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## Mechanisms adopted in curbing unsafe infant abandonment: A comparison between Namibia and South Africa

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**Summary:** *This article looks at the development of 'baby safe haven' laws in Namibia as a response to unsafe infant abandonment and examines the lack of similar laws in South Africa to curb this practice. The central question addressed in the article is whether an obligation rests with the South African legislature to prevent unsafe infant abandonment by providing a safe alternative. This question is expounded upon by looking at the approach or the mechanisms adopted in countries around the world with a specific focus on South Africa's neighbouring country, Namibia. The impact of the non-legalisation of any of these mechanisms in South Africa is dealt with through analysing the various human rights that are infringed in terms of the South African Constitution. The previous laws governing the abandonment of infants in Namibia are compared with the more recent introduction of 'baby safe haven' laws, which is indicative of how far Namibia has come in moving from emulating South African laws in the realm of children to taking the lead in introducing a safe alternative to unsafe abandonment. Lastly, the current South African law, which is reactive in its approach to infant abandonment, is dealt with. The conclusion is reached that in view of what Namibia has done*

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*an obligation indeed rests on the South African legislature urgently to implement similar laws to save the lives and protect the various other rights of unsafely abandoned infants. It is proposed that 'baby savers' and 'baby safe haven laws' urgently should be introduced in South Africa to prevent further deaths through the unsafe abandonment of infants in places such as toilets, pit latrines and open fields.*

**Key words:** *unsafe infant abandonment; infant death; baby savers; baby safe havens; South Africa; Namibia; human rights*

## **1 Introduction: The worldwide issue of unsafe infant abandonment with a specific focus on Namibia**

The issue of unsafe infant abandonment, which often leads to the death of infants, is a worldwide problem that has seen many countries introduce mechanisms to prevent this practice. The two mechanisms that are discussed are 'baby savers', also referred to as 'baby boxes' or 'baby safes' and 'baby safe havens'. A baby saver is a box-like structure in the wall of a child and youth care centre or a place of safety. Once a baby is placed inside the structure an alarm is triggered that alerts a member of staff that a baby has arrived. The baby is then collected and attended to. A 'baby saver' may also be erected independently and may not necessarily be attached to the wall of a charitable institution. Under such circumstances, first responders and emergency medical services will collect the baby once the alarm is triggered. The advantages of using a baby saver are, first, that it provides a safe alternative to unsafe infant abandonment and, second, that women can remain completely anonymous when relinquishing their infants.

The other mechanism referred to is a 'baby safe haven'. This mechanism involves the personal handover of an infant to a member of staff at a hospital, police station or fire station. In some instances a church may also function as a safe haven. However, in these instances mothers do not have the assurance of complete anonymity.<sup>1</sup>

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<sup>1</sup> AE Boniface & W Rosenberg 'The challenges in relation to undocumented abandoned children in South Africa' (2019) 1 *Journal of South African Law* 49; Also see AE Boniface & W Rosenberg 'The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa' (2017) 80 *Journal of Contemporary Roman-Dutch Law* 254; In addition, see W Rosenberg 'The illegality of baby safes as a hindrance to women who want to relinquish their parental rights' (2015) 1 *Athens Journal of Law* 201.

In June 2011 China's first baby box was installed in a children's home in Shijiazhuang City, Hebei Province. Thereafter, baby boxes expanded into 32 locations in 16 regions. Dr Wang reports that 1 400 abandoned babies have been accepted through these boxes and that, through the implementation of these boxes, China has improved the survival rate of abandoned babies and in so doing has realised its goal of 'putting life and children's best interests first':<sup>2</sup>

Through the Baby Box project, we were confronted with the challenge of systematically solving baby abandonment. Abandoned babies are socially vulnerable, so it is the joint responsibility of the government and society to find them as soon as possible and protect them properly. Baby Boxes were installed as a humane measure to protect the right to life of infants, and thus they must be universally established.

India introduced the baby box in the form of a cradle as early 1978 and since then the concept of having a cradle with an alarm attached to it has been followed.<sup>3</sup> The Republic of Korea saw the introduction of the first ever baby safe in December 2009 according to Rak, and between December 2009 and the end of December 2017 a total of 1 300 babies have been safely relinquished in this box.<sup>4</sup>

In Africa the development of baby safe haven laws in Namibia came as a result of the rise in the number of babies reportedly dumped on a monthly basis. In 2008 staff at the Gammans Water Care Works in Windhoek reported that 13 babies were dumped or flushed down toilets every month.<sup>5</sup> Although no official statistics exist, those provided by the police suggest that the problem is a 'significant' one.<sup>6</sup> The cases of concealment of birth more than doubled between 2003 and 2007 from six to 23 cases. This report is according to Hubbard who suggests that infanticide and baby

