

Legal Motherhood and Parental Responsibility

A Comparative Study on the Tensions between Scientific Knowledge, Social Reality and Personal Identity

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Abstract

For the past 15 to 20 years there has been intense discussion in many European countries how mothers in a crisis situation can be prevented from abandoning or even killing their new born babies. Baby-boxes have been installed in a number of countries and/or possibilities for anonymous birth have been discussed or introduced. The Committee on the Rights of the Child expressed concern over these developments and stated that both developments infringe on the child's right to know its origins. Both Germany and the Netherlands have taken steps to protect new mothers and their babies in crisis situations by introducing a form of secrecy surrounding the mother's identity. In Germany this has taken the form of a recently introduced law that keeps the birth and the identity of the mother confidential, in the Netherlands this has taken the form of a protocol drawn up by professionals which aims to keep the birth and the mother's identity secret. This article will compare and critically discuss these developments in Germany and the Netherlands.

Keywords: motherhood, child's right to identity, baby-box, secret birth, confidential birth.

A Introduction

For the past 15 to 20 years, there has been intense discussion in many European countries how mothers in a crisis situation can be prevented from abandoning or even killing their newborn babies.¹ Baby-boxes have been installed in a number of

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1 University of Nottingham UK, *Child Abandonment and its Prevention in Europe*, Nottingham 2012. Last consulted on 31-12-2014 at <<http://resourcecentre.savethechildren.se/library/child-abandonment-and-its-prevention-europe>>.

countries² and/or possibilities for anonymous birth have been discussed or introduced.³ The Committee on the Rights of the Child expressed concern over these developments and stated that both developments infringe on the child's right to know its origins.⁴ This article will critically discuss the legal steps taken in both Germany and the Netherlands to prevent abandonment and infanticide.

B Initial Situation: Baby-Boxes and Anonymous Birth

In both Germany and the Netherlands, media reports covering infants found dead initiated a cry-out for non-bureaucratic help for mothers and unwanted babies in the past decades. As a reaction, so-called 'baby-boxes' have been installed in several places in Germany since 2000.⁵ After lengthy debates, the Netherlands followed suit in the fall of 2014 with two privately initiated baby-boxes. These boxes provide a safe place for mothers to drop off their babies and then leave undetected. An alarm mechanism ensures that the child is found shortly after and is taken care of.⁶ In addition, around 130 hospitals in Germany are offering 'anonymous birth'.⁷ This offer addresses pregnant women who want to deliver their baby under medical care without stating their identity.⁸ The mother can give birth anonymously (and free of charge)⁹ and then leave the child at the hospital to be adopted.

The general public responds to baby-boxes and anonymous birth with widespread approval. This positive image comes from the assumption that these facili-

- 2 See the overview by the University of Nottingham UK 2012, pp. 4, 19 *et seq.* For information on countries outside Europe see J. Marshall, *Human Rights and Personal Identity*, Routledge 2014, p. 139.
- 3 See University of Nottingham UK 2012, pp. 20 *et seq.*
- 4 UN Committee on the Rights of the Child, *Concluding Observations*, Czech Republic, 17 June 2011, para 49.
- 5 In Germany, currently there are more than 90 baby-box locations, see the overview provided by SterniPark, available at <www.sternipark.de/fileadmin/user_upload/PDF/Babyklappenliste.pdf>.
- 6 Some institutions offer also a person-to-person handover of the child, see J. Coutinho & C. Krell, in Deutsches Jugendinstitut (Ed.), *Anonyme Geburt und Babyklappen in Deutschland – Fallzahlen, Angebote, Kontexte*, 2011, pp. 27, 78 and 81 *et seq.* (at least 11 institutions offered in 2010 an anonymous handover), available at <www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf>.
- 7 See German Ethics Council (*Deutscher Ethikrat*), *Anonymous Relinquishment of Infants: Tackling the Problem*, 2009, p. 13, available at <www.ethikrat.org/files/der_opinion_anonymous-relinquishment-of-infants.pdf>; see also Coutinho & Krell 2011, pp. 76 and 80 (ca. 77 hospitals in 2010); T. Helms, 'Die Einführung der sog. vertraulichen Geburt', *Zeitschrift für das gesamte Familienrecht* (FamRZ), Vol. 61, No. 8, 2014, pp. 609, 610 (ca. 80-100 hospitals in 2011).
- 8 See Coutinho & Krell 2011, pp. 24 *et seq.*
- 9 See Coutinho & Krell 2011, pp. 25, 113 *et seq.*; see also the critical remarks by A. Wolf, 'Über Konsequenzen aus den gescheiterten Versuchen, Babyklappen und "anonyme" Geburten durch Gesetz zu legalisieren', *Familie, Partnerschaft, Recht* (FPR), 2003, pp. 112 and 119 *et seq.*

ties save the lives of newborn babies who would otherwise be exposed or killed.¹⁰ However, since the beginning this proposition has been questioned. Critics of baby-boxes and anonymous birth argue that no proof exists that neonaticide or infanticide is actually being prevented.¹¹ No official record is available in Germany, but existing (non-official) data does not indicate any decrease of infanticide.¹² This is explained by pointing out that those offering help may not reach the women who would actually kill their child after giving birth.¹³ Neonaticide is seen as an act committed in the heat of emotional distress, caused by circumstances that are physically and psychically exceptional.¹⁴ Taking recourse to anonymous birthing requires contemplated actions which could hardly be expected from women acting in a psychosocial emergency.¹⁵

Alongside aforementioned doubts, fundamental legal issues arise.¹⁶ To be mentioned is German and Dutch law on personal status which requires notification of any birth including stating the name of the child's mother, thereby making anonymous birth illegal; the same holds true for dropping a child off at a baby-box.¹⁷ Additionally, as a matter of family law, the woman giving birth will be regarded as the legal mother,¹⁸ even if she stays anonymous.¹⁹ The legal status of motherhood cannot be given up unilaterally under German or Dutch law. This is possible exclusively during adoption procedures. The parental duties of care and maintenance of the child are directly attached to the legal status as mother.²⁰ A

