonymous birth have no obligation to notify provided that they do not know of the birth at first hand and fall within the group of persons mentioned in Section 19 No. 2 variant 2 (amended version) on account of such knowledge.

Independently of the knowledge of a birth, any person finding a newborn child must inform the local authority thereof not later than on the following day (Section 24 PStG – the “foundling clause”). The same applies to providers of a baby drop and to the persons who have received an anonymously

relinquished child.<sup>83</sup> This provision is intended to ensure that the relevant state agencies – in particular, the youth welfare office – learn of the foundling and can initiate the necessary investigations.

Failure to notify a birth in pursuance of Sections 18 to 20 PStG, the furnishing of incorrect information and failure to report a foundling in pursuance of Section 24 PStG give rise to the imposition of an administrative fine (Section 70 PStG). Furthermore, failure to furnish the relevant notification to the Registry Office (Sections 18 to 20 PStG) may be punishable under Section 169(1) variant 3 StGB.<sup>84</sup> The Registrar may levy a periodic penalty payment to secure notification or information pursuant to Sections 18 to 20 PStG.

The professional confidentiality obligations of doctors, midwives, nursing staff and the members of conflicted-pregnancy counselling centres do not release these persons from their notification obligations under the Act on Civil Status, as the statutory duties of disclosure provided for therein are not a matter of individual discretion. Hence disclosure in these circumstances is not deemed unauthorized for the purposes of Section 203 StGB.<sup>85</sup>

Where the Registry Office is aware of facts justifying the assumption that furnishing information from or permitting inspection of a civil status entry might give rise to a risk to a person's life, health, personal freedom or other interests worthy of protection, this entry will at that person's request be given blocked-disclosure status for a period of three years; this status may be renewed subject to the same conditions (Section 64(1) sentence 1 PStG). However, information from the entry may be imparted or inspection of the entry may be permitted without the consent of the person concerned notwithstanding the blocked-disclosure status, but only under a court order, if this is essential to overcome an existing lack of evidence or

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83 See Wiesner-Berg 2009, 153.

84 See Section IV.3 for the criminal law situation.

85 See Teubel 2009, 40.

for other reasons in the predominant interests of a third party (Section 64(1) sentence 3 PStG).

In the majority of cases of anonymous relinquishment of an infant, notification to the Registry Office in practice either does not take place or is appreciably delayed, and furthermore data on the child's parentage are lacking. The children concerned often remain unknown to state agencies for several weeks or even months until adoption proceedings are initiated.<sup>86</sup> This is the case except in those Federal *Länder* in which the youth welfare offices have been able to conclude an agreement with providers that requires them to notify each anonymously relinquished child to the youth welfare office immediately.<sup>87</sup>

### IV.3 Criminal law

Where a child is relinquished anonymously, the parents may render themselves liable to criminal prosecution on the grounds of suppression of civil status information (Section 169(1) variant 3 StGB) and failure to discharge the obligation of maintenance (Section 170 StGB).<sup>88</sup> Other possibilities are failure to discharge the obligation of care (Section 171 StGB) and the removal of minors if the mother removes the child from the father, or vice versa, by giving away the child anonymously (Section 235 StGB). However, criminal investigations are as a rule discontinued because the mother is assumed to be in a situation of distress, because the level of guilt is regarded as low, or because the mother cannot be identified.<sup>89</sup>

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86 On the practice of the individual *Länder*, see in particular the information presented by the Federal Government (*Bundesregierung* 2007 – specifically, 10, 11, 12, 25, 32 and 33).

87 This is the case, for instance, in Berlin, where an official guardianship order is made immediately after the notification by the institution that received the child.

88 See Neuheuser 2008, 29; for other references, see in particular, Elbel 2007a, 59 ff.; Mielitz 2006, 111 ff.; Neuheuser 2005; Wiesner-Berg 2009, 216 ff.; however, see also Beulke 2008, 605 ff.

89 For accounts of actual situations, see Neuheuser 2008, 30.

Whether the providers of baby drops and facilities for anonymous birth are guilty of a criminal offence is disputed.<sup>90</sup> Some authorities assume that no criminal offence is committed because the provision is intended to help mothers in situations of extreme distress in pursuance of the law governing emergency situations. At any rate, the provision of the relevant facilities makes it possible for others to break the law.

Doctors and hospitals attending or providing for an anonymous birth in the context of their obligation to render assistance under Section 323c of the Criminal Code are not breaking the law. However, the obligation to render assistance does not cover the systematic provision of facilities for anonymous birth and facilitation of continued anonymity after the birth once there is no longer any danger to the health or life of the mother and the child.

The administrative-fine provisions of the Act on Civil Status and the criminal offences set out in Sections 169 ff. of the Criminal Code protect the child's fundamental right to a knowledge of his parentage and parentage-based family rights as guaranteed by the Civil Code (in particular, his right to be cared for and raised by his parents, his right to maintenance, and his right to inherit).

## IV.4 The law of guardianship

A child who has been relinquished anonymously must be taken into the care of the youth welfare office.<sup>91</sup> The youth welfare office is required to accommodate the child in a care institution, to ensure the child's welfare, to undertake all legal acts necessary to ensure his welfare until a guardian is appointed (Section 42 of SGB VIII) and to secure the appointment of a guardian by the Family Court.

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<sup>90</sup> See Mielitz 2006, 114 ff.; Elbel 2007a, 59 ff.; Beulke 2008, 605 ff.; Wiesner-Berg 2009, 216 ff., 223-243; Teubel 2009, 51 ff.

<sup>91</sup> See Mielitz 2006, 273.



The guardian is selected by the Family Court after consultation with the youth welfare office (Section 1779(1) BGB). In some Federal *Länder*, the youth welfare offices are appointed as the official guardian. In other *Länder* – sometimes against the explicit wishes of the youth welfare offices – either the institutions providing facilities for anonymous infant relinquishment themselves or female staff of these institutions are appointed as guardians.<sup>92</sup> In this last case, the guardian is subject to a conflict of interests that has important consequences for the child: on the one hand, the guardian is required to safeguard the child's interests and, in this connection, must first and foremost establish his parentage, seek out his biological parents and protect his family rights; but, on the other, the mother has been assured of anonymity by the institution. In practice, the institution's staff do as a rule attempt to persuade the mother to give up her anonymity, where they are in contact with her. However, if the mother's mind cannot be changed, her identity (her name) is kept secret owing to the promise of anonymity, even if it is known to the institution that is at the same time acting as the child's guardian.<sup>93</sup> Nor are any investigations instituted by the guardian/institution in situations where the mother's/parents' identity could be determined from the specific circumstances.<sup>94</sup> The child continues to be deemed anonymous according to the entry in the register of births at the Registry Office and in the adoption documents, although the mother's identity is known to his statutory representative, who is responsible for his welfare and the protection of his rights.

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92 For details of variations in the practice of appointment of guardians, see *Bundesregierung* 2007, 33.

93 In discussions, providers often freely admit that the mother is in fact known to them by name; however, they keep this fact permanently secret, so that the child's parentage is not documented; some actual situations are described in Neuheuser 2008, 30.

94 However, committed official guardians sometimes succeed in determining the parentage even of children left in baby drops (see Herpich-Behrens 2008, 18).

## IV.5 Protection of social data

The youth welfare offices and other public and state-recognized independent-sector institutions engaged in child and youth welfare are subject to the provisions of the criminal law on secrecy (Section 203(1) and (2) StGB); they have a responsibility to protect social data and the secrecy of social data (Section 35 of SGB I). Data may be used and furnished to others only for specific purposes, subject – except where the person concerned gives his consent – to an authorization under Sections 67 to 85a of SGB X; further restrictions apply in the field of child and youth welfare (Sections 61 ff. of SGB VIII).<sup>95</sup> If these provisions have the consequence that the disclosure of social data is impermissible, there is no obligation to furnish information or certification and also no obligation to produce written documents. Data on the mother and child must not be disclosed to persons in the woman's social and family group. The provision of social data for the purposes of the conduct of criminal proceedings is permissible in the case of a crime or other significant punishable offence. A significant punishable offence is deemed to be one in which the degree of illegality approximates to that of a crime. For the investigation of other punishable offences, only standard data (name, date and place of birth, and addresses) and details of monetary payments made or to be made may be furnished. However, the furnishing of any information is conditional upon a court decision (Section 73 of SGB X).

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<sup>95</sup> The data protection requirement laid down in Section 61(3) of SGB VIII must be observed by independent-sector child and youth welfare institutions.

## IV.6 The law of adoption

Adoption is governed by the provisions of the Civil Code (Sections 1741 to 1766) and of the Adoption Placement Act<sup>96</sup>. Placement for adoption is the responsibility of the youth welfare offices. The *Land* youth welfare offices are required to establish a central adoption agency. In addition to the state adoption agencies, the central agency may recognize the *Diakonisches Werk*, Caritas Germany, *Arbeiterwohlfahrt* and other associations and organizations as adoption agencies.<sup>97</sup> Adoptions may be arranged only by the recognized agencies and youth welfare offices. The relevant functions may be entrusted only to staff deemed suitable in terms of personality, training and professional experience, who are not predominantly occupied with tasks other than those of adoption placement (Section 3 AdVermiG). Adoption agencies are required to provide thorough professional counselling and assistance to the child, his parents and the receiving persons before and after the adoption (Section 9 AdVermiG). In practice, anonymously relinquished children are predominantly adopted through denominational or non-state independent-sector adoption agencies. The institution that provides facilities for anonymous relinquishment of infants, or the youth welfare office when it becomes aware of the child, places the child in a care institution, or else the child is handed over immediately to the prospective adopting family for pre-adoptive care.