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- 2 Z Wang 'Development and challenge of protection measures for abandoned babies in China' (2018) 14th Asian Congress of Health Promotion in Kumamoto 37.
  - 3 S Bhalla 'The present situation and issues relating to children being abandoned in baby boxes/cradle in India' (2018) 14th Asian Congress of Health Promotion in Kumamoto 46.
  - 4 LJ Rak 'Baby boxes past, present and future' (2018) 14th Asian Congress of Health Promotion in Kumamoto 53.
  - 5 K Lewis 'Baby dumping on the rise in Namibia' 4 April 2013, <https://www.voanews.com/africa/baby-dumping-reported-rise-namibia> (accessed 6 February 2020); National Planning Commission with support from UNICEF 'Children and adolescents in Namibia 2010: A situation analysis' 2010, [https://www.unicef.org/sitan/files/SitAn\\_Namibia\\_2010.pdf](https://www.unicef.org/sitan/files/SitAn_Namibia_2010.pdf) (accessed 6 February 2020); D Hubbard 'Baby dumping and infanticide' 2008 Gender Research and Advocacy Project of the Legal Assistance Centre, Windhoek, Namibia 3, <https://www.lac.org.na/projects/grap/Pdf/mono1infant.pdf> (accessed 21 July 2021).
  - 6 Hubbard (n 5) 1, 6. The Namibian delegation, while presenting the report on the Elimination of All Forms of Discrimination Against Women published in 1995 to the United Nations Committee, conceded that 'infanticide is a significant problem in Namibia'.

abandonment could have been on the increase in recent years.<sup>7</sup> The issue in Namibia was so significant that in 1998 the Deputy Minister of Home Affairs urged fathers to take responsibility by finding out from women what happened to their babies. Speaking out against baby abandonment, in 2003 the Women's Action for Development (WAD), the SWAPO Party Women's Council and the SWAPO Party Youth League called for increased government action and that various stakeholders must develop ways to combat this issue.<sup>8</sup>

Hubbard cites reasons for infant abandonment, including the following: traditional views surrounding pre-marital sex and having a baby outside of wedlock; the reality of having to care for a child on her own; if the woman is involved in prostitution, having a child could hinder her ability to continue earning a living; teenage pregnancy and the mother's lack of readiness to look after a child; a lack of knowledge of other available options and the fear of the child having been infected with HIV.<sup>9</sup> These reasons were confirmed by Diende from the Congress of Democrats during a parliamentary debate in 2007, when she further stated that the role of the fathers of these abandoned children is not being addressed.<sup>10</sup> She pleaded with families to be more supportive of these women.<sup>11</sup> In this parliamentary debate the Minister of Gender Equality and Child Welfare stated that there is a demand to expand certain services to help desperate women in need.<sup>12</sup>

The Deputy Minister of Health stated that a new adolescent-friendly health service was being used to address the problem of baby-dumping through the training of health care workers with the knowledge of how to deal with teenagers more sensitively. This goal coupled with counselling services for pregnant teenagers was being

7 Hubbard (n 5) 2.

8 Hubbard (n 5) 16.

9 Hubbard (n 5) 9. These reasons are similar to those cited by D Blackie 'Child abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa' Fact Sheet on child abandonment research in South Africa research study 20 May 2014; also generally see D Blackie 'Sad, mad and bad: Exploring child abandonment in South Africa' LLM dissertation, University of Witwatersrand, 2014; these reasons were elaborated on in Namibia's parliamentary debate of 2007 after a motion calling for research into the issue of baby dumping had been tabled in the National Assembly by Diende from the Congress of Democrats an opposition party. See Hubbard (n 5) 10-15; see also N Hadimanović 'Confidential and anonymous birth in national laws – useful and compatible with the UN Convention on the Rights of the Child?' 2018, [www.comparazioneDirittocivile.it](http://www.comparazioneDirittocivile.it). (accessed 21 July 2021).

10 Hansard, National Assembly, 26 September 2007 (Hon Diende); Hubbard (n 5) 10.

11 As above.

12 Hubbard (n 5) 11-12.

developed.<sup>13</sup> Furthermore, the Minister of Home Affairs offered a list of recommendations, one of which pointed out the importance of the right to life of the child as protected by article 6 of the Namibian Constitution.<sup>14</sup>

At the end of the parliamentary debate in 2007 no mention was made of a safe haven law specifically to deal with the issue of baby-dumping. However, the question was left open to the public as to how it should be addressed. At the time only in draft form, the Child Care and Protection Act suggested the implementation of safe haven laws. Issues raised for public debate were highlighted and point to the limitations posed by these laws, such as considering the rights of biological fathers; children being deprived of the right to know their origins; and mothers giving birth in unsafe circumstances.<sup>15</sup> At the same time, the Act set out the advantages of safe haven laws in reducing the number of infant murders and illegal abortions. Additionally, safe haven laws could be a means to reach out to fathers to provide them with an opportunity to care for their children,<sup>16</sup> As a result, in 2019 the baby safe haven laws were introduced in Namibia.

