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Baby-dumping and Infanticide



by

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The logo for HIVOS, featuring the letters 'HIVOS' in a stylized, black, serif font. The 'i' is lowercase and has a dot above it. The 'V' is also lowercase and has a dot above it. The 'O' is lowercase and has a dot above it. The 'S' is lowercase and has a dot above it.

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Baby-dumping and Infanticide

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Gender Research & Advocacy Project of the Legal Assistance Centre

Infanticide and baby-dumping are crimes, but these acts are also cries for help.

New mothers – especially young mothers – may feel overwhelmed by the idea of parenthood. They may have difficulty coping with the drastic physical and emotional changes they are experiencing. They may be suffering from the depression sometimes brought on by the hormonal changes associated with giving birth. They may be convinced that they will be unable to provide for the child, and they may feel that there is no one they can turn to for help. They may fear the shame of having given birth outside of marriage, or they may fear that they will be unable to continue their studies.

None of these feelings can excuse the abandonment or murder of a child. But they show that communities can take steps to prevent infanticide and baby-dumping by giving mothers support and reassurance.

1. THE PROBLEM IN NAMIBIA

Statistics and press reports

It is difficult to estimate the true extent of infanticide and baby-dumping in Namibia, as such cases may go unreported. However, police statistics and anecdotal information suggest that the problem is a significant one.

Recent police statistics do not separate infanticide from other forms of murder.¹ However, an examination of case law on infanticide indicates that charges of

¹ Statistics kindly provided on request by Namibian Police, Ministry of Safety and Security.

murdering a newborn infant are usually combined with charges of concealment of birth. The table on the right shows statistics for the charge of concealment of birth in recent years.

There were almost equal numbers of male and female infants involved in these cases, suggesting that sex preference is not playing any role.²

Although we cannot be sure that the concealment of birth cases are equal to the number of infanticides and infant abandonments, this is the best indicator which could be extracted from the statistics provided by the police. The concealment of birth cases suggest that infanticide and baby-dumping could be on the increase in recent years.

It is possible to determine from the statistical summary provided by the police how many murder victims were juveniles (under age 18), but it is not possible to separate juvenile victims from infant victims. The second table on the right indicates the numbers of murder victims under age 18 as a rough point of comparison.

Infanticide cases are most likely to be some subset of the cases where a victim under age 18 was murdered by some means other than use of a firearm, another weapon or poison – since the most typical method of killing an infant in the instances recorded in recent news clippings is abandonment or putting the infant into a toilet or latrine. These cases of murder of a juvenile by

REPORTED CASES OF CONCEALMENT OF BIRTH, 2003-2007	
Year	Number of Cases
2003	6
2004	13
2005	17
2006	15
2007	23

Source: Namibian Police, April 2008

REPORTED CASES OF MURDER OF JUVENILES, 2003-2007	
Year	Number of Cases
2003	murder with firearm: 4 murder with another weapon: 19 murder by poison/noxious substance: 0 murder by other means: 16
2004	murder with firearm: 0 murder with another weapon: 10 murder by poison/noxious substance: 2 murder by other means: 19
2005	murder with firearm: 3 murder with another weapon: 21 murder by poison/noxious substance: 0 murder by other means: 16
2006	murder with firearm: 3 murder with another weapon: 10 murder by poison/noxious substance: 2 murder by other means: 13
2007	murder with firearm: 4 murder with another weapon: 10 murder by poison/noxious substance: 0 murder by other means: 23

Source: Namibian Police, April 2008

² Looking at the 54 cases where the sex of the victim is known, there were 26 male victims compared to 28 female victims of concealment of birth over this 5-year period. Two of the infants were non-Namibian.

other means show a broadly similar pattern over time as the concealment of birth cases. As in the case of concealment of birth cases, the juvenile murder victims over this 5-year period are almost equally divided between male and female juveniles.³

As a point of comparison, police recorded 21 cases of infanticide in 1992, 34 cases in 1993 and 13 cases in 1994.⁴ Thus, looking longer-term, the incidence of infanticide does not appear to have increased dramatically since independence – but it has not abated either.

There are a few other indicators of the extent of the problem. For example, in April 2008 staff at Gammams Water Care Works in Windhoek estimated that they discover an average of 13 bodies of newborn babies each month amongst the human waste flushed down toilets. "You may not always notice when something like this comes through. But when we do, we always call in the police," one staff member said.⁵

Similarly, in January 2008, the Namibian Police Public Relations Officer in the Oshana Region said that baby dumping has become a common practice and is a major concern in the region.⁶

It is impossible in many cases to identify the persons responsible for abandoning the babies in question. This 2008 case shows how difficult such an investigation can be:

One such recent case was of a woman who gave birth and dumped the baby on a bush at Okambode Village in Oniipa area.

A passerby who was looking for his missing goats discovered the baby at around 14h00 last Friday. He heard a baby crying and on investigation found the baby wrapped in a blanket on top of a thorn bush. A search was made around the area with the hope to find the mother, but to no avail and the man then reported the case to the nearest police station.

Matheus [Slogan Matheus, Namibian Police Public Relations Officer, Oshana Region] said it is suspected that the baby was delivered at the Onandjokwe Lutheran Hospital as it was discovered in the area near the church hospital.

The police officer said the baby is in a healthy condition and called on the public to help trace the mother. "I am calling on the public, especially those whose family members were pregnant but there is no baby, to come forward or report to the nearest police station," he said.

Matheus said efforts by the police to locate the mother have proved futile. He said they went as far as weighing the baby, to check against hospital records in an effort to identify the baby. "We managed to get two women, who delivered in the same week and whose babies' weights matched that of the

³ In the cases where the sex of the murder victim is recorded, the juvenile murder victims over this 5-year period comprised 89 males and 86 females. Looking only at the cases involving murder by "any other means" (excluding murder by firearm, other weapon or poison), the victims comprised 39 males and 47 females.

⁴ CCN Children's Desk, *Child Abuse in Namibia 1996*, at page 39. These cases were recorded in the statistics as infanticide, not as concealment of birth, meaning that comparisons of the two sets of statistics must be made with caution.

⁵ "Newborn discarded", *The Namibian*, 18 April 2008.

⁶ "Newborn baby found perched on thorn bush", *New Era*, 24 January 2008.

discovered baby but the addresses the two women gave were invalid. We also looked around in the surrounding villages but nobody knows the women." The baby is being cared for at a hospital.⁷

Excerpts from some other recent cases reported in the media appear below and on the following pages, to give some idea of the range of the problem.

VERONIKA Johannes (21) from Sky location at Oshakati, who dumped her baby in a pit latrine last Tuesday, was sentenced to five years in prison when she appeared in the Oshakati Magistrate's Court on Monday. Johannes pleaded guilty to a charge of attempted murder. She dropped her baby girl into a toilet shortly after giving birth. Neighbours heard the baby crying and called the Police. One of the neighbours, Silvanus Nghinongelwa (32), jumped into the cesspit and rescued the baby from the sewage. The infant was admitted to the Oshakati State Hospital, where she was breastfed by her mother under Police guard. ("Mother gets five years for baby-dumping", *The Namibian*, 31 October 2007)

THE body of another newborn baby has been found at the coast, bringing the number of babies left for dead in the area to four in the last two months. This time, the decomposing body of a baby boy was found on the municipal rubbish dump just north of Swakopmund on Wednesday. Detective Sergeant Julia Nujoma, the Police spokesperson in Erongo, told *The Namibian* that the body was discovered by a woman collecting firewood at the dumpsite. "We took the body and are doing some tests to see what the cause of death was, and possibly get some clues that would assist us in identifying the parents," Nujoma said. "It was evident that the body had been lying there for a couple of days, considering its decomposed state." She appealed to the public to report any suspected case of baby dumping to the Police immediately. "We need the public's help in these matters. The babies that we know of were all discovered first by the public who then informed us," Nujoma said. She said community involvement could even spare the lives of unwanted babies, referring to an incident last month where a newborn was found alive, buried under dune sand at Walvis Bay. Prompt Police action saved the little girl's life and she is doing well. ("Dead baby found at dump", *The Namibian*, 22 October 2007)

A NEWBORN baby girl was rescued by the Police after being buried alive by her mother in the dunes near Walvis Bay on Thursday. The little girl was immediately rushed to hospital. Her mother has been arrested on a charge of attempted murder, and is in custody in hospital with the baby. According to the police, the mother said she buried the baby because her boyfriend did not want the child... The Police followed footprints leading from the burial site and tracked down the baby's mother at a house on the edge of the NamPort Location. She was arrested and reunited with the child at the hospital, where she is now being held in custody until she will appear

⁷ Id.

in the Walvis Bay Magistrate's Court today on a charge of attempted murder. ("Newborn buried alive in dunes", *The Namibian*, 17 September 2007)

THE Police at Ondangwa have arrested a 21-year-old woman on a murder charge after she allegedly dumped her newborn baby in the bush. According to Constable Jonas Matheus, the woman will appear in court once she has been discharged from hospital. He said the young woman's parents called the Police when they noticed that she was no longer pregnant, and neither had she brought a baby home. She allegedly told them that she had given birth to a stillborn baby and left it in the veld. The woman was admitted to the Onandjokwe Lutheran Hospital for treatment under Police guard. ("Woman arrested for murder", *The Namibian*, 3 September 2007)

POLICE at Okatope in the Oshikoto Region have also arrested a young woman on a murder charge for allegedly dumping her newborn baby into a toilet. The woman, 25 years old, is from Oshamba village. She was also reported to the Police by her parents after she allegedly told them that she had given birth to a stillborn baby in a mahangu field. Her parents found a dead baby in a toilet, however. The woman appeared in the Ondangwa Magistrate's Court last week. ("Woman arrested for murder", *The Namibian*, 3 September 2007)

A 21-YEAR-OLD MOTHER, who a week ago allegedly abandoned her baby in a toilet just after delivery, has been happily reunited with the infant. Mother and child are bonding at the Onandjokwe Lutheran Hospital, Oshana Police Liaison Officer Constable Jonas Matheus said yesterday. According to Matheus, the young mother from Olukonda Informal Settlement at Ondangwa gave birth to a baby during the early hours of last Thursday. The baby started to cry, and was discovered in a toilet bowl by people living in the same house. The Police were summoned and the young mother was arrested and charged with attempted murder. Both the baby and the mother were escorted to Onandjokwe Lutheran Hospital under Police guard. Matheus said, that at the hospital, the nurses and doctors agreed to allow the woman to breast feed the baby. "She is very happy to be with her baby," said Matheus. He added that she would still have to appear in Court once she is discharged from the hospital. ("Mother and child reunion", *The Namibian*, 13 July 2007)

POLICE at Oranjemund on Wednesday arrested Julia Shanyengana (27) on a charge of concealment of birth. According to Inspector Bennie Groenewaldt, Shanyengana gave birth to a baby boy at the Namdeb Hospital on May 4. She was arrested after relatives informed the Police that she had given birth but brought no baby home. It is alleged that Shanyengana suffocated the baby after wrapping him up in blankets. She allegedly dumped his body in a rubbish bin. Groenewaldt said it is believed that a refuse-removal truck took the body to the town's dumpsite but Police have not been able to recover it. He said officers have been digging at the dumpsite without success. ("Newborn Dumped at Oranjemund", *The Namibian*, 18 May 2007)

POLICE at Aussenkehr on Monday arrested the mother of a newborn baby boy after the infant was found abandoned outside the settlement, covered in sand. Aussenkehr is located on the Orange River, about 300 kilometres

south of Keetmanshoop. Naanda Haingura (27) apparently gave birth to the baby on Monday between 13h00 and 14h00, Deputy Commissioner Josephat Abel of the Karas Police told *The Namibian* yesterday. Police found the baby after responding to a tip-off from the public. The baby was admitted to the Karasburg State Hospital. Abel described his condition as stable. Haingura yesterday made a brief appearance in the Karasburg Magistrate's Court on a charge of attempted murder. ("Mother held for dumping newborn", *The Namibian*, 8 November 2006)

POLICE at Okahao in the Omusati Region are investigating a murder case after a six-month-old girl was thrown into a pit latrine at Uukwandongo village on Saturday. The baby died later at the Oshakati State Hospital. Her 17-year-old mother was arrested and is expected to appear in the Outapi Magistrate's Court today. ("Baby dumped in latrine", *The Namibian*, 7 November 2006)

THE body of a newborn baby was found in a riverbed behind the Windhoek College of Education on Saturday morning. Police reported yesterday that the child had been found wrapped in plastic, and that the person who dumped the body is yet to be found. ("Body of newborn baby found in Khomasdal", *The Namibian*, 31 May 2006)

A YOUNG Angolan woman faces charges of attempted murder and concealment of birth after she allegedly threw her newborn baby into a toilet on Saturday. A Police spokesperson, Inspector Hannes !Naruseb, said yesterday that the 20-year-old woman and her baby – a boy – were both being treated in hospital at Outapi after she allegedly put the baby into a toilet shortly after its birth. The baby was rescued and survived the incident, which took place at Outapi. ("Woman accused of dumping her baby", *The Namibian*, 15 May 2006)

Such cases of baby-dumping do not constitute a new phenomenon in Namibia. Similar press clippings from 1996 are reproduced in a booklet on child abuse published by the Council of Churches in Namibia,⁸ and press clippings of the same nature dating right back to independence are quoted in Namibia's first report under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) published in 1995.⁹ While presenting this report to the United Nations Committee which monitors CEDAW, the Namibian delegation conceded that infanticide is a "significant problem" in Namibia.¹⁰

⁸ CCN Children's Desk, *Child Abuse in Namibia 1996*, at pages 39-42.