Adoption is conditional upon a declaration of consent by the child, represented by his statutory representatives (parents

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96 AdVermiG, Notice of 22 December 2001 (BGBl. I 2002, 354); most recently amended by Article 8 of the Law of 10 December 2008 (BGBl.). The Adoption Placement Act was comprehensively amended with effect from 1 January 2002 following ratification of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

97 In 2001 there were approximately 600 adoption agencies (see Swientek 2001, 234).

or guardian), and a notarially certified declaration of consent by the biological parents to the Family Court. Tacit consent is not permissible. The consent of the relinquishing parents and of the child must relate to specific accepting persons; in Germany a child cannot be put up for adoption on a general basis. For this reason, in the case of an incognito adoption, the accepting parents to whom the consent relates are identified in the notarially attested consent by a listing number which the adoption agency assigns to them. The adoption takes legal effect only upon the decision by the Family Court. The parents cannot give their consent until eight weeks have elapsed since the birth. This minimum period is intended to protect parents from making over-hasty decisions. However, in adoption proceedings, for the protection of the relinquishing parents there are no exclusion periods for declaring consent to the putting up of the child for adoption. The institutions that provide facilities for anonymous relinquishment of infants generally include a statement in their literature to the effect that the woman has a period of eight weeks after the birth in which she can choose to take her child back. This turns the minimum period into a supposed period of exclusion that has no basis in law, thus giving rise to the false impression that the mother no longer has any rights with respect to her child once the period has expired. This may have the consequence that, after the expiry of the period, a mother decides not to seek the return of her child solely because she believes that she has forfeited the right to take it back. However, her parental right entitles her to return to her child up to the time of the adoption decision, which can be pronounced no earlier than after one year of pre-adoptive care, unless considerations of child welfare argue against this. Parental consent to an adoption can also be dispensed with if the parents' residence is permanently unknown. Prior to dispensing with consent in this case, however, the court must attempt for not less than six months to

establish the parents' identity.<sup>98</sup> The court may give consent in place of that of a parent if the parent has grossly failed to discharge his obligations towards the child or has shown by his behaviour that he is indifferent to the child. But the mere fact that the child was relinquished anonymously cannot without further investigation justify the conclusion that the father or mother has failed to discharge his or her obligations or is indifferent to the child. This applies particularly where a child has been left in a baby drop, where neither the circumstances nor the person who deposited the child are known. The court may give consent in place of a parent on the grounds of indifference only if the parent concerned has been informed and advised about the possibility of this substitution (Section 51 of SGB VIII and Section 1748(2) BGB). If the parent's place of residence cannot be established notwithstanding investigation, the court may give its substitutive consent without the provision of such information, but no sooner than five months after the birth (Section 1748(2) BGB). In practice, these requirements and periods are commonly not observed where children are relinquished anonymously, and investigations to determine the identity and residence of the parents are in most cases not instituted owing to the promise of anonymity.

The persons charged with counselling and placement for adoption and with progressing the adoption process are required to observe secrecy and confidentiality in respect of the adoption. Except with the explicit consent of the persons concerned, data on their person and situation may be used only for the purposes of adoption placement and progressing the adoption process, for supervision by the relevant authorities

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98 Section 26 of the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG – Act on Procedure in Family Matters and Non-Contentious Matters), prior to 1 September 2009 Section 12 of the *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* (FGG – Act on Non-Contentious Matters). The courts have hitherto assumed, mainly in relation to parents known by name but whose residence is unknown, that a place of residence may be deemed permanently unknown after six months of fruitless investigative attempts (see Mielitz 2006, 83; Frank/Helms 2001, 1340, 1343; Kingreen 2009, 91).

and monitoring of the observance of prohibitions applicable to adoption placement, as well as for the prosecution of crimes or other significant punishable offences on the basis of a court order (Section 9d AdVermiG). Such data may not be used for the prosecution of other criminal offences. There is also a ban on the investigation and disclosure of data relevant to an adoption, which also extends to uninvolved third parties (Section 1758(1) BGB). Information on the original entry of birth in the Registry Office's register of births may be furnished – apart from to the child himself when he reaches the age of 16 – only to the accepting persons, their parents and the child's statutory representative<sup>99</sup> (Section 63 PStG). The child's statutory representative and the child himself when over 16 may also inspect the adoption documentation unless this right is overridden by the interests of others (Section 9b AdVermiG<sup>100</sup>). The child is deprived of these rights in the case of anonymous relinquishment. If, in exceptional cases, the adoption has to be annulled,<sup>101</sup> the family relationship with the biological parents is reinstated. The relinquishing parents remain as substitutive parents. This too is not possible in the case of anonymous relinquishment and “anonymous adoption”.

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99 The age limit of 16 years applies only to inspection by or information for the child himself; the adoptive parents may inspect and obtain information concerning the data at any time, and may also inform the child of his parentage sooner on the basis of their right to raise the child and if this is consistent with the child's welfare.

100 Section 9b(2) of the Adoption Placement Act reads: “If the placement files deal with the descent and life history of the child or if there is a justified interest otherwise, the legal representative of the child, and if the child has reached the age of sixteen, he or she shall be given permission upon request to inspect the documents under guidance by a specialist. The inspection shall be refused, if overriding matters of a concerned person are in opposition.” According to the “Recommendations on Adoption Placement” issued by the Federal Association of *Land* youth welfare offices (paragraph 4.3.4), permission to inspect should not be granted without prior consultation of the biological parents/mother.

101 For instance, if the conditions for dispensing with the consent of the parents or of one parent were not satisfied (Sections 1759 ff.).

## IV.7 The Conflicted Pregnancy Act

Any woman or man is entitled (Sections 2 and 6 SchKG) to obtain information and counselling from a state-recognized conflicted-pregnancy counselling centre<sup>102</sup> on all matters relating to a pregnancy – in particular, on existing pro-family benefits and aids for children and families, on the cost of antenatal examinations and maternity, social and financial assistance, possible solutions to pregnancy-related psychosocial conflicts, and the legal and psychological aspects of an adoption. Expectant mothers must be helped with the submission of claims in respect both of accommodation and of obtaining childcare. The counselling centres must be capable of working together with all public and private agencies that offer help to mothers and children, and of calling in other professional aid at short notice. Pregnant women must be counselled without delay and may remain anonymous if they so wish (Section 6). In the event of criminal proceedings, the members of a recognized conflicted-pregnancy counselling centre are entitled to refuse to furnish evidence on matters that have been divulged or become known to them in their capacity as such (Section 53(1) No. 3a of the *Strafprozessordnung* [StPO – Code of Penal Procedure]). Cologne Regional Court has ruled that the providers of baby drops are not entitled to refuse to give evidence in preliminary criminal proceedings against a relinquishing mother in respect of information obtained about the mother and child, since the counselling provided related to a mother who had left her child in the counselling centre's baby drop and not to a conflicted pregnancy.<sup>103</sup> This is so even if the provider belongs to the conflicted pregnancy counselling centre as a member of staff.

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102 The *Länder* must ensure the provision of a sufficient number of counselling centres close to residential areas. They are required to see that at least one full-time counsellor is available for every 40 000 individuals (Sections 3 and 4 SchKG).

103 *LG Köln* (Cologne Regional Court), decision of 9 January 2001, NJW 2002, 909.

## V THE INTERNATIONAL LEGAL SITUATION: A DIGRESSION

### V.1 International requirements on a child's right to know his parentage

By its resolution of 26 January 2000, the Parliamentary Assembly of the Council of Europe called upon the Council's member states to guarantee children the right to know their parentage and to repeal laws that opposed such knowledge. Article 7(1) of the *UN Convention on the Rights of the Child* of 20 November 1989 grants children the right to know their parents as far as possible.<sup>104</sup> It requires States Parties to ensure that each child is entered in a register after birth without delay (Article 7(1) and (2)). Article 8 of the Convention confers a right to the preservation of identity. Article 30 of the *Hague Convention* of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption requires States Parties to retain and make available information on parentage in the context of their national legislation. Germany became a State Party to the Hague Convention on 1 March 2002 following extensive deliberations on the changes to the relevant laws required for the purposes of ratification. The deliberations concerned not only the problem of preventing child trafficking, but also how to incorporate in the new adoption legislation the right, provided for in the Convention, of an adoptive child from another country to know his parents and parentage. Accordingly, the period for retention of the placement documents was set at 60 years and provision for

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<sup>104</sup> According to the declaration of interpretation provided by Germany at the time of ratification of the Convention on the Rights of the Child, the Convention is not directly applicable within an individual state, but only constitutes the basis for state obligations that must be transposed into national law. However, this interpretation of the declaration is disputed. Some authorities consider that the declaration has no effect on the immediate applicability of individual provisions, while others regard the declaration of interpretation as void, because inconsistent with the objective and purpose of the Convention. (See references in Wiesner-Berg 2009, 423.)



inspection was made in Section 9b of the Adoption Placement Act.<sup>105</sup>

## V.2 Baby drops and anonymous birth in other European countries

### *Baby drops*

Hungary is apparently the only European country in which baby drops have a basis in law.<sup>106</sup> There are currently some eight baby drops in Hungary.<sup>107</sup>

Baby drops exist in the countries mentioned below without any explicit statutory provisions. It is impossible to say here to what extent they are incompatible with the laws and constitutional principles of the countries concerned.

The installation of the first Austrian baby drop, in Vienna, was demanded by a parliamentary Study Commission after the establishment of the Hamburg baby drop in 2000.<sup>108</sup> There are currently about six baby drops in Austria.<sup>109</sup>

In Belgium, a baby drop was installed in the Antwerp district of Borgerhout in 2000.

In Switzerland, just one “baby window” has existed since 2001; it is located in Einsiedeln.

In the Netherlands, a project to install a baby drop in Amsterdam in 2003 came to nothing, in particular owing to objections by the Dutch Minister of Health, Clémence Ross.

In the Czech Republic, the first baby drop was installed in Prague in 2005.

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<sup>105</sup> See Wacker 2007, 7.

<sup>106</sup> Hungary placed baby drops on a legal foundation by Law 2005: XXII Amending Certain Laws in the Interests of Newborn Infants of 5 May 2005 (see Wiesner-Berg 2009, 19).

<sup>107</sup> Lischka 2009.

<sup>108</sup> For information on the establishment of the first baby drops in other European countries, see Wiesner-Berg 2009, 19.

<sup>109</sup> See [http://www.babyklappe.info/alle\\_babyklappen/index.html](http://www.babyklappe.info/alle_babyklappen/index.html) [2009-11-16].

The first Italian baby drop was installed at Rome's *Ospedale di Santo Spirito* in 2006.

In the same year, the first Polish baby drop, known as the "Window of Life", was installed in Krakow;<sup>110</sup> there are now four baby drops in Poland.<sup>111</sup>

### ***Anonymous birth***

Statutory regulation of anonymous birth exists only in France, Italy and Luxembourg. These countries are among those embracing the Romanistic law tradition, and their affiliation law differs fundamentally from that of Germany.<sup>112</sup> Unlike the situation in, for example, Germany, as well as in most other European countries, a mother in France, Italy and Luxembourg must acknowledge a child as hers. As confirmation of legitimate parentage, it is sufficient for the mother's name to be stated in the birth certificate. An unmarried mother in France and Italy must formally acknowledge her child, whereas in Luxembourg all that is necessary, in this situation too, is for the mother's name to be entered in the birth certificate.

In France, anonymous birth (*accouchement sous x*) remains legal to this day.<sup>113</sup> The relevant law provides that, before anonymous birth, the mother must be fully and personally informed of the legal consequences of her decision. It follows that baby drops, where contact with the mother is automatically ruled out, would not be permissible in France. Indeed, they were

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110 See *Radio Vatikan* 2006.

111 See *Stadtverwaltung Cottbus* (Cottbus City Administration) 2009.

112 With regard to the following, see Pfaller 2008, 47 ff.; Teubel 2009, 87 ff.; Mielitz 2006, 41 ff.; Wiesner-Berg 2009, 22 ff.