## 2 Infringement of human rights in the unsafe abandonment of infants under the South African Constitution

Various rights are impacted when an infant is unsafely abandoned. The most obvious of these rights are the infant's right to life as guaranteed in section 11 of the South African Constitution and the infant's right to human dignity as guaranteed in section 10. Each time an infant is discarded in an open field, dustbin or pit latrine, the practice threatens the life of that infant and infringes upon the infant's dignity. Statistics demonstrate that unsafe infant abandonment in more than half of all cases leads to infant death.<sup>17</sup> A further right that is threatened is the infant's right to knowledge of his or her origins because in most cases of unsafe infant abandonment the mother's identity is unknown and, therefore, the child's identity

13 Hansard, National Assembly, 23 October 2007 (Hon Haingura); Hubbard (n 5) 12.

14 Hansard, National Assembly, 22 November 2007 (Hon Nghidinwa); Hubbard (n 5) 14.

15 P Caplan 'The Draft Child Care and Protection Act issues for public debate booklet 2' (no date), <http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert2.pdf> (accessed 6 February 2020).

16 As above.

17 Information compiled by Nadene Grabham Director of the Door of Hope Children's Mission Johannesburg. Up to 8 September 2021 60 infants were unsafely abandoned and 34 of these infants were found dead.

also remains unknown. Although not specifically mentioned in the South African Constitution, this right exists in terms of other rights,<sup>18</sup> such as section 12 (the right to freedom and security of the person), which includes control over one's body and one's mind<sup>19</sup> and, therefore, the child's psychological development may be impacted without this knowledge.<sup>20</sup> Section 18, which encompasses the right to freedom of association, also protects the right to knowledge of one's origins. Freedom of association is not limited to companies but also applies to family relations.<sup>21</sup> A child's right to a legal identity is encompassed in the right to a name and nationality from birth (section 28(1)(a)).<sup>22</sup> The right to family and parental care (section 28(1)(b)) entails that where such a family no longer is in existence, then at the very least information must be provided to the child of his or her origins, otherwise the right to knowledge of origins will be infringed.<sup>23</sup> Section 28(2), which deals with the best interests of the child, also includes the right to an identity according to Giroux.<sup>24</sup> Lastly, the right to human dignity comprises the right to knowledge of one's origins as various authors suggest that dignity is at the core of psychological well-being.<sup>25</sup> Despite the various rights at play arising out of the unsafe abandonment of an infant, the right to life remains the most important of all rights and the threat of an infringement of this fundamental right warrants a look at the alternative options available in lieu of unsafe infant abandonment.

18 W Rosenberg 'Does the right to know one's origins exist and can it be limited?' (2020) 4 *Journal of South African Law* 724.

19 I Currie & J de Waal *The Bill of Rights handbook* (2013) 258; I Rautenbach & R Venter *Rautenbach-Malherbe constitutional law* (2018) 277; also see *AB v Minister of Social Development* 2015 (4) All SA 24 (GP).

20 Rosenberg (n 18) 728.

21 AE Boniface 'Do children in South Africa have a right to a family? An exploration of the development of the concept "a right to a family" in South African Law' 2015 Conference Proceedings International Workshop on Law and Politics 230-242; Rosenberg (n 18) 729.

22 Rosenberg (n 18) 733.

23 However, see Rosenberg (n 18) 724-745 for a discussion on the weighing of the right to knowledge of one's origins versus the right to life. It is found that the right to life prevails and thus the limitation of the right to knowledge of the child's origins is warranted in terms of the limitation clause in sec 36 of the Constitution.

24 M Giroux & M de Lorenzi 'Putting the child first: A necessary step in the recognition of the right to identity' (2011) 27 *Canadian Journal of Family Law* 59-60.

25 DM Ziedonis, C Larkin & R Appasani 'Dignity in mental health practice and research: Time to unite on innovation, outreach and education' (2016) 44 *Indian Journal Medical of Research* 491.