- 10 See, e.g., the dissenting position statement of the German Ethics Council, 2009, p. 97 ("Since the possibility cannot be ruled out that the lives and health of children threatened with abandonment in extreme situations of distress may actually be saved by the provisions of facilities for anonymous infant relinquishment [...]").
- 11 See German Ethics Council, 2009, pp. 66 *et seq.*; R. Frank, 'Reformdiskussion um die Babyklappe', *Das Standesamt* (StAZ), Vol. 65, No. 10, 2012, pp. 289, 291 *et seq.*; C. Katzenmeier, 'Rechtsfragen der "Babyklappe" und der medizinisch assistierten "anonymen Geburt"', *FamRZ*, 2005, pp. 1134, 1137.
- 12 See the numbers presented by terre des hommes, available at <www.tdh.de/was-wir-tun/themen-a-z/babyklappe-und-anonyme-geburt/zahlen-und-fakten.html>; see also Coutinho & Krell, 2011, p. 41 (approximately 20-35 infanticides per year; however, the number of unreported cases is unknown).
- 13 This is one of the reasons the Dutch Child Care and Protection Board is opposed to installing baby-boxes. Statement issued by the Board on 20 August 2014, available at <www.kinderbescherming.nl/meer_nieuws/nieuwsberichten/archief-2014/2-de-raad-geen-voorzitter-van-vondelingenkamers-of-vondelingenluiken.aspx?cp=103&cs=34660>.
- 14 See German Ethics Council 2009, p. 22.
- 15 T. Höyneck, U. Zähringer & M. Behnsen, *Neonatizid, Expertise im Rahmen des Projekts "Anonyme Geburt und Babyklappen in Deutschland – Fallzahlen, Angebote, Kontexte"*, 2011, available at <www.dji.de/Projekt_Babyklappen/Berichte/Expertise_Neonatizid.pdf>, p. 63; Katzenmeier 2005, pp. 1134, 1135.
- 16 For detailed information on German Law, see Katzenmeier 2005, pp. 1134, 1135 *et seq.*; T. Rauscher, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, Sellier/de Gruyter 2011, preliminary note to sec. 1589-1600d BGB, Mn. 135a *et seq.*; K.-A. Schwarz, 'Rechtliche Aspekte von "Babyklappe" und "anonymer Geburt"', *StAZ*, 2003, pp. 33, 34 *et seq.*
- 17 See sec. 169 German Criminal Code; see also Frank 2012, pp. 289, 291 with further references.
- 18 Sec. 1591 German Civil Code; Dutch Civil Code art. 1:198 (1)(a).
- 19 (Germany) Frank 2012, pp. 289, 290; Katzenmeier 2005, pp. 1134, 1136; Rauscher 2011, preliminary note to sec. 1589-1600d BGB, Mn. 136.
- 20 See in particular sec. 1601 and 1626, 1631 German Civil Code.

woman who gives birth anonymously or leaves her child in a baby-box acts in breach of those duties; this may quite possibly give rise to criminal liability in both Germany²¹ and the Netherlands. Finally, the described approaches are highly questionable considering the constitutional right of the child to know his/her parentage. The German Constitutional Court as well as the Dutch Supreme Court consider the right to know one's genetic origin as part of the general law of personality.²² In both jurisdictions, this right is protected by the Basic Law (Germany) or Constitution (the Netherlands).²³

In addition to the mentioned legal concerns, deficiencies have been alleged recently in relation to facilities providing baby-boxes and anonymous birth. According to a study of the German Youth Institute, the whereabouts of 21.6% of the children found in baby-boxes and of 23% of anonymously born children could not be traced.²⁴

Notwithstanding the criticism, the German legislator did not prohibit anonymous birthing or baby-boxes,²⁵ nor did he provide statutory regulations for such facilities.²⁶ Rather the 'Act on Improvement of Assistance for Pregnant Women and on Confidential Birth'²⁷ which came into force on 1 May 2014 amended sec. 25 *et seq.* of the 'Act on Pregnancies in Conflict Situations'²⁸ providing for confidential birth in addition to the existing offers. The new provision intends to make medically attended childbirth possible while taking into account the women's

21 See sec. 170 para. 1 and 171 German Criminal Code; see also Frank 2012, pp. 289, 291; Rauscher 2011, preliminary note to sec. 1589-1600d BGB, Mn. 135a.

22 (Germany) German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), 31 January 1989, *Neue Juristische Wochenschrift* (NJW) 1989, pp. 891 *et seq.*; BVerfG, 6 May 1997, NJW 1997, pp. 1769 *et seq.* (The Netherlands) Dutch Supreme Court HR 15 April 1994, NJ 1994/608; see for more information R. Blauwhoff, *Foundational Facts, Relative Truths: A Comparative Study of Children's Rights to Know Their Genetic Origins*, Antwerp, Intersentia 2009, pp. 121-136. See also C. Forder, *The Legal Establishment of the Parent-Child Relationship: Constitutional Principles*, PhD-thesis Maastricht University, Maastricht 1995, p. 143, for similarities between the German and Dutch constitutional decisions on this issue.

23 See art. 2, para. 1, art. 1, para. 1, German Basic Law; art. 10, Dutch Constitution.

24 Coutinho & Krell 2011, p. 11.

25 See the statement of the Federal Government, Official Records of the Parliament (*Bundestagsdrucksache*) 17/13391, p. 6; see also the justification given by the federal government for the draft Act, Official Records of the Parliament 17/12814, p. 2.