113 In 1941 the Vichy regime passed a law granting every woman in France the right to give birth to her child in hospital anonymously and at the expense of the state. At the time, this was mainly intended for the protection of women expecting a child from a German soldier. In those days, abortion and the killing of children were liable to the death penalty in France. Anonymous birth was incorporated into the *Code civil* in 1993. In 2002, a central commission was established to collect all data in cases of anonymous birth and to arrange for contact between mother and child if both agree. However, a mother cannot be compelled to disclose her identity. She can choose whether to give birth to her child in secret (her identity being documented with the commission) or to remain completely anonymous.

abolished in that country as long ago as in the mid-nineteenth century. At present, it is estimated that there are still some 500 anonymous births per year.<sup>114</sup> Criticism of the law providing for anonymous relinquishment of infants is increasingly being voiced in France. A number of associations of affected persons provide counselling and support for those born anonymously and are now calling for the law to be repealed. At the end of May each year, persons born anonymously demonstrate for their right to know their parentage and for the abolition of anonymous birth. Lined up against them are champions of the interests of adoptive parents, who very much desire the continuance of anonymous birth, and who are thought to exert appreciable influence in regard to retention of the law.<sup>115</sup> The European Court of Human Rights (ECtHR) has subjected the French law permitting anonymous birth to its scrutiny. In its decision in the case of *Odièvre v France* (2003), it derives a fundamental right to a knowledge of one's personal history from the right to respect for private and family life enshrined in Article 8 of the European Convention on Human Rights (ECHR). According to the ECtHR, this right is called into question by the permitting of anonymous birth.<sup>116</sup> However, according to the judgement,<sup>117</sup> the French law permitting anonymous birth does not contravene the ECHR.<sup>118</sup> An important argument in this connection was that the amendment of the relevant law in 2002 had introduced the National Council, which operated as a communication and contact point for both sides should the child subsequently request access to information on his

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114 See *Bundesregierung* 2007, 15.

115 See *Bentheim* 2008a, 9.

116 EGMR, NJW 2003, 2145 (2146 Nr. 29).

117 The judgement was arrived at by a small majority; seven judges gave reasons in a joint dissenting opinion why they considered that the French law did infringe Article 8 ECHR. In a subsequent decision involving Article 8 ECHR in 2006 (*Jäggi v Switzerland*), the Court espoused important aspects of the dissenting opinion in the *Odièvre* case and stressed the particular importance to personal identity of a knowledge of one's personal history. See *Wiesner-Berg* 2009, 467 f. with further references.

118 For a detailed account of the judgement, see *Benda* 2003, 534 ff.

personal history; this meant that, in the opinion of the Court, the plaintiff had at least secured the prospect of obtaining the desired information through the intermediary of the Council.<sup>119</sup> No conclusions can be drawn from this judgement as to whether anonymous births might be permissible under German law. Baby drops, which are prohibited in France, would contravene the ECHR according to the reasons given for the judgement.

In Austria, not only baby drops but also anonymous birth have become de facto permissible owing to the abolition of the criminal offence of abandoning a minor; however, anonymous birth has not been placed on a statutory basis.<sup>120</sup> In other fields of law, the problems are similar to those of Germany.<sup>121</sup>

In Luxembourg, anonymous birth has been permitted by law since 1975; here too, however, critical voices have been raised, with the aim of securing a review of the relevant law.<sup>122</sup>

In 2005, the UN Committee on the Rights of the Child, the highest-level body with responsibility for interpreting the Convention on the Rights of the Child, called upon Luxembourg to take measures to ensure observance of the provisions of Article 7 of the Convention – in particular, a child's right to know his parents – having regard to the principles set forth in Article 2 (prohibition of discrimination) and Article 3 (protection of the child's interests). It recommended Austria to take all necessary measures to prevent the continued use of baby drops, and called for statutory measures to permit the registration of all medically relevant data and the name and dates of

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119 See paragraph 49 of the judgement. This specific case was not one of total anonymity: the names of the biological parents were documented in the adoption certificate.

120 The legal position on the anonymous relinquishment of infants in Austria is set out in the Federal Ministry of Justice's Decree of 27 July 2001 on Baby Nests and Anonymous Birth in Austria.

121 Like its German counterpart, Austrian family law provides that a legal family relationship between mother and child automatically comes into being at birth and that an adopted child has the right to obtain information about his biological parents.

122 See for example <http://www.forum.lu/bibliothek/ausgaben/inhalt/artikel/?artikel=6155> [2009-11-16].

birth of the biological parents, and to enable children to have access to this information.<sup>123</sup> The Committee also repeatedly expressed doubts about the compatibility of the French provisions on anonymous birth with the Convention, even after the 2002 amendment of the relevant law.<sup>124</sup>

In Switzerland, both baby drops and the anonymous relinquishment of infants after an anonymous birth contravene the country's law in a number of respects.<sup>125</sup> Although there is no provision for anonymous birth, its introduction is urged by some doctors and politicians and by the mother-and-child welfare organization *Schweizerische Hilfe für Mutter und Kind*. The Swiss Federal Council expressed the following view on a motion to that effect on 7 September 2005:

The mere hope that a change in the law might by itself render something good is not a reliable guide in the matter of legislation. This is all the more true when it is considered that the possibility of “discreet birth” already exists today in this country: a pregnant woman can give birth in hospital with medical attention and immediately put up her child for adoption. The legal relationship with the biological parents ceases upon adoption, so that, for the purposes of the law of civil status, the biological parents become childless again. Prior to adoption, the supervisory authority may order disclosure of civil status data to be blocked where this is essential for protection of the biological mother (see Article 46(1)(a) of the Ordinance on Implementation of the Civil Status Act of 28 April 2004; SR 211.112.2). Unlike the situation with anonymous birth, however, it is not possible to keep the identity of the biological parents secret from the child once the child has reached the age of majority (Article 268c of the Swiss Civil Code).<sup>126</sup>

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123 Wiesner-Berg 2009, 428 with references.

124 Wiesner-Berg 2009, 426 with references.

125 See Wiesner-Berg 2009, 723.

126 *Schweizer Parlament* (Swiss Parliament) 2005 [translated by P. Slotkin].

With regard to the possible legalization of anonymous birth, comparable impediments to those obtaining in Germany exist in Swiss law. In addition, on the basis of other principles of international law the observance of the Convention on the Rights of the Child can be the subject of proceedings before a national court in Switzerland. Should Switzerland enact provisions contrary to international law, they must not be implemented.<sup>127</sup>

In the Czech Republic, since 1 September 2004 Law No. 422/2004 has permitted “birth with the mother’s identity kept secret”; in this case, although the mother’s personal data are known, they are kept in a sealed envelope at the maternity institution.<sup>128</sup>

In Belgium, although some advocate anonymous birth, a law permitting it has hitherto not been passed. The debate on the introduction of anonymous or confidential birth seems to be ongoing in that country too.<sup>129</sup>

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127 See Wiesner-Berg 2009, 774.

128 See Wiesner-Berg 2009, 18.

129 See *ibid.*

## VI LEGISLATIVE PROPOSALS IN GERMANY TO DATE

A number of proposals for the legalization of facilities for the anonymous relinquishment of infants were made by groups within the *Bundestag* and the *Bundesrat* between 2000 and 2004.

Under the draft law submitted by the CDU/CSU (Christian Democratic Union/Christian Social Union) parliamentary group on 12 October 2000,<sup>130</sup> the period allowed by the Act on Civil Status for notifying the birth of a child was to be extended to ten weeks if the mother was receiving assistance from a state-recognized conflicted-pregnancy counselling centre.

Under the cross-party (excluding the PDS [Party of Democratic Socialism] parliamentary group) draft law of 23 April 2002,<sup>131</sup> a provision would have been included in the Act on Civil Status to the effect that the parents' names need not be entered in the register of births if the child's mother was unwilling to furnish data on her person and if this wish was evident from the notification of the birth. The mother would have been permitted to give the child a forename and to leave the child a communication, the contents of which she herself would determine, in a sealed envelope which the Registrar would have been required to forward to a central storage location. The Registrar would have been required to return the envelope to the mother should she so request. The child, having reached the age of 16, would if he so wished be given the deposited communication if still present. Children relinquished anonymously were to be given an official guardian.

The legislative proposal of the *Land* of Baden-Württemberg submitted to the *Bundesrat* on 6 June 2002<sup>132</sup> also provided that the parents' names would not be entered in the register of births

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<sup>130</sup> *Deutscher Bundestag* 2000.

<sup>131</sup> *Deutscher Bundestag* 2002.

<sup>132</sup> *Bundesrat* 2002.

if the mother was unwilling to furnish data on her person and if this wish was evident from the notification of the birth. In that case, the Registrar would have been required without delay to inform the youth welfare office that became the child's official guardian at the child's birth. The institution where the child was, or was to be, born would have been required to refer the mother to appropriate counselling agencies. This draft law too provided that a mother who remained anonymous should be able to give the child a forename and to leave a communication in a sealed envelope. The Registrar would have been required to return the communication to the mother at any time if she so requested. If she did not, the child could ask to be given the communication on reaching the age of 16. If the Registrar was informed that an anonymous child had been left in a baby drop or institution, he would have been required to inform the Family Court accordingly.

In 2004, the Free State of Bavaria submitted the draft of a *Geburtsberatungsgesetz* (Birth Counselling Law) to the committees of the *Bundesrat*, in the formal guise of a proposed amendment to the Baden-Württemberg draft law.<sup>133</sup> It proposed a graduated model. The mother would be permitted a "secret birth" if, following thorough counselling by a state-recognized counselling centre,<sup>134</sup> she declared to that centre that she was unwilling to be mentioned in her child's entry of birth. If the woman chose the option of secret birth, the counselling centre would have been required to record the mother's personal data and to keep them in a sealed envelope. The centre would have been required to issue the mother with a certificate that she had received counselling, which would also confirm that she had declared herself unwilling to be mentioned in the child's entry of birth. The mother's name would not be entered in the register of births only if she observed this procedure and gave birth in an institution

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<sup>133</sup> *Bundesrat* 2004.

<sup>134</sup> Pursuant to Sections 8 and 9 of the Conflicted Pregnancy Act.



operated on a majority basis by a body constituted under public law, and also produced the counselling centre's certificate. After the birth, the counselling centre would have been required to forward the personal data it had recorded on the mother's identity to the Registry Office in the sealed envelope, so that the child could receive information on the mother's identity on reaching the age of 16. However, once the child reached the age of 15, the mother could contest the furnishing of information if she could establish<sup>135</sup> that the disclosure of her identity would have serious adverse consequences for her or her family. As in all the other draft laws mentioned above, the mother would also have been able to leave a communication for the child in a sealed envelope, the contents of which she could herself determine<sup>136</sup> and which the child could inspect on reaching the age of 16 unless the mother had previously exercised her right to demand the envelope back from the Registrar. The counselling centre would have been able to dispense completely with the recording of the mother's personal data if it considered that disclosure of the mother's identity would have led to an extreme conflict situation with danger to the life and limb of the mother or child ("anonymous birth"). The Registrar would have been required to notify the youth welfare office of each child born anonymously. All children whose personal data were not entered in the register of births, including children from baby drops, would have been given an official guardian. The child's official guardian would, under the draft law, have been released from his obligation to attempt to discover the identity of the child's biological parents. The cost of the anonymous birth would have been borne by the *Land*.

