



CONFIDENTIAL AND ANONYMOUS BIRTH IN NATIONAL LAWS – USEFUL AND COMPATIBLE WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD?¹

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1. Problem: Mothers in Trouble – Children in Trouble. – 2. Contraception and Abortion as Effective Means of Prevention? – 3. Anonymous or Confidential Birth – Help or Problem? – 4. Anonymous Birth – in Contrast or in Line with the Rights of Children to Identity based on the UN Convention on the Rights of the Child? – 5. Anonymous birth – Most Often Just the Beginning of a Transitional Stage. – 6. No Coercion – a Better Law? – 7. Acceptance Instead of Assessment – The Advantages of French Law’s Anonymous Birth compared to German Law’s Confidential Birth. – 8. How to Handle the Refusal of Motherhood. – 9. What About the Child’s Other Relatives? A comparison of German and French law. – 10. Conclusion.

SUMMARY: A pregnant woman in greatest need, who does not want to be a mother because she cannot be a mother in the circumstances, requires empathy, respect and a break from the pressure put on her. Only then can she explore in peace what is good for the child and what is good for her. Granting mothers this important “time-out” in the form of an anonymous birth in a safe environment seems to lead not only to decisions resulting in a significant reduction of cases of neonaticide and child abandonment but also causes only a very small number of mothers to stay anonymous permanently. In order to encourage women to choose it, the option of anonymous birth must be widely known. And these women need to be shown and told that what they are doing to protect their child from themselves is recognized as an act of love. Confidential birth, however, in which the mother is not only permanently identifiable but can actually be identified in certain circumstances by the child, is only a half-hearted step in the right direction. It fails to pay respect to the existential need of the mother for a break from motherhood, because the mother is informed of the risk of potential later “discovery” by the child, before the confidential birth can take place. This, however, means pressure. In my opinion, confidential birth therefore misses the mark of saving child and mother from an existential crisis. The UN Committee on the Rights of the Child should, therefore, not condemn anonymous birth, but rather ask for its promotion and an empathetic environment for mothers who wish to give birth anonymously, as this helps mothers to find a way out of their existential crisis.

KEY WORDS: Confidential birth, anonymous birth, neonaticide, non-violent communication, UN Convention on the Rights of the Child.

1. Problem: Mothers in Trouble – Children in Trouble

It is hard to evaluate and judge a confidential or anonymous birth without insight into the pregnancy preceding it.

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In this context, it is important to stress that the problem of women leaving their new-born children in unsafe places or even killing them cannot be attributed to a mental illness of the mother. On the contrary, it is first and foremost the woman's situation in life that leads to the failure to find a different way out: "A careful analysis of contemporary cases confirms one fundamental similarity: in virtually every instance, maternal filicide is committed by mothers who cannot parent their child in the circumstances dictated by their particular position in place and time."²

Mothers who leave their newborns in an unsafe place often have the following reasons for their actions: They are afraid of a negative reaction from their families, they have financial problems, or the child's father is absent.³ These mothers are often young, did not intend to become pregnant, and they do not accept their pregnancy.⁴ Many of these women have significant personal problems, other children, or live in a violent environment. In some cases the pregnancy is even due to an incestuous or other kind of unpleasant or traumatic sexual encounter.⁵ Women who abandon their children cannot, however, be typecast easily.⁶

It seems easier to characterise the type of women who kill their new-born children or leave them to die within 24 hours after delivery: In most cases, these women are very young, without a permanent partner, and heavily dependent on their parents or other persons, often relatives.⁷ According to a Finnish study, these women are afraid of the reaction of their own mothers or their boyfriends.⁸ These women therefore seem to fear that they will be unable to raise the child without a strong network of friends and family.⁹ Also, sexuality often seems to be a taboo in the families of these women. Thoughts of pregnancy and birth are suppressed,¹⁰ in some cases that goes so far that the birth process is only perceived as an urge to defecate, and the delivery takes place in the toilet.¹¹ The children are killed because the mothers panic:¹² They fear that the cries of their newborns,

² Oberman, M., "Mothers who kill: Cross-cultural patterns in and perspectives on contemporary maternal filicide", *International Journal of Law and Psychiatry* 2003 (26(5)), 493, 493 et seq., 513 f.

³ Appell, A. R., "Safe Havens to Abandon Babies, Part II: The Fit", *Adoption Quarterly* 2002 (6(1)), 61, 62 with further reference.

⁴ Appell, A. R., (fn. 3), 62.

⁵ Case of Odièvre v. France, Application no. 42326/98, Judgment 13 February 2003 Nr. 36, Reasoning by France; Bonnet, C., *L'Enfant cassé, l'inceste et la pédophilie* (Paris: Albin Michel, 1999), 118 et seq.

⁶ Willenbacher, B., "Legal transfer of French traditions? German and Austrian initiatives to introduce anonymous birth", *International Journal of Law, Policy and the Family* 2004 (18(3)), 343, 346; Université Médicale Virtuelle Francophone (UvMaF), *L'accouchement sous le secret* (2011–2012), http://campus.cerimes.fr/maeutique/UE-sante-societe-humanite/accouchement_secret/site/html/cours.pdf, 9.

⁷ Appell, A. R., (fn. 3), 63; Oberman, M., (fn. 2), 495; Krischer, M. K., Stone, M. H., Sevecke, K., Steinmeyer, E. M., "Motives for maternal filicide: Results from a study with female forensic patients", *International Journal of Law and Psychiatry* 2007 (30(3)), 191, 192, 197 et seq.

⁸ Putkonen, H., Weizmann-Henelius, G., Collander, J., Santtila, P., Eronen, M., "Neonaticides may be more preventable and heterogenous than previously thought – neonaticides in Finland 1980 – 2000", *Archives of Women's Health* 2007 (10(1)), 15, 20.

⁹ Oberman, M., (fn. 2), 495.

¹⁰ Bonnet, C., (fn. 5), 118 et seq.; Hatters Friedman, S., Heneghan, A., Rosenthal, M., "Characteristics of Women Who Deny or Conceal Pregnancy", *Psychosomatics* 2007 (48(2)), 117, 118 et seq.

¹¹ Oberman, M., (fn. 2), 495.

¹² Bonnet, C., (fn. 5), 120 et seq.



whom they deliver alone and very often in public toilets, could reveal them.¹³ These mothers' actions are based on extreme fear and guilt.¹⁴

Nonetheless, according to the same Finnish study, which examined all confirmed cases of filicide in Finland between 1980 and 2000, a few cases of filicide within 24 hours after delivery are committed by married women that are over 26 years old, already have children, went to their pregnancy check-ups and do not keep their pregnancy and filicide a secret; all of these women seem to have pre-existing mental illnesses and they therefore could not be convicted; they state, however, their "inability to cope with the child" as the motive for their acts.¹⁵ Thus there also seem to be external circumstances that make it impossible for these mothers to let their children live – at the minimum mental illness does not seem to be the only reason for filicide.¹⁶ These women have no criminal record.¹⁷ However, in a few cases the women repeat the act.¹⁸ There is also a US study that shows that it is not only very young unmarried women who commit neonaticide.¹⁹ These two groups of women – except for the mentally ill – never planned to care for their child.²⁰

The profile of women who kill their children at a later point of time differs significantly from the profile of those women. It is even harder to generally characterise this group. All the same, mental problems alone fail to account for their acts. They are accompanied by isolation as a decisive factor.²¹ These women hide neither their pregnancy nor the birth.²² Often, they kill their children to protect them from actual or potential harm or suffering.²³ Many of these women are suicidal and commit suicide after killing their child.²⁴

As mentioned above it seems to be a combination of factors that leads mothers to behave in this manner.

Maybe EUGEN DREWERMANN'S analysis of "Hänsel und Gretel" can be generalised to help understand what happens if a mother's soul is starving and poor. Such a mother is unable to give

¹³ Appell, A. R., (fn. 3), 63.

¹⁴ Appell, A. R., (fn. 3), 63 with further reference.

¹⁵ Putkonen, H., Weizmann-Henelius, G., Collander, J., Santtila, P., Eronen, M., (fn. 8), 19.

¹⁶ Cf. Oberman, M., (fn. 2), 493 et seq., 513 et seq.

¹⁷ Putkonen, H., Weizmann-Henelius, G., Collander, J., Santtila, P., Eronen, M., (fn. 8), 19.

¹⁸ De Bortoli, L., Coles, J., Dolan, M., "A review of Maternal Neonaticide: A Need for Further Research Supporting Evidence-Based Prevention in Australia", *Child Abuse Review* 2013, (22(5)), 327, 333 et seq.

¹⁹ See Shelton, J. L., Muirhead, Y., Canning, K. E., "Ambivalence Toward Mothers Who Kill: An Examination of 45 U.S. Cases of Maternal Neonaticide", *Behavioral Sciences and the Law* 2010 (28(6)), 812, 819 et seq.

²⁰ Appell, A. R., (fn. 3), 63 with further reference.

²¹ Appell, A. R., (fn. 3), 63; Oberman, M., (fn. 2), 498; Krischer, M. K., Stone, M. H., Sevecke, K., Steinmeyer, E. M., (fn. 7), 197.

²² Appell, A. R., (fn. 3), 63.

²³ Appell, A. R., (fn. 3), 63 with further reference; Orthofer, M., Orthofer, R., "Is the introduction of anonymous delivery associated with a reduction of high neonaticide rates in Austria? A retrospective study", *BJOG exchange, An International Journal of Obstetrics and Gynaecology* 2013 (120(8)), 1028; Hatters Friedman, S., Sorrentino, R., "Commentary: Postpartum Psychosis, Infanticide, and Insanity – Implications for Forensic Psychiatry", *The Journal of the American Academy of Psychiatry and the Law* 2012 (40(3)), 326, 327; Hatters Friedman, S., Cavney, J., Resnick, Ph. J., "Mothers Who Kill: Evolutionary Underpinnings and Infanticide Law", *Behavioral Sciences and the Law* 2012 (30(5)), 585, 589.

²⁴ Appell, A. R., (fn. 3), 61 with further reference; Krischer, M. K., Stone, M. H., Sevecke, K., Steinmeyer, E. M., (fn. 7), 198; Hatters Friedman, S., Cavney, J., Resnick, Ph. J., (fn. 23), 589 et seq.; Hatters Friedman, S., Sorrentino, R., (fn. 23), 27.



anything. Everything is too much for her.²⁵ DREWERMANN, a theologian and psychoanalyst, describes this situation – even though he meant physical hunger – as follows:

“The point is reached when biological weakness turns into psychical defence, into a desire for aloneness: Any other person, simply because of his presence, consumes by his demanding existence just the energy that the own body would need so desperately; already the mere contact with another person, a mere conversation, let alone a request or even a new problem, consumes too much of the remaining physical energy. Peace and solitude, to hear nothing, to see nothing – protection through distance and avoidance, those are commands of the body, and this is what is also wanted by the soul now. And now a *child!* This is what the fairy tale of Hänsel and Gretel portrays us as an initial condition!”²⁶

How can a mother’s soul that is starving (for love) be helped in such a situation? Can legal norms help persuade women who might endanger their child to choose another, life-affirming path?