26 There are only (non-mandatory) recommendations on minimum standards for baby-boxes developed by the German Association for Public and Private Welfare (*Deutscher Verein für öffentliche und private Fürsorge e.V.*), 'Empfehlungen des Deutschen Vereins zu den Mindeststandards von Babyklappen' (11 June 2013), available at <www.dji.de/fileadmin/user_upload/Projekt_Babyklappen/Berichte/Abschlussbericht_Anonyme_Geburt_und_Babyklappen.pdf>, <www.deutscherverein.de/05-empfehlungen/empfehlungen_archiv/2013/DV-4-13-Mindeststandards-von-Babyklappen>, and the German Institute for Youth Human Services and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht (DIJuF) e.V.*), 'Hinweise des Deutschen Instituts für Jugendhilfe und Familienrecht e.V. (DIJuF) vom 31. Juli 2013 zu den rechtlichen Mindestanforderungen für den Betrieb einer Babyklappe', available at <www.dijuf.de>. However, there is no evidence that these recommendations are generally observed.

27 Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt, *Federal Law Gazette (Bundesgesetzblatt)* Part I, Vol. 53, 3 September 2013, pp. 3458-3462.

28 *Schwangerenkonfliktgesetz* (hereinafter 'SchKG').

need for privacy. The aim is to ensure legal certainty for all those concerned and at the same time to infringe the interests of the child and the biological father as little as possible.²⁹ In this way, the new act tries to give women in a childbirth-related situation of distress a convincing alternative to the anonymous relinquishment of infants and aims to prevent infanticide and abandonment.³⁰

In the Netherlands, the discussion on the need for and legality of baby-boxes intensified in 2011 when a private initiative announced a baby-box would be opened in Dordrecht.³¹ The discussion focused, on the one hand, on the criminal liability for abandoning newborn children and facilitating abandonment by opening a baby-box³² and, on the other hand, on the question whether baby-boxes are the right answer to abandonment and infanticide by new mothers in crisis.³³ Meanwhile, the organizations involved in the procedure surrounding adoption have developed a procedure for women to give birth secretly in a safe environment. This procedure is laid down in a protocol which is currently under revision.³⁴ The announced baby-box was only opened after the *Raad voor Strafrechtstoepassing en Jeugdbescherming*³⁵ advised the government to focus energy on prevention rather than prosecution in June 2014.³⁶ The discussion about baby-boxes, abandonment, and possible legislative action is still ongoing, and in this context the German experience is looked at with interest as a possible example for legislation.

C New Concepts in Germany and the Netherlands

I Confidential Birth as Alternative to Baby-Boxes and Anonymous Birth in Germany
According to a report on 'Anonymous relinquishment of infants' published by the German Ethics Council in 2009, there are indications that a significant number of women give up their anonymity after qualified counselling.³⁷ The German legislator has also recognized the importance of professional and easily accessible

29 See Official Records of the Parliament 17/12814, p. 9.

30 See Official Records of the Parliament 17/12814, p. 11.

31 *Algemeen Dagblad*, 23 September 2011, Vondelingenluik beter dan baby dumpen.

32 Abandoning a baby or young child (art. 256 Dutch Criminal Code) is a crime punishable with up to 4 years imprisonment or an equivalent fine; a mother who abandons her baby for fear of the birth being discovered will only be punishable with up to 2 years of imprisonment or an equivalent fine (art. 259 Dutch Criminal Code).

33 See for instance M. de Jong-de Kruijf & M. Vonk, 'Het vondelingenluikje: sympathiek bedoeld maar ontoereikend voor moeder en kind', *Ars Aequi*, February 2013, pp. 110-113 and F. Juffer, 'Geen reden voor een vondelingenluik in Nederland', *Mobiel pleegzorg*, 25 April 2013, <www.mobiel-pleegzorg.nl/2013/04/geen-enkele-reden-voor-een-vondelingenluik-in-nederland/>.

34 Protocol Afstand ter adoptie (2010).

35 Council for the administration of criminal justice and the protection of juveniles. This Council is an independent body established by law. The Council has two tasks: giving advice and administering justice. <www.rsj.nl/english/>.

36 Raad voor strafrechtstoepassing en jeugdbescherming, *Advies vondelingenkamer en babyhuis*, 30 June 2014.

37 German Ethics Council 2009, p. 28 ("Experience showed [...] that three out of four women gave up their anonymity during the course of counselling").

advice.³⁸ For this reason, comprehensive counselling is considered crucial in view of the new concept of confidential birth.

1 *Counselling in Relation to Confidential Birth*

It is therefore foreseen that the mother who wishes to give birth confidentially will first receive comprehensive (anonymous) counselling at a counselling centre.³⁹ When a pregnant woman contacts such a centre, the *Act on Pregnancies in Conflict Situations* requires advice no matter what the final decision of the women may be.⁴⁰ During this stage, solutions should be discussed which allow the pregnant woman to reveal her identity or to live with the child.⁴¹ If the woman insists on her decision to keep her identity secret, she will be informed about the possibility and consequences of confidential birth.⁴²

The counselling is primarily intended to facilitate a medically supervised childbirth.⁴³ Furthermore, the counsellor will provide information regarding the rights of the child, especially the importance of the knowledge about one's origin for the development and self-conception of the child.⁴⁴ Explicitly included into the issues to be discussed are the rights of the father.⁴⁵ This is intended to encourage the pregnant woman to provide as much information as possible to the child regarding his/her biological origin and regarding the reasons for giving the child away.⁴⁶

2 *Overview of the German Procedure of Confidential Birth*

When the pregnant woman decides to give birth confidentially, she chooses a pseudonym (first and family name) to be used during the proceedings of confidential birth and she chooses one or more given names for the child.⁴⁷ The counselling centre then registers the pregnant woman at a maternity clinic or with a midwife of her choice using the pseudonym (and pointing out that this will be a confidential birth).⁴⁸ The expenses of childbirth and any medical attention to the mother before and after giving birth are covered by the federal state.⁴⁹ When the child is born, the hospital administration or the midwife will inform the counselling centre of the child's date and place of birth.⁵⁰ Also the registry office has to be notified of the birth using the pseudonym of the mother and the names she chose for her child.⁵¹ The birth will subsequently be entered in the birth register.