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135 In other words, the Registrar would have had to verify the plausibility of the mother's case, and not the factual accuracy of the information.

136 Under this draft law, there would thus have been two envelopes in the case of a "secret birth": one with the communication for the child, the contents of which would have been determined by the mother; and one with the personal data for identification of the mother to be recorded by the counselling centre.

None of these draft laws was adopted. Except for the first of these proposals (that submitted by the CDU/CSU), which provided not for the anonymous relinquishment of infants but only for an extension of the period allowed for notification of the birth to the Registry Office, all were not pursued further – sometimes only after extensive deliberations and hearings – on account of constitutional objections, in particular with regard to the rights of the children who remained anonymous and their fathers.<sup>137</sup>

The Government Coalition Agreement of 2005 includes the following statement in Chapter 5 “Equality and women’s policy”: “Experiences with anonymous births should be evaluated and appropriate legislation adopted if necessary.” The following is included in Section III “Social Progress” Chapter 1. “Marriage, family and children: Assistance for pregnant women in distress” of the 2009 Coalition Agreement: “We must review the option of confidential birth and the possible legal basis.” In its response to the Major Interpellation of 15 November 2007, the Federal Government described the situation on the basis of a survey of the 16 Federal *Länder*, but its account was incomplete, as some of the questions were not answered by the *Länder*, or in some cases could not be answered by them owing to lack of information from the institutions providing facilities for the anonymous relinquishment of infants. The Federal Government does not consider the outcome of the survey to constitute “a sufficient foundation

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137 See Kingreen 2009, 92. One of the reasons given by the Legal Committee of the *Bundesrat* to justify its decision to adjourn deliberations on Baden-Württemberg’s legislative proposal was that additional provisions were necessary, in particular, on the official guardianship of children left in a baby drop. The Committee also considered that the provisions could not be incorporated without contradiction into the existing legal structure of the Civil Code and into Book VIII of the Social Code; provisions were also needed to take account of the father’s rights where the mother remained anonymous, as well as documentation of the mother’s data to preserve the child’s right to a knowledge of his parentage, this right having been recognized by the Federal Constitutional Court, the European Human Rights Convention and the United Nations Convention on the Rights of the Child; finally, provisions were needed to determine who would meet the cost both of the deliveries and of the youth welfare services.

at present for a valid assessment of the need for statutory regulation of anonymous birth and is currently contemplating a study at central Federal level<sup>138</sup>. This study had since been commissioned by the Federal Ministry for Families, Senior Citizens, Women and Youth from the German Youth Institute (DJI).

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<sup>138</sup> *Bundesregierung* 2007, 9.

## VII CONSTITUTIONAL FRAMEWORK

### VII.1 Fundamental rights involved

A number of guarantees provided by the Basic Law (GG) could be regarded as incompatible with legalization of the anonymous relinquishment of infants, while others perhaps argue in favour of it. Such inconsistency – i.e. conflicting provisions – calls for a consideration of the relative merits if there is no specific rule for resolving the conflict; in other words, “practical concordance” among the conflicting constitutional provisions must be sought by way of a proportionate balance involving mutual reconciliation and limitation.

#### VII.1.1 Fundamental rights that appear incompatible with legalization of the anonymous relinquishment of infants

##### a) Article 2(1) in conjunction with Article 1 GG: the right to a knowledge of one’s parentage and to a knowledge of one’s offspring

On the basis of his right of personality under Article 2(1) in conjunction with his human dignity (Article 1(1)), every person has a fundamental right to a knowledge of his biological parentage.<sup>139</sup> The general right of personality protects “the possibility of putting oneself as an individual into a relationship with others not only socially but also genealogically”. It embraces “a child’s right to a knowledge of his parentage just as much as a man’s right to know whether he is the father of a child.”<sup>140</sup>

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139 BVerfGE 79, 256 ff.; BVerfGE 90, 263 ff.

140 BVerfGE 117, 202 (226).

### *Protection of the child*

Statutory provisions that deprived a child of the right to judicial establishment of his parentage, either wholly<sup>141</sup> or only within a given period of exclusion,<sup>142</sup> would be unconstitutional.

It is true that Article 2(1) in conjunction with Article 1(1) does not create any entitlement vis-à-vis the state to obtain a knowledge of one's parentage, but instead affords protection from the withholding of information that could be obtained.<sup>143</sup> If the anonymous relinquishment of children were legalized, the law would violate this protection by contributing to a situation in which children were cut off from information that was in principle obtainable. Safeguarding of the right to a knowledge of one's parentage is facilitated, in particular, by the provisions of the Act on Civil Status and of the Criminal Code requiring notification of the birth of a child and the furnishing of accurate civil-status information, as well as by the rules on the register of births and the preservation of adoption documentation.

A child has the right to receive information from the mother identifying the biological father. The child's right to know his father necessarily takes precedence over the mother's right of personality and her interest in keeping the fact of her maternity secret. Only in specific circumstances may a mother, in an individual case, be entitled to conceal the father's name, following consideration of the conflicting interests and with provision for review by the courts at the instigation of the father or child.<sup>144</sup>

### *Protection of the biological father*

The right of personality enshrined in Article 2(1) in conjunction with Article 1(1) also protects the father's right to a

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141 BVerfGE 798, 256.

142 BVerfGE 90, 263.

143 BVerfGE 79, 256 (269).

144 BVerfGE 96, 56 (62); BVerfG, non-admission ruling of 18 January 1988, NJW 1988, 3010.

knowledge of his offspring.<sup>145</sup> However, this right does not extend to a man's interest in having his biological paternity established by a court if another man is deemed by law to be the father.<sup>146</sup>

**b) Article 2(2), sentence 1, second alternative: the right to life and physical integrity**

A child has a right to protection of his physical and psychological integrity. Since ignorance of one's parentage can be severely prejudicial to the development of a person's identity and give rise to profound psychological disturbances, this fundamental right of the child must be included in the consideration of the relative merits.

**c) Article 6(2) GG**

***Protection of the child***

A child has an independent fundamental right to association with both parents even against their will.<sup>147</sup> The anonymous relinquishment of a child makes it impossible for him to exercise his right to a relationship with his biological parents. The counterpart to the child's right is the parents' responsibility for their child pursuant to Article 6(2). In addition, the child has a right, under Article 6(2), to be cared for and raised by his parents.<sup>148</sup> For this purpose the conduct of the mothers and fathers of anonymously relinquished children prior to the birth is immaterial. Whatever the circumstances, a child has a right to parental care and to contact with his parents.<sup>149</sup> If the child is adopted, this fundamental right also subsequently exists vis-à-vis the adoptive parents.

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<sup>145</sup> See BVerfGE 117, 202 (226); Kingreen 2009, 93; Gernhuber/Coester-Waltjen 2006, Sec. 52 para. 20.

<sup>146</sup> BVerfG, non-admission ruling of the Second Chamber of the First Senate of 13 October 2008, AZ 1 BvR 1548/03.

<sup>147</sup> BVerfG, 1 April 2008; Kingreen 2009, 94.

<sup>148</sup> Ibid.

<sup>149</sup> See Kingreen 2009, 94.

### *Protection of the biological father*

The rights of the biological father are also in principle protected by Article 6(2).<sup>150</sup> Although biological paternity in itself is not considered to fall within the sphere of protection granted by Article 6(2), the biological father has a right of access, by way of procedural law, to the parental right; that is to say, it must be made possible for him to acknowledge his paternity and have it established.<sup>151</sup>

The fundamental-right provision protects the biological father (...) in his interest in assuming the legal position of the child's father. However, this protection does not grant him the right to have paternity granted to him with priority over the legal father in all cases (...). The law may accord priority to the interest of the child and of his legal parents in the preservation of the social family relationship existing in pursuance of Article 6(1) over the interest of the biological father in also being acknowledged as the legal father, thereby making it impossible for the biological father to contest the legal paternity.<sup>152</sup>

## **VII.1.2 Fundamental rights that argue in favour of legalization of the anonymous relinquishment of infants**

### **a) Article 2(2) sentence 1 GG: the child's right to life and physical integrity**

The availability of facilities for the anonymous relinquishment of infants is intended to prevent the killing and abandonment of newborn babies and thereby to serve the purpose of protecting their lives and physical integrity. For the purposes of

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<sup>150</sup> See *ibid.*

<sup>151</sup> BVerfGE 108, 82 (104 ff.); Kingreen 2009, 94 f.

<sup>152</sup> BVerfG, non-admission ruling of the Second Chamber of the First Senate of 13 October 2008, AZ 1 BvR 1548/03 [translated by P. Slotkin].

exercising the fundamental right provided for in Article 2(2) sentence 1, a real, individual danger to the anonymously relinquished child would have to be established, or the existence of such danger would at least have to be plausibly asserted. Experience to date casts doubt on the possibility of furnishing evidence capable of substantiating such an assertion.

However, there is a further protective dimension to the fundamental right to life (Article 2(2) sentence 1). Fundamental rights are not only defensive rights and do not only afford protection from active interference from the state, but also oblige the state to protect people from interference with their fundamental rights by third parties.<sup>153</sup> For this reason, failure to afford protection, or a provision that accords inadequate protection, may likewise constitute an interference with a fundamental right. The state must “adopt a protective, facilitating posture towards (the relevant) life; this means in particular that it must also give protection from unlawful interference by others”.<sup>154</sup> The duty of protection is triggered by the mere risk of violation of an object of legal protection.

Article 2(2) sentence 1 also guarantees a child’s right to be born with professional medical attendance.

#### **b) Article 2(1) in conjunction with Article 1(1) GG: the mother’s right of self-determination**

The general right of personality is deemed to include an entitlement to make decisions for oneself and to choose one’s course of action in any life situation autonomously. In the context of the anonymous relinquishment of infants, this right of self-determination should be construed not in the sense of blanket maternal autonomy in regard to wishes and decisions, but as the right to personal appreciation and personal tackling of the mother’s situation of distress, due allowance

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<sup>153</sup> See Kingreen 208, 35. See also footnote 154 for the fundamentals of an interpretative construct of the state’s protective obligations with further references. Kingreen 2009, 95.

<sup>154</sup> BVerfGE 39, 1 (42); BVerfGE 46, 160 (164).



being made for the rights of others – in particular, for those of the child.

**c) Article 2(2) sentence 1 GG: the mother's right to life and physical integrity**

If the mother is threatened by her social or family group as a reaction to her pregnancy or maternity, her right to life and physical integrity may be affected.

Article 2(2) sentence 1 in addition guarantees the right to give birth to a child with professional attendance and under safe medical conditions.

## **VII.2 Legal consideration**

In order to achieve a proportionate balance between the contradictory constitutional positions that may be held to exist when an infant is relinquished anonymously, it is important for the objects of legal protection at issue not to be curtailed in their fundamental elements. Proof of *suitability*, *necessity* and *appropriateness* must be furnished in regard to the aims of each option as compared with the constitutional guarantees that will thereby be assigned less importance. In this connection, it is essential always to guarantee the necessary minimum degree of protection for the affected fundamental rights (“prohibition of inadequate provision”).