### 3 Previous laws governing the abandonment of infants in Namibia

Up to this point in Namibia the laws pertaining to children emulated the South African approach. This was because the laws of the Union of South Africa were applied to the territory of Namibia following delegation by the King of Great Britain from the mandate of the League of Nations.<sup>26</sup> For example, the Namibian Children's Act 33 of 1960 was inherited from South Africa.<sup>27</sup> However, in the sphere of developing a solution to unsafe infant abandonment Namibia now has taken the lead. The abandonment of infants is not an occurrence that is unique to Southern Africa – it occurs in both Europe and America,<sup>28</sup> as well as in other parts of Africa and the world, as stated above. Having newly-enacted safe haven laws, Namibia serves as both a positive example as well as a warning to carefully consider each aspect of these laws to avoid repercussions such as those which were experienced in the state of Nebraska.<sup>29</sup>

The Children's Act 33 of 1960 is Namibia's primary piece of legislation on children and, as stated above, at independence this legislation was inherited from South Africa.<sup>30</sup> The law reform came as a result of the outdated nature of this law and the fact that its colonial origin meant it did not cater to the needs of an African

26 For more on how South African law has influenced Namibian law, see SK Amoo *An introduction to Namibian Law: Materials and cases* (2018) 60.

27 For more on how South African law has influenced Namibian law, see Amoo (n 26) 60.

28 The US state of Texas enacted a Baby Moses law in 1999 to stop unsafe infant abandonments when numbers were on the rise. See SE Dreyer 'Texas' safe haven legislation: Is anonymous, legalized abandonment a viable solution to newborn discardment and death?' (2002) 12 *Texas Journal of Women and The Law* 167; M Athans 'Saving abandoned lives: Community programs seek to keep mothers from discarding their newborns' *Austin AM.-Statesman*, 16 January 2000 A2, [https://0-bi-gale-com.ujlink.uj.ac.za/global/article/GALE%7CA66141306/e4e60ac5be9d021c50310be6ed663fca?u=rau\\_itw](https://0-bi-gale-com.ujlink.uj.ac.za/global/article/GALE%7CA66141306/e4e60ac5be9d021c50310be6ed663fca?u=rau_itw) (accessed 8 November 2021). In Europe, Germany implemented the use of the *babyklappen* in 2000 and its success is illustrated by the fact that between 2001 to 2007, 143 infants were safely relinquished in these safes. See S Benner *Babyklappe und anonyme geburt: ist die kindesabgabe durch babyklappe und anonyme geburt moralisch vertretbar?* (2010) 18.

29 The state of Nebraska failed to set an age limit for children who may be relinquished safely in terms of safe haven laws and this resulted in a spate of a relinquishment of older children. See DK Donnelly 'Nebraska's youth need help – but was a safe haven law the best way?' (2009-2010) 64 *University of Miami Law Review* 771-808, 775-776; B Neal 'Reforming the safe haven in Ohio: Protecting the rights of mothers through anonymity' (2012) 25 *Journal of Law and Health* 347-380, 353; further see LJ Cornett 'Remembering the endangered "child": Limiting the definition of "safe haven" and looking beyond the safe haven law framework' (2009-2010) 98 *Kentucky Law Journal* 833.

30 Caplan (n 15); P Caplan 'Revision of Namibia's Draft Child Care and Protection Act Final Report' 2010, [https://www.lac.org.na/projects/grap/Pdf/ccpa-revision\\_of\\_draft.pdf](https://www.lac.org.na/projects/grap/Pdf/ccpa-revision_of_draft.pdf) (accessed 6 February 2020).

society.<sup>31</sup> In terms of the previous Namibian law, section 18 of the Children's Act 33 of 1960 regards the abandonment of an infant as a crime.<sup>32</sup> Section 18 also holds both parents liable for the care of the child. Further, the concealment of birth of a child is an offence in terms of section 7 of the General Law Amendment Ordinance 13 of 1962.<sup>33</sup> In addition, similarly to South African law, a parent who abandoned a child could be charged with murder, attempted murder or culpable homicide depending on the circumstances in which the infant was abandoned. Namibia also has the common law crime of 'exposing an infant' which consists of abandoning an infant in a life-threatening environment.<sup>34</sup>

In the past, a child who was abandoned would be classified as a 'child in need of care' in terms of the Children's Act 33 of 1960. The child would be placed in a foster home or a children's home as places of safety pending an inquiry by the Children's Court.<sup>35</sup> After an inquiry the infant would be placed in a more permanent foster home or children's home,<sup>36</sup> a medical examination could be ordered if required and, if reunification with the biological parents is not possible, the child would be made available for adoption.<sup>37</sup> This procedure after a child has been abandoned is similar to the one currently observed in terms of South African law. The Namibian Children's Act 33 of 1960 has been repealed by the Child Care and Protection Act 3 of 2015.