38 See Official Records of the Parliament 17/12814, p. 9.

39 See sec. 3 and 8 SchKG.

40 See sec. 2 para. 4 SchKG.

41 See sec. 2 para. 4 sentence 2 SchKG.

42 See sec. 25 SchKG.

43 See sec. 25 para. 2 sentence 1 SchKG.

44 See sec. 25 para. 2 sentence 2 No. 2 SchKG.

45 See sec. 25 para. 2 sentence 2 No. 3 SchKG.

46 See sec. 25 para. 3 SchKG.

47 See sec. 26 para. 1 SchKG.

48 See sec. 26 para. 4 SchKG.

49 See sec. 34 para. 1 SchKG.

50 See sec. 26 para. 6 SchKG.

51 See sec. 18 para. 2, sec. 19 and 20 Personal Statute Law (*Personenstandsgesetz*).

The competent administrative authority will determine a family name and any given name of the child;⁵² however, the given names of the child can only differ from the mother's choices if the welfare of the child is endangered.⁵³ No information about the parents will be entered into the register;⁵⁴ consequently the pseudonym of the mother will also not be registered.⁵⁵

If the mother opts for confidential birth, her parental authority will be suspended.⁵⁶ Guardianship will be ordered for the child⁵⁷ – unless the father (if known in an exceptional case) is entitled to parental authority.⁵⁸ However, the parental authority of the mother will revive as soon as the family court declares that the mother has submitted all necessary personal details for the birth register and has thus relinquished her anonymity.⁵⁹ The guardianship will end at this point,⁶⁰ unless the court suspends the parental care of the mother because the welfare of the child would be endangered.⁶¹

If the mother does not wish to relinquish her anonymity, the child will usually be placed for adoption. In this case, the mother's consent is not required for the adoption procedure. In a case of confidential birth, the place of residence of the mother is presumed to be permanently unknown until she provides the family court with all necessary personal details for the birth register.⁶² As soon as the adoption of the child is completed, the relationship to the birth mother will cease to exist.⁶³ However, court proceedings regarding an adoption will usually be preceded by a foster period of approximately one year.⁶⁴ During this time, the mother may still reclaim her child – provided the welfare of the child is not endangered.⁶⁵

3 *The Child's Right to Know His/Her Parentage in Germany*

The right to know one's parentage has received the special attention of the legislator. To protect the rights of the child, the counselling centre has to make a record of his/her origin. It must include the (real) name of the mother, her date of

52 See sec. 21 para. 2a sentence 2 Personal Statute Law.

53 See Official Records of the Parliament 17/12814, p. 16.

54 See sec. 21 para. 2a sentence 1 Personal Statute Law.

55 Helms 2014, pp. 609, 612.

56 See sec. 1674a sentence 1 German Civil Code.

57 See sec. 1773 para. 1 German Civil Code.

58 B. Veit, in H.G. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, C.H. Beck 1.11.2014, sec. 1674a BGB, Mn. 6; see also Official Records of the Parliament 17/12814, p. 16.

59 See sec. 1674a sentence 2 German Civil Code.

60 See sec. 1882, 1773 para. 1 German Civil Code.

61 See sec. 1666 German Civil Code; see also Helms 2014, pp. 609, 613.

62 See sec. 1747 para. 4 sentence 2 German Civil Code.

63 See sec. 1755 German Civil Code.

64 See sec. 1744 German Civil Code. A foster period of at least one year is recommended by the Federal Work Group on State Youth Welfare Offices (*Bundesarbeitsgemeinschaft der Landesjugendämter*), *Empfehlungen zur Adoptionsvermittlung*, 6th edn, 2009, No. 7.5 para. 2, available at <www.bagljae.de/empfehlungen/index.php>; see also H.-U. Maurer, in F.J. Säcker & R. Rixecker (Eds.), *Münchener Kommentar zum BGB*, 6th edn, C.H. Beck 2012, sec. 1744 BGB, Mn. 11.

65 See Official Records of the Parliament 17/12814, pp. 10, 17, 21.

birth and her address.⁶⁶ The record has to be enclosed in a sealed envelope, which must be labelled in order to allow for clear identification of the mother and child.⁶⁷ It then must be sent to the Federal Office of Family Affairs and Civil Society Functions⁶⁸ for safekeeping.⁶⁹ A copy of the record will not be prepared, which means the document itself is the only source of information for the child. Consequently, if the document becomes lost, the child has no possibility to learn the identity of his/her mother.⁷⁰

Attaining the age of 16 years, the child is entitled to access the record and thereby learn the identity of his/her birth mother.⁷¹ However, from the time her child becomes 15 years old, the mother may object to any disclosure of her identity.⁷² In this case, the child's initial request for access to the record will be denied.⁷³ The child then has the possibility to enforce the right of access by court proceedings.⁷⁴ In this case, the family court will assess whether the interest of the biological mother to keep her identity secret outweighs the interest of the child to know his/her parentage. On behalf of the mother, any danger for physical integrity, life, personal liberty, health, or similar interests requiring protection must be considered.⁷⁵ If the court dismisses the application, the earliest date for any further application by the child will be three years after the preceding decision became legally effective.⁷⁶

II *Secret Birth as Alternative to Baby-Boxes and Anonymous Birth in the Netherlands*

1 *Information and Support in the Context of Secret Birth in the Netherlands*

FIOM⁷⁷ (or SIRIZ)⁷⁸ provides information and support to women (and their partners) who have indicated that they intend to give up the baby for adoption after birth. FIOM provides emotional and practical support during the decision-making process, the pregnancy, the adoption process, and the period after the adoption. FIOM discusses options surrounding the birth and the position of the biological father with the mother.