Admittedly, the law often only has a limited influence. It can neither magically make society unconditionally accept pregnancy, birth, and the raising of children, nor can it grant a high social standing to mothers and motherhood; only to a limited extent can it provide a social network for isolated mothers in order to prevent the raising of children from becoming too heavy a burden.

Social change cannot be achieved externally by coercion and regulation. Society will only change if its members change: “Who changes oneself, changes the world. There is nothing to improve in this world, but a lot of oneself.”²⁷

Thus, change is an inner path, chosen by people freely if they want to change in order to mentally grow, and become a better father or a better mother, and a better fellow human being. Only when this happens will women who grew up in such families or who chose this path for themselves become independent individuals, who do not see their children as a threat or as a burden too heavy for them, but shall rather wish to give birth to and raise their children – even though life with a child is demanding and challenging.

The growing interest of many people in the deep inner secrets of the metaphysical, psychology and psychotherapy, support groups and counselling shows that many people take steps in the direction of inner growth, the goal of which is not to suppress one’s own flaws, but to deal with them responsibly. This can therefore be perceived as a gradual collective change in consciousness, driving new and greater sensitivity. However, it seems that society will need legal crutches a little while longer, until larger parts of it adopt this line of thinking.

What kind of legal norms are able to reconcile all the differing interests – the self-determination of the mother, the child’s right to care and identity, the needs of fathers, grandparents and other relatives in respect of the child, as well as the public interest in safeguarding life, health and identity? And what kind of preventive measures can be taken?

²⁵ “Je n’ai pas pu être une enfant, comment voulez-vous que je devienne mère?”, Bonnet, C., (fn. 5), 128 as well as Bonnet, C., *Les enfants du secret* (Paris: Odile Jacob, 1992), 96: “Ce cri révèle combien il est difficile pour une femme d’aimer son enfant lorsqu’elle même a été en quelque sorte privée de son enfance. Cette réflexion très profonde montre comment l’amour maternel est lié à l’amour des parents. Une femme pourra-t-elle donner l’amour qu’elle n’a pas reçu? Ne préférerait-elle pas interrompre une chaîne de souffrances? On n’imagine jamais à quel point il faut avoir été une enfant heureuse pour se rêver mère.”

²⁶ Drewermann, E., *Hänsel und Gretel, Aschenputtel, Der Wolf und die sieben Geißlein, Grimms Märchen tiefenpsychologisch gedeutet* (München: Deutscher Taschenbuch Verlag, 2008), 19.

²⁷ Dethlefsen, Th., *Schicksal als Chance* (München: Bertelsmann, 1984), 86 et seq.



2. Contraception and Abortion as Effective Means of Prevention?

For the first two groups of women, access to regular and emergency contraception such as the “morning after pill” and legal abortions would theoretically prevent unwanted births and the ensuing distress. Regular contraception and – in some countries also – emergency contraception are freely accessible to women, meaning they do not require the cooperation of their partners, medical consultation or treatment, and their family need not know about it. One might deem it sufficient to offer such means to these women free of charge and ensure the confidentiality of their use of these options.

Nonetheless, these vulnerable women are apparently very often not in a position to take matters into their own hands²⁸ and realise their full potential as autonomous human beings. Rather, they find themselves in many cases in the invidious position of being unable to get pregnant because they must not get pregnant. This is because, in their families, sexuality and pregnancy are a taboo. These are, therefore, phenomena that are not only unspoken but are totally unthinkable.²⁹ A significant number of women belonging to the first two groups, therefore, ignore their being pregnant because they cannot even admit their pregnancy to themselves.³⁰ Human consciousness is capable of doing this, however incomprehensible it may seem to outsiders.

Some women want an abortion at a time in which they can no longer ignore the signs of pregnancy because the mechanisms of repression are no longer powerful enough. If the pregnancy is then too advanced to be terminated, they develop obsessive negative thoughts against the unborn, for which they are deeply ashamed.³¹ As a result they become mute and paralysed³² and consequently appear passive and indifferent.³³ Only when they are allowed to speak do they show signs of anxiety, tension, and violent aggressive feelings.³⁴ But where does this aggressiveness come from?

Women with strong aggressive feelings have often been – so it seems – subject to sexual violence in their youth. Be it through being victims of rape by strangers or even males closely related to them, or be it through confrontation with adult sexuality in other shocking ways,³⁵ they are – as discussions with affected women have shown – reminded of these traumatic experiences throughout the pregnancy and birth.³⁶ Aggression towards the child is to be understood as an attempt to eliminate their own uncontrollable distress from memories of traumatic experiences relating to sexuality triggered by the pregnancy and the childbirth.³⁷

It seems, however, that most women who kill their newborns predominantly choose passive forms of harm.³⁸

²⁸ Marshall, J., “Concealed births, adoption and human rights law: being wary of seeking to open windows into people’s souls”, *Cambridge Law Journal* 2012 (71(2)), 325, 335; Oberman, M., (fn. 2), 495.

²⁹ Bonnet, C., “Adoption at birth: Prevention against abandonment or neonaticide”, *Child Abuse & Neglect* 1993 (17(4)), 501, 505.

³⁰ Bonnet, C., (fn. 5), 118 et seq.; Marshall, J., (fn. 28), 335; Oberman, M., (fn. 2), 495.

³¹ Bonnet, C., (fn. 29), 506.

³² Bonnet, C., (fn. 29), 506; Marshall, J., (fn. 28), 332.

³³ Bonnet, C., (fn. 29), 506.

³⁴ Bonnet, C., (fn. 29), 506.

³⁵ Bonnet, C., (fn. 29), 506.

³⁶ Bonnet, C., (fn. 29), 506.

³⁷ Bonnet, C., (fn. 29), 506.

³⁸ Cf. Putkonen, H., Weizmann-Henelius, G., Collander, J., Santtila, P., Eronen, M., (fn. 8), 19; Shelton, J. L., Muirhead, Y., Canning, K. E., (fn. 19), 821.



Other women in turn cannot terminate their pregnancy for religious reasons.³⁹

This means that even guaranteeing (through medically prescribed contraception, or the “morning after pill”, or a medical abortion) these women access to pregnancy-preventing measures free of charge and without their families’ awareness would not be enough to have a conclusive preventive effect.

For children of the third group of women – that is those who kill their newborns later than 24 hours after delivery – these means will not be adequate prevention, as these women accept their pregnancy and childbirth.

For that reason, it is not enough simply to provide means that can prevent birth. The law must provide more options: “[N]o society should in the name of the promotion of human rights be forced to leave a woman with abortion as the only apparent safe option”.⁴⁰ A solution to this problem may be anonymous or confidential births.

However, the anonymous (or confidential) birth should not be the only measure. Teachers, doctors and other people should be encouraged to develop a look for pregnant women in need and to empathetically offer assistance – so that the distress may be alleviated already during pregnancy.⁴¹ Only if a woman understands why she suppresses her pregnancy, she will be able to make the best decision for the welfare of her child.⁴² This will help prevent their history repeating itself. Such assistance during early pregnancy is an effective way to avoid neonaticide and the abandonment of children.⁴³

3. Anonymous or Confidential Birth – Help or Problem?

It is clear that neither anonymous nor confidential births offer protection to children of women in the third group – those who do not kill their children within 24 hours after delivery but later. In this risk group, only midwives and medical personnel who care for mothers and children after birth can ensure that endangered mothers and their children quickly receive adequate help. In cases in which the continuation of mother and child co-habitation is not advisable, procedures which enable a permanent or temporary foster placement, the adoption of slightly older infants and children, and the protection of mothers from their environment must exist; in such cases, it can be useful to allow the mother “to go into hiding” through non-disclosure of her personal details and the place of her residence until her medical recovery.⁴⁴ And if foster placement and adoption fail to guarantee the

³⁹ Marshall, J., (fn. 28), 335.

⁴⁰ Concurring opinion of judge Greve in the Case of Odièvre v. France, Application no. 42326/98, Judgment 13 February 2003.

⁴¹ De Bortoli, L., Coles, J., Dolan, M., (fn. 18), 335.

⁴² Bonnet, C., (fn. 29), 510.

⁴³ Bonnet, C., (fn. 29), 510; for means of prevention cf. United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Fifty-seventh session, 30 May–17 June 2011, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Czech Republic CRC/C/CZE/CO/3-4, Family environment and alternative care (Arts. 5, 18 (paras. 1-2), 9-11, 19-21, 25, 27 (para. 4) and 39 of the Convention), Abuse and neglect: “50. The Committee strongly urges the State party to undertake all measures necessary to end the “Baby Box” programme as soon as possible and expeditiously strengthen and promote alternatives, taking into full account the duty to fully comply with all provisions of the Convention. Furthermore, the Committee urges the State party to increase its efforts to address the root causes which lead to the abandonment of infants, including the provision of family planning as well as adequate counselling and social support for unplanned pregnancies and the prevention of risk pregnancies.”

⁴⁴ Appell, A. R., (fn. 3), 64.



safety of the child from its biological mother, it is also necessary to provide protection for the child. In such cases, it may help if the personal details and location of the child remain confidential.

By contrast, a new study⁴⁵ seems to have proved that a significant increase in the survival of newborns for the first two groups of women is achieved when mothers are given the chance to give birth to their children in a safe environment anonymously and leave their children there physically healthy,⁴⁶ but only if the introduction of such a law for anonymous births is continuously accompanied by a publicity campaign, i.e. in schools, on the internet and on television and radio.⁴⁷ This study, which is based on police reports of neonaticides from 1975-2012 in Austria, shows a significant drop in cases of neonaticide in Austria immediately after the introduction of anonymous birth (27 July 2001)⁴⁸ and the accompanying campaign. However, it also shows a subsequent increase in neonaticides with a simultaneous sharp decline in the number of anonymous births, which is probably because the campaign was discontinued a short time after the introduction of the new legislation.⁴⁹ An earlier Austrian study – which seemingly identified a steady decline of neonaticides from 1975 that only stagnated since 2004, attributing this to social developments – accordingly appears to be disproved.⁵⁰

Nevertheless, opinion on the desirability of anonymous births is divided in Austria. This probably explains why there has been no new public awareness campaign since the first.