#### 4 Safe haven laws in Namibia and their shortcomings

Section 227 of the Child Care and Protection Act,<sup>38</sup> which entered into force on 30 January 2019, provides the procedure for dealing with abandoned children left with approved authorities. Section 227(1) states that

31 As above.

32 Sec 305(3)(b) of the South African Children's Act 38 of 2005 provides that the abandonment of an infant is a crime and in terms of sub-sec (6) a person is liable to a fine or imprisonment of a period not exceeding ten years.

33 In South Africa the offence of concealment of birth is governed by sec 113 of the General Law Amendment Act 46 of 1935.

34 In South Africa, if murder or attempted murder cannot be proved, the exposure of an infant may warrant the alternative offence of concealment of birth in terms of sec 113 of the General Law Amendment Act 46 of 1935. This in terms of sec 258 of the Criminal Procedure Act 51 of 1977.

35 Secs 26-29 of the Children's Act 33 of 1960.

36 Sec 31 of the Children's Act 33 of 1960.

37 Parental consent for adoption is not necessary if the parent has deserted the child. However, if the parents' whereabouts are known, they must be given an opportunity to be heard. See secs 72 & 73 of the Children's Act 33 of 1960.

38 Act 3 of 2015.

a parent, guardian or care-giver of a child who abandons the child may not be prosecuted under section 254 for such abandonment if the child (a) is left within the physical control of a person at the premises of a hospital, police station, fire station, school, place of safety, children's home or any other prescribed place; and (b) shows no signs of abuse, neglect or malnutrition.<sup>39</sup>

Further, this section goes on to provide that anyone who finds an abandoned child must report the finding to the police or to a designated social worker.<sup>40</sup> If the finding is reported to the police, the police must immediately inform a designated social worker.<sup>41</sup> The social worker then has the responsibility to place the child in a place of safety and to start an investigation in terms of section 139 of the Act.<sup>42</sup> In terms of subsection 5 a social worker who has been notified of an abandoned child must call upon any person to claim responsibility for the child through publication in at least one national newspaper circulating in Namibia and in another in the area in which the child was abandoned. Furthermore, the social worker must cause a radio announcement to be broadcast on at least one national radio station in terms of paragraph (b). Section 227 also makes provision for a person who has changed their mind and wishes to reclaim the child, and subsection 6 gives the person 60 days from the date on which the child was abandoned. However, in this instance the child will be treated as one in need of protective services in terms of section 131(1)<sup>43</sup> and the social worker will investigate the circumstances surrounding the child and related issues in terms of section 139 of the Act.<sup>44</sup> In respect of adoption, an abandoned

39 Sec 254: '(1) Subject to the provisions of s 227(1), a parent, guardian or other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person (a) abuses or deliberately neglects the child; or (b) abandons the child, and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. (2) A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.'

40 Sec 227(2).

41 Sec 227(3).

42 Sec 227(4); in terms of sec 139 a social worker has 45 days within which to investigate the circumstances surrounding the child and to compile a report that must be submitted to the Children's Court.

43 'Child in need of protective services (1) In this Chapter, a child is in need of protective services, if that child (a) is abandoned or orphaned and has insufficient care or support.'

44 Sec 139 of the Child Care and Protection Act 3 of 2015 reads as follows: '(3) For purposes of an investigation made under this section, a designated social worker may (a) question any person who may have relevant information in order to establish the facts surrounding the circumstances giving rise to the concern; (b) evaluate the child's family circumstances; (c) evaluate the child's

child may not be made available for adoption immediately after abandonment. A period of 60 days must elapse before such a child may be put up for adoption. The 60 days commence from the date of the newspaper publication or the radio broadcast, whichever is the latest, and provided that no one has claimed responsibility for the child.<sup>45</sup>

It is evident that Namibia was faced with the issue of infant abandonment or baby-dumping and infanticide, as it had been referred to for a long time prior to the enactment of the safe haven laws in 2019.<sup>46</sup> Not only is the parliamentary debate of 2007 evidence, but case law dating back to 1941 is illustrative of this fact.<sup>47</sup> The Namibian safe haven legislation, although aimed at curbing unsafe abandonment, failed to deal with certain pertinent issues such as the maximum age of the child that may be abandoned under the safe haven laws. No mention is made of an age requirement which could create a problem similar to the one experienced in the state of Nebraska where initially no age requirement was stipulated and resulted in older children being abandoned by their parents.<sup>48</sup> The law is not clear as to the procedure to follow should the child show signs of abuse, neglect or malnutrition, although it can be inferred that the person abandoning the child will not enjoy immunity from prosecution. The Namibian safe haven law obviously excludes the possible use of baby safes or baby boxes since it specifies that the child must be left in the physical control of a person at the premises. This stipulation could deter desperate women who do not want to be