⁹ Department of Women's Affairs, Office of the President, Government of the Republic of Namibia, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) First Country Report: Republic of Namibia, December 1995*.

¹⁰ Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Namibia*, U.N. Doc. A/52/38/Rev.1, Part II paras.69-131 (1997), at paragraph 79.

THE WINDHOEK OBSERVER - 13 January 1996

Baby dumped in seaside bracken

ON Saturday afternoon two young brown men, in a heavy frame of mind for they were slightly inebriated, walked through a large cluster of bracken following a well-trodden footpath. As they were about to cross the road linking the holiday bungalow complex with the seaside street passing the research centre of Sea Fisheries, they heard a baby crying.

This was good luck.

They went to the nearest bungalow where they found Mr Arno Stofberg, a Grootfontein resident on a visit to Swakopmund. They told him that they had heard the crying of a baby. They then walked up closer to the place of the crying infant and saw the small baby who later showed a two kilogrammes weight when taken to the state hospital...

The baby girl, about 36 hours of age when she was discovered, suffered sunburn and bluebottles had laid eggs in her ears...

THE
NAMIBIAN
3 June 1996

Gruesome find at Keetmanshoop

The severely mutilated body of a baby girl was discovered in a field at Keetmanshoop after a dog was spotted feeding on its remains on Wednesday.

According to the Police, a man employed by the Government garage at the town spotted the dog carrying something and went to investigate. He found the dog had two legs and an arm of a baby and when he followed the dog's tracks, he discovered the remains of the baby.

The baby is believed to be of Nama parentage. The mother of the baby is not known, but it is believed that she gave birth to the baby and left her in the field where the body was later mutilated by dogs...

INFANTICIDE

THE NAMIBIAN - 5 February 1996

Dead baby found at Water Works

POLICE in Windhoek are investigating a case of murder after the body of a baby boy was found near the Gammans Water Works yesterday.

Nampol spokesperson Warrant officer Hieronymus Goraseb said that the body was found by Municipal security officers who were patrolling the area. Although it was not known how the baby died, the police suspect foul play.

THE NAMIBIAN - 18 June 1996

Baby dumped in bushes

The Police have arrested a Grade 10 student from Ongha Secondary School after the body of a newborn baby was found dumped in the bushes.

The baby boy has apparently died after having sand forced in his mouth. The incident happened last Friday.

The mother, aged 19, from Okatope, told the police that she had abandoned the baby because she was afraid that she would be removed from school, as is common practice when a schoolgirl gives birth.

She said she had been six months pregnant and only a few of her classmates had known about her condition.

She confirmed to the Police that the baby had been alive when delivered.

DIE REPUBLIKEIN - 20 February 1996

Honde eet aan lyk

'n Dertienjarige meisie en ma van 'n pasgebore dogtertjie, word van moord aangekla nadat sy glo haar baba met 'n onbekende voorwerp vermoor het.

Volgens die polisie het die verdagte Sondag in die Tutungeni-woonbuurt van Rundu geboorte geskenk aan die kind en haar kort daarna vermoor, die lyk in 'n plastieksak geplaas en toe die oorskot van die erf verwyder.

Rondloperhonde het glo reeds aan die lykie begin et voordat 'n voerbyganger dit opgemerk het. By nadere ondersoek het die onbekende voetganger die polisie in kennis gestel.

DIE REPUBLIKEIN - 28 Junie 1996

Babamoorde neem toe

Gister het die polisie gesê dat me. Dorothea Negumbo (29) van Oshakati, die moeder van 'n baba, weens die veweerde moorde op haar pasgebore kind aangekla sal word.

Volgens die polisie het Negumbo haar baba op 25 Junie vanjaar in die Onyelela-wyk in die distrik Uukwambi in die veld "weggegooi".



Kind lewend in asblik verbrand

'n Weerlose babaseun is lewend met sy eie moedershande in 'n askonka geplaas. Hierna is die houer met papiere bo-op die suigeling gestook en aan die brand gestee.

Moord gaan die waarskynlike klag wees wanneer 'n verpleegster Dinsdag in Windhoek in die hof verskyn. Sy is in polisie-aanhouding na die voorval by die verpleegsterstehuis van die Sentrale Hospitaal.

Die vlammedood van die suigeling het net nog 'n aflewering in die gruwelverhaal geword waarby weerlose Namibiese kinders betrokke is en wat rigtinggewend kan word wanneer omstredende abortiewetgewing finaal oorweeg word.

Uit Oshakati is berig dat 'n baba Dinsdag in die veld gekry is waar ontbering en die koue waarskynlik die kind oorval het. Sy

29-jarige ma is in hegtenis.

Die polisie ondersoek ook ander babamoorde landwyd.

Uit statistieke wat Vrydag deur die distrikskommissaris van Windhoek, brig. Egbert Shikerete, aan Tempo verskaf is, blyk dat die polisie gemiddeld een tot drie beweerde babamoorde per maand ondersoek.

Brig. Shikerete het weer die versekering gegee dat enige inligting wat deure lede van die publiek in die verband aan die polisie verskaf word, streng vertroulik sal wees.

In Windhoek is die verkoolde lyk van die seuntjie sowat drie weke na die voorval in 'n asblik in die verpleegsterstehuis van die

Sentrale Hospitaal gevind. Volgens beskikbare inligting het die kind gelewe toe hy as kermende wesetjie aan die brand gestee is.

Volgens adj.-off. Hieronymus Goraseb, woordvoerder in die polisie se openbare skakelafdeling, het die voorval vermoedelik begin Junie gedoen toe die vrou vir behandeling weens infeksie na 'n dokter gegaan het. 'n Polisieondersoek is gevolglik geloods.

Adj. Goraseb se die vrou het vermoedelik papiere bo-oor die kind se liggaam in die asblik geplaas en dit aan die brand gestee. Die baba is verkool.

DIE REPUBLIKEIN - 12 July 1996

Baba kry sand in mond; ma behandel

Moorde, soms onder gru-omstandighede, op pasgebore babas duur skynbaar onverpoos in Namibië voort.

Gister het die Namibiese Polisie bekend gemaak dat 'n pasgebore meisie in die Ooste na bewering deur haar twintigjarige ma vermoor is. Sy het vermoedelik sand in die baba se mond gestop en haar onder 'n klip versteek om haar dood te veroorsaak. Die lykie is vroeër van vandeeweek in bosse langs woonbuurt Epako op Gobabis aangetref. Deure middel van 'n lykskouing is bevind dat die suigeling vermoor het weens sand in haar lugpyp, longe en maag.

Die identiteit van die jong vrou kon gister nie bekend gemaak word nie omdat sy nog nie in 'n hof verskyn het nie. Sy word in 'n hospitaal behandel. Haar toestand is onbekend.

Die klerk van die kriminele afdeling van die Gobabis-landdroskantoor het gister gesê 'n dossier oor die saak is nog nie aan hulle voorgelê nie, maar die distriks-misdaadoffisier, insp. Carstens, het bevestig dat reëlins met 'n landdros getref is dat die verdagte genoegsaam moet herstel voordat sy teregstaan.

Sy is in hegtenis geteem voordat sy in die hospitaal opgeneem is.

THE NAMIBIAN - 8 September 1996

Crime beat

Police at Okahandja are investigating a case of murder after the body of a newborn baby was discovered in a riverbed near the Okahandja Secondary School in Nau-Aib township yesterday morning.

It is suspected that a woman gave birth to the baby on Sunday and buried it.

THE NAMIBIAN - 17 September 1996

Crime beat

At Ondangwa, Police are investigating a murder after a Namibian woman gave birth to a baby boy on Friday and abandoned him immediately afterwards.

The infant died the same day. The mother is known to police but has not been arrested yet.

THE NAMIBIAN - 23 September 1996

Bodies of two babies found

TWO cases of infanticide were reported in Namibia over the weekend.

At Otjiwarongo, the body of a newborn baby was discovered by workers at the rubbish dump while they were unloading a rubbish truck on Friday.

The workers noticed a towel among the rubbish because it was full of blood. When they examined it, they found the small body inside.

It is suspected that the babu was dumped in a rubbish bin on Thursday and left to die.

The body of another newborn baby was discovered in a toilet at the Onandjokwe Hospital yesterday.

Hamufungu said the mother gave birth to the baby at the hospital. Afterwards she allegedly left the maternity ward, wrapped her baby in plastic and put it in the toilet.

A newborn baby girl was admitted to hospital with serious injuries after she was thrown through a window by the mother in Katutura on Tuesday evening. The 20-year-old mother was arrested for attempted murder. She had just given birth to the baby girl.

THE NAMIBIAN

Interviews in northern Namibia, 2007

Some interviews on the topic of baby-dumping were recently conducted in northern Namibia by Christa Rudolf von Rohr, a Masters student in Social Anthropology and African Studies visiting Namibia from the University of Basel in Switzerland. She interviewed two nurses in the maternity ward in Oshakati State Hospital, three nurses in the maternity ward in Engela District Hospital and two traditional birth attendants in Onamutai.

These informants cited the following reasons for baby-dumping:

- **“tradition”**: Young women fear rejection by their parents and/or the community if they are found to have had a baby outside of marriage.
- **rejection by a partner and resulting economic vulnerability**: Pregnant women are often rejected by their boyfriends, who may even deny being in any relationship with the woman and the child. The mother may then dump the baby because she fears that she will be unable to look after the child alone, or to afford the child's maintenance.
- **prostitution**: A sex worker who must care for and breastfeed an infant will not be able to continue the work she has turned to in order to support herself.
- **unwanted pregnancies**: Young women in particular may not want to have a baby, or they may feel that they are not yet ready for this responsibility.
- **lack of knowledge**: Women may be unaware of the possibilities of foster care or adoption.
- **HIV/AIDS**: Some women who are HIV positive think that their baby will also be infected and will die soon.
- **fear of having to leave school**: When a student has a baby, she might abandon the infant to ensure that she can continue her studies.

The informants interviewed for this small study said that police are informed whenever an abandoned baby is found. If the police locate the mother, she is arrested and criminally charged. If the abandoned infant is still alive when found, the mother may be required to breastfeed the child under surveillance. According to one doctor in Engela District Hospital, the mother may be released without being criminally charged if she cares well for the baby for a time so that the authorities feel confident that she will not abandon the infant again.

The study found that in Oshakati, there is an orphanage inside the hospital called “Oshuundika” which takes in orphans and abandoned children. Social workers care for the children and look for a foster family. They also try to convince the mother and/or the child's extended family to keep abandoned children. According to one nurse, it sometimes happens that the biological mother comes to fetch the child after some years, when it is grown up a bit and no longer requires such intensive care.¹¹

The issue of baby-dumping received attention from a number of quarters in 2007. Following on a string of incidents of baby-dumping at the coast, Swakopmund Mayor Rosina //Hoabes stated that the nation needs to find a solution to the problem

¹¹ Preliminary findings of field research by Christa Rudolf von Rohr, MA student in Social Anthropology and African Studies, University of Basel, Switzerland (personal communication).

of mothers dumping their babies.¹² SWAPO MP Bartholomeus Shangheta called for a commission of inquiry to look into the root causes of baby-dumping.¹³

Parliamentary debate, 2007

The seriousness of the problem led to a Parliamentary debate on the issue in September 2007, after a motion on the issue calling for research into the reasons behind baby-dumping was tabled in the National Assembly by Hon Diende (CoD).

Hon Diende emphasised that there was a need to understand the reasons behind baby-dumping: "We need to ask ourselves, why? We need to ask what went wrong in our society and in our communities".¹⁴

Hon Diende highlighted several themes in her input. Firstly, she cited "the unconditional love of the parents, families, boyfriends who impregnate the girls, the community and the church leaders". She emphasised the role of the fathers of abandoned children:

In most of these cases, nothing or little has been said about the fathers of these babies. We do not know what the positions of the father are. How did they in fact treat the lady before or after the pregnancy became known to them, whether they were aware of the pregnancy or not? Maybe the fathers also do not want the pregnancy and together with the mothers they planned on how to get rid of the baby... in some cases the mothers of these boys or men are denying paternity on behalf of their sons. What a shame on our nation! ¹⁵

She also highlighted the fact that families do not always support women when they are pregnant:

Families are kicking out these women and leave them to live on the streets... There is nothing wrong with being upset as a parent when your daughter becomes a teenage mother. Parents are disappointed, but this is not the end of the world, forgive and forget. Comfort our daughters in times like these, do not reject them.