### **VII.2.1 Suitability**

The aim of permitting the anonymous relinquishment of infants is to protect the life and physical integrity of the children concerned, as well as, where applicable, that of their mothers. In the case of anonymous or confidential birth, there is also the subsidiary aim of ensuring that the delivery can take place with medical attendance.

In the view of the Federal Government, the information currently available on the take-up of anonymous birth facilities is insufficient for an assessment of their suitability.<sup>155</sup> The scientific and forensic evidence concerning women who have killed their babies during or after birth or abandoned them to die suggests that precisely these women are unable to make use of the available facilities for anonymous relinquishment of infants because they are suffering from a severe personality disorder and kill their children or abandon them to die when in a state of emotional upheaval, having denied their pregnancy to themselves and then been surprised by the birth. According to the evidence, the women concerned are in conflictual situations and incapable of goal-directed, planned and problem-solving action.<sup>156</sup> However, if a woman is to make use of the availability of anonymous infant relinquishment facilities, she must reflect on the possible ways of coping with the situation of distress caused by her pregnancy and maternity and be capable of acting in a goal-directed manner.<sup>157</sup> Again, the number of recorded infant killings and abandonments has not fallen since the introduction of these facilities. Analysis of the cases of anonymous infant relinquishment on which information is available shows that the relevant factors are social, family and financial problems, conflicts with partners, shame with respect to, or fear of, the mother's social group, reluctance to approach official bodies and the feeling of being unable to cope with the child.<sup>158</sup> In not

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155 *Bundesregierung* 2007, 9: "The Federal Government currently lacks an adequate foundation for valid assessment of the need for statutory provisions on anonymous birth and is therefore contemplating a central study at Federal level. The aim of the study is to augment the evidence available as a basis for the decision-making processes involved in, and the factors influencing, anonymous birth, as well as, in particular, to investigate whether the women who would otherwise have given birth in secret and then abandoned or killed their babies can in fact be reached by the availability of appropriate counselling and assistance services." [Translated by P. Slotkin.]

156 See Rohde 2008, 54.

157 Rohde 2007, 131 ff. and 2008, 54; Herpich-Behrens 2007, 145 ff.; The Opinions of *terre des hommes* can be accessed at <http://www.tdh.de/content/themen/weitere/babyklappe/index.htm> [2009-11-16].

158 See BStMAS 2007, 49; *Bundesregierung* 2007, 10 f.; Herpich-Behrens 2008, 20 f.; Neuerburg 2008, 17.

one of the recorded cases can it be assumed that the baby would have been at risk of being killed or abandoned if the possibility of anonymous relinquishment had not existed. However, it is of course not inconceivable that the anonymously relinquished infants might include one that would have died had the facility not existed, or that the life of one of the newborn babies found dead could have been saved if the mother had been aware of the availability of anonymous infant relinquishment and been able to use the facility.

### VII.2.2 Necessity

The issue with regard to necessity is whether there are ways of protecting the life of a newborn baby or the mother's right to health or self-determination without, or at least with less serious, interference with the child's right of personality and his right to a relationship with his parents (mother and father). In this connection, a qualitative and hence constitutionally relevant distinction must first be made between baby drops and anonymous birth.<sup>159</sup> After all, anonymous births take place with medical attendance; the women concerned can be reached personally and counselled. This is not the case with baby drops. The providers can merely attempt, by placing literature at the drop, to induce the relinquishing person to contemplate the possibility of making contact. Again, in the case of a baby drop, it is not even certain that the person who left the infant was in fact the mother. For this reason, the possibility of violation of the mother's fundamental rights must also be considered.

With regard to the question of necessity, account must be taken of the existing range of legally sanctioned assistance services provided by both independent-sector and state institutions, whose principal task is to give effective help to pregnant women and mothers in situations of conflict and distress.

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<sup>159</sup> See Kingreen 2008, 36.

Analysis of the known cases of anonymous infant relinquishment shows that the distress situations concerned are of the same kind as those consistently met with at the counselling and assistance centres and adoption agencies, where they are addressed by legally sanctioned means. Even when the official assistance provided by the independent-sector and state institutions is used, the birth and adoption of a child can be kept secret from the mother's social group – especially in view of the possibility of the assignment of blocked-disclosure status to the entry in the civil status register in pursuance of Section 63 PStG and Section 62(2) of the *Verordnung zur Ausführung des Personenstandsgesetzes* (PStV – Ordinance on Implementation of the Civil Status Act). Complete, lifelong anonymization with respect to the child too is not necessary for the protection of mother and child. This applies also, and in particular, in cases where the mother's personal group are aware of the pregnancy or birth and she is actually pressured by her partner or family into relinquishing the child anonymously because this seems to be a simple way of resolving the acute situation of conflict or distress.

At the same time, account must be taken of experience in the field which shows that some of the women concerned are deterred by the prospect of approaching official sources of help. They are afraid of making contact with public bodies and do not trust that their identity will be kept unconditionally secret.

### **VII.2.3 Appropriateness (proportionality in the stricter sense)**

Legalization of the anonymous relinquishment of infants could be contemplated only if the associated loss of protection for the affected fundamental rights of children and fathers were considered, in terms of value, to be tolerable relative to the positive effects of anonymous relinquishment for the protection of the

life of the newborn baby and, where applicable, of the mother. The issue is therefore the extent to which it would be constitutionally acceptable for the law to restrict or abolish the right of children to a knowledge of their parentage and to a relationship with their parents, as well as the rights of fathers, in order to save the life of a single child that may possibly be at risk.

In justification of the provision of facilities for anonymous relinquishment of infants, it is not claimed that all relinquished infants would lose their lives if facilities for anonymous birth were not available; nor is it argued that at least the majority of the children concerned would not survive. Instead, the rights at issue are intended to be restricted for the purpose of possibly saving another potentially at-risk child, or a small number of other potentially at-risk children (“Even if only one life were saved, it would already be worth while”<sup>160</sup>). This means that the relevant rights of third-party children are curtailed or abolished although these children themselves have nothing whatsoever to do with the situation in which a life is at risk.<sup>161</sup> “Co-liabilities in terms of fundamental rights” of this kind affecting third parties are subject to strict requirements. They can be justified only if they have as their counterpart a substantial increase in the protection of other objects of legal protection.<sup>162</sup>

The scale of the individual risk must be taken into account as regards both those disadvantaged by a measure and those potentially protected by it. An important point in this connection is that the legally protected object represented by life is a precondition for any possession and exercise of other rights. Hence the problem in the cases to be considered here is precisely the fact that, according to the available evidence, it is unlikely that a child whose right to knowledge of his parentage is affected will himself belong to the group of children at

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160 See Swientek 2007c, 209; Rippegather 2009; Kässmann in Berndt 2008; Merkle quoted in du Bois 2004. *SterniPark*, in particular, has used this notion to justify the facilities it provides.

161 Kingreen 2009, 103, refers to “collateral damage to fundamental rights”.

162 BVerfGE 115, 320 (328 ff.); Kingreen 2009, 103.

risk of being abandoned or killed after birth. At any rate, the number of affected “third parties” is manifestly far greater than the number of children at risk. However, it is extremely doubtful whether it is permissible for these numerous “third parties” to be made “co-liable” in terms of fundamental rights for an individual child who may possibly be at risk. The greater the interference with the rights of those made “co-liable”, the more cogent the constitutional objections will be.

### **VII.3 The state’s obligation to intervene**

Toleration of the systematic availability of facilities for anonymous relinquishment of infants constitutes an appreciable interference with the right to a knowledge of one’s parentage and with the parent-child relationship, which is protected as a fundamental right. In so far as the state fails to take measures against the providers, it is potentially helping a mother who remains anonymous – and, in the case of a baby drop, also other persons who remain anonymous – to dispose at will of fundamental family rights of children and parents without any obligation to justify her/their action and without any monitoring process.<sup>163</sup> The issue to be considered and resolved is the extent to which it is permissible for the state to leave it to others to decide whether the legal order it has established is or is not enforced, particularly where the persons to whom the decision is left need not take responsibility for it owing to their anonymity.

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<sup>163</sup> See Kingreen 2009, 103; Benda 2003.

## VIII ETHICAL EVALUATION

### VIII.1 Introduction

For an ethical evaluation of the various forms of anonymous infant relinquishment, a number of issues on three different levels must be distinguished. First, there is the *fundamental level* of the importance of a knowledge of one's biological parentage, the social bond with one's family of origin and parental responsibility for a child. Second, on the *level of the relative priority* accorded to various objects of protection and rights, the question arises as to whether and, if so, under what circumstances it may be ethically acceptable permanently to deprive children of access to a knowledge of their biological parentage and contact with their biological parents, and to deprive the non-relinquishing parent of access to his or her child. Lastly, on the *level of state responsibility*, the issue is whether the state, with the aim of presumed assistance to a small number of persons, ought to adopt fundamental provisions, with possible effects on society's conception of the family and on the entitlements and duties of individual family members, which might foster an ethos in which tragic exceptions become state-tolerated forms of action – having regard also to the possibility of abuse. Another point to be considered is whether the state might have greater responsibility for averting a mother's exceptional psychosocial distress, which can presumably be relieved at most rudimentarily and temporarily by the anonymous relinquishment of her infant.

One aspect of the ethical evaluation of the anonymous relinquishment of infants is the treatment of empirical knowledge and ignorance. An ethical evaluation of the provision of facilities for anonymous infant relinquishment presupposes that information on social and psychosocial situations and empirical data and evidence from the field are first gathered and then evaluated. This applies particularly to the question of whether the facilities provided for the anonymous relinquishment of

infants are indeed effective means of achieving their predominant ethical objective of preventing the killing of newborn babies or avoiding the risk to them presented by abandonment. However, another relevant consideration is the possible unfavourable psychological consequences of ignorance of one's parentage.

After some ten years of experience, the empirical data currently available on the utilization of the facilities and the criminological and scientific evidence concerning women who have killed or abandoned their babies do not suffice to prove the efficacy of this provision. On the contrary, they suggest that women at risk of killing or abandoning their newborn babies are not reached by the availability of these facilities. The facilities are in fact also used by women, parents and families who would have been able to make use of the legally sanctioned provision for dealing with situations of distress if the possibility of anonymous relinquishment had not existed. The available evidence admittedly does not "prove" this in a way that precludes any hope that the facilities might be effective. For this reason, some hold that one should continue to assume that the provision of the facilities might possibly still have the desired effect. A particular problem for the purposes of ethical evaluation is not only the lack of empirical evidence, but also the arguable relationship between empirical knowledge (or ignorance) and normative consideration.

What is not disputed is the existence of wide-ranging evidence-based findings concerning the psychological harm caused by, and the adverse consequences of, ignorance of their parentage in foundlings and adopted children.