66 See sec. 26 para. 2 SchKG.

67 See sec. 26 para. 3 SchKG.

68 *Bundesamt für Familie und zivilgesellschaftliche Aufgaben.*

69 See sec. 27 SchKG.

70 See the critical remark by M. Berkl, 'Das Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt – unter besonderer Berücksichtigung der personenstandsrechtlichen Konsequenzen', *StAZ*, 2014, pp. 65, 72 (footnote 62).

71 See sec. 31 para. 1 SchKG.

72 See sec. 31 para. 2 SchKG.

73 See sec. 31 para. 3 SchKG.

74 See sec. 32 SchKG.

75 See sec. 32 para. 1 sentence 2 SchKG.

76 See sec. 32 para. 5 SchKG.

77 FIOM is an organization that helps individuals in case of unwanted pregnancies and questions regarding a person's genetic and biological origins. See <<https://fiom.nl/>>.

78 SIRIZ provides support and counselling to pregnant women and young mothers from a religious perspective: <www.siriz.nl/>.

2 *Secret Birth in the Netherlands*

If a pregnant woman has important reasons to conceal the fact that she is about to give birth to a child from her environment, she may opt to give birth to her child in secret. Giving birth in secret is not regulated in the Dutch Civil Code but is a procedure developed in practice by the professional parties involved, such as the foundation FIOM, the Child Care and Protection Board, the Certified Organizations entrusted with the implementation of youth care and protection measures, and the judiciary. This means that regulations concerning legal parenthood, parental responsibility, child maintenance and adoption apply as they normally would in case a mother indicates she means to give up her baby for adoption after birth. Moreover, she will be registered as the child's mother on the birth certificate. The difference is that all the organizations and professionals involved (including hospitals, health-care workers and the Registry of Birth, Deaths, Marriages and Registered Partnerships) strive to keep the birth of the child secret from the mother's environment. The procedure that is followed in case a pregnant woman indicates that she wants to give up her child for adoption after birth is laid down in a protocol.⁷⁹ This protocol also contains a course of action in case a mother wants to give birth in secret. Secrecy can, however, not be guaranteed given the number of professionals and organizations involved in the care surrounding the birth of the child and the procedure surrounding relinquishment and adoption.

Measures to ensure secrecy include the possibility for the birth mother to have all communication with regard to the baby take place through FIOM,⁸⁰ so she will receive no visits, mails or phone calls at her own address regarding antenatal care or the adoption procedure. Furthermore, a notice will be attached to the child's birth certificate that it concerns a secret birth. The birth mother will be the child's legal mother in accordance with the Dutch Civil Code,⁸¹ and she will hold parental responsibility.⁸² However, after the birth, the Child Care and Protection Board will file an application for temporary custody of the child to be attributed to the Certified Organization, which will temporarily relieve the mother of her responsibility to care for the child. The child will be placed in a neutral foster family for a period of three months, to give the birth mother time to (re)consider her decision. If the birth mother persists in giving up her child after this three-month period, the baby will be placed with the prospective adoptive parents and the Child Care and Protection Board will file an application to terminate the mother's parental responsibilities.⁸³ The responsibility for the child's care and upbringing (guardianship) will then be attributed to the Certified Organization or to the prospective adoptive parents. Once the adoptive parents have cared for the child for one year, they can apply for an adoption order.⁸⁴ The birth

79 Protocol Afstand ter adoptie (2010).

80 FIOM receives state subsidy to provide these services to the public.

81 Dutch Civil Code art. 1:198(1)(a).

82 Dutch Civil Code art. 1:198(1)(a).

83 Dutch Civil Code art. 1:253b(1) (unmarried mother), art. 1:251(1) married mother and art. 1:253(1) aa/sa birth mother in a registered partnership.

84 Dutch Civil Code art. 1:228(1)(f).

mother will be the child's legal mother until the adoption order becomes final and will in principle remain liable for child maintenance.⁸⁵ However, prospective adoptive parents need to agree before they become eligible for adoption that they will take on all the costs for the child's care during the period prior to the adoption.⁸⁶ Once the adoption order is final, the names of the adoptive parents will be added to the birth certificate.⁸⁷ The parties registered on the birth certificate have the right to file for a copy of the certificate; this naturally includes the adoptive parents and the child once it has reached the age of 16.

3 *The Child's Right to Know His/Her Parentage in the Netherlands*

The Dutch Supreme Court has firmly established the child's right to know his/her parentage in its case law. This right is very strong but not absolute, which means that under circumstances the right of the biological parent to privacy may prevail.⁸⁸ The protocol does not infringe on this right, because the birth mother is named on the birth certificate. There are concerns about the position of the biological father and the options to obtain and secure information about his identity for the child in case of relinquishment and adoption. Much depends on the mother's willingness to supply this information voluntarily during the adoption process. If she refuses to supply this information, the child may in time force the mother to reveal the biological father's identity.⁸⁹

III *Critical Remarks*

1 *Coexisting Concepts*

a. *Baby-Box, Anonymous Birth and Confidential Birth: Coexisting Concepts in Germany*

An initial problem of the new German act seems to be its limited scope: The act only regulates the procedure of confidential birth; the existing concepts of 'anonymous birth', 'baby-boxes' and 'anonymous handover' are not explicitly prohibited nor is any legal framework created for such facilities. As a result, several concepts providing help to women in distress will coexist in a legally disputable state.⁹⁰ In view of this situation, the question has already been raised whether *confidential* birth will actually prevail over *anonymous* birth and baby-boxes. Considering the state of physical and psychological emergency in which those women are, it remains questionable whether they will engage in a bureaucratic procedure, which involves several public authorities, while the available alternatives are a

85 Dutch Civil Code art. 1:392(1)(a).

86 Protocol Afstand ter adoptie (2010) p. 8.

87 Official information brochure on adoption published by the ministry of justice: *Een kind adopteren* p. 18. <http://issuu.com/adoptievoorzieningen/docs/een_kind_adopteren_2013> (last consulted 31 December 2014).