Secondly, Hon Diende referred to "the fear for the unknown". She pointed out that women will be particularly frightened if they have no support from their parents or the father of the child.¹⁶

Thirdly, she mentioned the position of orphans and vulnerable children. Hon Diende noted that some teen pregnancies result from situations where orphans and vulnerable children without financial support become involved with older men who can support them financially, "so that they can put food on the table for

¹² "Prayer the only solution to crime?" *The Namibian*, 17 October 2007.

¹³ "MPs concerned about children's grants", *The Namibian*, 1 June 2007.

¹⁴ Hansard, National Assembly, 26 September 2007 (Hon Diende).

¹⁵ Id.

¹⁶ Id.

their younger brothers and sisters". Then, when the girls become pregnant, the men disappear or deny paternity or do not want to have further involvement.¹⁷

Fourthly, she cited HIV/AIDS. Hon Diende felt that women who are HIV positive may be particularly frightened during a pregnancy, because they may fear that the baby will slowly die of AIDS and because they have no access to information on how to prevent the transmission of HIV to the unborn child, or how to deal with the possibility of an HIV positive child.¹⁸

Fifthly, Hon Diende cited poverty. She emphasised that poverty is not an excuse for baby-dumping but still one of the reasons behind the problem: "If you do not have something to eat yourself, how will you take care of an extra mouth to feed? Some of these women are unemployed, kicked out by their families or they are living on the streets."¹⁹

Her sixth theme was "impulsive decisions". Hon Diende felt that abortion should not be an option, but she noted that young women going through a pregnancy alone may not be able to give proper consideration to the rights and needs of the unborn child: "Support by families, both the families from the father's and mother's side, and support by the father of the child is very important. Going alone through this will make you mad."²⁰

Hon Diende related her concerns about baby-dumping to her own experience, when she became pregnant at age 17 and was dumped by her boyfriend. She felt that she could not have handled this without the support of others, and she recalled the frightening possibilities that went through her mind.²¹

After this outline of issues, Hon Diende recommended the following actions:

- a) research
- b) outreach programmes, including outreach which focuses on preventative measures
- c) reconstructive services which monitor the situation of mother and baby after the baby-dumping incident
- d) places of safety where pregnant girls and women with no place to stay can be housed and supported.²²

The Minister of Gender Equality and Child Welfare supported the call for more support to desperate women in need, also citing her own past experience:

It also happened to me when I was the University of the Western Cape when I got pregnant. I almost got into that thing, but the church took me into its hands. I almost aborted my baby. I went through the same psychological things she [Hon Diende] went through.²³

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ Ibid (Hon Mungunda).

She also noted that there are already some institutions where abandoned babies are cared for – such as the Namibian Children's Home and the privately-run Baby Haven in Windhoek – but noted that there is a need to expand such services to other parts of the country.²⁴

Hon Schimming-Chase endorsed the call for more research into infanticide, as well as more support for pregnant women. She stressed the role of *post-partem depression*, also known as *post-natal depression*, which is a psychological condition that affects some women shortly after they have given birth. She suggested that part of the ante-natal services offered to pregnant women should include an assessment of their risk for post-natal depression, and provision of appropriate support services.²⁵ At a later stage in the debate, the Deputy Prime Minister also emphasised the role of depression during and after a pregnancy, which can affect young mothers in particular:

Psychological problems do happen, they do not bond with the baby and as soon as the baby is born, they do not want even to touch the baby and it is a psychological problem. Socially they feel left out because they feel that now they cannot go back to their school, they cannot go back and do anything else. Anything that is a happy event is a disaster to them. In very serious cases they want to commit suicide. It is either that they commit suicide or they kill the baby. Therefore it is actually a mental disease which is treatable. It occurs at eight months of pregnancy, 24 hours after birth and sometimes six to eight months after the baby has been born they can continue to have a relapse of this depression... These ladies can easily kill the baby without any feelings and this is what we have to also study in Namibia.²⁶

Several MPs pointed to the impact of social and cultural change, noting that pregnancy outside marriage was rare in the past because it was treated so severely by society, whereas it has become more common in modern times – with the changes in this regard producing a form of “cultural shock”. Some also felt that cultural change coupled with new rights and freedoms has resulted in less parental control over children, which leads to more sexual activity and pregnancy at a young age.²⁷

Some MPs pointed to the need for open discussion and information sharing between parents and young people about sexual issues, as a way of preventing teenage pregnancies.²⁸

The Deputy Minister of Regional and Local Government emphasised the role of “economic pressures” and women's “economic dependency” on richer men as factors which led to unwanted pregnancies, with the women sometimes then dumping their

²⁴ Id.

²⁵ Ibid (Hon Schimming Chase). Factors associated with the risk of post-natal depression include pre-natal depression or anxiety, low self esteem, stresses associated with lifestyle or childcare duties, lack of social support or support from the child's father, a history of previous depression, low socioeconomic status and the fact of the pregnancy being unplanned or unwanted.

²⁶ Hansard, National Assembly, 23 October 2007 (Hon Dr Amathila).

²⁷ Hansard, National Assembly, 26 September 2007; 10 October 2007; 11 October 2007.

²⁸ Hansard, National Assembly, 10 October 2007; 23 October 2007; 31 October 2007.

“Baby dumping baffles National Assembly”

Elma Dienda of the Congress of Democrats (CoD) opposition party tabled a motion in the National Assembly requesting the House to allow research into the social and psychological reasons causing young girls to abandon their newborn children.

“We have to find out what is the state of mind of these girls. What drove them to such a decision and what are their backgrounds?” Dienda said. “We need to understand the mind of these girls and women; we must also ask what went wrong in our society.”

She claimed that early pregnancies happened in all sectors of society, rich and poor. Poverty, unemployment and the lack of responsibility of the men who impregnated the girls and young women could not be the only reasons for such acts, Dienda stressed.

“The fear of shame, stigma and finger-pointing by society when a girl gets pregnant at an early age might be strong reasons to lead young mothers to drown and bury their babies.”

The CoD politician told the House that she herself became pregnant at the age of 17 and her boyfriend left her when he found out she was pregnant.

“One feels terribly lonely in such a situation and definitely needs support from others, it cannot be handled alone.”

Dienda proposed that parents should support their daughters and not reject them. “Life goes on, forgive and forget. Comfort your daughters in that situation and don't reject them,” she urged. She said orphaned girls having to look after siblings often found themselves in a situation where older men engaged in a relationship with them in exchange for food and/or money to

help them to cope with their daily lives. Should they get pregnant from such a “relationship”, these men disappeared.

According to Dienda, HIV-AIDS caused even more anxiety to young pregnant mothers. “They have to worry if they themselves are infected and transmit the HI virus to their unborn babies, who would die anyway at a young age, should they get infected from their mothers,” she argued.

Abortion was not an option, Dienda feels. She argued that places of safety should be set up for pregnant girls kicked out of their homes by parents. Clinics and hospitals where the girls gave birth should have follow-up services for the young mothers.

Fellow CoD MP Nora Schimming-Chase was the first speaker when the debate opened. She said abandoning babies to die – infanticide – was “murder of the most vicious form.”

Swapo backbencher Dr Moses Amweelo said in his culture girls used to be “set on fire”, but this practice could not be applied in today's times.

Prime Minister Nahas Angula noted that a teenager getting pregnant was in a very “lonely situation” and that such babies could be adopted.

Justice Minister and Attorney-General Pendukeni Iivula-Ithana entertained the House with old traditions and customs, which did not allow girls to become pregnant before marriage. “Today we however don't know what our children are doing, where they go, which places they visit and who their friends are. We don't have control of our children nowadays,” she said.

The Namibian, 28 September 2007

babies to maintain the relationship.²⁹ The Deputy Minister of Justice elaborated on this point by referring to the impact of the economic and social pressures faced by young people, combined with peer pressure and competition for resources.³⁰

The role of family planning services was highlighted by the Deputy Minister of Health, who acknowledged that the reproductive health services provided by the state in the past neglected the sexual and reproductive needs of young people, which contributed to poor utilisation of reproductive health services by adolescents. She reported that a new emphasis on adolescent-friendly health services was attempting to address this problem, by involving young people as peer counsellors and by training health workers on how to address the needs of adolescents more sensitively. She also reported that counselling services for pregnant teens were being intensified. She proposed that these efforts should be supplemented by a national awareness campaign on the issue of baby-dumping, combined with the formulation of a multi-sectoral strategy on how to address the problem.³¹

The Prime Minister pointed to the need for counselling centres which can provide non-judgmental assistance.³²

The Minister of Home Affairs offered a list of recommendations for action:

- Biblical studies to be reintroduced in school because Biblical healing is the fundamental holistic treatment to all social evils.
- Social workers and assistants to be trained to cater for the population with social instability
- Parents to be educated about their role in upbringing of their children. Single mothers to continue to give more love to their children and have open discussion at home.
- Men should accept their children and give them prosperity, rights and good names.
- All stakeholders to assist the government on how to tackle such phenomenon and reduce the death of innocent babies.
- Teenage girls to respect themselves and to respect and love their babies as prescribed under the Namibian Constitution Article 6: *"The right to life shall be respected and protected."*
- Teenage girls to be assisted by churches and government should make sure that their lives are in good health.
- Peer group counselling should be encouraged in all educational facilities and other youth forums.

²⁹ Hansard, National Assembly, 10-11 October 2007 (Hon Kazenambo).

³⁰ Hansard, National Assembly, 11 October 2007 (Hon Nujoma).

³¹ Hansard, National Assembly, 23 October 2007 (Hon Haingura).

³² Hansard, National Assembly, 26 September 2007 (Rt Hon N Angula).

- Teenage girls should be assisted during ante-natal and puerperium stage [immediately after the delivery of the baby] to avoid depression and hallucination which can lead to abandoning of babies.
- There is a need to establish an adoption centre of vulnerable babies to ensure that affected babies are in good health.
- The parents and the caretakers to know signs of symptoms of stress and behaviour changes of their children to prevent such incidents as early as possible.
- Gender discrimination should be addressed at all times.
- Youth to be encouraged to attend all forms of youth activities, sports, youth choirs, etcetera.
- The rehabilitation centres, in combination with vocational programmes, should be established to cater for early school dropouts and unemployed youth to promote self-reliance and for the youth to add value to the economy of this country.³³

At the conclusion of the debate, the National Assembly referred the motion to the Standing Committee on Human Resources, Social and Community Development "for further input and investigation".³⁴

Following this referral, the Committee initiated public hearings on baby-dumping in April 2008 to solicit views from members of the public on how to deal with the problem. Inputs at the first meeting were made by the Legal Assistance Centre (R Coomer on behalf of D Hubbard), the National Coordinator of the Woman and Child Protection Units (Chief Inspector R Shatilweh) and a Control Social Worker from the Ministry of Gender Equality and Child Welfare (Ms V Theron). The Committee expects to hold further public hearings before issuing a report.³⁵

Other public comment

Concerns about the problem of baby-dumping and infanticide are not new. Many government officials and non-governmental groups have spoken out about baby-dumping over the years.

For example, in 1996, NamPol's District Commissioner of Windhoek Egbert Shikerete went on record with the following views:³⁶

³³ Hansard, National Assembly, 22 November 2007 (Hon Nghidinwa).

³⁴ Hansard, National Assembly, 22 November 2007.

³⁵ Personal communication, Mr Chippa Tjirera, c.tjirera@parliament.gov.na.

³⁶ "Murder of babies: police chief hits out", *Tempo*, 26 May 1996, as quoted in CCN Children's Desk, *Child Abuse in Namibia 1996*, at page 40.

Murder of babies: police chief hits out

The District Commissioner of Windhoek this week lashed out against infanticide in his district, not only blaming mothers but also society as a whole.

The increasing problem is not restricted to the Windhoek district. According to the Police, it is also a matter of grave concern in other areas across the country. Windhoek District Commissioner Egbert Shikerete addressed the issue at a media conference in Windhoek after another baby was dumped at Okahandja recently.

Normally the corpses are discovered at rubbish dumps, sewerage works and outlets and isolated places while in some cases the babies showed signs of life before abandonment or being mutilated.

In the first quarter of the year six dead babies have already been found in his district, Brigadier Shikerete indicated.

If a person looked at the circumstances leading to the crime, the whole society stood accused. He mentioned the general breakdown of moral structures, increased sexual activities, poor discipline and the lack of parental control and extended family ties.

He was of the opinion that society would tend to attack the mother of such a baby but

that the father who has caused the pregnancy was never accused. "Any pregnancy should be a shared responsibility," he added.

He mentioned that in the end it was a crime of desperation, usually of a single or unwed mother who had no support from the child's father, her own family and society.

In some cases, he added, even an unreported rape resulted in pregnancy and further infanticide.

Brig Shikerete called on the public to come forward with information to enable the police to stem this horrible practice.

He referred to the physical changes entailed by pregnancy and added that he was under the impression that the public was either scared or reluctant to come forward with information.