## VIII.2 Fundamental ethical consideration

### VIII.2.1 Importance of personal identity for the individual

The development of identity is nowadays considered to be a lifelong process. It is underlain by the infant's proprioceptions, which already bear the stamp of prenatal sensations and experiences. The subsequent development of the self and hence the formation of identity are moulded by social experiences in the early years of life. From birth, each child has a sense of identity, which is further developed by active participation in interactions involving eye contact and the use of imitative, body-movement-related and preverbal modes of communication. Developmental psychologists used to consider a symbiotic mother-child relationship and primal trust in the sense of reliable concern to be a necessary condition for the successful development of identity; today, however, the emphasis is on successful "now moments", in which the mother understands the child, devotes herself to him and satisfies his immediate needs, while, however, already treating him as a person in his own right. No one in the entire field of research on child development disputes the fact that the self, as the foundation of identity, can emerge only on the basis of a secure, accepting and reliable relationship and relatedness, initially with the primary attachment figure and subsequently also with others.

For the formation of personal identity, an individual needs a development extending throughout his life, relations with others and the assimilation of his social experiences. He must know that a future lies before him and a history behind him. He needs expectations, as well as a memory of at least a part of the time he has experienced. For this purpose, it is not enough for the memory of his own experiences to be linked to the events taking place around him. Each individual who, with the consciousness of time, also knows that his life is finite needs a starting point for his own history. Hence the value

of one's personal data – in particular, the date of one's birth and the circumstances of one's origins. A person who does not know who his mother and father are lacks certainty about the beginning of his existence and the circumstances in which he was relinquished. He has immeasurably more difficulty in developing his identity and self-confidence. This being the case, where children are brought up in foster families it is standard practice today for the biological parents to be involved as far as possible.

A human community that is concerned to permit the unfolding of the full potential of the individuals living in it must create the conditions whereby each can develop into a self-confident person capable of self-determination. This requirement must be satisfied to an even higher degree in a state that considers itself to be responsible for the protection of human dignity. For this reason, such a state must take it as an elementary ethical principle, and at the same time as an essential legal task, to ensure that individuals are not exposed to the risk of remaining ignorant of their origins.

## **VIII.2.2 When identity is in danger**

The findings of developmental psychology and anthropology show that the institutional availability of facilities for giving birth anonymously and the provision of means of relinquishing newborn babies with guaranteed anonymity have the consequence that an elementary need of a newborn human being goes unsatisfied. Serious harm is done to a child when its parents disappear into anonymity. Moreover, it is precisely this loss that is indicated by the euphemistic term “anonymity”.

In consequence of anonymity, the biological parents are also lost to a child, unless they subsequently acknowledge him as theirs. However, if the biological father or mother hides permanently behind anonymity, the children left behind are placed at a lifelong disadvantage. A society that encourages

such a far-reaching impediment of a child's development potential (if only through the granting of legal spheres of protection) must have powerful reasons for doing so. Yet no such reasons exist, except the right, in emergency, to immediate protection of the life and limb of mother and child.

Human beings depend on trusting relations with their fellows. A child's development into a self-confident individual is substantially dependent, firstly, on secure togetherness and on supportive, reliable relationships, as well as, secondly, on due allowance for autonomy and independence, which can best be provided by the biological parents owing to their primary bond with the child. In this connection, nature's intervention in the social situation is particularly striking. The parents who conceived the child – especially the mother who carried him to term – are the first social entities that care for a human being.

In the absence of family concern for a child and for his care and upbringing, a substitute is required if he is not to die or suffer serious physical harm. Efforts to substitute for the natural parents can create happy and favourable conditions for the affected children, but they cannot make the question of their origins superfluous. On the contrary, such efforts must be combined in a positive manner with a frank approach to providing information about the biological parents and their relinquishment of the child in the past.

The emotional bonds between parents and their child and between children and their mother and father are among the most powerful feelings known to human beings. So it is not only the moral obligations that cease to exist when a person's origins are anonymized: the abandoned children are also robbed of this emotional environment. If they are lucky, they grow up with loving foster or adoptive parents, to whom they develop an emotional bond in the same way as biological offspring.

Adoption is a valuable and helpful institution of human civilization. However, no society should from the beginning organize matters in such a way that it is necessary. Yet a woman's

hard-won decision to accept her pregnancy and to put up her child for adoption should be respected.

### VIII.2.3 Parental responsibility

Accepting their child and acknowledging him as their own is the first duty of parents. Its counterpart is a fundamental right of the child, which the state must protect.

A state committed to liberal principles is characterized by far-reaching acceptance of a diverse range of social behaviours. However, tolerance must not induce it to abandon its ethical principles. Were it to do so, it would run the risk of itself no longer being able to justify the humanity on which the assistance it provides is based.

The availability of anonymous birth facilities and institutionalized baby drops favours breaches of the law by parents who disappear in anonymity. Once used, these facilities invite repetition or imitation. The signal they send out by offering the option of a seemingly normal action is fundamentally wrong.

In the ethical evaluation of the availability of facilities for the anonymous relinquishment of infants, it must therefore not be forgotten that the strengthening of parental responsibility is the predominant moral precept. For this reason, society should offer neither direct nor indirect incentives for parents to be released from their responsibilities. The moral duty of parents to accept responsibility for the child they have jointly conceived and to provide him with love, security and protection has its counterpart in the child's right to be cared for and raised by his parents. Where the biological parents are unable to discharge this obligation, a responsible course of action may be for them to put up the child for adoption so that he can grow up in an alternative family relationship, without themselves disappearing into anonymity.

## VIII.2.4 Protection of life

Life is the elementary condition of human existence. Nothing exists in or on mankind, and nothing exists with or for mankind, that would exist if there were no such thing as life. It is from this realization that human beings derive the obligation to concern themselves with the preservation of life, especially where it is in acute danger.

Moreover, human life is the precondition for everything human beings find valuable and significant in the world. So if anything at all is important to them, they must safeguard the foundation of their attribution of value.

Consequently, both the individual and the community have an obligation to help people who find themselves in a life-threatening situation of distress. This includes women about to give birth: if assistance is not forthcoming, its withholding may result in their death. The life of the expected child, too, may be in acute danger. From the ethical point of view, therefore, it is imperative that a pregnant woman who finds herself in a situation of distress be helped. This means that she must be assisted even if she is unwilling to disclose her name. This ethical obligation does not include a requirement to allow her simply to remain anonymous once the birth is behind her. In the interests of the child, doctors and helpers have a moral obligation to attempt to persuade the mother, once her life is no longer in danger, to furnish the data indispensable to a knowledge of the child's parentage.

The situation differs in the case of baby drops. Here, mother and child have come through the birth and the lives of both are no longer in immediate danger. There is no reason to provide help to protect life in emergency while at the same time accepting anonymity. The only consideration is the assumption that the child's life might be endangered if the mother were to leave the child in a place where he was found too late or not at all – or if the mother were to kill her child if a baby drop were not available to her.

A distinction must be made between two situations: on the one hand, where a pregnant woman requires medical assistance immediately before her confinement; and, on the other, where she finds herself in a state of (continuing or intensified) social distress after the birth of a child. In the former case, help must be given if only for legal reasons. In the latter, the woman's anguish will be of social origin, and she will likewise need help. However, this must not be furnished by means of a facility that leads to grave infringements of the rights of the child. Instead, the woman, who is as a rule still in a weakened condition, must have access to counselling and care services that are also conducive to the welfare of the newborn infant. This would also mitigate the risk to the child's life that might exist in an extreme situation, as a result, for example, of a sudden panic reaction.

Such a risk cannot be precluded a priori. However, considering the reasons for transferring a child to the care of others, it is unlikely that a woman might kill or abandon him if facilities for anonymous relinquishment did not exist.

### **VIII.2.5 Other risks**

For the purposes of ethical evaluation, particular attention must also be devoted to the specific risks presented by the facilities for the anonymous relinquishment of infants. One problem is that persons other than the mother may place an infant in a baby drop, and may even do so against her will. Women living in difficult relationships or who are under pressure from their partners will not always be in a position to ask for their child back.

In addition, baby drops facilitate the concealment of criminal acts, if the child was the fruit of sexual abuse or rape. According to several providers, some women stated that the reason for anonymous relinquishment was that their child was conceived in consequence of a rape. These cases manifestly did

not lead to the bringing of a charge. The rape is cited as justification for keeping the woman's identity secret and for the anonymous relinquishment of the child. However, concealment of a criminal act against a woman's sexual self-determination benefits only the perpetrator and cannot ultimately be in her interests. In such cases, the providers' avoidance of state involvement and their failure to bring the matter to the attention of the public prosecutor's office has particularly serious repercussions. In one case in Berlin, it was found after investigations by the youth welfare office that an anonymously relinquished child was conceived as a result of sexual abuse within the family of origin.<sup>164</sup>

Another specific problem is presented by the relinquishment of disabled children. Baby drops provide a simple means of disposing of a severely disabled child and thereby avoiding the associated financial and personal burden. Sometimes even severely disabled infants who are several months old have been relinquished. Furthermore, these children do not always find adoptive parents: in consequence of their anonymous relinquishment, they become parentless children of the state.

The risk of child trafficking cannot be ruled out with an adequate degree of certainty, even if there is no reason to suppose that the providers have such intentions.<sup>165</sup> Here again, particular problems are posed by the absence of a legal basis for the anonymous relinquishment facilities, by the providers' frequent avoidance of state involvement, the failure to bring the situation to the attention of the public prosecutor's office and the inability of the state to exercise its "watching" function (Article 6(2) GG). Only the youth welfare office and the police and investigative authorities have the legal means to establish the facts in the event of suspicion and, for example, to determine the mother's identity by a DNA test or to refuse to hand over the child to the mother or parents if this appears

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<sup>164</sup> See Herpich-Behrens 2008, 20.

<sup>165</sup> On this point, see Wacker 2007, 83, 92 ff.; Swientek 2007c, 220; Wiesner-Berg 2009, 511.

necessary for the child's welfare or to prevent possible child trafficking.

To preclude child trafficking, the legislative proposals from Baden-Württemberg and Bavaria would have provided that anonymous birth be restricted to clinics operated by institutions constituted under public law. However, even this would not have afforded reliable protection, as the reason for the lack of protection is the child's situation of anonymity and "non-existence", and this would still be the case if the child were born in a clinic operated by an institution constituted under public law. Again, the demand for infants available for adoption vastly exceeds the supply, and those willing to adopt are prepared to go to considerable expense to obtain an adoptive child (as witness the large number of illegal, highly expensive intercountry adoptions contrary to the Hague Convention). This shows that the risk of child trafficking must not be disregarded in the assessment of anonymous child relinquishment. In child trafficking, the child is the only victim who cannot defend himself; all others concerned are interested parties. It is therefore unlikely that a criminal offence will be detected.

### **VIII.3 Ethical consideration**

The provision of facilities for the anonymous relinquishment of infants constitutes an attempt to protect women in subjectively hopeless situations of social and existential distress from perpetrating acts against their child's life. An ineluctable ethical problem with these attempts is that the availability of anonymous infant relinquishment facilities may also actually encourage their use by such parents, mothers or persons close to them, who might in the absence of such facilities have stood by their child notwithstanding their plight.