In France, a similar division of opinion regarding the desirability of anonymous births is evident. Depending on one's *Weltanschauung*, anonymous births are either rejected, require amendment, or are strongly supported.⁵¹ On the one side, the French *Académie de médecine* has retained in their *communiqué* of 8 March 2011 in which it considers anonymous births as very useful because they are the only way to ensure that mothers and children in need do not suffer harm. Confidential births (*l'accouchement*

⁴⁵ Grylli, C., Brockington, I., Fiala, C., Huscsava, M., Waldhoer, T., Klier, C.M., “Anonymous birth law saves babies – optimization, sustainability and public awareness”, *Archives of Women's Mental Health* 2015 (19(2)), 1, 4. This study is to be understood as a reply to a note by Orthofer, M., Orthofer, R., (fn. 23), 1028, which criticised the study Klier, C.M., Grylli, C., Amon, S., Fiala, C., Weizmann-Henelius, G., Pruitt, S.L., Putkonen, H., “Is the introduction of anonymous delivery associated with a reduction of high neonaticide rates in Austria? A retrospective study”, *BJOG, An International Journal of Obstetrics and Gynaecology* 2013 (120(4)), 428 et seq., as this study evaluated police records of neonaticides in Austria between 1991 and 2011, while the study by Orthofer, M., Orthofer, R., “Angebot zur anonymen Kindesabgabe, Reduzieren anonyme Geburten und Babyklappen die Tötung von Neugeborenen?”, *Pädiatrie & Pädologie* 2013 (48(3)), 22, 23 et seq. evaluated both police records and conviction records regarding neonaticides between 1975 and 2011. Klier, C.M., Grylli, C., Amon, S., Fiala, C., Weizmann-Henelius, G., Putkonen, H., (fn. 45), 1028 et seq. reply to this criticism, that police records are more reliable than conviction records as not every neonaticide lead to a conviction. Furthermore, there is typically only one conviction, even if a woman commits more than one neonaticide.

⁴⁶ Cf. the study of Grylli, C., Brockington, I., Fiala, C., Huscsava, M., Waldhoer, T., Klier, C.M., (fn. 45), 4; Klier, C.M., Grylli, C., Amon, S., Fiala, C., Weizmann-Henelius, G., Putkonen, H., (fn. 45), 431; cf. Bonnet, C., (fn. 29), 501 et seq.

⁴⁷ Grylli, C., Brockington, I., Fiala, C., Huscsava, M., Waldhoer, T., Klier, C.M., (fn. 45), 4; Klier, C.M., Grylli, C., Amon, S., Fiala, C., Weizmann-Henelius, G., Putkonen, H., (fn. 45), 432.

⁴⁸ Austrian Decree of 27 July 2001 on baby flaps and anonymous birth. However, this decree is no positive legal regulation of anonymous births, but only annuls the criminal offense of abandoning a newborn. Cf. <http://anonymegeburt.at/fachkraefte/gesetze/erlass-des-osterr-justizministeriums-vom-27-7-2001/>. On the problem of this very basic regulation Aebi-Müller, R., “Anonyme Geburt und Babyfenster – Gedanken zu einer aktuellen Debatte”, *FamPra.ch* 2007 (3), 544, 565.

⁴⁹ Grylli, C., Brockington, I., Fiala, C., Huscsava, M., Waldhoer, T., Klier, C.M., (fn. 45), 4.

⁵⁰ Orthofer, M., Orthofer, R., (fn. 45), 23 et seq.

⁵¹ Lefaucher, N., “The French ‘Tradition’ of Anonymous Birth: The Lines of Argument”, *International Journal of Law, Policy and the Family* 2004 (18(3)), 319, 327 et seq.



dans le secret) in turn are rejected as currently unsuitable.⁵² And the French *Conseil Constitutionnel* has decided in its judgment of 16 May 2012 that the legal provisions of 22 January 2002 allowing women in France to give birth anonymously are not unconstitutional.⁵³

Whether or not anonymous births should be allowed is, as it seems, a very controversial question. Those who reject anonymous birth stress that the profile of women who leave their children is not clear;⁵⁴ that anonymous birth can be used to force pregnant women to abandon their children;⁵⁵ that it is mainly adoption agencies and adoptive parents that profit from the mothers' anonymity;⁵⁶ that such anonymity-promoting solutions are contrary to the modern trend of conducting adoptions as openly as possible in order to facilitate multi-parenthood⁵⁷ and to help the children in their search for their identity;⁵⁸ and, lastly, that these anonymous mothers are not aware of the far-reaching consequences the anonymous birth may have for them⁵⁹.

Indeed, anonymous and confidential births can cause big problems – for the mothers, the children and other relatives. And it actually seems that the trend towards greater openness of adoptions can help the concerned parties with their own development or in their relative development, with their questions, and with overcoming their guilt or shame.⁶⁰ However, it is important to design the open adoptions and multi-parenting concepts in a way that does not

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- ⁵² Henrion, R., “Communiqué, À propos de l'accouchement dans le secret”, *Bulletin de l'Académie Nationale de Médecine* 2011, 195, n° 3, séance du 8 mars 2011, 729-732 (<http://www.academie-medecine.fr/bulletin/>): “Sans sous-estimer aucunement l'importance pour tout être humain de connaître ses origines, exigence naturelle dont l'absence peut être source de très grande souffrance psychologique, l'Académie nationale de médecine demande que la question soit considérée dans sa globalité et ses aspects les plus concrets sans se limiter au seul aspect psychologique des adultes à la recherche de leur origine. La mise en cause de l'anonymat serait lourde de conséquences en compromettant la confiance des femmes en grande difficulté, leur faisant fuir les maternités et les services sociaux avec les risques que cela comporte pour les mères, les nourrissons et les enfants”. Cela conduirait à augmenter le nombre d'accouchements faits “dans la clandestinité, dans les pires conditions, avec les risques de déchirures graves du périnée, d'hémorragies ... [auxquels] succèdent des abandons dans des lieux variés et des conditions précaires. Aux mieux, l'enfant est recueilli dans un état d'hypothermie. Au pire, il est retrouvé mort et la mère risque fort d'être condamnée pour infanticide.” Quoted in: Université Médicale Virtuelle Francophone (UvMaF), *L'accouchement sous le secret* (2011–2012), http://campus.cerimes.fr/maeutique/UE-sante-societe-humanite/accouchement_secret/site/html/cours.pdf, 13 et seq.
- ⁵³ Cf. Bonnet, C., Kramer, E., Chabernaud, J.-L., “L'anonymat de l'accouchement et la transmission d'informations non identifiantes, À propos de la décision du Conseil Constitutionnel du 16 mai 2012”, *La lettre du Conseil de l'Ordre, Contact Sages-femmes* No. 32 2012, 34, 34. Relating to the conformity with the ECHR: Case of Odièvre v. France, Application no. 42326/98, Judgment 13 February 2003, Nr. 49; criticised by Besson, S., “Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights”, *International Journal of Law, Policy and the Family* 2007 (21(2)), 137, 151.
- ⁵⁴ Willenbacher, B., (fn. 6), 346; Aebi-Müller, R., (fn. 48), 560.
- ⁵⁵ Willenbacher, B., (fn. 6), 346; Bonnet, C., (fn. 5), 124 points out that there were cases in France before 1990 where (especially minor) women were forced to give birth anonymously because of familial or other pressures and that these women, since they did not do it voluntarily, never overcame the experience; but the risk of exerting pressure exists much more clearly today due to baby flaps, cf. Bonnet, C., Chabernaud, J.-L., “Pourquoi des femmes accouchent dans l'anonymat?”, *Pratiques* No. 64 2014, 84, 85, because women are not taken out of their familiar surroundings and so never even receive an offer to talk about their situation with trained staff.
- ⁵⁶ Willenbacher, B., (fn. 6), 349.
- ⁵⁷ Willenbacher, B., (fn. 6), 349.
- ⁵⁸ Willenbacher, B., (fn. 6), 347 Lefaucher, N., (fn. 51), 338 et seq.
- ⁵⁹ Wiesner-Berg, S., “„Babyklappe“ und „anonyme Geburt“: Rechtskonflikte zwischen Mutter und Kind?”, *FamPra.ch* 2010 (3), 521, 541 et seq.
- ⁶⁰ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 100 et seq.



discourage parents from adopting in favour of surrogacy. It is essential to ensure that all children find a family. And surrogate motherhood comes with its own considerable problems: As surrogate mothers also carry children that they do not wish to keep, the important prenatal attachment is missing⁶¹.

4. Anonymous Birth – in Contrast or in Line with the Rights of Children to Identity based on the UN Convention on the Rights of the Child?

Austria⁶² and France (Art. 311-25 and Art. 341-1 *Code civil*) are not the only countries which allow for anonymous birth. Other countries, such as Italy⁶³ (Art. 30 no. 1(a) of the Decreto Presidente della Repubblica 3 novembre 2000, no. 396⁶⁴; see also Art. 28 no. 5 - 7 of the legge 4 maggio 1983, n. 184) and Luxembourg⁶⁵ (Art. 334 para. 4 *Code civil*) permit it as well.

⁶¹ McK. Doan, H., Zimerman, A., “Prenatal Attachment: A Developmental Model”, *International Journal for Prenatal and Perinatal Psychology and Medicine* 2008 (20), 20, 20 et seq.; van Bakel, H.J.A., Maas, A.J.B.M., Vreeswijk, C.M.J.M., Vingerhoets, A. J.J.M., “Pictorial representation of attachment: measuring the parent-fetus relationship in expectant mothers and fathers”, *Pregnancy and Childbirth* 2013 (13:138), 1, 1 et seq.; Brandon, A. R., Pitts, S., Denton, W. H., Stringer, C. A., Evans, H. M., “A History of the Theory of Prenatal Attachment”, *The Journal of Prenatal and Perinatal Psychology and Health* 2009, (23(4)), 201, 201 et seq.

⁶² Austrian Decree of 27 July 2001 on baby flaps and anonymous birth. However, this decree is no positive legal regulation of anonymous births, but only annuls the criminal offence of abandoning a newborn. Cf. <http://anonymegeburt.at/fachkraefte/gesetze/erlass-des-osterr-justizministeriums-vom-27-7-2001/>. On the problem of this very basic regulation Aebi-Müller, R., (fn. 48), 565.