Brig Shikerete stressed that infanticide was a case of child abuse and as such the whole society needed to address the problem ...

TEMPO, 26 May 1996

In 1998, the Deputy Minister of Home Affairs also spoke out about the problem, noting that fathers must also take responsibility: "Men also condone the illegal activities of their girlfriends ... you should find out what happened to the baby."³⁷

Women's Action for Development (WAD) made a statement on baby dumping in 2003, calling on women's organisations, stakeholders and the Namibian Police to join hands to take measures aimed at fighting and combating baby dumping.³⁸ The Swapo Party Women's Council and the Swapo Party Youth League also spoke out against baby-dumping in 2003, calling for increased government action to combat this problem.³⁹

Yet, although baby-dumping and infanticide have received regular public attention over the years, there is still no official policy on how to address it.

³⁷ "Minister alarmed by abortions, baby dumping", *The Namibian*, 17 March 1998.

³⁸ "De Klerk damns baby dumping", *The Namibian*, 15 January 2003.

³⁹ "Swapo wings urge action on violence", *The Namibian*, 5 February 2003. See also statements by the Deputy Chairperson of the National Council, Hon Margareth Mensah, as reported in "Security force members urged to support kids", *The Namibian*, 3 June 2003.

The following editorial appeared in *The Namibian* on 28 September 2007:

Ensuring The Safety Of Our Children

Today marks the Day of the Namibian Child, and it comes at a time when our vulnerable children and our youth are more beleaguered than ever before.

From manifold cases of child rape, which are consistently reported and gaining momentum in Namibia, to the burning issue of baby dumping, incidents of which have also increased, there is little to commemorate on this day.

Only this week we reported that there were five cases of rape of minor girls aged between four and nine over the weekend, a shocking indictment of the society we live in.

The abandonment of newborn babies is yet another phenomenon that has become more prolific, and fortunately, in a most recent case of an infant being buried alive by its mother in the dunes at the coast, there was a happy ending. Police were tipped off and managed to save the newborn.

In Parliament too this has been a topic under discussion, with MPs trying to establish the reasons behind these criminal acts.

On the Day of the Namibian Child we should all be asking ourselves why it is that our society has lost its way with regard our infants and young children.

And we need to establish what the deeper societal issues are that are responsible for the increase in abuse and rape of our youngsters as well as the manifold cases of baby dumping.

Some of the reasons for the latter can probably easily be guessed at. Poverty and stigma and dire socio-economic circumstances will probably come to the fore as reasons why young mothers do not feel able to care for their offspring, and therefore resort to child abandonment, sometimes in the most callous of circumstances.

Whatever our research proves, we need to get to grips with this social problem and try to solve it, and to do so will mean that controversial subjects such as abortion will have to be put back on the national agenda.

This will not please those who are opposed to abortion and the pro-choice movement, but we need to establish why young women do not even consider the solution of adoption when they find themselves pregnant with unwanted babies.

In the case of the infant buried alive in the dunes at the coast, and fortunately rescued by Police, we need to ask ourselves what the future of this child will be, since she has been 'reunited' with a mother who did not want her in the first place.

It is possible that the mother already regrets her action and continues to be a good mother, but it is equally probable that she cannot come to terms with motherhood and in turn, cares little about the child she gave birth to.

The abuse and rape of minor children is perhaps a far more complex issue that would require a great deal of research in an attempt to find out what lies behind these horrible crimes.

Globally paedophilia is a growing problem, and Namibia is not unique when it comes to witnessing this scourge.

We need to examine how we can address it, and manage the problem, if possible, out of existence, for no child is safe unless we can control this awful social evil.

But again, research can help us to establish why it occurs and how to stamp it out, and interviewing those found guilty of such crimes may help sketch profiles of those who abuse or rape children.

Talking to children about their rights is something that can only happen when they have reached the age of understanding.

There is nothing we can do to protect babies and toddlers, short of ensuring they are under caring adult supervision 24 hours of the day, and this is a well-nigh impossible task for most parents.

On the Day of the Namibian Child we need to re-commit ourselves to fighting these evils, and not simply pay lip service to their eradication from society.

2. THE LAW

What happens to a parent who abandons an infant?

Although police and the public speak of 'baby-dumping' and 'infanticide', there are in fact no crimes with these names. The applicable crimes are murder or attempted murder, culpable homicide, exposing a child, abandonment of an infant or concealment of birth.

Abandonment of an infant is a crime in terms of section 18 of the Children's Act 33 of 1960.

CHILDREN'S ACT 33 OF 1960, section 18

18 Ill-treatment or neglect of children

(1) **Any parent or guardian of a child or any person having the custody of a child** who ill-treats, neglects (otherwise than by such failure as is mentioned in subsection (2)) **or abandons that child** or allows it to be ill-treated, shall be guilty of an offence **if as a result of the ill-treatment, neglect or abandonment the child is likely to suffer unnecessarily or any part or function of its mind or body is likely to be injured or detrimentally affected**, even though no such suffering, injury or detriment has in fact been caused or even though the likelihood of such suffering, injury or detriment has been averted by the action of another person.

(2) Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence.

(3) On the trial of any person charged with an offence under subsection (2), his ability to provide the child in question with adequate food, clothing, lodging or medical aid shall be presumed, but he may rebut that presumption by proving that the failure alleged was due to lack of means and that such lack of means was not attributable to his default or negligence.

(4) Omission by the person charged to take reasonable steps to obtain for the child from any other person legally liable to maintain him or from any available authority, association or establishment whose object is the relief of indigency, such food, clothing, housing or medical aid as he is himself unable to provide, shall for the purposes of subsection (3) be deemed to be a default on his part.

(5) Any person convicted of an offence under this section shall be liable to a fine not exceeding two hundred pounds or in default of payment of such fine

to imprisonment for a period not exceeding two years or to such imprisonment without the option of a fine or to both such fine and such imprisonment; or if it was proved that the said person would, to his knowledge, directly or indirectly acquire any property or an interest in any property or indirectly derive any benefit from any such acquisition by any other person in the event of the death of the child in respect of whom that offence was committed, he shall be liable to a fine not exceeding five hundred pounds or in default of payment of such fine to imprisonment for a period not exceeding five years or to such imprisonment without the option of a fine or to both such fine and such imprisonment.

It should be noted that section 18 in theory places responsibility on both parents to ensure that an infant is adequately cared for. For example, in cases where a child is born outside of marriage and the father is absent, subsection (1) places a duty of care on the parent with custody of the infant, and subsection (4) places an additional duty on that parent to seek assistance with maintenance from the absent father or from any appropriate institution (such a government or a charity). Subsections (2) and (3) place a responsibility on the absent parent to provide support in the form of maintenance, insofar as that parent has the means to do so. Subsection (5) provides identical penalties for all the crimes described in the section – in other words, it provides the possibility of equal punishment for any both parents if they have failed in their statutory duties to care for and provide for the child.

Section 7 of the General Law Amendment Ordinance 13 of 1962 makes concealment of the birth of a child a criminal offence.

In addition to these two statutory offences, and depending on the facts of the case, a parent who abandoned an infant could be charged with attempted murder, or if the baby actually died, with murder or culpable homicide (if the parent was negligent as to the potential death of the infant without a specific intent to cause the infant's death).

There is also an overlapping common-law crime of "exposing an infant" which consists of the intentional exposure and abandonment of an infant in such a place or in such circumstances that its death from exposure is likely to result.

What happens to a child who is abandoned?

The Children's Court would decide where to place an abandoned child, usually on the basis of advice from a social worker who has investigated the situation.

An abandoned infant would fall into the category of a "child in need of care" in terms of the Children's Act 33 of 1960.

CHILDREN'S ACT 33 OF 1960, section 1

"child in need of care" means a child who –

- (a) has been abandoned or is without visible means of support...

The infant would initially be put in a "place of safety" pending the outcome of an enquiry by a Children's Court. (Magistrates' courts serve as Children's Courts in most parts of Namibia.) This "place of safety" could be a foster home or a children's home.

CHILDREN'S ACT 33 OF 1960

26 Removal of certain children to a place of safety pending enquiry

(1) Any policeman, probation officer or authorised officer may remove a child from any place to a place of safety –

(a) if he is, in the opinion of that policeman, probation officer or authorised officer, a child in need of care; or

(b) if there are reasonable grounds for believing that any offence mentioned in the First Schedule to this Act is being or has been committed upon or in connection with that child:

Provided that if the child is in a public place accompanied by the person having the custody of the child, he shall not be so removed against the will of the person in whose custody he is, unless there is reason to believe that an offence aforesaid has been committed or is being committed by that person upon or in connection with the child. [Subsec (1) amended by sec 3 of Act 50 of 1965.]

(2) The policeman, probation officer or authorised officer who has removed a child to a place of safety shall as soon thereafter as may be, subject to the provisions of subsection (4) of section thirty bring the child or cause him to be brought before the children's court of the district in which is situate the place from where the child was removed.

(3) Any person who hinders or obstructs any policeman, probation officer or authorised officer in the exercise of his powers under subsection (1) shall be guilty of an offence.

27 Removal of infant to place of safety

If it appears to any magistrate, commissioner of child welfare or justice of the peace that an infant within the area of his jurisdiction –

(a) has been received by any person in contravention of the provisions of subsection (4) of section ten; or

(b) is a protected infant and is being maintained in circumstances detrimental to his welfare and that it is necessary that the infant be removed forthwith from the place where he is kept,

he may, by order in writing, direct any person to remove the infant to a place of safety pending the making of other suitable provision for the custody of the infant.

28 Removal of child to place of safety because of an offence disclosed during legal proceedings

If it appears to any court in the course of any proceedings before that court or to a magistrate in the course of a preparatory examination that an offence mentioned in the First Schedule to this Act has been or is being committed upon or in connection with any child or if the person having the custody of a child is by any such court or magistrate convicted of or committed for trial for any such offence, that court or magistrate may, if it or he deems it expedient, order that the child be taken to a place of safety and be brought as soon as may be thereafter before a children's court.

29 Removal of child to place of safety on sworn information of an offence

(1) If it appears to any magistrate, commissioner of child welfare or justice of the peace on information on oath given by any person that there is reasonable ground for suspecting that any offence mentioned in the First Schedule to this Act is being or has been committed upon or in connection with a child who is then within the area of his jurisdiction and that it is expedient that the child be taken to a place of safety, that magistrate, commissioner or justice of the peace may issue a warrant authorising any policeman to search for the child and to take him to a place of safety to be there kept until he can be brought before a children's court.

(2) Any policeman authorised by warrant issued under this section to search for and remove a child may enter (by force if need be) any house or other premises mentioned in the warrant and may remove the child therefrom.

(3) A magistrate, commissioner or justice of the peace issuing a warrant under this section may authorise any person indicated in the direction to accompany the policeman who is to execute the warrant.

(4) It shall not be necessary in any warrant issued under the provisions of this section to state the name of the child whose removal is thereby ordered.

After the Children's Court held an enquiry, the infant would most likely be placed in foster care or in a children's home. The Court could order a medical examination of the child if this appeared to be necessary. If reunification with the biological parent or parents seems unlikely, then the child could be made available for adoption.

CHILDREN'S ACT 33 OF 1960

30 Bringing children before children's court and holding of enquiries

(1) Any child alleged to be a child in need of care, may be brought before the children's court of the district in which the child resides or happens to be by any policeman, probation officer or authorised officer or by a parent, guardian or other person having the custody of the child.

(2) **The court** before which a child is brought under subsection (1) **shall hold an enquiry** and determine whether the child is in need of care: Provided that if the child ordinarily resides in a district of another children's court the firstmentioned court may refer the enquiry to the court of that other district.

(3) Any children's court holding an enquiry as to whether any child is in need of care, may, at any time during the enquiry, order any medical officer in the service of the Government or of the Administration of the territory to examine that child. [Subsec (3) substituted by sec 9 of Act 74 of 1973.]

(4) If it appears to a children's court that a child who is alleged to be a child in need of care, and who is subject to the court's jurisdiction, should by reason of his infancy, ill-health or other sufficient cause not be brought before the court, the court may bold the enquiry in the absence of the child.

31 Powers of children's courts

(1) A children's court which, after holding an enquiry as provided in section thirty, is satisfied that a child is a child in need of care may –

(a) **order that the child be returned to or remain in the custody of his parent or guardian or of the person in whose custody he was immediately before the commencement of the proceedings;** or

(b) **order that the child be placed in the custody of any suitable foster parent;** or

(c) **order that the child be placed under the control of an approved agency;** or

(d) **order that the child be sent to a children's home;** or

(e) order that the child be sent to a school of industries...

(4) When a children's court has, in terms of subsection (2), placed a child on probation or when a child has, in terms of subsection (3), been brought before a children's court, **that children's court may order the child or his parent or guardian to comply, until such time as that children's court or any other children's court otherwise orders, with such of the prescribed requirements as the court may determine.**

(7) A children's court which is satisfied that a child is a child in need of care may order that the child be kept in a place of safety or be kept in an observation centre for observation or be returned to the custody of its parent or guardian or of the person in whose custody the child was immediately before the commencement of the proceedings in question until the court has made an order under subsection (1) in respect of that child or until such time as effect can be given to any order which such court has made.