Ethical evaluation of baby drops and facilities for anonymous or confidential birth is difficult because it is impossible to determine with complete certainty what the alternative to



the option chosen in a specific case would have been. If the parents or mother had ultimately resolved to accept their child in the absence of the provision for disposing of him without consequences to themselves, it would have been better if they had never known that the possibility of anonymous relinquishment existed. Conversely, if such facilities had not been available and they had, in their desperation, helplessness and inability to cope, abandoned their child at some other location where it would not have been cared for, the worst would have been prevented by the availability of better medical care. In such a case, the fact that the child would necessarily grow up in ignorance of his biological parents would admittedly have to be accepted.

In the conflict situation described above, at least three objectives relevant to evaluation of the provision of anonymous facilities collide.

The first objective is to ensure that children whose lives and health might otherwise be threatened survive and receive the necessary medical care.

The second objective is to help women in extreme situations of distress. Such existential emergencies can be exacerbated by cultural constraints whereby a woman feels it advisable to conceal her pregnancy at all costs from her family and social group.

The third objective is the strengthening of parental responsibility, or at least the avoidance of any direct or indirect incentives that might weaken it still further. Parents have a moral duty to accept responsibility for the child they have conceived together and to provide him with devotion, security and protection. Again, the child has a right to inclusion in the bosom of his family and to a knowledge of his origins.

However, recent evidence concerning the psychodynamic situation of women who kill or abandon their newborn babies casts doubt on the assumption that such women are in fact reached by the availability of facilities for the anonymous relinquishment of infants and that the lives of their children

might thereby be saved. Furthermore, to date not a single case has come to light in which the mother would manifestly have killed her child if facilities for anonymous relinquishment had not existed. On the other hand, the possibility that none of the anonymously relinquished infants would otherwise have been killed or abandoned cannot be entirely ruled out. If only for reasons of methodology, it will never be possible to answer this question empirically with ultimate individual-case accuracy. In assessment of the relative merits, the importance assigned to the protection of life and health thus depends greatly on the assumed probability of the saving of children's lives. However, according to one position, the impossibility of ruling out the saving of even one child's life takes precedence over the rights and interests of all the other children, mothers and fathers that are violated by the existence of facilities for anonymous relinquishment of infants.

In this context, different ethical arguments are deployed.

#### **Argument A: Against the continued availability of facilities for anonymous relinquishment of infants**

The availability of facilities for the anonymous relinquishment of infants cannot in practice be justified by the ethical principle of the preservation of life. Evaluation of evidence from the field and research clearly demonstrates the damage done to objects of legal protection by, and the personal harm (problems of personal and social identity) resulting from, the anonymization of children's parentage permitted in many cases by the utilization of these facilities; whereas the assumption that the killing and abandonment of newborn babies are thereby prevented must be deemed to have been refuted. The argument that the availability of facilities for anonymous relinquishment of infants is justified if the life of just one child could thereby be saved would convince only if this availability were not otherwise associated with substantial damage to objects of legal protection. However, the more severe the harm done by anonymization to the relevant children, fathers and possibly also mothers, the

greater the probability needs to be that even worse harm can thereby be averted. Relative ethical evaluation of a child's right to life and right of personality against the right of personality of others is impossible where the postulated threat to the right to life if the relevant facilities did not exist is based on mere speculation. In this case, the actual, undisputed violation of the right of personality of the affected children, fathers and possibly also mothers due to baby drops and the anonymization of the children's parentage is all the more significant.

These facilities are often regarded as ethically justified because they are seen as an *ultima ratio*. The *ultima ratio* is recognized as an ethical solution in a conflict situation in which it is no longer possible to choose a good action, but only to accept one evil (in this case, the anonymization of the child) in order to avoid a worse evil. An *ultima ratio* argument of this kind can be valid only in dramatic conflict situations where no other courses of action are available. In the case of anonymous relinquishment of infants, however, it is impossible to determine whether this is so. An anonymous user can decide only on the occasion and reason for use, and then utilize the facilities for whatever reason. With a baby drop, the user is even given special protection from discovery by means of complex technical devices. It is not the provider with good ethical aspirations but the user who is in charge of the procedure. Outsiders can neither examine nor evaluate the user's action. Comparable problems arise with the provision for anonymous birth. Owing to the woman's anonymity, it is impossible to determine whether the situation really is one of extreme distress.

For the reasons set out above, the continued availability of the facilities at issue is indefensible not only legally but also ethically.

#### **Argument B: In favour of the continued availability of facilities for anonymous relinquishment of infants**

According to a different ethical approach, it is not known in a specific case how the parents or mother would actually

have behaved should facilities for anonymous relinquishment of infants not have been available. Generalizing conclusions based on statistics permit no more than statements of probability underlain by evidence of varying quality, but these cannot replace the absence of knowledge of what the alternative to anonymous relinquishment would have been in a specific case. For this reason, the ethical evaluation takes the form of an ethical consideration of courses of action in a conflict situation for which a reliable basis for prediction does not exist. In such situations of conflict, responsible action must be based on a choice among a number of objectives, for which it is often impossible to strike a satisfactory balance that would not unacceptably impair any of the threatened objects of protection. Similarly, an ethical compromise must be sought by asking which of the threatened objects and rights merits priority over the others in cases of doubt.

From this point of view, the providers of baby drops and anonymous birth facilities are attempting to provide help and succour with a view to warding off dangers to children's lives and health. In so doing, the providers rightly assume that the obligation to protect the lives and health of children threatened with abandonment or extreme neglect does not come into being only when a concrete risk is proved to exist in an individual case. Instead, protection is already a moral imperative if the possibility of such a risk exists in particular circumstances – that is to say, if a real threat to a child's life and health cannot be ruled out in a specific risk situation. According to this view, the uncertain predictive basis on which the decision must be taken has the consequence that, among the threatened objects – the child's life and health on the one hand and the knowledge of his biological origins on the other – priority is given to the fundamental object represented by life.

If baby drops are compared with the provision of anonymous birth facilities in terms of the treatment, in the two options, of the conflict of objectives and objects described above, a significant moral distinction emerges. Both types of provision

are directly intended for couples or women in distress in order to show them a way out of their plight. In the case of anonymous birth, however, this at the same time includes the possibility of establishing a counselling situation and of building up a trusting relationship with the mother. There is then at least a chance that a woman who wishes to remain anonymous with respect to her social or family group might ultimately declare herself prepared to give up her anonymity vis-à-vis her child. The provision of anonymous birth with reliable medical attendance for mother and child must therefore be assessed differently, in ethical terms, from the situation where an infant is left in a baby drop. Attempts to allow for the child's right to a knowledge of his parentage will have even greater prospects of success if the woman identifies herself by name in a counselling interview, so that the child can subsequently have access to the data and potentially make contact with his parents.

#### **VIII.4 The responsibility of the state**

Having regard to the practice of anonymous infant relinquishment that has developed and become established over a ten-year period, and in view of the ethical considerations, the dismantling of the systematic availability of facilities for anonymous relinquishment of infants – in particular, of baby drops – would be a highly complex task for the state. Continued toleration or legalization is also problematic in view of their ever expanding availability, extending even to advertising in various media, and in terms of the accountability of the state. On the other hand, simply to abolish and close down the facilities for anonymous infant relinquishment without the provision of a suitable alternative would be inadequate and not readily feasible politically.

The aim of state measures must be to reach women and families in conflictual, subjectively stressful situations with counselling and help. For this purpose, it is essential for the

existing facilities to be known and also taken up. However, experience shows that women in a situation of social and psychological distress sometimes do not find their way, shortly before or after the birth of a child, to the existing, legally sanctioned counselling and assistance facilities because, for whatever reason, they do not believe in the confidentiality of state-provided services. It must be assumed that many women in this situation are not in a position to consider options and develop strategies for solving their problem. Instead, they are overcome by uncertainty, fear and a sense of being unable to cope. Such women and couples could at most be reached by facilities with easier access than the existing forms of help, where they are not required to enter into any obligations and in which they can be made more confident than hitherto that their data will be kept secret.

Whereas the state cannot be said to have so far failed adequately to discharge its duty of protection towards pregnant women and mothers in situations of distress and their children, there is also nothing to prevent the state, in satisfying the requirement of protection set out in Article 6(4) GG – according to which every mother is entitled to the protection and care of the community – from providing additional facilities.

However, a state that in certain respects relieves women and couples from their responsibility towards their children by the establishment of easy-access counselling and assistance facilities and which refrains, if only temporarily, from discharging some of its supervisory and protective obligations, runs the risk of creating a climate in which such actions, intended as emergency interventions, gradually come to be seen as normal. This possibility must be counteracted by the practical configuration of the counselling and assistance facilities as well as by appropriate accompanying measures. In terms of the consideration of the relative merits of the rights and interests at issue, additional facilities ought in particular also to allow for the fact that as a rule the conflictual situation in which the woman finds herself is or may be extremely limited in time, so that long-term, let

alone permanent, preclusion of the child's rights to a knowledge of his parentage would be neither necessary nor proportionate for its resolution; instead, the granting of a limited period for the maintenance of absolute secrecy with respect to third parties would suffice. This is particularly so if the woman can be counselled and assisted by a professionally staffed counselling centre in overcoming her situation of distress.

A compromise might therefore be to make it possible for a woman in a childbirth-related situation of distress to disclose her personal data, for a period of one year, only to the counselling centre from which she is receiving help. Only if the woman wished to put up her child for adoption, would it be possible – indeed, mandatory – for her data to be passed on to the adoption agency, so that the woman could be involved in the procedure, receiving professional counselling in relation to the process and consequences of putting up her child for adoption, choosing prospective adoptive parents from those vetted by the adoption agency and quickly accommodating the child in pre-adoptive care. The proven principles of the adoption process, such as the one-year period of pre-adoptive care, should and could be retained with such an approach. The adoption agency would furthermore not be allowed to divulge the data to any third party. Correspondingly, access by state or private bodies to the data held by the counselling centre or adoption agency before the expiry of the compulsory period of secrecy should be precluded.

The obligation to preserve secrecy should also end if the mother no longer wishes to keep her data secret or if she takes her child back. Before a child is returned to his mother, the youth welfare office should review the situation, to ensure that the state can perform its “watching” function for the child's welfare. Another consequence of the state's “watching” function is that the child's birth must be notified to the Registry Office (as temporarily anonymous) within one week, the entry of birth being completed with the required personal data once the period of compulsory secrecy comes to an end.

The father's rights in relation to his child should be allowed for, on the one hand, by the requirement that the woman be informed of his rights and be counselled with the aim of ensuring that he is named and involved in the adoption process. On the other hand, once the period of compulsory secrecy comes to an end, the court should be informed of the manner of allowance for the father in the adoption process in accordance with the existing statutory provisions, and should in addition be given the power to substitute for the father's consent where necessary to protect the mother or the child. Such a system would avoid a situation in which protection of the father's rights was officially made dependent on the mother's decision alone, as this could expose the state to the charge of inadequate provision and of violation of the state's obligations to protect fathers' rights. In reaching its decision, the court would be required to consider the relative merits of the rights and interests of the mother, child and father where these conflict. Even if, as a result of this consideration, the father is not involved in the adoption process, his data should where possible be recorded in the adoption documents, to enable the child subsequently to exercise his right to a knowledge of his paternal as well as his maternal parentage.