⁶³ Even though the mother’s details are not reported in the declaration of birth and not registered in the certificate of birth, they can, at least in theory, be found by consulting the certificate of assistance to parturition and the related medical records concerning the mother, see Troiano, S., “Understanding and Redefining the Rationale of State Policies Allowing Anonymous Birth: A Difficult Balance between Conflicting Interests”, *International Journal of the Jurisprudence of the Family* 2013 (4), 177, 181 et seq. Please note that in Italy there is a reform proposal of 19 June 2015 (n. 1978) regarding Art. 28 of the Act of 4 May 1983, n. 184 related to access to information for children who have not been recognised at their birth (Modifiche all’articolo 28 della legge 4 maggio 1983, n. 184, e altre disposizioni in materia di accesso alle informazioni sulle origini del figlio non riconosciuto alla nascita); see: <http://www.senato.it/leg/17/BGT/Schede/Ddliter/44394.htm> and for the text of the modification proposal (see especially no. 7, 7bis, and 7ter of Art. 28: <http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/45784.pdf>. If the proposal were adopted, anonymously born children could obtain non-identifying information on their mother or, if the mother consents to it, identifying information. The reform in Italy is still ongoing (information dated 4 February 2018).

⁶⁴ “La dichiarazione di nascita è resa da uno dei genitori, da un procuratore speciale, ovvero dal medico o dalla ostetrica o da altra persona che ha assistito al parto, rispettando l’eventuale volontà della madre di non essere nominata.”

⁶⁵ Please note that in Luxembourg a reform proposal was published in 2013: *Projet de loi portant réforme du droit de la filiation*, n° 6568, du 18 April 2013, http://www.mj.public.lu/actualites/2013/06/Presentation_reforme_filiation_/PDL_6568_CHD.pdf. See the critical opinion of the CCDH dated 15 June 2015: <https://ccdh.public.lu/content/dam/ccdh/fr/avis/2015/Avis-PL6568-filiation-final-05062015.pdf>: “Le législateur devrait prévoir l’obligation pour la mère de laisser des informations dans un système centralisé ainsi que la création d’un mécanisme qui permet de lever le secret de l’identité de la mère et qui facilite à l’enfant la recherche d’informations sur ses origines. Le Luxembourg doit lever la réserve n°4 concernant l’article 7 de la Convention relative aux droits des enfants de New York de 1989.”; see also <https://ccdh.public.lu/content/dam/ccdh/fr/archives/2015/revue-de-presse-avis-filiation.pdf>. Complete data on the project: <http://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&cid=6568>. According to the news, this reform proposal was to be implemented very soon; see the news at <http://www.lesentiel.lu/fr/news/luxembourg/story/26100400> of 10 March 2016, but this was not the case. The ongoing, modified project (6568A *Projet de loi portant réforme du droit de la filiation*, modifiant le Code civil, le



In contrast to such rules Germany opted for confidential birth in 2014.⁶⁶ In the eighteen months following its introduction approximately 150 babies were born confidentially in Germany.⁶⁷ Nevertheless, anonymous birth is still being practised in Germany; and Germany has, so far, not shut down the baby boxes (“Babyklappen”, i.e. “baby hatches” where a baby may be left at a hospital or another medical institution which takes immediately care of the baby). However, the German system, unlike the French (see chapter 7 for a detailed comparison of these systems), does not permit caregivers, unless the mother gives her consent to it, to: (i) collect non-identifying information concerning the mother if she delivers anonymously at a hospital, (ii) keep a record of it or (iii) to deposit this information with an authority.⁶⁸ This means that an anonymously born child in Germany has no access to any kind of information.

Unlike the French, Luxembourgish, and Italian systems⁶⁹ most other legal systems (e.g. the German, Austrian, Swiss, and common law systems; see also Art. 2 of the European Convention on the Legal Status of Children Born out of Wedlock of 1975) do imply that carrying a baby and giving birth lead to motherhood. However, with adoption the legal ties between mother and child break.

In the UK it is not legally permitted to give birth anonymously.⁷⁰ But there the mother is allowed to leave the child at the hospital after the birth, after having identified herself,⁷¹ and to give the baby over for adoption.⁷²

In the US all 50 states, the District of Columbia, and Puerto Rico have enacted safe haven legislation.⁷³ In most states with safe haven laws, either parent may surrender his or her baby to a safe haven.⁷⁴ The purpose of safe haven laws is to ensure that relinquished children are left with persons who can immediately provide care for them.⁷⁵ In some states anonymity for the relinquishing parent is expressly guaranteed.⁷⁶ In others the safe haven provider cannot force the parent to provide

Nouveau Code de procédure civile, le Code pénal, la loi communale du 13 décembre 1988 et la loi du 1er août 2007 relative aux tissus et cellules humains destinés à des applications humaines) can be found here: http://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServletImpl?path=/export/exped/sexpdata/Mag/0004/103/9037.pdf: “Art. 312bis. L’enfant a le droit d’avoir, dans la mesure du possible, accès à ses origines. Cet accès à ses origines est sans effet sur son état civil et sur sa filiation.”

⁶⁶ Schwangerschaftskonfliktgesetz (Abschnitt 6: Vertrauliche Geburt): <http://www.gesetze-im-internet.de/bundesrecht/beratungsg/gesamt.pdf>.

⁶⁷ Aktuelle Notizen, *Zeitschrift für Kindschaftsrecht und Jugendhilfe herausgegeben in Verbindung mit der Bundeskonferenz für Erziehungsberatung e.V.* 2016, 83.

⁶⁸ See also Deutscher Verein für öffentliche und private Fürsorge e.V., *Empfehlungen des Deutschen Vereins zur vertraulichen Geburt* (2015), <https://www.deutscher-verein.de/de/empfehlungen-stellungnahmen-2015-empfehlungen-des-deutschen-vereins-zur-vertraulichen-geburt-1859,724,1000.html>, 8.

⁶⁹ See on the French and Italian models of anonymous birth Troiano, S., (fn. 63), 179 et seq.

⁷⁰ Offences against a Person Act, 1861, s. 27 (UK); Marshall, J., (fn. 28), 335.

⁷¹ Registration of Births Act, 1953, s. 2 (UK).

⁷² Marshall, J., (fn. 28), 335.

⁷³ Infant Safe Haven Laws, Child Welfare Information Gateway, Children’s Bureau, Washington 2013, 2: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>.

⁷⁴ Infant Safe Haven Laws, Child Welfare Information Gateway, Children’s Bureau, Washington 2013, 2: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>.

⁷⁵ Infant Safe Haven Laws, Child Welfare Information Gateway, Children’s Bureau, Washington 2013, 2: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>.

⁷⁶ Infant Safe Haven Laws, Child Welfare Information Gateway, Children’s Bureau, Washington 2013, 4: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>.



identifying information.⁷⁷ Some of the laws permit persons at safe havens to inquire about non-identifying information, such as medical history.⁷⁸ In addition to the guarantee of anonymity, most states exempt parents who safely relinquish their infants from criminal liability.⁷⁹ However, the privileges of anonymity and immunity are forfeited in most states if the child has been abused or neglected.⁸⁰

The question is whether the UN Convention on the Rights of the Child of 20 November 1989 prohibits or allows anonymous birth. This UN Convention has so far been ratified by 196 countries, the United States still not among them.

Art. 7 of the UN Convention on the Rights of the Child (UN-CRC) states that the child shall “as far as possible” have the right to know his or her parents. This wording is explained by the drafting history of Art. 7 UN-CRC. During the drafting process various national delegations referred to their national law concerning secret adoption, and stated that the child’s right to know his or her parents could not be absolute.⁸¹ However, because of the vagueness of the expression, which gave rise to doubts as to its content,⁸² explicit reservations concerning Art. 7 UN-CRC were made by a few countries.⁸³ Anonymous birth has a long tradition in both France and Luxembourg (Art. 334 para. 4 *Code civil*). Luxembourg therefore entered a reservation in which it stated that according to its belief Art. 7 UN-CRC presented no obstacle to the law in respect of anonymous birth, “which is deemed to be in the interest of the child, as provided under Article 3 of the Convention”. Interestingly enough, France did not enter such a reservation to Art. 7 UN-CRC. This might be because France saw her interests sufficiently protected by said mitigation (“as far as possible”).

Art. 7 UN-CRC is closely related to Art. 8 UN-CRC which provides that State parties undertake to respect the child’s right to preserve his or her identity, including name and family relations as recognized by law without unlawful interference. The drafting history shows that Art. 8 originates in the proposal of Argentina’s delegation to protect the child’s “true and genuine personal, legal and family identity”.⁸⁴ This is due to historical reasons: During the military junta in Argentina in the 1970s children and adults had disappeared; some of the children were placed in other families. This led to the arbitrary severance of family ties in Argentina in that period.⁸⁵ Therefore, Art. 8 UN-CRC is concerned with the biological relationship of natural parent and child, even though it fails to expressly address questions of paternity and filiation.⁸⁶ And this is also true with regard to Art. 7 UN-

⁷⁷ Infant Safe Haven Laws, Child Welfare Information Gateway, Children’s Bureau, Washington 2013, 4: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>.

⁷⁸ Appell, A. R., “Safe Havens to Abandon Babies, Part I: The Law”, *Adoption Quarterly* 2002 (5(4)), 59, 63.

⁷⁹ Infant Safe Haven Laws, Child Welfare Information Gateway, Children’s Bureau, Washington 2013, 4 et seq.: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>.

⁸⁰ Infant Safe Haven Laws, Child Welfare Information Gateway, Children’s Bureau, Washington 2013, 5: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>.

⁸¹ Detrick, S., *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999), 153.

⁸² Detrick, S., (fn. 81), 153.

⁸³ The Czech Republic also entered a reservation concerning Art. 7 UN-CRC; it stated there that it would maintain the confidentiality of the child’s origin concerning cases involving artificial fertilization and certain adoption procedures based on anonymity. Poland made a similar reservation concerning adoptions.

⁸⁴ Detrick, S., (fn. 81), 163.

⁸⁵ Detrick, S., (fn. 81), 159 et seq.

⁸⁶ Detrick, S., (fn. 81), 163.



CRC: As far as the child's right to know his or her parents is concerned, the definition of "parents" includes genetic parents, birth (i.e. legal) parents, and also social parents.⁸⁷

It seems due to the chosen wording and the drafting history that the permission and legal regulation of anonymous birth does not necessarily contravene Art. 7 UN-CRC. But this seems to be controversial. However, before turning to the UN Committee's view on anonymous birth, the UN Committee's view on so-called baby boxes shall first be examined.