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environmental circumstances; (d) identify sources who may verify any alleged neglect, maltreatment or abuse of the child; (e) identify the level of risk to the child's safety or well-being; (f) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child; (g) make an assessment of the child's developmental, therapeutic and other needs; (h) request entry into any premises in order to obtain relevant information; (i) enter and search any premises without a warrant if there is good reason to believe that the delay involved in obtaining a warrant would prevent the obtaining of relevant information which is critical to the investigation, but search of a building or structure used as residence, may not be carried out without a warrant, unless the owner or occupier of the residence, has consented to the search or the designated social worker on reasonable grounds believes that a warrant will be granted if applied for and that delay in obtaining such warrant would defeat the objects of the search; (j) be accompanied by a member of the police; and (k) recommend any appropriate protective measures or intervention as provided for in this Act.'

45 Sec 227(7).

46 The case of Nangombe of Ovamboland, Northern Namibia as summarised by M McKittrick & F Shingenge 'Faithful daughter, murdering mother: Transgression and social control in colonial Namibia' in W Woodward, P Hayes & G Minkley (eds) *Deep histories: Gender and colonialism in Southern Africa* (2002) 205; also M McKittrick 'Faithful daughter, murdering mother: Transgression and social control in colonial Namibia' (1999) 40 *Journal of African History* 265; also see *S v Glaco* 1993 NR 141, *S v Shaningwa* 2006 2 NR 552.

47 As above.

48 Donnelly (n 29) 775-776; Neal (n 29) 353; further see Cornett (n 29) 833.

identified when abandoning their children from using safe havens. It also does not make provision for leaving certain non-identifying, or in some cases even identifying, information to help promote the protection of the child's right to knowledge of his or her origins, although this is an optional requirement and the parent is not forced to leave such information. In a similar vein, it does not guarantee the anonymity of the relinquishing person or mother, which could result in greater confidence in using safe havens rather than unsafely abandoning a child.

Further, Namibian law does not specify how it may be verified that someone is the parent of the child when they later seek to reclaim the child in terms of section 227(6), although section 139 states that a social worker must conduct an investigation. By issuing the parent with a unique number when they abandon the child so that if they wish to reclaim the child they have only to produce the unique number as proof, could be a possible solution.<sup>49</sup> Furthermore, the Namibian safe haven law fails to indicate what happens to mothers who fail to abandon their children safely in accordance with these laws. Should it be assumed that these mothers will be charged with abandonment and face the full force of the law because of the existence of a safe alternative or is there a time period for awareness to be created about these new laws that will allow for leniency to be shown mothers?

Namibian safe haven laws serve as a corrective for the South African legislature on aspects of these laws which should not be erroneously omitted and which other aspects require greater consideration and thought. For a properly-functioning law that succeeds in its aim of saving the lives of infants, factors such as age, procedures and consequences form essential components. Nevertheless, Namibia has taken a step in the right direction by enacting these laws to save the lives of infants being abandoned in life-threatening situations.

## 5 South African law pertaining to the abandonment of infants

From Roman times there have been dramatic changes in relation to the attitude to infanticide and infant abandonment; according to Roman-Dutch law it became punishable by death, depending on where an infant was abandoned.<sup>50</sup> English law saw a change in the

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49 This is an example of what is done in the state of California. In this regard, see California Health and Safety Code sec 1255.7(b)(1).

50 See eg J van der Linden *Institutes of Holland* (1904) 2.5.13.

attitude of the legislature and the way in which these matters were dealt with by the courts by introducing the crime of infanticide.<sup>51</sup> The recognition of the crime of infanticide saw the introduction of evidence of leniency shown mothers on the grounds of the effects of childbirth and lactation.<sup>52</sup> A verdict of infanticide was less harsh than one of murder.<sup>53</sup> Later South African law introduced the death penalty for the killing or abandonment of infants as there existed no distinction between child murder and other forms of murder.<sup>54</sup> However, this changed with the introduction of the crime of concealment of birth,<sup>55</sup> which meant that mothers no longer were subject to the death penalty. The crime of concealment of birth required refining and over the years with each case, the framework of this 'new' crime was established.

An overview of the case law illustrates the empathy with which matters were adjudicated.<sup>56</sup> The circumstances of the women and their true intent traced in each case before a verdict was rendered.<sup>57</sup> In most cases women acted out of desperation and confusion. According to the case law, if a child is found alive, concealment of birth is not a competent verdict.<sup>58</sup> In addition, the actions of the accused are crucial in the rendering of such a verdict. If the accused discloses the fact that she gave birth to a child and the location of the child, this negates a charge of concealment because she is not actually 'concealing' such birth.<sup>59</sup> Further, concealment of birth can serve as an alternative charge to murder, depending on the circumstances of the case. Another issue that was addressed was the fact that only the mother can be found guilty of the crime of concealment of birth.<sup>60</sup> This does not cater to a situation where someone else, such as the father or grandmother, removes a child from the mother and

51 See C van der Westhuizen 'An historical overview of infanticide in South Africa' (2009) 15 *Fundamina* 174, 182-185 for a look at the history of abandonment and infanticide in English law.