88 Dutch Supreme Court HR 15 April 1994, *NJ* 1994/608.

89 Dutch Supreme Court HR 3 January 1997, *NJ* 1997, 451.

90 See Helms 2014, pp. 609, 614.

rather uncomplicated anonymous birth or a baby-box to discreetly drop off the child.⁹¹

Additionally, the mother has to expect her identity being revealed eventually even if she desires secrecy under any circumstances.⁹² The child's right to know his/her parentage is highly valued in Germany.⁹³ Though the child's right of personality is limited by the mother's competing right, it can be assumed that the child's interests will take precedence in many cases over the birth mother's wishes to remain permanently anonymous. This is inherent in the wording of the statute: Sec. 32 SchKG lists as determining factors to be taken into consideration on behalf of the mother any danger for "physical integrity, life, personal liberty, health or similar interests requiring protection". Further, any anticipated danger must 'outweigh' the child's interest to know his/her parentage. As a result, strict requirements have to be met to retain permanent anonymity for the mother. Thus, having obtained extensive information about the consequences of *confidential* childbirth, a pregnant woman might at last prefer to give birth *anonymously*.

b. Baby-Box and Secret Birth: Coexisting Concepts in the Netherlands

New mothers in crisis currently have two options in the Netherlands: to travel to one of the baby-boxes to abandon the baby or to contact an organization like FIOM or SIRIZ for help and guidance concerning secret birth and adoption. It seems at present unclear whether legal action will be taken against the baby-box initiative and the women who make use of one of the baby-boxes. It is also unclear whether the number of abandoned and murdered newborn babies will decrease as a result of these two options. Furthermore, in terms of the rights of a child to know his/her origins, the baby-box is problematic, since a baby can be left anonymously and thus is never able to trace its birth mother or biological father. The problem with secret birth is found in the fact that secrecy cannot be guaranteed, which may induce pregnant women in extreme distress to forgo this possibility and abandon or even murder a newborn child.

As was mentioned earlier, secret birth is not anonymous and the name of the birth mother will be on the child's original birth certificate. After the adoption becomes final, the adoptive parents will be added as the legal parents. This means that it will not be particularly difficult for the child to uncover the identity of the birth mother. Whether the child will be able to uncover the identity of the biological father will depend on the father's legal status at the time of the child's birth (is he registered on the original birth certificate as the child's father?). If the biological father had no legal status, much will depend on the information provided by the mother about the biological father during the adoption process. This information will be stored in the child's adoption file, which will in principle be accessible to the child, unless the birth mother proves that her interests in preventing

91 Berkl 2014, pp. 65, 72; K. Dahm, in D. Kaiser *et al.* (Eds.), *NomosKommentar BGB Familienrecht*, Nomos, 3rd edn, 2014, preliminary note to sec. 1741-1772 BGB, Mn. 45; Helms 2014, pp. 609, 614.

92 Dahm, in D. Kaiser *et al.* (Eds.), *NomosKommentar BGB Familienrecht*, preliminary note to sec. 1741-1772 BGB, Mn. 45; *see also* Berkl 2014, pp. 65, 72.

93 *See* Katzenmeier 2005, pp. 1134, 1136 *et seq.*; Schwarz 2003, pp. 33, 36 *et seq.*

access by the child to information in the file strongly outweigh the child's interests.⁹⁴

For children born through artificial insemination, a Donor data register has been in place since 2004.⁹⁵ The clinic or professional providing the reproduction service is obliged to register the identity and other relevant information about the donor in the Donor data register. A recent evaluation of this new regulation shows that there was confusion among practitioners about the obligation to provide donor data to the Donor data register, as a result of which some practitioners did not provide the relevant data to the register.⁹⁶ Information provided by sperm banks to a FIOM donor database prior to the implementation of the Donor data Act in 2004 turned out to be incorrect in a number of cases after DNA testing.⁹⁷

2 *The Rights of the Father*

a. *The Rights of the Child's (Legal or Biological) Father in Germany*
Repeated academic criticism in Germany suggests the rights of the father are insufficiently taken into consideration.⁹⁸ However, the comments provided with the bill attempt to mitigate such concerns. It is pointed out that while the parental custody of the mother is suspended, this does not infringe the father's parental authority, and as soon as he learns about the pregnancy the father can exercise his rights.⁹⁹ Also, even though the mother is not required to consent to adoption procedures, the father's consent remains an unchanged requirement.¹⁰⁰

However, to exercise his rights, the biological father must first of all also be the legal father. This will be the case under exceptional circumstances only.¹⁰¹ In general, the father will be unable to exercise his rights because he is unaware of the pregnancy.¹⁰²

The weak legal status of the biological father is also problematic from the child's point of view: Although the mother will be made aware of the particular

94 Dutch Supreme Court HR 15 April 1994, NJ 1994/608.

95 P.M. Janssens, A.H.M. Simons, R.J. van Kooij, E. Blokzijl & G.A.J. Dunselman, 'A New Dutch Law on the Provision of Identifying Information of Donors to Offspring: Background, Content and Impact', *Human Reproduction*, April 2006, Vol. 21, No. 4, pp. 852-856.