(8) A children's court which is satisfied that a child is a child in need of care because his parent has been convicted under section 18(1) of this Act or under section 16(1) of the Children's Ordinance, 1961 (Ordinance 31 of 1961), of the territory, of ill-treating or neglecting him or because he was in a state of physical or mental neglect for which his parent was responsible, and has made in respect of such child an order under paragraph (b), (c), (d) or (e) of subsection (1), shall, if such parent is present, draw the attention of the parent to the provisions of section 73 and record on the record of the proceedings the fact that it has been done. [Subsec (8) substituted by sec 10 of Act 74 of 1973.]

32 Failure to observe certain requirements an offence

Any person who fails to comply with a requirement referred to in subsection (4) of section thirty-one, with which it is his duty to comply, shall be guilty of an offence and liable on conviction –

- (a) if the person convicted is the child concerned, to –
 - (i) a caution or reprimand; or
 - (ii) a fine not exceeding twenty-five pounds.

(b) if the person convicted is the parent or guardian of the child, to a fine not exceeding one hundred pounds or, in default of payment of that fine, to imprisonment for a period not exceeding one year, or to such imprisonment without the option of a fine.

33 Safe custody or observation of child pending enquiry

The court holding an enquiry under section thirty may, if it deems it expedient, from time to time postpone or adjourn the enquiry for periods not exceeding fourteen days at a time, and may order that in the interim the child remain in a place of safety or be kept in an observation centre for observation or that the child be returned to the custody of his parents or guardian or the custody in which he was immediately before the commencement of the enquiry on such conditions as the court may prescribe.

34 Summoning of parent or guardian of child to attend enquiry

(1) Notice of the holding of an enquiry under section thirty in respect of any child and that the attendance thereat is required of the person to whom the notice is given shall, unless the commissioner of child welfare otherwise directs, be given in the prescribed manner to the parents or guardian or person having the custody of that child.

(2) Any parent or guardian or any person having the custody of a child who, having received notice as aforesaid of the holding of an enquiry in respect of that child and without the permission of the commissioner or other reasonable excuse (the proof whereof shall rest upon him), fails to attend and to remain in attendance during the enquiry may be dealt with *mutatis mutandis* as provided in subsection (4) of section fifty-seven of the Criminal Procedure Act, 1955 (Act 56 of 1955).

35 Determination of school of industries, etc., to which a child is to be sent

(1) A children's court making an order under paragraph (d) or (e) of subsection (1) of section thirty-one shall order that the child be sent to the school of industries or children's home (as the case may be) which shall in each case have been designated by the Secretary.

(2)(a) In selecting any person in whose custody a child is to be placed or any children's home, other than a children's home established in terms of subsection (3) of section thirty-nine, to which a child is to be sent, regard shall be had to the religious and cultural background and ethnological grouping of the child and, in selecting such a person, also to the nationality of the child and the relationship between him and such person.

(b) Any illegitimate child whose classification in terms of the Population Registration Act, 1950 (Act 30 of 1950), is the same as that of his mother shall be deemed to have the same religious and cultural background and nationality as his mother and only relatives of the mother of any such child shall be regarded as being related to such child.

(c) A child shall not be placed in the custody of any person whose classification in terms of the Population Registration Act, 1950, is not the same as that of the child except where such person is the parent or guardian of the child.

(3) In the application of subsection (2), or of that subsection as applied by any other provision of this Act, in respect of any child in the territory, the provisions of paragraphs (b) and (c) of the said subsection shall be disregarded.

36 Period of retention, supervision and treatment

(1) A child who has under section thirty-one been placed in any custody or under any supervision or any control or sent to any children's home or school of industries and also any such child who is, as a result of any transfer by the Minister in terms of section fifty, in any custody or under any supervision or any control or in any children's home or school of industries shall, subject to the provisions of section fifty, remain in that custody or under that supervision or control or in that children's home or school of industries –

(a) if at the time of the making of the order of the children's court he was under the age of sixteen years, until he attains the age of eighteen years; or

(b) if at the time of the making of the order of the children's court he was not under the age of sixteen years, until he attains the age of twenty-one years, or, in either case, until he is discharged or released on licence in accordance with the provisions of this Act, before having attained the said age.

(2) A child who has, in terms of subsection (2) of section thirty-one, been placed on probation by a children's court or who has as a result of a transfer by the Minister in terms of section fifty been placed on probation shall remain on probation for such a period, not exceeding one year, as the children's court or the Minister, as the case may be, may determine in its or his order: Provided

that where a period of less than one year has been determined in respect of any child, any commissioner to whom a report has been furnished in terms of subsection (5) of section thirty-one may order that that child shall remain on probation for such further period or periods as he may determine but which shall, together with the original period, not exceed one year.

(3) After expiration of the period of retention of a pupil in a children's home or school of industries, whether by effluxion of time or release on licence, that pupil shall remain under the protection of the management of the children's home or school of industries until he attains the age of twenty-one years or until he is discharged from that protection in accordance with the provisions of this Act, before having attained the said age.

(4) The Minister may, if he deems it necessary, order that any former pupil of or pupil in a children's home or school of industries or any child who is in any custody, whose period of retention has expired or is about to expire, return to or remain in that children's home, school of industries or custody, as the case may be, for any further period which he may fix, and may from time to time extend that period: Provided that no such order or extension shall extend the period of retention of any pupil beyond the expiration of the period of protection of that pupil or extend the period of retention of any child in any custody beyond the end of the year in which that child attains the age of eighteen years.

If a child has been deserted, then the adoption of that child can take place without the parent(s)' consent – although this can take place only after reasonable efforts have been made to ensure that the parent or parents have an opportunity to be heard, if their whereabouts are known. Thus, the current law attempts to balance the child's best interests with respect for parental rights, while recognising that a parent who has abandoned a child has in effect forfeited some of his or her parental rights.

CHILDREN'S ACT 33 OF 1960

72 Circumstances under which consent may be dispensed with

(1) If application is made for an order of adoption of a child –

(a) whose parents are dead, or, in the case of an illegitimate child, whose mother is dead; or

(b) **whose parents, or, if one parent is dead, whose surviving parent, or, if the child is an illegitimate child, whose mother –**

(i) have or has deserted the child;

(ii) are or is as a result of mental disorder or defect incompetent to give consent to the adoption of the child;

(iii) have or has in terms of section three hundred and thirty-five of the Criminal Procedure Act, 1955 (Act 56 of 1955), been declared habitual criminals or an habitual criminal; or

- (c) **one of whose parents has deserted him and whose other parent –**
 - (i) **is as a result of mental disorder or defect incompetent to give consent to the adoption of the child;**
 - (ii) **has in terms of section three hundred and thirty-five of the Criminal Procedure Act, 1955, been declared an habitual criminal,**

and for whom no guardian has been appointed, the children's court may, notwithstanding the provisions of paragraph (d) of subsection (2) of section seventy-one, grant such application.

(2) Where application is made for an order of adoption of a child of a parent who has deserted such child the court shall not grant the application under subsection (1) unless –

(a) if the place of residence or address of the parent is known to the court, such parent has been given a reasonable opportunity to oppose the application; and

(b) if the parent is a parent who is in terms of paragraph (a) of subsection (1) of section seventy-three deemed to have deserted the child, a report has been obtained from a probation officer or an authorised officer and the court is satisfied that there is no likelihood that the child will in the near future be returned to the custody of the parent if no order for the adoption of the child is made.

(3) For the purposes of subsection (1) a parent shall not be regarded as being incompetent as a result of mental disorder or defect unless the court is satisfied that the condition of mental disorder or defect is likely to be permanent.

73 Circumstances under which a parent shall be deemed to have deserted a child

(1) For the purposes of this Chapter a parent of a child shall be deemed to have deserted that child also –

(a) if the child has at any time been found to be a child in need of care because his parent has been convicted under section 18(1) of this Act or under section 16(1) of the Children's Ordinance, 1961 (Ordinance 31 of 1961), of the territory, of ill-treating or neglecting him or because he was in a state of physical or mental neglect for which his parent was responsible according to the opinion of the children's court which found the child to be a child in need of care, and has in terms of this Act been placed in any custody other than the custody of the said parent or sent to a children's home or school of industries and has for a period of not less than two years not been returned to the custody of his parent: Provided that in calculating such period no period before the commencement of this Act shall be taken into account; or

(b) if he is legally liable to maintain such child and has, while able to do so, failed to provide him with adequate food, clothing, lodging and medical aid; or

(c) if a contribution order has been made against such parent in terms of section sixty-two and he has, while able to do so, continuously neglected or refused to pay the amount due in terms of the contribution order.

(2) Until such time as the contrary has been proved, a parent shall be deemed to have been able to provide such child with adequate food, clothing, lodging and medical aid or to pay the amount due by him in terms of a contribution order.

In terms of section 13 of the Children's Status Act (which has been passed by Parliament but not yet brought into force) the consent of both parents will be required in future before the child can be put up for adoption – even if the parents are not married. However, the Children's Status Act itself provides for some exceptions, and it also specifies that the provisions for dispensing with consent in the law on adoption continue to apply. This means that if a mother abandoned an infant and the father had made no effort to provide maintenance for that infant despite being able to do so, then there would be no bar to placing the child up for adoption even without the explicit consent of the parents to the adoption.

CHILDREN'S STATUS ACT 6 OF 2006

(7) Unless the children's court orders otherwise, the written consent of both parents is required for –
the adoption of the child, **subject to the provisions for dispensing with any required consent contained in, the law on adoption**; or
the removal of a child from Namibia for a period longer than one year.

(8) Despite subsection (7), no consent is required from a parent of a child if –
the parent cannot be located through any of the prescribed means of notice within the prescribed period;
the parent in question cannot give valid consent because he or she is mentally incapacitated; or
in any other circumstances the children's court finds that the consent requirement would not serve the best interests of the child.

(9) Lack of consent on any matter referred to in subsection (7) may be overruled by a children's court if the consent is being unreasonably withheld.

Some of the provisions of the Children's Act of 1960 quoted above are obviously outdated. For instance, obsolete provisions in the statute still refer to racial classifications and require a child in need of care be placed with foster parents of the same "population classification" as the child. This outdated law is expected to be replaced in the near future by new provisions in the forthcoming Child Care & Protection Act. However, the basic approach under the new law to children in need of care and to adoption is expected to be broadly similar to the current system.

Court cases on baby-dumping and infanticide

A case from the colonial period

One of the earliest recorded court cases on infanticide in Namibia gives some insight into the relevant cultural background in some Namibian communities. The case has been summarised as follows by Meredith McKittrick:

In 1938 or 1939, an uninitiated and unwed girl named Nangombe living in the Uukwaluudhi district of Ovamboland, northern Namibia, became pregnant. If mission and colonial accounts are to be believed, it was not an unusual occurrence at this time, but it had profound consequences for Nangombe and those close to her. By the 1930s, the belief that pre-initiation pregnancies boded ill fortune for clan, chief and community was highly contested, but it was far from extinct. When the chief discovered the pregnancy, he expelled Nangombe. She took refuge in a neighbouring society and bore a daughter. While such infants were often killed at birth, Nangombe's was not. Mother and daughter returned home within the year. The chief, enraged by their reappearance, then expelled the entire family.

The problems created by Nangombe's child caused tension in her household and the family was driven to begging for food. Nangombe's mother, seeing the catastrophes already caused by the presence of her illegitimate granddaughter and fearing that worse would come, urged her daughter to kill the child. Nangombe refused, while her mother continued to offer dire predictions that their lineage would be destroyed if the child were left alive. Finally, in July 1941, Nangombe gave into her mother's pressure and strangled her daughter. Her father and the local chief reported her act to colonial officials. The colonial government of South West Africa investigated and sent her to trial with her mother, who was charged as an accessory to murder.