52 SD Sclater 'Infanticide and insanity in 19th century England' in F Ebtehaj et al (eds) *Birth rites and rights* (2011) 219. Medical knowledge of what is now referred to as post-natal depression took shape in the 19th century where it was first referred to as puerperal insanity.

53 See eg the Infanticide Act of 1922.

54 See P van der Spuy 'Infanticide, slavery and the politics of reproduction at Cape Colony, South Africa, in the 1820s' in M Jackson (ed) *Infanticide: Historical perspectives on child murder and concealment, 1550-2000* (2002 reprinted 2005) 131; Van der Westhuizen (n 51) 174, 188.

55 Cape Ordinance 10 of 1845.

56 *Rex v Arends* 1913 CPD 194 (*Arends*); *Rex v Verrooi* 1913 CPD 864 (*Verrooi*); *Rex v Moses* 1919 CPD 81 (*Moses*); and see especially *Rex v Williams* 1920 EDL 80 (*Williams*) where the Court altered a sentence of six months' imprisonment with hard labour to one of three weeks with hard labour on the grounds that the previous sentence was too severe.

57 As above.

58 *Arends*; also see *Verrooi* (n 56).

59 *Rex v Emma Madimetae* 1919 TPD 60 (*Madimetae*).

60 *Moses* (n 56).

abandons the child. However, section 305(3) of the Children's Act 38 of 2005 provides that *anyone* may be charged with the abandonment of a child and, therefore, sufficiently covers this aspect, and if this child dies, murder, attempted murder or culpable homicide may be an appropriate charge.

The crime of concealment of birth has not been shown to curb abandonment, as the number of concealment of birth cases does not match the estimated number of abandonments, which can be due to a number of factors. First, if a child is found alive, it will not amount to concealment of birth. Second, if the body of a child is found in an open area such as a toilet, drain or open field, a charge of concealment of birth may not be appropriate. Lastly, a huge challenge to a charge of concealment of birth is identifying and locating the mother. In terms of South African law, a mother may still be charged with murder, attempted murder or culpable homicide for abandoning her child.

South African law does have a separate crime of infanticide contained in section 239 of the Criminal Procedure Act.<sup>61</sup> As suggested by the judge in *S v Jokasi*,<sup>62</sup> this takes into account the circumstances of the mother at the time of abandoning the child, such as her emotional state, the effects of child birth and lactation.<sup>63</sup> Therefore, South African law as it pertains to children at one stage adopted a progressive approach by acknowledging the individual circumstances of a mother in a case as serious as that of the abandonment of a child leading to its death. The question then arises as to what has happened to the current law makers and the seeming indifference they exhibited by not recognising the needs of children and mothers. Consider that in 2020 out of a total of 83 infants found unsafely abandoned, only 34 were found alive and the other 49 were found dead. These are cases that were reported, but the majority of cases go unreported. From January to June 2021 a total of 37 infants were unsafely abandoned and of this total only 19 infants were found alive. According to further news reports in 2020 118 new-born infants were abandoned in South Africa's public hospitals.

These numbers are far higher than those experienced in Namibia, yet Namibian law makers saw a 'significant' problem and acted to

61 Act 51 of 1977.

62 1987 (1) SA 431 (ZCS).

63 Today it is referred to as post-natal depression, see Sclater (n 52) 219 for the history of this disease and its recognition as a line of defence in cases of infanticide.

curb the increasing rate of unsafe abandonment and in so doing ensured that children's lives are protected and mothers in desperate need are provided with a safe alternative. South Africa faces a dire situation where mothers who find themselves in a desperate situation have no other option but to unsafely abandon an infant.

A study undertaken by Blackie has revealed that some of the causes of child abandonment in South Africa are 'restrictive legislation, poverty, mass urbanisation, high levels of violence, including rape, extreme gender inequality, HIV/AIDS and diminishing family support'.<sup>64</sup> With the proposed implementation of baby safes and safe haven laws and with proper awareness brought to the existence of these laws, if the mother still opts to abandon an infant in an unsafe location, a charge of murder, attempted murder or culpable homicide would be justified and this would, as a matter of consequence, question the necessity for the separate crimes of concealment of birth and infanticide.