The UN Committee on the Rights of the Child is very clear about their opinion on the baby boxes. Austria and other State parties were asked to shut them down, as these constitute a violation of Arts. 6, 7, 8, 9 and 19 UN-CRC.⁸⁸ There are, however, strong additional arguments against baby boxes: They do not ensure good health care for mother and child and there is an increased risk of external pressure on women, forcing them to abandon their child.⁸⁹ Furthermore, compared to an anonymous birth in a hospital, baby flaps have the disadvantage of failing to ensure psychological care for the mothers. That may well lead to their history repeating itself.⁹⁰ The ideal care for such women should – in addition to psychological support before and after the anonymous birth – include the opportunity to consult a social worker, who looks at and helps with the mother's socio-economic problems, and the inclusion of a legal expert, who explains her legal position to her.⁹¹

What is the opinion of the UN Committee on the Rights of the Child on anonymous birth?

At the 61st session of the UN Committee, Austria received an explicit recommendation to promote and increase the number of anonymous births at hospitals – as a last available means of preventing child abandonment and neonaticide – as well as to strengthen the fight against the causes that lead to such dangers for children.⁹² But at the same time, Austria was urged to keep a

⁸⁷ Hodgkin, R., Newell, P., *Implementation Handbook for the Convention on the Rights of the Child* (Geneva: United Nations Children's Fund, 2007), 105.

⁸⁸ United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Sixty-first session, 17 September–5 October 2012, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Austria CRC/C/AUT/CO/3-4, Civil rights and freedoms (Arts. 7, 8, 13-17, 19 and 37 (a) of the Convention), Birth registration: "29. The Committee reiterates its concern about the practice of anonymous abandonment in the State party through the use of "baby flaps" or "baby nests", which is in violation of, inter alia, Articles 6, 7, 8, 9 and 19 of the Convention. 30. The Committee strongly urges the State party to undertake all measures necessary to end the practice of anonymous abandonment and expeditiously strengthen and promote alternatives such as the possibility of anonymous births at hospitals as a measure of last resort to avoid abandonment and or death of the child, and to keep a confidential record of the parents to which the child could access at a later stage, taking into account the duty to fully comply with all provisions of the Convention. Furthermore, the Committee urges the State party to increase its efforts to address the root causes which lead to the abandonment of infants, including the provision of family planning as well as adequate counselling and social support for unplanned pregnancies and the prevention of risk pregnancies." United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Fifty-seventh session, 30 May–17 June 2011, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Czech Republic CRC/C/CZE/CO/3-4, Family environment and alternative care (Arts. 5, 18 (paras. 1-2), 9-11, 19-21, 25, 27 (para. 4) and 39 of the Convention), Abuse and neglect: "50. The Committee strongly urges the State party to undertake all measures necessary to end the "Baby Box" programme as soon as possible and expeditiously strengthen and promote alternatives, taking into full account the duty to fully comply with all provisions of the Convention. Furthermore, the Committee urges the State party to increase its efforts to address the root causes which lead to the abandonment of infants, including the provision of family planning as well as adequate counselling and social support for unplanned pregnancies and the prevention of risk pregnancies."

⁸⁹ Bonnet, C., Chabernaud, J.-L., (fn. 55), 85.

⁹⁰ Bonnet, C., Chabernaud, J.-L., (fn. 55), 85; Bonnet, C., *Geste d'amour, L'accouchement sous X* (Paris: Odile Jacob, 1990), 119 et seq.

⁹¹ Bonnet, C., (fn. 29), 510.

⁹² United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Sixty-first session, 17 September–5 October 2012, Consideration of reports submitted by States parties under Article 44 of the Convention,



confidential record of the parents which the child could access at a later stage.⁹³ It is, therefore, crucial to know what is meant by a confidential record of the parents.

In Austria mothers who give birth anonymously are given the possibility to deposit a closed envelope for the child with the hospital or the youth welfare office; but, in contrast to France (see chapter 7 for details on the French rules on anonymous birth), there are no special measures and no legal framework has been created to ensure that children and mothers can contact each other at a later stage if they wish to do so. So, the question is whether it suffices to adopt a system akin to the French for anonymous births to be in line with Art. 7 of the UN-CRC.

Because the French system of anonymous birth was approved by the European Court of Human Rights (ECtHR) in 2003 in the famous (and much debated⁹⁴) case of *Odièvre v. France*,⁹⁵ i.e. there had been no violation of Art. 8 (protection of family life)⁹⁶ of the European Human Rights Convention (ECHR), one could argue that in order to be in line with Art. 7 UN-CRC Austria should provide for a legal framework akin to that in France. According to the ECtHR the French system of anonymous birth legitimately balances the rights of both mother and child. The ECtHR held that, because the mother was encouraged to leave non-identifying information for the child and was entitled to reveal her identity at a later stage, a fair balance had been struck between the mother's right to privacy and the child's right to have information on his or her origins. Furthermore, the ECtHR did not depart from this reasoning when nine years later it decided in the case of *Godelli v. Italy*⁹⁷ that Italy had violated Art. 8 ECHR. The reason for this was that Italian law, unlike the French system of anonymous birth, does not allow the mother to change her mind and identify herself at a later stage if she so wishes; Italian law, is however, most probably going to be changed in this respect.⁹⁸

Concluding observations: Austria CRC/C/AUT/CO/3-4, Civil rights and freedoms (Arts. 7, 8, 13-17, 19 and 37 (a) of the Convention), Birth registration: “29. The Committee reiterates its concern about the practice of anonymous abandonment in the State party through the use of “baby flaps” or “baby nests”, which is in violation of, inter alia, Articles 6, 7, 8, 9 and 19 of the Convention. 30. The Committee strongly urges the State party to undertake all measures necessary to end the practice of anonymous abandonment and expeditiously strengthen and promote alternatives such as the possibility of anonymous births at hospitals as a measure of last resort to avoid abandonment and or death of the child, and to keep a confidential record of the parents to which the child could access at a later stage, taking into account the duty to fully comply with all provisions of the Convention. Furthermore, the Committee urges the State party to increase its efforts to address the root causes which lead to the abandonment of infants, including the provision of family planning as well as adequate counselling and social support for unplanned pregnancies and the prevention of risk pregnancies.”

⁹³ See above, fn. 92.

⁹⁴ See for instance Freeman, M., Margaria, A., “Who and What is a Mother? Maternity, Responsibility and Liberty”, *Theoretical Inquiries in Law* 2012 (13(1)), 153, 160 et seq and Besson, S., (fn. 53), 151.

⁹⁵ *Odièvre v. France*, Application no. 42326/98, Judgment 13 February 2003.

⁹⁶ “Article 8 ECHR– Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

⁹⁷ *Godelli v. Italy*, Application no. 33783/09, Judgment of 25 September 2012.

⁹⁸ In Italy there is a reform proposal of 19 June 2015 (n. 1978) regarding Art. 28 of the Act of 4 May 1983, n. 184 related to access to information for children who have not been recognised at their birth (Modifiche all'articolo 28 della legge 4 maggio 1983, n. 184, e altre disposizioni in materia di accesso alle informazioni sulle origini del figlio non riconosciuto alla nascita); see: <http://www.senato.it/leg/17/BGT/Schede/Ddliter/44394.htm> and for the text of the modification proposal (see especially no. 7, 7bis, and 7ter of Art. 28: <http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/45784.pdf>). If the proposal were adopted, anonymously born children could obtain non-identifying information on their mother or, if the mother consents to it, identifying information. The reform in Italy is still ongoing (information dated 4 February 2018).



But the UN Committee on the Rights of the Child's policy does not consider the reasons that led to the two decisions of the ECtHR when it directs its periodical recommendations to the State parties. The UN Committee states that Art. 7 UN-CRC requires that all appropriate measures to fully enforce the child's right to know his or her biological parents and siblings have to be taken and, therefore, all necessary measures for all information to be registered and filed about the parent(s) have to be taken.⁹⁹ Therefore, the UN Committee recommends that State parties consider removing the requirement of the biological mother's consent to reveal her identity where it exists (for instance in France and in Luxembourg) and to increase its efforts to address the root causes leading parents to choose to use anonymous birth.¹⁰⁰

This means, in fact, that the UN Committee condemns anonymous birth and favours confidential birth. As becomes evident, the UN Committee does not allow the special wording of Art. 7 UN-CRC, "as far as possible", to have effects. The UN Committee does not seem to share Luxembourg's view expressed in its reservation that Art. 7 UN-CRC presents no obstacle to the law in respect of anonymous births, "which is deemed to be in the interest of the child, as provided under Article 3 of the Convention". That is why the UN Committee urges the State parties that provide for anonymous birth to change their laws and provide instead for confidential birth. But the UN Committee seems so far to have been unsuccessful.

Luxembourg is about to change its law on anonymous birth. But whether or not the child will receive any information on the mother's identity will, like in France, depend entirely on her decision because Luxembourg will not prohibit the anonymous birth (see Art. 334 *Code civil*; see, however, Art. 312bis *Code civil* of the proposed bill on parentage which is worded similarly to Art. 7 UN-CRC¹⁰¹). The same is true for the Italian reform proposal (see fn. 63).

⁹⁹ See United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Concluding observations on the fifth periodic report of France adopted by the Committee at its seventy-first session (11-29 January 2016), 29 January 2016, CRC/C/FRA/CO/5, Civil rights and freedoms (Arts. 7, 8, and 13-17), Right to know and be cared for by parents: "33. The Committee reiterates its recommendations to take all appropriate measures to fully enforce the child's right to know his/her biological parents and siblings and urges it to adopt the necessary measures for all information about parent(s) to be registered and filed, in order to allow the child to know, to the extent possible and at the appropriate time, his or her parents (CRC/C/FRA/CO/4, para. 44). The Committee also recommends that the State party consider removing the requirement of the biological mother's consent to reveal her identity and to increase its efforts to address the root causes leading parents to choose to use confidential birth."

¹⁰⁰ See above. See also the concluding observations on the combined third and fourth periodic reports of Luxembourg, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013), CRC/C/LUX/CO/3-4, 29 October 2013.