The nature of the case changed abruptly in the colonial capital of Windhoek. Instead of trying Nangombe for murder, the Supreme Court convened to decide whether she was insane, despite testimony from her village asserting that she was sane and that the murder had been a rational act. Her mother was transformed from a co-defendant to a witness to her daughter's physical and mental health. Nangombe was diagnosed as epileptic and, on this basis, committed to a native asylum in Fort Beaufort, South Africa. She remained there until 1946, when she was released and returned home. She lived out the rest of her life in relative anonymity, little noticed in the communities where she lived and invisible to the colonial administration – a far cry from the scrutiny and public interventions which attended her young adulthood.⁴⁰

⁴⁰ M McKittrick with F Shingenge, "Faithful Daughter, Murdering Mother: Transgression and Social Control in Colonial Namibia" in W Woodward, P Hayes and G Minkley, eds, *Deep Histories: Gender and Colonialism in Southern Africa*, Editions Rodopi BV, 2002 at 205-ff; M McKittrick (Georgetown University), "Faithful Daughter, Murdering Mother: Transgression and Social Control in Colonial Namibia", *The Journal of African History* (1999), 40: 265-283 Cambridge University Press; See also Nahas A Angula, "Namibia's Gender Challenge", *The Namibian*, 1 April 1999, citing M McKittrick, *Conflict and Social Change in Northern Namibia, 1850-1954*, doctoral dissertation, Stanford University, 1995. This case was unusual because most murder cases in the North during this period were dealt with by traditional authorities, without leaving

McKittrick asserts that "infanticide was normally reserved for children born to uninitiated mothers and therefore ritually and physically dangerous to other humans".⁴¹ She quotes a missionary to the Ovambo area in 1911: "it is said that children whose mothers have not undergone the [initiation] ceremony are not human beings and they are therefore not entitled to live".⁴² McKittrick elaborates:

In theory, the threat of earthly and supernatural sanctions controlled the sexual behaviour of uninitiated women. In Ovambo kingdoms, preinitiation pregnancy was believed to threaten the life of the king and the girl's lineage. Oral traditions state that pregnant, uninitiated girls were burned alive in the distant past. By the late nineteenth century, girls who became pregnant before initiation were barred from the ceremony and given the obscene label *omusimbakadhona*, or 'pregnant girl', in Nangombe's part of Ovamboland; to the east, they were called *ehengu*. In many kingdoms they were expelled; usually their pregnancies were aborted or their children killed upon birth. They also faced greatly reduced marriage prospects. The label 'pregnant girl' outlasted physical pregnancy and was a stigma which remained with them for life.⁴³

However, due to missionary influence, such beliefs were coming under attack as Christian communities were growing in Ovamboland. Some Ovambo girls who fell pregnant prior to their initiation fled to mission stations to avoid the issue of infanticide, but Nangombe stated in court that she did not want to do this as it would mean breaking off all family ties.

Nangombe's mother stated that Nangombe's child was *oshipwe* (taboo; bringing ill fortune). She told European investigators that "I told her to kill the child because I was afraid of the child and that the child would bring death to our clan".⁴⁴ In court, Nangombe said: "I killed my child because I had nothing to give her to eat. And my mother kept quarrelling with me about the child. She would not allow my child to eat with her children because she said her children would die".⁴⁵

The fact that Nangombe delayed the infanticide until the infant was about two years old offended many people in her community, as this was not in accordance with the traditional custom. McKittrick suggest that the delay was a symptom of the conflict between traditional practices and the standards of behaviour being promoted by missionaries and colonial officials.⁴⁶

behind any written records.

⁴¹ McKittrick in *Deep Histories* at page 215.

⁴² Id. Becker cites a number of ethnographic sources which state that a young woman who fell pregnant before her initiation ceremony would be burnt to death in most precolonial Ovambo communities. H Becker, "*Efundula: Women's Initiation, Gender and Sexual Identities in Colonial and Post-Colonial Northern Namibia*" in S Arnfred, ed, *Re-Thinking Sexualities in Africa*, Uppsala: Nordic African Institute, 2004 at page 40.

⁴³ Ibid at page 209, footnote omitted.

⁴⁴ Ibid at page 214.

⁴⁵ Id.

⁴⁶ Ibid at page 215.

Cases in independent Namibia

In modern-day independent Namibia, there have been several court cases involving offences related to infanticide, with the courts acknowledging the seriousness of the crimes in question whilst also showing sympathy to mothers in difficult situations.

The 1993 case of *S v Glaco*⁴⁷ recognised the role of post-natal depression in some cases of infanticide. The accused in this case was a young San woman aged about 17 or 18. She gave birth to a son whilst on a journey to Windhoek to visit her other child in hospital. The birth was unexpected, as the baby was two months premature. The accused had never before left Bushmanland. The accused and her son were taken to hospital in Otjiwarongo where the baby was placed in an incubator. The accused's husband, who was travelling with her, then returned to Bushmanland, leaving her on her own.

It was alleged that when the baby was two days old, the accused removed him from the incubator, dropped him onto the concrete floor twice and throttled him. One woman was witness to this and a nurse arrived shortly afterwards. The baby died and the mother was charged with murder.

The accused pleaded not guilty, stating that on instructions from a nurse (in a language which she did not understand), she had gone to the baby, removed him from the incubator to clean him with a blanket and then accidentally dropped him. The court did not accept this testimony as true due to the medical evidence given by a state doctor that there were two separate points of impact on the skull of the deceased infant. The judge also found that it was unlikely that the accused was sent by a nurse to clean the baby, when she was weak and in pain.

The judge (Levy J) found the accused guilty of murder but went on to add that it was clear that there were extenuating circumstances:

At the hospital... where she was taken to, she was put in a ward, her baby was put into an incubator in another room. She understood that the incubator was intended to help the baby, but this was an alien development in her life. In the hospital, no one could talk to her and she did not understand any other language. After she was admitted to the hospital, her husband, and those who had brought her to the hospital, left for Bushmanland. Whatever support this young and simple little girl had in those most traumatic circumstances, whatever support she had then, was whipped away from her.

The evidence was that after birth women often become depressed and can do strange things, including killing themselves or their babies. Dr Liebenberg [the doctor who performed the *post mortem*] thought the accused may indeed have been depressed. And Ursulla Araes, who witnessed the baby being thrown to the floor, thought the accused was disturbed. There was, however, no evidence that this was the case. For a woman, clearly attached to her first child, to have done something of this nature to a second child, she must indeed have been extremely distraught.

For the rest of her life she must carry in her heart the knowledge that she terminated the life of her little boy. Can there be a greater punishment?

⁴⁷ 1993 NR 141.

It is argued that a suspended sentence will hang over her head as a deterrent in the future. Her suffering is her deterrent. She needs no sentence to remind her of the horror which she has experienced.

The accused is sentenced to be detained until the rising of this court.⁴⁸

In the 2006 case of *S v Shaningwa*,⁴⁹ the accused was a 21-year-old girl who killed her second child. The man she claimed to be the father of both children denied responsibility for the second child. Her family had rejected her after the birth of her first child and had tried unsuccessfully to evict her from the family home. Her unemployed grandmother cared for her and her first child.

The young mother pleaded guilty to murder and concealment of birth. Evidence was solicited by the Court from a regional court magistrate for the Oshakati division on similar cases in the area, to provide guidance on the issue of sentencing. This magistrate testified that eight such cases had been finalised in his division between April 2003 and April 2006, with another eight such cases still pending. In one case, the mother had a previous conviction for a similar offence. She was convicted of murder and the sentence was 12 years imprisonment with two years suspended. In a case where the verdict was attempted murder, the mother was sentenced to 3 years' imprisonment, with half suspended. In other cases, where the conviction was for an offence lesser than murder and the perpetrator had another newborn baby at the time of trial, wholly suspended sentences were preferred. Fines were imposed in cases where the only crime established was concealment of birth or exposing an infant. After hearing the account of this string of cases, the judge (Damsaseb JP) commented that "one is struck both by the triviality and selfishness of the explanations given for the commission of the offences, and the methods employed; cruelty to the newborn baby is the common denominator".⁵⁰

The defence asked for a wholly suspended sentence due to the circumstances of the convicted mother, citing the judgement in *Glaco*. The judge distinguished the two cases, stating that the facts in *Glaco* were "peculiar" due to the circumstances surrounding the birth, and that there was evidence that the accused in that case was depressed. The judge addressed the mother:

In everything that you said I did not find a single word of what measures you took to avoid a second pregnancy after your sad experience with the first. With all the public campaigns, targeted especially at the youth, about unwanted pregnancies and incurable diseases, you surely ought to know what the best way to avoid pregnancy is to take contraceptives. Since your first experience was traumatic, one would have expected that 'once bitten' you would be 'twice shy'. Clearly you had not learnt a lesson from your first experience.⁵¹

The judge stated that he would give regard to the mother's "heart-rending" personal circumstances when imposing the sentence, but he also noted that such

⁴⁸ At page 149B-G.

⁴⁹ 2006 (2) NR 552.

⁵⁰ At page 553H-I.

⁵¹ At page 554G-I.

offences are serious and that "the court must not send a wrong message to other young girls like you that they will get away with this kind of conduct":

However young the victims may be, they are human beings with an existence independent of their mother who had given birth to them. They also do not seem to be isolated cases.⁵²

Conscious of the fact that the sentence imposed would provide guidance for the lower courts, Judge Damaseb concluded that "a custodial sentence, albeit tempered with mercy, is unavoidable".⁵³ On the count of murder, the mother was sentenced to three years imprisonment with 30 months of the sentence suspended for five years. On the count of concealment of birth, she was sentenced to six months' imprisonment, to run concurrently with the other sentence. Judge Damaseb advised for the future that:

In deserving cases custodial offences must be considered for these offences. Only when there is compelling medical evidence that the accused's mental state had deteriorated as a result of pregnancy or birth, or there are other circumstances of such compelling nature as to reduce the moral blameworthiness of the accused, should non-custodial sentences be considered in cases of offences involving the murder of a newborn child.⁵⁴

The ruling in the *Shaningwa* case appears to have been followed in both *S v Kaulinge*⁵⁵ and *S v Uupindi*,⁵⁶ both unreported 2007 cases involving females who had extenuating personal circumstances but were not deemed to have extenuating psychological circumstances.

Kaulinge was 20 years old when she gave birth in August 2003. She was one of 13 children, and she contributed to the support of 5 children from the salary of N\$350/month she earned working as a waitress. She was held in custody for approximately 4 months after her arrest. The judgement concerned only the question of sentencing and did not reveal further details of the offence. Kaulinge was convicted of culpable homicide for negligently killing her newborn baby, as well as concealment of birth. The judge (Muller, J) commented:

I have considered the personal circumstances of the accused, as well as the seriousness of the offences and the interests of the community. It must never be forgotten that the accused was convicted of the negligent killing of a human being. Although the accused was young at the time, and even when all her personal circumstances are accepted, her culpable homicide conduct prevented a human being, that was alive, to grow up and live his life. I cannot believe that society would tolerate this kind of conduct and would expect this court to express its indignation of such a deed through its sentence. The sentence I intend to impose would be a balanced result of all these interests.⁵⁷

⁵² At pages 553A, 553I and 554D.

⁵³ At page 554F.

⁵⁴ At page 554H-I.

⁵⁵ Case No: CC15/2007(unreported).

⁵⁶ Case No: CC14/2007 (unreported).

⁵⁷ At paragraph [6].

Kaulinge was sentenced to five years imprisonment for culpable homicide, two of which were conditionally suspended for five years. She was also sentenced to six months imprisonment for concealment of birth, with this sentence to run concurrently with the first sentence.

The *Uupinde* case involved incest between the 27-year-old accused woman and her brother. Uupinde stated that her brother forced himself on her, although she did not lay a charge of rape against him. When she became pregnant, her brother did not want her to keep the baby. She was ashamed of what had happened and did not tell anyone about the pregnancy, not even her parents, because it is not acceptable in her culture for a sister and brother to sleep together. Uupinde gave birth to a baby boy in April 2003, alone in a mahungu field after some seven hours of labour. She knew that the baby was born alive because he was crying and coughing as he came out. However, while she was delivering the placenta, which took about one hour, the baby lay on the ground with the umbilical cord wrapped around his neck. Uupinde stated that the baby did not cry or move during this time, and seemed to her to be dead. She said that she tied a scarf tightly around the baby's neck and body to cover it before burying it. She admitted that she buried the body of the baby with an intention to conceal the birth. In her testimony, she stated that she was tired, in pain and unable to think properly at the time. However, she also stated that she did not want the child because of the shame surrounding the circumstances of its conception. Furthermore, in an earlier statement before the magistrate, she conceded that she had killed her newborn baby. Uupinde was convicted of murder and concealment of birth.

After considering the *Shaningwa* case and the evidence of similar cases cited therein, the judge (Muller J) made the following comments on the question of sentencing:

Society will not expect the Court to condone what the accused did, although this type of pregnancy caused by the accused's brother is not acceptable. The accused can never be excused for the killing of her own child, even if it would have shamed her and even if her situation would not have carried the approval of the community. Society would expect the Court to punish her appropriately. It is horrifying to take note of so many of these types of conduct in respect of the killing of defenceless and innocent babies in the same region. Obviously the court's convictions and the sentences imposed for such heinous deeds are not taken seriously.⁵⁸

For the crime of murder, Uipindi was sentenced to 7 years imprisonment with two years conditionally suspended, to run concurrently with a sentence of six months imprisonment for concealment of birth.

In recent cases of infanticide, the Namibian courts appear to be attempting to try to strike a balance between taking seriously the murder of innocent children and showing understanding for extenuating circumstances which may affect the perpetrator's degree of culpability. However, since the *Shaningwa* case, the courts are reluctant to impose fully-suspended sentences for infanticide as in the *Glaco* case.

⁵⁸ Sentencing portion of unreported judgment, at paragraph [9].