96 Winter *et al.*, 'Evaluatie Embryowet en Wet Donorgegevens kunstmatige bevruchting', 2012, *ZonMw*, pp. 247-248.

97 <www.blikopnieuws.nl/2014/spermabanken-verstreken-onjuiste-donorgegevens>.

98 Y. Döll, in H.P. Westermann, B. Grunewald & G. Maier-Reimer (Eds.), *Erman – Bürgerliches Gesetzbuch*, Dr. Otto Schmidt, 14th edn, 2014, sec. 1674a BGB, Mn. 2; I. Götz, in Palandt, C.B. Beck, 74th edn, 2015, sec. 1674a BGB, Mn. 4; Berkl 2014, pp. 65, 72 *et seq.*; See also Veit, in H.G. Bamberger and H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, sec. 1674a BGB, Mn. 5; Helms, FamRZ, 2014, pp. 609, 614; for a different view, see Dahm, in D. Kaiser *et al.* (Eds.), *NomosKommentar BGB Familienrecht*, preliminary note to sec. 1741-1772 BGB, Mn. 47.

99 Official Records of the Parliament 17/12814, p. 16.

100 Official Records of the Parliament 17/12814, p. 18.

101 See the examples given by Veit, in H.G. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, sec. 1674a BGB, Mn. 4.

102 This is supposed also by the legislator to be the regular case *in praxi*, see Official Records of the Parliament 17/ 13391, p. 6.

importance to know one's parentage regarding mother *and father*, she is not required to give any details about the identity of the father. The child's only remaining resource will be, after discovering the identity of his/her mother, to request information about the father from her.

However, if the mother does provide information about the father voluntarily, this will not be included in the record of origin but will be handed to the adoption agency, which has to include the information into the adoption file.¹⁰³ If no adoption is made, any information will be forwarded to the Federal Office of Family Affairs and Civil Society Functions.¹⁰⁴ The child can obtain this information by his/her right to access in accordance with sec. 9b para. 2 AdVerMiG or through a corresponding right against the Federal Office of Family Affairs and Civil Society Functions.¹⁰⁵

b. What Does Secret Birth Mean for the Child's Biological Father in the Netherlands?

The rights of the biological father will depend on his legal status and his involvement in the mother's life prior to the child's birth. If he is married to or in a registered partnership with the child's birth mother, he will be a legal parent with parental responsibility from the moment of the child's birth.¹⁰⁶ His parental responsibility will need to be terminated before adoption can take place.¹⁰⁷ Moreover, he must consent to the adoption of the child by the prospective adoptive parents.¹⁰⁸ The latter is also true for the legal father without parental responsibility and the biological father who has no legal link with the child but developed family life with the child or the birth mother prior to the birth of the child.¹⁰⁹ In order to give the biological father the opportunity to realize this right in case the birth mother means to give up her child, it is important to acquire information about the child's biological father from the birth mother. In particular, in case the mother wants to keep the birth secret, for instance because the child was conceived through incest, rape or extramarital sex, this may be very complicated. Furthermore, the court that resides over the adoption procedure has to ascertain that the child has nothing further to expect from his/her parents in their role as parents, which requires the court to have some information about the (possible) biological father of the child and his legal status.¹¹⁰

103 See sec. 26 para. 8 SchKG.

104 For this opinion see already Helms 2009, pp. 609, 613.

105 See Official Records of the Parliament 17/12814, p. 19.

106 Dutch Civil Code art. 1:251(1) or 1:253aa(1).

107 Dutch Civil Code art. 1:228(1)(g).

108 Dutch Civil Code art. 1:228(1)(d).

109 Dutch Supreme Court HR 24 January 2003, NJ 2003/386.

110 Dutch Civil Code art. 1:227(3).

3 *The Legal Position of the Birth Mother*

a. *The Legal Position of the Birth Mother in Germany*

Regarding the mother, it needs to be stated that giving birth confidentially does not influence the legal status of motherhood. The mother is the woman giving birth, and giving birth confidentially provides no exception.¹¹¹ This corresponds with the fact that the mother's parental authority is not completely terminated until an adoption has actually been completed.¹¹² Also the mother's right of contact with the child will remain unaffected by a confidential birth; as long as the birth mother remains a legal parent, she retains her right of contact with her child.¹¹³

Early in the discussion about confidential birth, the request emerged to indemnify the mother against any financial burden including the maintenance obligation.¹¹⁴ However, the legislator did not meet this request. The resulting question is whether the mother is liable to pay maintenance until an adoption eventually becomes effective.¹¹⁵ As the mother remains a relative of the child, a claim for maintenance could quite possibly arise.¹¹⁶ This could lead to a substantial financial risk for the mother if the child cannot be placed for adoption – for example as the result of some disability. That risk becomes viable as soon as the child learns about the identity of his/her mother.

Last but not least, if the child is not adopted, he or she will be one of the heirs after his/her mother's death,¹¹⁷ and if the mother disinherits her confidentially born child, he or she will have a claim to a compulsory portion of the estate against the heir.¹¹⁸

b. *The Legal Position of the Birth Mother in the Netherlands*

Secret birth has no influence on the legal status of the birth mother. She will be the legal mother of the child and will be on the birth certificate. This means that as long as the legal ties between mother and child (parental responsibility and legal parenthood) have not been severed, she will bear at least some responsibility for the child. Moreover, as long as she is the child's legal parent, the child will

111 German Federal Court of Justice 10 December 2014 (Case No. XII ZB 463/13), NJW 2015, pp. 479, 483 (Mn. 50); Veit, in H.G. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, sec. 1674a BGB, Mn. 3.

112 See sec. 1674a sentence 1 Civil Code.

113 See sec. 1684 para. 1 German Civil Code; see also Veit, in H.G. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, sec. 1674a BGB, Mn. 3.2; for a different view, see A. Schwedler, 'Die vertrauliche Geburt – Ein Meilenstein für Schwangere in Not?', *Neue Zeitschrift für Familienrecht* (NZFam), 2014, pp. 193, 195.