¹⁰¹ "Art. 334. Lors de l'accouchement, la mère peut demander que le secret de son admission et de son identité soit préservé." "Art. 312bis. L'enfant a le droit d'avoir, dans la mesure du possible, accès à ses origines. Cet accès à ses origines est sans effet sur son état civil et sur sa filiation." The legislative commission explains the meaning of this proposed article as follows: "Les dispositions de cet article sont applicables qu'il s'agisse d'accès aux données relatives aux origines d'une personne en cas d'accouchement sous X, d'adoption plénière, de procréation médicalement assistée ou de gestation pour autrui." See http://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServletImpl?path=/export/exped/sexdpata/Mag/0004/103/9037.pdf. In Luxembourg, the reform proposal was first published in 2013: *Projet de loi portant réforme du droit de la filiation*, n° 6568, du 18 April 2013, http://www.mj.public.lu/actualites/2013/06/Presentation_reforme_filiation_/PDL_6568_CHD.pdf. See the critical opinion of the CCDH dated 15 June 2015: <https://ccdh.public.lu/content/dam/ccdh/fr/avis/2015/Avis-PL6568-filiation-final-05062015.pdf>: "Le législateur devrait prévoir l'obligation pour la mère de laisser des informations dans un système centralisé ainsi que la création d'un mécanisme qui permet de lever le secret de l'identité de la mère et qui facilite à l'enfant la recherche d'informations sur ses origines. Le Luxembourg doit lever la réserve n°4 concernant l'article 7 de la Convention relative aux droits des enfants de New York de 1989."; see also <https://ccdh.public.lu/content/dam/ccdh/fr/archives/2015/revue-de-presse-avis-filiation.pdf>. Complete data on the



The UN Committee would maybe see things differently if it considered the whole situation of mother and child and its likely temporariness if certain important conditions are met. It would, therefore, stress more importance on the creation of a mother (and therefore also child) friendly environment to complement anonymous birth and not condemn the system of anonymous birth in its entirety; it would see that its recommendations could also be complied with through indirect measures.

5. Anonymous birth – Most Often Just the Beginning of a Transitional Stage

Whether or not anonymous births should be allowed is, as it seems, hotly debated. Nonetheless, critics often fail to acknowledge that an anonymous birth is mostly just a transitional stage – if and because there is no pressure for the women and they are treated with empathy and respect. Most¹⁰² anonymous mothers ultimately decide to give up their anonymity and if they choose to put the child up for adoption, they opt for open or semi-open adoptions. Anonymous birth sets off a period of reflection that leaves all options open, and so helps women in distress to gather strength and think about what they really want. Anonymous births are consequently seen as a great help for women in desperate situations. This is shown by a survey conducted by the Allensbach Institute in 2012 of 25 women who were helped and enabled by SterniPark¹⁰³ to give birth anonymously in Hamburg.

The Allensbach survey revealed that 89 per cent of the women found the anonymous birth to be a very important means of support and 11 per cent as an important support in a desperate situation; not a single woman questioned the regulations afterwards.¹⁰⁴ Only about one-third of the women put their children up for adoption. Of this third, two-thirds opted for an open or a semi-open adoption.¹⁰⁵ Only about 5 per cent decided to remain completely anonymous.¹⁰⁶ On the contrary, two-thirds of women that were enabled to give birth anonymously decided to keep their child and raise him or her themselves – not only because of emerging loving feelings for the child, but also

project:

<http://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&id=6568>. The data on the ongoing project (6568A Projet de loi portant réforme du droit de la filiation, modifiant le Code civil, le Nouveau Code de procédure civile, le Code pénal, la loi communale du 13 décembre 1988 et la loi du 1er août 2007 relative aux tissus et cellules humains destinés à des applications humaines) can be found here: http://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServletImpl?path=/export/exped/sexpdata/Mag/0004/103/9037.pdf.

¹⁰² The following report speaks, however, of a “not insignificant number” of mothers: Deutscher Verein für öffentliche und private Fürsorge e.V., *Empfehlungen des Deutschen Vereins zur vertraulichen Geburt* (2015), <https://www.deutscher-verein.de/de/empfehlungen-stellungnahmen-2015-empfehlungen-des-deutschen-vereins-zur-vertraulichen-geburt-1859,724,1000.html>, 4 et seq.

¹⁰³ SterniPark cares for anonymous pregnant women before giving birth, they accompany the women to hospital for delivery and take care of mother and child in the aftermath. The women can live in the establishments of SterniPark. The child is cared for after the birth by foster parents. The mother can still opt for a life with the child, but she is not obliged to have one; cf. <http://www.sternipark.de/index.php?id=7>.

¹⁰⁴ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 107.

¹⁰⁵ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 77 et seq.

¹⁰⁶ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 78.



because of the advice and assistance available at SterniPark, which is offered around the clock and is always understood as an offer and not an imposition.¹⁰⁷

It is noteworthy that of 95 women who choose to give birth confidentially in Germany in the first year after the introduction of the new law, only 5 decided to keep the child.¹⁰⁸

The women were allowed to stay at SterniPark's premises for as long as they needed to. They were also given the freedom to take as much time as they needed to decide whether they wanted to care for the child themselves. At SterniPark, they were able to take a break from their everyday worries, draw new courage and consider their new situation at rest. And lastly they were able to become part of a community, and even help newcomers to the facility or benefit from such contacts.¹⁰⁹

SterniPark's philosophy is to provide freedom from coercion and unconditional respect for each woman and her particular special circumstances. That is what helps these women to find a way out of their crisis. They also learn that they are not alone with their concerns and emotions, but that other mothers have similar problems. All this is very clear from the survey.

The vast majority of those who have decided to raise their children themselves and also of those who have put their children up for adoption are in retrospect convinced that they have done the right thing. Of those who have decided to raise their children themselves, all are convinced that they have done the right thing and of those who have put their child up for adoption, 86 per cent are convinced that they have done the right thing. Only 14 per cent of the latter group later question their decision.¹¹⁰

It therefore seems that anonymous births can play a very important role for women in desperate situations, if properly facilitated. They take away pressure and create an atmosphere of serenity. In many cases, this then leads to the formation of a good mother-child relationship and opens avenues to overcoming the crisis. Thus, anonymous births seem to be very useful in several respects.

In the following section, the German legislation concerning confidential births passed in 2014 shall be analysed and compared to the corresponding regulations in France. The main focus shall however be: Does the general rule – of things being better with as little coercion as possible – apply to the law as well?

6. No Coercion – a Better Law?

Law works in most cases – if you want to use the non-legal terminology of psychologist MARSHALL B. ROSENBERG – as a mechanism of violence. Law allows judgment and condemnation.

¹⁰⁷ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 78; on the importance and significance of respect see also Deutscher Verein für öffentliche und private Fürsorge e.V., *Empfehlungen des Deutschen Vereins zur vertraulichen Geburt* (2015), <https://www.deutscher-verein.de/de/empfehlungen-stellungnahmen-2015-empfehlungen-des-deutschen-vereins-zur-vertraulichen-geburt-1859,724,1000.html>, 6.

¹⁰⁸ <http://www.stern.de/familie/vertrauliche-geburt--95-frauen-nutzen-fast-anonyme-entbindung-im-ersten-jahr-6207536.html>.

¹⁰⁹ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 81 et seq.

¹¹⁰ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 100.



It operates with coercion. One is right. The other is wrong. The one who is right, is – to put it somewhat exaggeratedly – God. And the one who is at fault is the sinner.¹¹¹ The game, however, is not at that point over. Because the one who is the sinner at first begins afterwards to play the part of God. And the two fight each other over who is worse.¹¹² This mechanism of violence thus produces interpersonal conflicts. It fails to resolve them – even though it is designed to pacify the parties. This may lead to a tendency of the law to impose even stronger solutions – a vicious circle! The law is the product of our culture. And our culture says that the initially defined violence is good if it is the wicked one that is punished.¹¹³ Transposed into private law, that means that the evil one has to do or endure something, in order for the good one to get something.

Even though mediation is becoming more and more popular, in various family law matters for example, where an agreement fails to be reached, the state will engage its coercive apparatus (cf. § 278 II ZPO (German Code of Civil Procedure)). Evidently, state-imposed solutions continue to dominate the law.

Another route is taken by the concept of non-violent communication, which is strongly inspired by the Far Eastern teachings of knowledge.¹¹⁴ In this concept, the concerned person explains, without judging the addressed person, how his or her own quality of life is affected by the behaviour of the addressed person. That is followed by an expression of what feelings are triggered by the impairment and why they are caused: These feelings are caused by the fact that a personal need is not met because of the impairment. Finally, the addressed person is asked to perform a concrete action that enriches the life of the pleading person. The concept of non-violent communication puts the parties of the conflict on equal footing and goes the way of empathy and consensuality. There are no assessments or judgments. Both parties remain sovereign and autonomous beings.

But what if the parties fail to find agreement? How does this non-violent method resolve a conflict? The solution is found on a different level. It consists in the knowledge that personal feelings and personal happiness do not depend on the behaviour of other people.¹¹⁵ Only one's own attitude, with which one responds to a situation, may affect one's feelings.¹¹⁶ This means that it is necessary to develop a corresponding, usually new, worldview and practice serenity.

So the question is: What would happen if the law followed this non-violent approach as far as possible?

As the German and French rules can be assessed as model rules for anonymous and confidential birth respectively, these rules shall be compared in the next chapter.

7. Acceptance Instead of Assessment – The Advantages of French Law's Anonymous Birth compared to German Law's Confidential Birth

Where a mother's refusal of parenthood is accepted, she can give birth and leave. That conveys relief. The mother saves the child – from herself¹¹⁷ – by bringing it into the world in a protected

¹¹¹ Cf. Rosenberg, M. B., Seils, G., *Konflikte lösen durch gewaltfreie Kommunikation* (Freiburg i.Br.: Herder, 2012), 23.

¹¹² Rosenberg, M. B., Seils, G., (fn. 111), 23.

¹¹³ Cf. Rosenberg, M. B., Seils, G., (fn. 111), 25.

¹¹⁴ Cf. Rosenberg, M. B., Seils, G., (fn. 111), 15.

¹¹⁵ Cf. Rosenberg, M. B., Seils, G., (fn. 111), 13.

¹¹⁶ Cf. Rosenberg, M. B., Seils, G., (fn. 111), 13.

¹¹⁷ Bonnet, C., (fn. 29), 501, 507 et seq. stresses the fact that women who repress their pregnancy and have strong aggressive feelings towards the child and also corresponding obsessive fantasies, do not usually want to see, touch or hear their newborn – because they are afraid to hurt the child because of their own accumulated aggressiveness. However, if they



environment and ensuring that the child may be adopted by people who can love it. This is not only proof of great responsibility; it is an act of love and should be recognized as such.¹¹⁸ The mother also need not worry, then, about incurring child protection measures concerning potential older children or during a later pregnancy and thus about a potential separation from her children or other reprisals.¹¹⁹ She can act independently. She is paid respect. Her dignity remains untouched.¹²⁰

This respect given to the mother causes her – if she knows about the option of giving birth in a protected environment with no strings attached – to choose this path. And it seems that, in the majority of cases, these mothers then allow their child to find them in one way or another. Mothers refusing to embrace parenthood are left alone. Society and children must have confidence that the mother’s decision was her only option, and that she therefore decided correctly. The mother cannot do more. She should not be forced to do more. Everything she does should be done of her own free will. That is justice. This is because justice does not threaten our freedom – it increases it.¹²¹ Justice results from dignity and protects it at the same time.¹²²

With their legislation on anonymous birth, France went a long way down this path. Contrarily, German law was not yet ready for so much freedom: Confidential birth in German law requires the mother to participate in a counselling session (§ 2 IV Schwangerschaftskonfliktgesetz,¹²³ SchKG) and to reveal her identity to the counselling institution (§ 25 I SchKG).