## IX RECOMMENDATIONS

The availability of facilities for the anonymous relinquishment of infants is primarily intended to prevent newborn babies from being killed or abandoned. However, these facilities present serious ethical and legal problems. Furthermore, experience to date suggests that women at risk of killing or abandoning their newborn infants are very unlikely to be reached by these facilities.

The public child and youth welfare centres and independent-sector institutions, as well as the conflicted-pregnancy counselling centres, offer an extensive range of forms of assistance for women even in extreme situations of distress. They ensure in particular that children do not remain ignorant of their origins and biological family. However, this assistance is not always taken up.

### **Recommendations of the German Ethics Council:**

- (1) The existing baby drops and arrangements for anonymous birth should be abolished. The ending of the provision for the anonymous relinquishment of infants should as far as possible be implemented jointly by all bodies responsible for policy in the relevant field and the institutions concerned.
- (2) This measure should be accompanied by an expansion of the availability of public information about the existing legally sanctioned assistance facilities provided by independent-sector institutions and state child and youth welfare bodies, as well as about the aid available to pregnant women and mothers in situations of distress and conflict. In addition, action is necessary to improve trust in the legally sanctioned assistance services so as to increase take-up of this provision. An essential requirement here is cooperation on a basis of trust between the denominational and other independent-sector institutions and the state child and youth

welfare bodies. The following objectives and measures are important:

- » More publicity must be given to the fact that a legal entitlement exists to receive anonymous advice on the forms of assistance available in situations of distress and conflict.
- » Easy access to the legally sanctioned facilities for assistance to pregnant women and mothers in situations of distress (such as the confidential arrangement of accommodation in a mother-and-child hostel or of care for the child) must be guaranteed at any time of the day or night. This includes, for example, the provision of round-the-clock telephone or online counselling by persons specially trained to furnish the relevant information and advice. The contact details for these initial ports of call should be posted, for instance, in doctors' surgeries, public transport facilities and other public places such as government offices, as well as on the World Wide Web.
- » The counselling and assistance centres should cooperate with each other in such a way that they can promptly point callers to sources of effective help even if they themselves are not formally competent to deal with a woman's specific problem.
- » The independent-sector institutions and the state bodies responsible for the welfare of mothers-to-be and for children and youth welfare should, as in the case of the planning of youth welfare (Section 80 of SGB VIII), be required to cooperate at an early stage and to coordinate the services they provide.
- » Effective professional advice on the assistance available in situations of distress and psychosocial counselling should also be provided in maternity institutions.
- » The fact must be more widely publicized that the assistance available in situations of distress and conflict is confidential, that it offers protection from potential

dangers from third parties, and that the birth of a child and the handing over of a child to a care institution or for adoption are subject to the regulations on the protection of social data and on confidentiality in adoption.

- » A parental decision to put a child up for adoption so as to allow him to grow up in a stable family of his own should be respected and deemed a responsible act. The social acceptance of such decisions should be promoted.

(3) It is admittedly the case that the law governing emergency situations legitimizes the actions of all who are present and able to assist in an emergency involving immediate physical danger to the life and health of a mother and child for the duration of the emergency. In pursuance of the obligation to render assistance (Section 323c StGB), a mother in childbirth cannot be refused medical attention even if she fails to disclose her identity. However, neither the law governing emergency situations nor the obligation to render assistance covers the provision of facilities for the anonymous relinquishment of infants in cases where there is no individual acute emergency, such as the provision of a baby drop or the widespread systematic public availability of anonymous birth. The facilitation of continued anonymity once the emergency is over is also not covered. For this reason, such provision should not be maintained.

(4) As a minimum, the following measures should be mandatory in every situation where a child is relinquished anonymously:

- a) Immediate notification of the child to the youth welfare office, full information on the circumstances of his relinquishment being supplied.
- b) Appointment of a neutral guardian for the child, the guardian to be independent of the institution where the child was anonymously relinquished.

- c) Adoption of children given up anonymously to be arranged only through an adoption agency separate in organization and staffing from the institution at which the child was relinquished.
  - d) The child to be returned to the mother or parents only through the youth welfare office.
- (5) Pregnant women and/or mothers who consider it necessary to conceal their maternity from their social group, but who prefer to avoid contact with public bodies because they do not trust that their identity will be kept unconditionally secret, should be helped by means of an arrangement which assures them of a reasonable period of maximum possible confidentiality for solving their problems with the aid of counselling and assistance, and which does as little harm as possible to the interests of the child and the father, the arrangement being only temporary and applicable for as short a time as possible. For this reason, statutory provision should be made for “confidential relinquishment of an infant with temporarily anonymous registration”.
- The new law to be introduced should include the following core provisions:

- a) A woman in the care of a state-recognized counselling centre before, during or after the birth of a child can request that the data to be furnished in pursuance of Sections 18 to 20 PStG shall, for a period of one year from the birth of the child, be communicated only to the counselling centre and not to the Registry Office.
- b) For a period of one year from the birth, the counselling centre must not communicate the data concerned to any third party. The woman’s data may and must be communicated to an adoption agency only if she wishes to put up her child for adoption. The adoption agency must not divulge the data to any third party. Neither state nor private bodies may have access to the data held

by the counselling centre or adoption agency prior to the expiry of the period of confidentiality. That period shall end if and when the mother no longer wishes the data to remain confidential or if and when she takes the child back.

- c) The counselling centre must, within the specified period, register the birth at the Registry Office as temporarily anonymous.
- d) Upon the expiry of the period of compulsory confidentiality, the counselling centre must communicate the data in its possession relating to the mother and father to the Registry Office, where applicable with a request by the mother for the data to be given blocked-disclosure status.
- e) The counselling centre must furnish comprehensive information to pregnant women and/or mothers about the assistance available to mother and child in situations of distress, such as accommodation in a mother-and-child hostel, taking the child into care, and the possibility of adoption, as well as about the rights and obligations of the father and the child's right to know his father, and should try to obtain the name of the father. As a part of its advisory obligations, the adoption agency should attempt to secure the involvement of the father in the adoption procedure.
- f) A decision on adoption cannot be made until after the expiry of the period of compulsory confidentiality or, as the case may be, until after the court has taken cognizance of the mother's or, where applicable, the parents' data.
- g) Over and above the existing provisions of adoption law, the court should be empowered to give consent in place of the father if the woman or the child would be exposed to disproportionate harm as a result of obtaining the father's consent or of the making of contact with the father. However, the father's data should be recorded at

least in the adoption documentation, except where the father remains unknown in a given individual case.

## **SUPPLEMENTARY POSITION STATEMENT ON THE ETHICS COUNCIL'S RECOMMENDATIONS**

We agree with the recommendations of the majority of members of the Ethics Council – in particular, with the recommendation that baby drops and facilities for anonymous birth should be abolished. After all, in a state governed by the rule of law, the decision whether the legal order established by the state for the purpose of protecting the fundamental rights of all individuals is effectively applied must not be left to persons who wish to remain anonymous. The *de facto* violation of fundamental rights of many anonymously relinquished children whose lives and health were never at any time under threat is too serious a matter to be compromised by the merely speculative hypothesis, not based on empirical evidence of any kind, that a life might possibly be saved in an individual case in the future.

However, we regard the provision for confidential birth, as proposed in Recommendation No. 5, to be unnecessary for achieving the goal of ensuring that pregnant women and mothers in a situation of distress have a confidential protective space within which they can be helped to cope with that situation by professional counselling and assistance. This aim can and should continue to be pursued and achieved, as it was before the introduction of facilities for anonymous birth, by means of the many currently existing legally sanctioned facilities for counselling and assistance. Easy access is available to these lawful facilities too, particularly if the measures provided for in the Ethics Council's Recommendation No. 2 are implemented. Moreover, even during extensive hearings and deliberations within the Ethics Council, no plausible argument was put forward to suggest that mothers and parents who are unable or unwilling to accept their child cannot be expected to pursue the official adoption procedure, in which, moreover, strict confidentiality is required to be observed.

However, we support Recommendation No. 5 as an alternative to the anonymous facilities, because, as the debate so far on these facilities has shown, it is manifestly very difficult on the political level to remove a facility, once established, which has contributed to raising the profile and increasing the possibilities for action of the institutions concerned, even if these facilities have been unable to reach their target group and are incompatible with the law currently in force. In the deliberations on a possible law on confidential birth, however, it would be appropriate to consider whether the legislature should, by the removal or relaxation of certain proven legal requirements, accommodate the concerns of many mothers, observed by the institutions providing for anonymous relinquishment of infants, who do not trust the institutions and requirements of the constitutional state that are supposed to protect them and their child.

In the implementation of the recommendation to terminate the availability of facilities for the anonymous relinquishment of infants, account should be taken of the fact that, before they are actually abolished, many more children will be anonymously relinquished, and will then have to live with the permanent deprivation of fundamental rights, and possibly also with severe consequences for the development of their identity and personality, even though the abolition of the facilities is already established policy.

Lastly, with regard to the decision on implementation of the recommendations, it should be remembered that, as adults, anonymously relinquished children will be confronted with the circumstances of their origins and will then also contemplate the legal and factual context of the introduction and maintenance of the provision for anonymous relinquishment facilities. It is quite likely that those concerned will then also wish to pursue the issue of the responsibility of the state, the politicians and the institutions that continue to offer these facilities.

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## DISSENTING POSITION STATEMENT

We are unable to associate ourselves with the recommendation that the existing facilities for the anonymous relinquishment of infants should be closed down immediately or gradually. As the experience of the providers of baby drops and other facilities for anonymous infant relinquishment shows, quite a few parents and women are manifestly not reached by the official assistance services. Even if the proposals mentioned for providing improved information on these services and more cooperation between the independent-sector and state institutions is achieved, it is likely that a small number of parents and women will still not find their way to these counselling centres because they are afraid that they will be required to disclose their identities. For this group of parents and women, the availability of anonymous relinquishment facilities may be a last resort, presenting them with an alternative to abandoning their child without anyone to care for him.

In the cases where children have been relinquished anonymously, we do not know what their fate would have been without this provision. For this reason, their toleration seems to us still to be acceptable notwithstanding the ethical and legal objections that have been expressed. Since 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 provision of facilities for anonymous infant relinquishment, and since the placement of the relinquished children with adoptive families cannot be regarded as in itself problematic, the availability of these facilities can be tolerated as an *ultima ratio* even without a foundation in law. We therefore see no need for statutory provisions on the conditions that should govern the work of the existing institutions. Indeed, a statutory basis might even have the unwanted consequence of an upgrading of the status of anonymous infant relinquishment, as it could be construed as meaning that

the constitutional state acquiesces in these facilities, thus making them a legitimate alternative to acceptance of the child by his biological parents. The authorities should require the institutions concerned to be closed down only in the event of concrete suspicion of child trafficking or of some other form of abuse.

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