114 R. Frank & T. Helms, 'Rechtliche Aspekte der anonymen Kindesabgabe in Deutschland und Frankreich', *FamRZ*, 2001, pp. 1340, 1348.

115 However, during the foster period prior to the adoption the foster parents are primarily liable to pay maintenance, see sec. 1751 para. 4 German Civil Code.

116 See sec. 1601 German Civil Code.

117 See sec. 1924 German Civil Code.

118 See sec. 2303 para. 1 German Civil Code.

inherit from her if she dies without a will.¹¹⁹ If she dies with a will in which the child is disinherited, the child may claim a compulsory portion of the estate.¹²⁰

D Conclusion

Both in Germany and in the Netherlands, pregnant women can avail themselves of a number of options if they want to keep their environment from discovering that they have given birth to a child. Competing models are the anonymous relinquishment of infants and confidential birth. While the former alternative is just being tolerated in both jurisdictions, Germany has recently taken the step to regulate the latter. The German law regulating confidential birth first of all provides a safe legal framework. It guarantees medical care during birth and thus protects the health of mother and child. In addition, it attempts a compromise between the interests of the mother and the interest of the child. The law does not provide the possibility for the mother to unilaterally terminate legal motherhood. The mother giving birth will be the legal mother until an adoption is completed. The Netherlands tries to achieve more or less the same result without formal regulation and thus without formal safeguards for keeping the mother's identity secret. The German law has been discussed, but the Dutch Secretary of State for Justice recently stated in a letter to parliament that he prefers the current Dutch protocol to the German law, because the child's right to know its origins are better safeguarded under the protocol.¹²¹ On the basis of the discussion in this article, we argue that if the aim of policy is to protect the mother by keeping the birth and her identity confidential – with the aim to prevent abandonment or infanticide – the policy should guarantee that the birth and the mother's identity are confidential. The Dutch protocol does not and cannot guarantee secrecy. The argument that this policy is preferable because it is more in line with the child's right to know its origins is a valid one, but this right can also be guaranteed by registering the mother's (and possibly the father's) identity in a Register that is accessible to

119 Dutch Civil Code 4:10(1)(a).

120 Dutch Civil Code 4:63.

121 Letter of 1 September 2014: <www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/09/02/reactie-op-adviesrapport-rsj-over-vondelingenkamer-en-babyhuis.html>.

the child at a certain age.¹²² The German experience, including the criticisms discussed and the problems encountered in the early days after implementation of the law, is very relevant here. A number of issues discussed, such as the consequences for the child if the document containing information about the birth mother is lost, however, should be addressed.

Time will tell whether pregnant women in crisis will accept confidential or secret birth as a viable alternative for anonymous birth or abandonment. It is interesting to note in this context that in the first six months after the introduction of the new act in Germany, 45 records of descent have been reported to the Federal Office of Family Affairs and Civil Society Functions.¹²³ Unfortunately, there is no information available regarding the motives for choosing confidential birth or whether any of the children concerned would have been killed or abandoned without the possibility of confidential birth. While the law primarily targets women who want to hide pregnancy and motherhood from their social surroundings,¹²⁴ it cannot be excluded that confidential birth is used for other purposes,¹²⁵ e.g. getting rid of unwanted (possibly handicapped) children in a simple (and legal) way.

In order to judge the success of the introduction of confidential birth in Germany, the Federal Government is obliged to evaluate the effectiveness of the law after three years.¹²⁶ Moreover, the effect of confidential birth on other (ongoing) facilities for anonymous relinquishment of infants should be evaluated.¹²⁷ The legal and actual questions that arise in this context require action by the legislator – the sooner the better. This holds true for Germany as well as the Netherlands.

122 This could be a register akin to the Donor data register. The age of the child is a relevant point of discussion. The age for access to the Donor data register for person-identifying information about the donor is 16 in the Netherlands. There may be valid arguments grounded in the Convention on the Rights of the Child to lower this age to 14 or 12. In the German literature on the new act regulating confidential birth, there are some concerns that the minimum age limit of 16 is too high; see Dahm, in D. Kaiser *et al.* (Eds.), *NomosKommentar BGB Familienrecht*, preliminary note to sec. 1741-1772 BGB, Mn. 46; Helms 2014, pp. 609, 613; Berkl 2014, pp. 65, 68 (footnote 36). It is proposed to lower the age of the child to at least 14 years, Dahm, *loc. cit.*; the German Ethics Council argued to keep the identity of the mother confidential for only one year, German Ethics Council 2009, pp. 92 *et seq.* This view is supported by a recent decision of the German Federal Court of Justice. In its ruling of 28 January 2015 (Case No. XII ZR 201/13), the Court decided that a child conceived as a result of heterologous artificial insemination has the right to learn about the identity of the anonymous sperm donor against the reproductive clinic. The crucial point is that the interest of the child to know his/her father's identity prevails over the interests of the reproductive clinic and of the sperm donor to prevent disclosure. The court ruled that a minimum age of the child is not necessary for requesting the disclosure of the sperm donor's identity. The decision is available at: <www.bundesgerichtshof.de>.

123 See the press information from 29 October 2014 by the Federal Ministry for Family, Senior Citizens, Women and Youth (*Bundesministeriums für Familie, Senioren, Frauen und Jugend*), available at <www.bmfsfj.de/BMFSFJ/Presse/pressemitteilungen,did=210432.html>.

124 See Official Records of the Parliament 17/12814, p. 9.

125 See also Helms 2014, pp. 609, 610.

126 See Art. 8 of the Act to Strengthen the Assistance for Pregnant Women and to Regulate Confidentiality of Childbirth.

127 Official Records of the Parliament 17/12814, p. 24.