With the merely confidential birth,¹²⁴ German law not only provides for the mother to be identifiable (§ 26 II SchKG), but also that she may be identified by her child under certain conditions. Upon request by the child, the family court may decide to grant the child the right to inspect the birth documentation (§§ 31 et seq. SchKG). The court weighs the interests of the mother and those of the child against each other and can – even against the declared will of the mother – grant the right of inspection to the child, if it is convinced that the interests of the child prevail (§ 32 I SchKG). German law attaches legal disadvantages to the mother’s passive behaviour (§ 32 IV SchKG), but it provides that the mother can take active defensive measures (§ 31 II, III and IV SchKG).

The present author disagrees with these regulations. This is not to deny the needs of the identity-seeking child. Those are positively acknowledged. The life of a rejected child is certainly not easy, even less so if the child was not fully embraced by his or her adoptive family. Rejecting the solution

wish to see the child, they want to convince themselves that the child has not suffered harm from their aggressive thoughts and/or they want to forget everything at the sight of their child. If the child is nonetheless forced (in good faith) on these mothers by midwives, doctors or relatives, the mothers feel completely torn: on the one hand, they feel connected to the child because of their contact; on the other hand, they still have intense aggressive feelings towards the child, which stem from the fact that they are still haunted by memories of their own traumatic experiences related to sexuality, which they want to eliminate. The imposition of motherhood can end badly for the child, because the repression of the child’s needs and the aggression towards it continue after birth; the child may be neglected, injured or abandoned by the mother. Cf. Bonnet, C., (fn. 5), 120 et seq., 128 et seq.

¹¹⁸ Bonnet, C., (fn. 29), 509.

¹¹⁹ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 47 et seq.

¹²⁰ Cf. for the importance of this fundamental principle of “living well”, Dworkin, R., *Justice for Hedgehogs* (Cambridge/London: The Belknap Press of Harvard University Press, 2011), 212 et seq.

¹²¹ Dworkin, R., (fn. 120), 423.

¹²² Dworkin, R., (fn. 120), 423.

¹²³ Schwangerschaftskonfliktgesetz of 27 July 1992: <http://www.gesetze-im-internet.de/bundesrecht/beratungsg/gesamt.pdf>.

¹²⁴ See for possible solutions under Swiss law Aebi-Müller, R., (fn. 48), 563 et seq.



of German law has more to do with the culture and the worldview that stands behind this legislation, and with what it does to mother and child.

This culture and this legislative solution chain the child to his victimhood if the child fails to free itself from it independently. They produce frustration, because happiness is always projected to be somewhere else and because the path to it may again and again be blocked from the outside, e.g. by the mother or the state that refuses to give the necessary information. This is the problem of this solution.

This culture and solution also compromise the dignity of the mother. She must always be afraid, alert and prepared to protect herself. She is therefore vulnerable to imposition. And that is regardless of whether her confidentiality is ultimately upheld or not. It is clear that mothers do not and will not want to take such an approach.

In my opinion, the objection that a mother can hardly be frightened and put under pressure by a probable future act, i.e. if the child later decides to inquire into his or her origin,¹²⁵ is invalid. The pressure actually results from the constraints that the mother is subjected to before the confidential birth: She may fear that her personal details will be used to her detriment in a number of respects, such as to take away her other children or in connection with a naturalisation. In addition, the mother is told how the child might access her personal details not only in the future, but as soon as she wants to give birth confidentially. The resulting pressure is consequently immediately placed on the mother. And her act of rescue is not recognised and acknowledged as such. In the author's opinion, this legislation therefore misses its goal. Such a compromising solution cannot solve the problem.

In addition, the state fails to promote institutions such as SterniPark, which receive future mothers to give them a break from their everyday lives, gain their trust through recognition, and respect and make them curious about how their lives could go with their children, should they decide to keep them.

But German law imposes even more restrictions.

A study by the Allensbach Institute showed that a few mothers took longer than two months to decide to raise their child themselves.¹²⁶ Mothers should therefore be given the opportunity to think about whether they want to keep their child, without any time pressure, if they are still undecided.¹²⁷ For this to happen, women need to be allowed to visit their children whenever they want during the entire period in which they are still undecided, in order to facilitate mother-child bonding. However, it is questionable whether German law ensures this.¹²⁸ A mother's custody is suspended for as long as she fails to provide the information required for the entry of the child's birth in the register (§ 1674a sentence 1 BGB). She only has the right of access (§ 1684 I BGB). However, if she is not married (so that her husband has parental custody – § 1678 I half-sentence 1 BGB), she will be dependent on the

¹²⁵ Cf. the thoughts of Aebi-Müller, R., (fn. 48), 561 et seq. with further reference, even though they do not relate to German law.

¹²⁶ Institut für Demoskopie Allensbach, *Schwangerschaftskonflikt und anonyme Geburt Befragung von Müttern, die von SterniPark betreut wurden* (2012), http://www.sternipark.de/fileadmin/content/6227_Allensbach_-_Bericht_Sternipark_Anonyme_Geburt.pdf, 80 et seq.

¹²⁷ It is important for both mother and child that there be a prolonged rapprochement phase, if this is initiated by the mother and is required. The child suffers if it is not given the love of a mother and a father and if it does not become part of a family receiving it as soon as possible. Cf. the very expressive input by Bonnet, C., (fn. 90), 13. The mother, giving birth to the child, should never be forced to approach the child if she declines it; otherwise there is a risk that the child may be abused and/or neglected by the mother; cf. Bonnet, C., (fn. 29), 507 et seq. as well as here in fn. 130.

¹²⁸ Schwedler, A., "Die vertrauliche Geburt – ein Meilenstein für Schwangere in Not?", *NZ Fam* 2014, 193, 195.



cooperation of the child's legal guardian (§ 1773 I BGB; § 1791c I sentence 1 BGB) and foster parents.

In addition, the sword of Damocles remains over her head: Should she fail to decide to live with her child within the statutory eight-week period (§1747 II BGB), she might lose the child. After all, a parent's consent is not required for an adoption if they are permanently unable to declare it or if their residence is permanently unknown; the residence of the mother of a child born confidentially under § 25 I SchKG is considered permanently unknown until she states the necessary information for the birth registration of her child at the family court (§ 1747 IV BGB). The option to cancel the adoption *ex officio* on serious grounds (§ 1763 BGB) with the consequence of an annulment of the (adoptive) parent-child relationship in favour of the birth mother (§ 1764 BGB) will benefit these mothers only in the rarest cases.

German law thus exerts too much pressure,¹²⁹ it should follow the role model of institutions like SterniPark to a much greater extent.

In contrast, which path did French law choose?

According to French law, the mother is informed of the legal consequences of an anonymous birth and the importance of access to data on one's origin and history of every human being (Art. L222-6 I *Code de l'action sociale et des familles*).

She is invited to provide information about her own health and that of the child's father, about the origin of the child and the circumstances of the birth, and her own identity, in writing and to deposit this information in a sealed envelope (Art. L222-6 I *Code de l'action sociale et des familles*). She is also informed that she may provide the information about her identity at any later date and may supplement the information provided at birth (Art. L222-6 I *Code de l'action sociale et des familles*). The envelope bears the given names of the child and a remark as to whether the names were chosen by the mother, the child's sex, and the date, place and hour of birth (Art. L222-6 I *Code de l'action sociale et des familles*).

The wish of a mother to remain anonymous is comprehensively respected in French law, at least during her lifetime; her secret is only revealed if she changes her mind about her anonymity and explicitly declares so before the *Conseil national* (Art. L147-6 *Code de l'action sociale et des familles*). Even after her death will her decision will be respected, but only if she explicitly requests this. Nonetheless, if no personal details were provided, even an investigation through the *Conseil national* will come to nothing.

Consequently, in France, mothers are subject to very little coercion.

In addition, the personnel accompanying mothers in the context of anonymous births is also asked to independently collect and make available non-identifying information about the health of the child's parents, their origins and the reasons and circumstances that led to the child's entrustment to the state (Art. L147-5 II *Code de l'action sociale et des familles*). This does not put pressure on the mother. These pieces of information are made available to the child (Art. L147-6 V *Code de l'action sociale et des familles*) upon request (for details cf. Art. L147-2 *Code de l'action sociale et des familles*).

Data-collecting third parties are asked to acknowledge the purpose of the collection of these details: to safeguard the child's welfare. Negative judgments about the child's biological family and the child itself should be avoided.¹³⁰ Whether it is useful to confront the child with the shocking (and stigmatising) reality of being conceived by (incestuous) rape is questionable¹³¹ (if the mother mentioned this to, say, the midwife). The child may better comprehend the reasons that drove his or

¹²⁹ Likewise Schwedler, A., (fn. 128), 196.

¹³⁰ Bonnet, C., Kramer, E., Chabernaud, J.-L., (fn. 53), 36.

¹³¹ Bonnet, C., Kramer, E., Chabernaud, J.-L., (fn. 53), 36; Besson, S., (fn. 53), 147.



her mother to give birth anonymously. However, this goal can also be achieved by other means, such as by hinting at the mother's very difficult circumstances in life, and protect the child at the same time.

The French law gives the mother a reflection period of two months from the provisional declaration of the child to be a ward of the state (which occurs as soon as the social services draw up the corresponding protocol) and allows the mother to take back her child without any formalities at any time during this period (Art. L224-6 II *Code de l'action sociale et des familles*). An option to deny the child to the mother depending on the balance of interests is only available if the child is reclaimed at a later point in time (Art. L224-6 III *Code de l'action sociale et des familles*); the placement of the child into an adoptive family, however, always prevents a biological mother's later claim (Art. L224-6 III *Code de l'action sociale et des familles*, Art. 352 *Code civil*). The decision is subject to an appeal in a court of law (Art. L224-6 III *Code de l'action sociale et des familles*).

The French solution is thus somewhat more flexible than the German. It allows mother and child more time to build a relationship (if the mother is still undecided in this respect). It is therefore preferable. And SterniPark's model can be better achieved with this solution. In order to do so, either the provisional declaration of the child as a ward of the state must be delayed or the relationship-building process must be considered in balancing the interests in case of a later reclaiming of the child.

And what about the child's options of contact if the mother gave birth anonymously?