Currently, infanticide and concealment of birth function as a less severe measure of dealing with unsafe infant abandonment in the face of no legal safe alternative. In the matter of *S v Molefe*<sup>65</sup> the Court attempted to iron out any uncertainties pertaining to the elements of the crime of concealment of birth. However, the Court was unsuccessful in providing clarity and left the elements of 'disposal' and 'child' unresolved. The link between concealment and abandonment exists in that, in order to conceal the existence of the child, the mother abandons the child – in other words, *gets rid of, discards, does away with* that child. In some examples the body of a child may be so severely decomposed that it is not known whether the child was still alive at the time of abandonment. In that case a charge of concealment of birth may find application. This law neither acts as a deterrent to mothers who are desperate, nor is it enforceable because in most cases the mother cannot be located.

In terms of the Draft Children's Amendment Bill<sup>66</sup> an extended definition of the terms an 'abandoned child' as well as an 'orphan' is suggested. The impact of these changes will be financial in nature, placing an even greater burden on the state to provide adequate support to these children and still not prevent the practice of unsafe abandonment continuing.<sup>67</sup>

64 Blackie (n 9), where it was found that 3 500 babies were abandoned in 2010 and out of a total of 200 babies abandoned in Soweto and Johannesburg monthly, only 60 are found alive.

65 2012 2 SACR 574 GNP.

66 2018 and 2019.

67 Sec 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996.

With abandonment on the rise, it is easy to deduce that whatever options are available in lieu of abandonment, are not being utilised. Such options include adoption and abortion. An obstacle to adoption is the permission requirement, in that a minor must have the required consent of her parent or guardian should she choose to give her child up for adoption<sup>68</sup> but the same minor does not need the consent of a parent or guardian should she wish to procure an abortion.

The accompanying message sent by these laws is that adoption is not an accepted practice and perhaps even treated as a last resort whereas procuring an abortion is preferred. This notion is further supported when looking at the proposed amendments in the Draft Children's Amendment Bill.<sup>69</sup>

South African law is purely reactive in the realm of the abandonment of infants. Concealment of birth and abandonment cannot be prosecuted if the mother or anyone else cannot be located, thus the current laws are ineffective.

## 6 Conclusion

Namibia has developed a safe haven law to curb the issue of unsafe infant abandonment and ultimately save the lives of infants who are at risk of being dumped.<sup>70</sup> Although these laws are far from perfect and omit crucial details, it is submitted that it is a step in the right direction. As with many states in the US it is only after initial implementation that the laws may subsequently be tailored to meet the needs of the specific state. In fact, these challenges may only be amplified after initial implementation. Namibia's laws provide

68 Sec 233 of the Children's Act 38 of 2005; W Rosenberg 'The legal regulation of infant abandonment in South Africa' LLD thesis, University of Johannesburg, 2020 474.

69 Rosenberg (n 68) 474; specifically with reference to the proposed amendment to sec 249(2)(b)-(g), which suggests that no consideration be paid in respect of adoption, which will ultimately cause adoption services to cease to exist. The emphasis on adoption first came in the 1970s, prompted by the child's right to a family; see also J Goldstein, A Freud & AJ Solnit (eds) *Beyond the best interests of the child* (1973). Morgan has argued that adoption should be seen as a public declaration by the family that they are committed to care for the child; see P Morgan *Adoption and the care of children: The British and American experience* (1998); J Lewis 'Adoption: The nature of policy shifts in England and Wales, 1972-2002' in A Bainham (ed) *Parents and children* (2008) 567. In both the US and the UK it is argued that the state is a bad parent; see IM Schwartz & G Fishman *Kids raised by the government* (1999). Research has shown that children prefer adoption as opposed to foster care because of the stability and security it provides. See J Triselotis & M Hill 'Contrasting adoption, foster care, and residential rearing' in DM Brodzinsky & MD Schechter (eds) *The psychology of adoption* (1990) 107.

70 Child Care and Protection Act of 2015.

a framework for South Africa in which to develop its own laws. It offers a means to educate on what not to do in respect of aspects that should not be omitted, but it also largely serves as an example of why these laws are important. Namibian safe haven legislation was developed because 13 fetuses were abandoned in toilets or other locations in Windhoek every month. This is in stark contrast to the 200 estimated in 2010 to have been abandoned in Soweto and Johannesburg monthly of which only 60 were found alive.<sup>71</sup> Thus, despite all its shortcomings, this law indicates a move on the part of the legislature to protect the rights of infants that were being abandoned in life-threatening situations and equally magnifies the South African legislature's sluggishness and plain indifference in protecting and enforcing the right to life of children as guaranteed in section 11 of the South African Constitution.

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71 Blackie (n 9).