In South Africa, in contrast, the few reported cases of infanticide which have been located indicate a somewhat more lenient approach – although the fact situations in the reported cases are somewhat different than those which have come before the Namibian courts.

The Uipindi case is vividly described in this news article which appeared at the time:

ALL alone in a mahangu field, a woman from a village in the Omusati Region was in labour for 12 hours before she gave birth to a baby that was the result of an incestuous relationship with her brother, the High Court at Oshakati heard this week.

Vistolina Ekandjo Uupindi (29), from Onandjo village in Omusati Region, gave this explanation to Judge Louis Muller this week when she pleaded not guilty to a charge of murder, but admitted concealing the birth of her baby, at Onandjo between April 18 and 19, 2003.

Uupindi is accused of killing her newborn baby boy by strangling him. She then buried him in a shallow grave, it is alleged...

In her plea explanation that was handed to Judge Muller, Uupindi said she was pregnant during the period leading to April 19, 2003. She said that she fell pregnant as a result of an incestuous sexual relationship with a brother of hers.

During the night of April 19 2003, she experienced labour pains while she was asleep, she said. She told the court that she woke up early in the morning and went to a nearby mahangu field where she was in labour for about 12 hours. At about noon, she gave birth to a baby boy who was alive – crying and coughing – at the time. She told the court that she waited for about an hour while the baby lay on the ground with the umbilical cord around his neck.

"After a while, the baby became quiet as if dead and I believed therefore

it was dead," she told the court. She said she took a scarf and tied it tightly twice around the baby's neck and body to cover it before burying it, but not to kill it. Uupindi said when she was doing so, the baby did not cry or move and did not appear to be breathing. She added that after she had wrapped the scarf around the infant's neck, she put the baby's body in plastic bag, dug a hole with a stick and buried the child.

Uupindi told the court that she did not inform anyone about the birth, until after it was discovered that she had given birth on that day. Uupindi admitted that she buried the dead body of the baby with the intention to conceal the birth.

She further told the court that after giving birth, she experienced a lot of bleeding and went to Okahao hospital, from where she was transferred to Oshakati State Hospital, where she was admitted for treatment of post-natal complications.

Uupindi admitted that it was wrong of her to not tell anyone about the birth or that she had buried the baby. She also admitted that she realised that she was acting wrongly and unlawfully and that she could be punished if found guilty by a court of law.

"I am profoundly sorry for what I did and pray for mercy from the Honourable Court," she said.

Oswald Shivute,
"Lonely birth of baby born of
incest described to court",
The Namibian, 20 April 2007

In the 1975 South African case of *S v De Bellocq*,⁵⁹ the mother, a recently arrived immigrant to South Africa who had previously been a medical student, gave birth prematurely. The child had a condition called "toxoplasmosis" which meant that the child could not live for long, nor would it have full mental capacity. The mother understood this prognosis. The infant was discharged after a lengthy hospital stay, after it had been determined that nothing further could be done by way of treatment. The mother then took the child home. Whilst bathing the child at home, she suddenly decided that it would be best to drown the child. The judge (De Wet, JP) upheld the conviction of murder on the grounds that the mother had clearly intended to kill the child. However, he found that there were extenuating circumstances which should be taken account of during sentencing.

It can be accepted that she was in a highly emotional state. According to the evidence she was still in a puerperal stage [the stage shortly after childbirth] when a woman is inclined to be more emotional than the normal person. She also was in a strange country with very few people that she knew and no relations or close friends to be with her to assist her with advice or help and under those circumstances, of course a lot of sympathy can be had for her.⁶⁰

The Court declined to impose a custodial sentence and discharged the mother at the conclusion of the case.

More recently, in the 1995 case of *S v Khumalo*⁶¹, a 20-year-old woman was convicted of child abandonment in contravention of section 50(1)(b) of the South African Child Care Act, No. 74 of 1983. She had left her baby in the veld. The baby was found later the same day, unharmed. The mother testified that the baby's father had left her when she was two months pregnant, and that her sister chased her out of the house after the baby was born. She said that she left the baby in the veld because she could not care for it.

The mother initially received a sentence of one year. The matter came before a higher court on automatic review. The judge (Zulman J) stated that the following factors justified a wholly suspended prison sentence:

- (1) the age of the accused (20 at the relevant time);
- (2) the plea of guilty;
- (3) her being unemployed at the time;
- (4) her seeking assistance without success from her family;
- (5) the absence of any proper investigation as to whether in fact she intended or should have contemplated that the child might die and where exactly she placed her child in the veld and how the child was clothed at the time;
- (6) the finding of the child, apparently unharmed, upon the very day that it was abandoned;
- (7) the emotional stress which the accused in all probability must have been suffering at the relevant time...;
- (8) the fact that the accused was a first offender.⁶²

⁵⁹ 1975 (3) SA 538.

⁶⁰ At page 539A.

⁶¹ 1995 (2) SACR 660 (W).

⁶² At page 64.

The judge found that sentencing in this matter should follow the precedent set in *De Bellocq* and in the Namibian *Glaco* case. The court sentenced the mother to one year of imprisonment, suspended in total for a period of three years.

3. SAFE HAVEN LAWS IN AMERICA

In some countries, such as the United States, the problem of “baby dumping” has been addressed by “safe haven” legislation.⁶³ These laws are sometimes called by other names, such as “Baby Moses” laws or “safe surrender” laws. The first such law in the USA was passed in the state of Texas in 1999, after thirteen babies were left in public places around the state capital in a single year, with four of them being found dead. By early 2008, all 50 states in the United States had enacted some version of this kind of law.⁶⁴

The purpose of these laws is to encourage parents – usually mothers – to take unwanted babies to a safe place where the baby will receive proper care and protection until an adoptive home can be found. For example, such laws generally provide for babies to be left at locations such as hospitals, police stations and fire stations. The objective is to prevent infants from being abandoned in circumstances which are likely to harm them, or cause their deaths. As an incentive, safe haven laws generally allow the parent to remain anonymous and to be protected from prosecution for abandonment or neglect as long as the infant is left in one of the designated safe havens and has not been abused or otherwise mistreated.

For example, the Abandoned Newborn Infant Protection Act in the state of Illinois includes the following statement of purpose:

Public policy. Illinois recognises that newborn infants have been abandoned to the environment or to other circumstances that may be unsafe to the newborn infant. These circumstances have caused injury and death to newborn infants and give rise to potential civil or criminal liability to parents who may be under severe emotional distress. This Act is intended to provide a mechanism for a newborn infant to be relinquished to a safe environment and for the parents of the infant to remain anonymous if they choose and to avoid civil or criminal liability for the act of relinquishing the infant. It is recognised that establishing an adoption plan is preferable to relinquishing a child using the procedures outlined in this Act, but to reduce the chance of injury to a newborn infant, this Act provides a safer alternative.

A public information campaign on this delicate issue shall be implemented to encourage parents considering abandonment of their newborn child to

⁶³ Except where otherwise indicated, the overview which follows is based primarily on information from Child Welfare Information Gateway, www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm, accessed 2 April 2008 and Ian M Bolling, *Adoption Trends in 2003: Infant Abandonment and Safe Haven Legislation*, National Centre for State Courts, www.ncsconline.org/WC/Publications/KIS_Adopt_Trends03Haven.pdf, accessed 2 April 2008. Links to detailed information about the laws of individual states can be found at www.adopting.org/adoptions/legalized-abandonment-state-safe-haven-laws-and-programs.html.

⁶⁴ “All Fifty States Now Offer Option of Confidential Safe Haven Relinquishment for the Protection of At-risk Infants”, www.adoptioncouncil.org/, accessed 27 April 2008.

relinquish the child under the procedures outlined in this Act, to choose a traditional adoption plan, or to parent a child themselves rather than place the newborn infant in harm's way.

Under most US safe haven laws, either parent may leave the baby at a safe haven. In a few states, only the mother or the custodial parent has the right to do this. In some states, a person who is acting on the parent's behalf, with the parent's approval, can leave the baby. Most laws specifically state that the person dropping off the infant cannot be followed or pursued.

Safe haven laws usually allow a mother to leave her infant anonymously, without revealing the father's identity or contacting the father. Some lawyers have expressed concerns about the way in which this limits a father's right to seek custody of his child, which could be a violation of the father's constitutional rights.⁶⁵

There are various forms of safeguards for fathers in some laws. Some require notice to the father by publication or through the media. Others provide for a registry of "putative fathers" and require that notice must be sent to any man who has registered as the possible father of a child of the same approximate age.

For example, in the state of Utah, the law takes the view that a man who has engaged in a sexual relationship with a woman knows that a pregnancy may result, and that the resulting child could be put up for adoption, meaning that he then has the duty to take steps to protect his own rights and interests. He can do this in any of the following ways: (1) by providing support for the mother and child during the mother's pregnancy and after the child's birth; (2) by registering with the putative father registry before the child's birth, or shortly after the birth; and (3) by establishing legal paternity. If an unmarried father, or possible father, fails to take any of these steps, then he is viewed as having relinquished his interest in the child. The Utah law requires strict application of the rules, so that unmarried fathers' lack of compliance cannot prevent the biological mother from placing a child for adoption.

In the state of Illinois, before an infant who has been left at a safe haven can be placed for adoption, the child welfare agency responsible for handing the adoption must search the state's putative father registry at least once, 30 days after the estimated date of the child's birth, to see if there is a possible match with the approximate age of the infant in question. The agency must also verify with law enforcement officials that the relinquished infant has not been reported as a missing child.⁶⁶

In many states, the person who wishes to leave the infant will be asked for information about the child's family. Sometimes medical information about the child will also be requested. But the parent who wants to leave a child at a safe haven generally cannot be forced to give any information against his or her will, and any information which is provided must be kept confidential.

⁶⁵ See, for example, JA Parness and TA Clarke Arado, "Safe Haven, Adoption and Birth Record Laws: Where Are The Daddies?", *Capital University Law Review*, Vol. 36, No. 2, 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012884, accessed 27 April 2008.

⁶⁶ Information from www.adoptioncouncil.org/about/state_model.html and Illinois statute H.B. 0632 PA 92-0408 (2001), available at [www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1459&ChapAct=325 ILCS2&ChapterID=32&ChapterName=CHILDREN&ActName=Abandoned+Newborn+Infant+Protection+Ac](http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1459&ChapAct=325%20ILCS2&ChapterID=32&ChapterName=CHILDREN&ActName=Abandoned+Newborn+Infant+Protection+Ac), accessed 27 April 2008.

In some states, the safe haven must give the parent who wants to leave the infant information about what will happen to the child, and about support services which are available if the parent would prefer to keep the child.

There are usually limits on the ages of infants who will be accepted at safe havens. Most states provide safe havens only for very young infants – such as infants less than 72 hours old, or under the age of 1 month. A few states allow for slightly older infants, such as 60 days old or 90 days old, and one state allows infants to be left in safe havens up to age one.

After an infant is left at a safe haven, procedures for arranging an adoption are usually set in motion. Several states give the parent the right to reclaim the infant within a specified time period – for example, in some states the mother who drops off the child is given an identification bracelet which can match her with her baby if she returns within a specified time period.

A 2001 report by the National Conference of State Legislatures found that the safe haven laws had reduced infant abandonments in states where the passage of the law was accompanied by a public awareness campaign. However, most states with these laws have not taken action to promote awareness, with the result that mothers who are unaware of the laws still abandon infants in harmful circumstances.⁶⁷

A 2003 report by the Evan B Donaldson Adoption Institute pointed to some negative consequences of the safe haven legislation in the United States:

- The laws can create the opportunity for upset family members, disgruntled boyfriends, or others who have no legal rights to abandon babies without the mothers' consent (such as a father who wishes to avoid paying maintenance);
- The procedure may encourage abandonment by women who otherwise would not have done so because it is perceived as being "easier" than other alternatives such as seeking support to keep the child.
- Mothers who intend to leave their infants at a safe haven may conceal their pregnancies and give birth in unsafe circumstances instead of seeking appropriate pre-and post-natal care.
- The laws can deprive biological fathers of their legal right to care for their children, as the infant may be left without their knowledge in many states.
- The children who are left at safe havens may never know their family histories.
- The laws may send out a message to young people that they do not necessarily have to assume responsibility for their actions and that deserting one's children is acceptable.
- Some infants left at safe havens cannot be adopted because the safe haven procedures do not make it possible to contact both parents to get the necessary permission for the adoption.
- Many states have passed safe haven laws without providing funding for appropriate public awareness campaigns, with the result that the laws do not serve their intended purpose.⁶⁸

⁶⁷ Nina Williams-Mbengue, *Safe Havens for Abandoned Infants*, *NCSL State Legislative Report*, Vol. 26, No. 8, September 2001, www.ncsl.org/programs/cyf/slr268.htm, accessed 27 April 2008.

⁶⁸ The full report is available at www.adoptioninstitute.org/whowe/lastreport_coverpage.html,

In indigenous communities, such as Native American communities, it has also been argued that the safe haven laws deprive extended family members of the chance to exercise their responsibility to care for the child in question.