If a mother gives birth anonymously under French law, it must be ensured that – should the mother wish to contact the child and vice-versa – mother and child can get in touch. This is realised through the mother's option to provide or add to her personal details and the information about the birth at any later time. The child also has the option to check for any such information. For this purpose, France has founded the so called *Conseil national*, which manages biological parents' and children's requests for information (Art. L147-1 *Code de l'action sociale et des familles*). The *Conseil national* acts as an intermediary. All employees are subject to professional secrecy (Art. L147-10 *Code de l'action sociale et des familles*).

Children are only informed of requests from their biological parents or other biological relatives if they themselves request information about their biological relatives (Art. L147-3 II *Code de l'action sociale et des familles*). The mother, on the other hand, can be contacted by the *Conseil national*, even if she has not asked for information about the name or whereabouts of her child (Art. L147-5 I *Code de l'action sociale et des familles*). Clearly this is only possible if her basic personal details were recorded in the first place.

The question arises as to whether the mother's interests are such that she can only be contacted if she previously consented to such contact. That would certainly be the strongest kind of respect towards her. Even a mere request can throw a mother off balance. And she may perceive it as pressure if she knows before the birth that she may be contacted.

After all, the mere communication of a request, which only opens up opportunities without forcing them and which can only be understood as an offer, is not as intrusive as the German solution. This is because under German law the disclosure of the data of the mother may be enforced in certain circumstances. This is different under French law. Furthermore, in French law there is no duty to indicate any information. The mother can thus remain anonymous and completely avoid such requests.

That way, the French solution puts two individuals – mother and child – on nearly equal footing. Accordingly, it hesitates to pass judgement. The French law enables disclosure and contact. However, it respects the wishes of the individuals concerned to a very large extent.

The French solution can – in combination with accompanying facilities in line with the model of SterniPark and similar institutions – provide very effective help for pregnant women and their



children in need. But what if a child cannot handle his or her anonymous mother's refusal of motherhood? Or vice versa?

8. How to Handle the Refusal of Motherhood

If a child fails to accept his or her mother's refusal, free psychological help might help. This makes sense, and is – given the low numbers of those who demand information¹³² – financially manageable. In France, *les Centres Médico-psychologiques* (CMP) help and offer advice for free.

The – ambitious – goal of such assistance must be to strengthen the child and to free it from its victimhood. It should encourage the emancipation of children and lead them to a serene philosophy of life. Their personal happiness should not depend on the behaviour of their mother. They must learn to take responsibility for their happiness. Happiness is not taken away by an anonymous mother. The children themselves have control over it. In addition, it may help the children if they can acknowledge that their mothers did not abandon them despite their distress but instead gave them access to the love of adoptive parents – as a substitute for the love that they could not give them.¹³³

The same applies in the opposite case. If the child does not so wish, the anonymous mother can neither find out the child's name nor where he or she lives. Similarly, the mother should also be offered psychological help to help her find her own happiness regardless of the child's behaviour – should she require this help.

In France, psychological care and social assistance are available to women after childbirth, if they desire or accept it (Art. L222-6 *Code de l'action sociale et des familles*). But they can also claim free psychological care at a later date. Counselling and help are also available in Germany (§ 25 V SchKG). However, as the SterniPark model shows, in order to be effective the aid should only come from people who are very sensitive towards these women.

9. What About the Child's Other Relatives? A comparison of German and French law

As a rule, neither fathers that are not married to the mother nor any other relatives are informed of the birth. Therefore, they can neither substantiate nor exercise their rights. The law, however, will have to enable the execution of their rights – despite the risk that the anonymity of the mother might be compromised – but only under the condition that this is compatible with the child's welfare. There are cases where the mother chooses to give birth anonymously because the child's father or the mother's family are unable to cope with the pregnancy. On the other hand, a father's or other relatives' disruptive tendencies that prevent a mother from forming a relationship with her child must also be prevented.

In France, the *Cour d'Appel* of Angers has in its judgment of 26 January 2011 awarded grandparents the right to request the transfer of guardianship for their anonymously-born granddaughter. In France, that created a small sensation. This judgment and another (in which a father, who had recognized his child before birth, was ultimately given visitation rights, although the child – because of his anonymous birth – had been given into the care of foster parents, who were to

¹³² According to Prof. Dr. med. Roger Henrion, in France, only 1.5 percent of all children born anonymously investigate their identity, cf. Henrion, R., "L'accouchement sous X, peut-il encore exister?", *La Revue du Practicien* 2011 (61(7)), 896–897, cited by Bonnet, C., Kramer, E., Chabernaude, J.-L., (fn. 53), 35, cf. Henrion, R., (fn. 52), 731 (<http://www.academie-medecine.fr/bulletin/>).

¹³³ Bonnet, C., (fn. 29), 509.



adopt the child) gave rise to a change in the rules that govern the rights of fathers and other relatives. They are now as follows:

The father and other relatives that have declared an interest in the child to the *Service de l'aide sociale à l'enfance* before the declaration of the child as a *Pupille de l'État* (ward of the state), will be informed of the decision to declare the child a ward of the state (Art. L224-8 III *Code de l'action sociale et des familles*). If the claimants agree to take care of the child, an appeal against such a decision is admissible in a court of law, (Art. L224-8 II 3° *Code de l'action sociale et des familles*). The limitation period is 30 days and begins with the receipt of the declaration of the child as ward of the state. If the appeal succeeds, the claimant is granted the right to apply for guardianship or to obtain custody (Art. L224-8 V *Code de l'action sociale et des familles*). Otherwise, the court may award visitation rights so far as this is in the interest of the child.

German law regulates these issues as follows:

If the child's parents are not married, but the father issued a prenatal recognition statement (§ 1594 IV BGB) that was agreed to by the mother (§ 1595 BGB), or if paternity was established by a court (§ 1600 d BGB), the family court may award sole custody to the child's father, providing there is no prospect that the reason of suspension of the mother's parental rights will cease to exist and the allocation of sole custody to the father is in the child's interest (§ 1678 II BGB). In any case, he will have rights of access (§ 1684 I BGB); this is, however, not applicable to biological fathers that are not concurrently legal fathers (§ 1686a BGB). Whether grandparents and siblings have rights of access depends on whether there is a legal bond between them and the child and on whether access is in the interest of the child (§ 1685 BGB).

The family court will – if it becomes aware of the birth – order a guardianship (§ 1773 BGB)¹³⁴ only if a man's fatherhood could not be substantiated so that he is not entitled to custody, or if a father's custody is revoked or suspended (§ 1674 BGB). When selecting the guardian, the court will take into account the presumed will of the parents, the personal ties of the ward and the ward's family ties (§ 1779 II BGB); relatives of the ward will be heard during the selection process, if that is possible without significant delays or disproportionate costs (§ 1779 III S. 1 BGB). This means that grandparents or other relatives may be appointed as guardians.

In any event, the mother's right to anonymity remains among her personal rights, even if the father or other relatives take in the child or if they are granted visitation rights. The parties should therefore be informed of the mother's rights and asked to respect the mother's wishes as far as possible.

10. Conclusion

The law should resolve conflicts instead of making them worse. It therefore makes sense to look beyond coercion for ways to resolve conflicts.

Parties to a conflict should be put on an equal footing and any requested action should be voluntary; voluntariness makes actions valuable – for both the giving and the receiving party. The giver discovers the value of his gift; he earns appreciation and acknowledgment. And the receiver obtains a gift. The refusal to do something should not be sanctioned. Instead, dealing with unfulfilled wishes must be learned, either independently or by accepting help. Everyone is solely responsible for his or her own happiness. The law should only offer assistance and provide appropriate procedures.

Such a philosophy of non-violence can cause wonders:

¹³⁴ Cf. Veit, B., § 1674a BGB Para. 6, in H. G. Bamberger and H. Roth (eds.), *Beck'scher Online-Kommentar BGB* (München: C.H. Beck, 2015).



In the majority of cases of women in great need because of an unwanted pregnancy a decision was made to keep the child. If the pressure is taken away from them by means of an anonymous birth in a protected environment, those women do not later regret their decision. Only a very small percentage of all anonymously delivering women seem to choose to stay anonymous. Consequently, anonymous birth seems to be a valuable “time out” in most cases. And this seems to reduce neonaticide and child abandonment significantly – if continuously accompanied by publicity campaigns.

The confidential birth recently introduced in Germany, where the mother is required to provide her personal details and her identity is revealed to the child in certain circumstances, is only a half-hearted step in this direction. It fails to provide the women concerned with a break from reality, because they have to reveal their identity before the confidential birth. This creates pressure, not only because they know that they may be identified by their child in the future, but also because they may think that their data is also used in other contexts: e.g. for questions of naturalisation or to take away their other children. In addition, the rescue of a child by its mother is not enough to obtain respect and approval for her act of love: The mother will still have (albeit alleviated) duties towards her child. In my opinion, this legislation therefore misses its goal.

It is thus worthwhile to turn our gaze towards France and support, through governmental means, institutions such as SterniPark, which take in mothers without demanding consideration and create an environment friendly to the mother (and, therefore, the child also).¹³⁵ This is to allow hope for mothers and children in seemingly hopeless situations.

This seems, unfortunately, not to be the policy envisaged by the UN Committee on the Rights of the Child. However, if the UN Committee on the Rights of the Child accepted that its requirement that “all appropriate measures to fully enforce the child’s right to know his or her biological parents and siblings have to be taken and, therefore, all necessary measures for all information about parent(s) to be registered and filed have to be adopted”¹³⁶ could also encompass indirect measures, i.e. the creation of a benevolent and respectful environment for a highly distressed mother who wishes to give birth anonymously, it could reconsider its recommendation. Instead of requiring that State parties replace anonymous birth with confidential birth, the UN Committee could ask for the public promotion of anonymous birth and the creation of suitable conditions for mothers who wish to give birth anonymously. It could also trust in the power of the principle of non-coercion.

¹³⁵ It must of course be ensured that those institutions actually aspire to the aims and methods accredited here to the model of SterniPark and do not participate in baby trafficking and other illegal activities.

¹³⁶ See United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Concluding observations on the fifth periodic report of France adopted by the Committee at its seventy-first session (11-29 January 2016), 29 January 2016, CRC/C/FRA/CO/5, Civil rights and freedoms (Arts. 7, 8, and 13-17), Right to know and be cared for by parents: “33. The Committee reiterates its recommendations to take all appropriate measures to fully enforce the child’s right to know his/her biological parents and siblings and urges it to adopt the necessary measures for all information about parent(s) to be registered and filed, in order to allow the child to know, to the extent possible and at the appropriate time, his or her parents (CRC/C/FRA/CO/4, para. 44). The Committee also recommends that the State party consider removing the requirement of the biological mother’s consent to reveal her identity and to increase its efforts to address the root causes leading parents to choose to use confidential birth.”



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