On the positive side, others argue that the safe haven laws are useful if they prevent even small numbers of infants from being left to die.

It is generally agreed that safe haven laws are only one component of overall action needed to prevent unwanted pregnancies and to support mothers who feel overwhelmed by their situations.

4. ZIMBABWE'S INFANTICIDE ACT

Zimbabwe has a special law on infanticide which distinguishes it from other forms of murder.

Zimbabwe's Infanticide Act was preceded by the 1987 case of *S v Jokasi*.⁶⁹ The accused in this case was a 38-year-old woman with seven children. Her husband and parents were dead, meaning she had no means to support herself and was dependent upon support from the headman. Following the birth of her baby girl in a field outside of her village, the accused wrapped the baby in a fertiliser bag and placed a rock on top of her. Once the baby had stopped crying, the accused returned to her village.

The mother pleaded guilty to a charge of murder, stating that she feared her late husband's relatives might chase her away from the village. She was initially sentenced to nine years' imprisonment with hard labour, but the case was appealed.

The Zimbabwean Supreme Court reduced to the sentence to four years imprisonment with hard labour. The judge (McNally JA) stated that it was time for the Court to reassess its attitude towards sentencing in cases of infanticide. The judge pointed to this mother's desperate situation and lack of family support:

... [F]or an unemployed woman, unskilled, totally unsophisticated, totally unemancipated tribal woman past her middle years, to be threatened with expulsion from the village and presumably separate from her children, is surely a terrible threat. Her parents were dead, and there is no evidence of any other relatives to whom she could have gone. In that society a woman must live under the protection of a man. In that area (Hurungwe) starvation is a reality.⁷⁰

The judge pointed out that there was not a specific law on infanticide in Zimbabwe and suggested that it would be favourable for infanticide to be a separate crime, citing the 1938 Infanticide Act in the UK as an example.⁷¹ Judge McNally also suggested that there should be a maximum sentence of five years for infanticide.

accessed 27 April 2008. See also www.adopting.org/adoptions/new-study-shows-safe-haven-laws-causing-problems-not-solving-them-press-release.html, accessed 2 April 2008.

⁶⁹ *S v Rufaro*, 1987 (1) SA 431 (ZS).

⁷⁰ At page 434.

⁷¹ At pages 434-5.

Another judge in the case (Beck JA) dissented on this point, noting that a mother might callously kill her child and still be able to receive a sentence of only five years. Judge Beck agreed with Judge McNally's opinion in general, noting that "...the all important task of the Court in this kind of case is to assess the emotional state of the accused at the time of the offence" and observing that most infanticide cases in practice contain "circumstances of mitigation which render them considerably less serious than other forms of murder". However, Judge Beck recommended that there should be no limitation on sentences imposed for infanticide, either by legislation or by conscious judicial avoidance of sentences in excess of a particular limit.⁷²

Judge Gubbay offered a different perspective. He asserted that there are three reasons why infanticide should always be regarded as "less reprehensible than ordinary murder":

In the first place, the injury done to the newly born infant is less, for it is incapable of the kind of suffering that might be felt by an adult or teenage victim of a murder. Its level of consciousness is not sufficiently developed to enable it to agonise upon the contemplation of approaching death. It is incapable of exhibiting fear or terror. Secondly, the loss of a newly born infant leave no gap in the family circle, deprives no children of their breadwinner or their mother, and no one of a friend, helper or companion. Thirdly, the crime does not create the sense of insecurity in society which other murders cause. No one feels less safe because of it.⁷³

According to a member of the Women's Action Group, formed in 1983 to safeguard the rights of women and to research the killing of infants, "Judges are beginning to realise that baby dumping is a crime of self-defence. As such, there should be more understanding. It is often not an act of gross wanton cruelty but women fighting for their own survival." ⁷⁴

Ultimately following on the court's suggestions in the *Jokasi* case, in 1990 the Zimbabwean government enacted the Infanticide Act.⁷⁵ In terms of this statute, a woman who kills her own child within six months of the child's birth "at a time when the balance of her mind is disturbed as a result of giving birth to the child" is guilty of infanticide and liable to imprisonment for a period not exceeding five years. In determining whether the mother's mind was disturbed, the court is expected to consider stresses relating to the mother's "social, financial or marital situation", concerns about her ability to care for the child due to her personal circumstances, inexperience or incapacity; and any other relevant circumstances.

⁷² At pages 437-8.

⁷³ At pages 439-40.

⁷⁴ As quoted in Sheila Rule, "A Zimbabwe Issue: Killing of Babies", *The New York Times*, 17 May 1987.

⁷⁵ Zimbabwe Government Gazette 1990: 381-3.

A Zimbabwe Issue: Killing Of Babies

...Since 1967, courts here have given about 90 prison sentences to women charged with killing their babies – Zimbabwean law does not differentiate between murder and infanticide as crime. But one supporter of women's rights said the number of cases did not reflect the seriousness of the problem because the "percentage of actual incidents, which no one can determine, is another thing entirely."

Many Zimbabweans view the crime as abhorrent and callously premeditated. But some lawyers and women's rights groups say it often represents an act of desperation in male-dominated Africa, where women have low status and few options and tend to be economically dependent.

Some women conceal pregnancies and then kill their babies, in the view of these lawyers and rights groups, because they fear abandonment by parents who would lose much of the "lobola," or the

"bride's price," that a family might have received from a suitor had their daughter remained a virgin.

This group includes schoolgirls who have been educated to increase the amount of lobola that families can demand, and who face expulsion from school and rejection by their families if they become pregnant. Others may be victims of rape but, fearing divorce or ostracism because of the social stigma, do not report it.

Still other women become pregnant because of promises of marriage. Among some ethnic groups a woman must conceive before marriage to prove that she is fertile, but later may be abandoned by the baby's father. The father can be ordered by the court to provide child support, but such payments are said to be rare...

Sheila Rule, *The New York Times*, 17 May 1987

THE CRIME OF INFANTICIDE IN ZIMBABWE

Infanticide

(1) Any woman who, within six months of the birth of her child, causes its death

(a) intentionally; or

(b) by conduct which she realises involves a real risk to the child's life;

at a time when the balance of her mind is disturbed as a result of giving birth to the child, shall be guilty of infanticide and liable to imprisonment for a period not exceeding five years.

(2) Where a woman is charged with the murder of her child committed within six months of the child's birth and it is proved that she caused the child's death at a time when the balance of her mind was disturbed as a result of giving birth to the child, she shall not be found guilty of murder but may be found guilty of infanticide if the evidence establishes that she committed that crime.

(3) For the purposes of this section, in determining whether or not the balance of a woman's mind was disturbed as a result of giving birth to a child, regard shall be taken to any pressure or stress from which she suffered arising out of any one or more of the following circumstances or considerations

(a) the effects which the birth had, or which she believed it would have, on her social, financial or marital situation;

(b) the difficulties which were created, or which she believed would be created, in caring for the child in the social, financial or marital situation in which the child was born;

(c) the difficulties which she had, or which she believed she would have, in caring for the child due to her inexperience or incapacity;

(d) any other relevant circumstance or consideration, whether based on the psychological effects on the woman's mind arising from the birth itself, or otherwise.

(4) For the avoidance of doubt it is declared that nothing in this section precludes

(a) a woman from being charged with the murder of her child and, subject to subsection (2), from being convicted of and punished for that crime; or

(b) a court from returning a special verdict in terms of section 29 of the Mental Health Act [*Chapter 15:12*] (No. 15 of 1996) in respect of a woman charged with causing the death of her child.⁷⁶

One stated motivation for the new law was the concern "that women were paying for a crime in which both sexes had played a role since deserted or divorced women were the ones mostly driven to kill their children".⁷⁷ The Catholic Bishops of Zimbabwe commented:

We accept that a new law (Infanticide Act) makes a difference between murder and infanticide, provided this does not signal a disregard for the value of human life in the moral consciousness of the nation. We welcome the leniency shown to distraught and desperate women, but insist that every child, whatever the circumstances of its birth, must be made welcome.⁷⁸

Botswana and Lesotho are amongst the other southern African countries which have separate offences of infanticide, although we were unable to obtain the text of the relevant statutes.⁷⁹

⁷⁶ As embodied in section 48, Criminal Law (Codification and Reform) Act [Chapter 9:23], Act 23 of 2004, available at www.kubatana.net/docs/legisl/criminal_law_code_050603.pdf, accessed 18 April 2008.

⁷⁷ International Covenant on Civil and Political Rights, Initial reports of States parties due in 1992: Zimbabwe. 29/09/97, CCPR/C/74/Add.3. (State Party Report), at paragraph 58.

⁷⁸ P Edmonds, SJ, "Save Our Families: Pastoral Letter on Marriage, Family, Sexuality and the AIDS Epidemic", African Forum for Social Teaching, March 1991, available at <http://afcast.org.zw/Zimbabwe/ZimPL1991.htm>, accessed 18 April 2008.

⁷⁹ The reference for the Botswana law is section 208, Chapter 08:01, Penal Code.

The UK Model for the Zimbabwe statute

The UK Infanticide Act 1938 served as the model for the Zimbabwean law.

UK INFANTICIDE ACT

(1) Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

(3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter, or a verdict of guilty but insane, ...⁸⁰

The UK law had its origins in the courts' reluctance to impose the death penalty in infanticide cases, back when this was the mandatory penalty for murder.

Even where a murder conviction was returned, both the jury and the judge were likely to recommend mercy, which usually meant that the death penalty was commuted. This lenient attitude on the part of both law enforcers and the general community was said to be due in part to sympathy for the social and economic conditions which unmarried mothers faced, as well as a perception that these women did not pose a threat to the general public, since their crime was confined to the killing of their own children.⁸¹

⁸⁰ Infanticide Act 1938, 1938 c.36 1_and_2_Geo_6, available at www.statutelaw.gov.uk/content.aspx?activeTextDocId=1085464, accessed 18 April 2008.

⁸¹ Law Reform Commission, New South Wales (Australia), Report 83 (1997) – Partial Defences to Murder: Provocation and Infanticide, Chapter 3, available at www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP3, accessed 18 April 2008.

In recent years it has become very rare for a mother who kills her infant child in the UK to receive a custodial sentence, save in very exceptional circumstances.⁸² It has been noted that the British law and its derivatives in some other Commonwealth countries (such as Canada, Australia and New Zealand) tend to treat infanticide as the result of a psychological disorder which requires treatment rather than punishment: "As dreadful as the crime is, in truth the homicidal mother is more a threat to herself than to society – one of the principal reasons for incarcerating someone."⁸³

The wording of the UK law was criticised in 1980, on the grounds that the medical principles which it cites are both outdated and too limited. The statute refers to mental disturbance "from the effect of giving birth to the child or by reason of the effect of lactation". The UK's Criminal Law Revision Committee asserted that there is no longer any medical support for mental illness resulting from the effect of lactation. They also cited evidence from the Royal College of Psychiatrists that mental disturbances following birth may result not just from the "effect of giving birth", but from:

- (1) overwhelming stress from the social environment
- (2) overwhelming stress from an addition to a household already struggling with poverty
- (3) stress resulting from the mother's inability to cope with the additional demands of an extra member of the family, which may be exacerbated by the husband or other family members
- (4) a failure of the normal bonding between mother and child as a result of illness or disability which impairs the development of the mother's capacity to care for the infant.⁸⁴

(These criticisms of the wording of the UK statute were cited in the *Jokasi* case, and the Zimbabwean statute appears to take them into account.)

In a 2005 case, three UK Court of Appeal judges suggested that the UK Infanticide Act should be reviewed and strengthened. They identified two weaknesses (1) that the law is restricted to mothers who are affected by the actual birth, and not by subsequent events such as inability to bond with the infant; and (2) where the mother who has committed the offence does not admit to it (perhaps because she is too emotionally disturbed by what she has done), it may be difficult to produce psychiatric evidence relating to the balance of the mother's mind.⁸⁵

⁸² "Of the 49 women convicted of infanticide between 1989 and 2000, only two were jailed; the rest were given probation, supervision or hospital orders." Maxine Frith, "Scrap outdated infanticide law, say judges", *The Independent* (UK), 4 May 2005, available at www.independent.co.uk/news/uk/crime/scrap-outdated-infanticide-law-say-judges-495016.htm, accessed 18 April 2008.

⁸³ LL Schwartz and NK Isser, *Child Homicide: Parents Who Kill*, CRC Press, 2006, at page 89.

⁸⁴ Fourteenth Report of the (English) Criminal Law Revision Committee, HMSO, Cmnd 7844, March 1980 as cited in the *Jokasi* case at page 435.

⁸⁵ Maxine Frith, "Scrap outdated infanticide law, say judges", *The Independent* (UK), 4 May 2005, www.independent.co.uk/news/uk/crime/scrap-outdated-infanticide-law-say-judges-495016.htm, accessed 18 April 2008.

However, a 2006 review of the UK statute disagreed with this judicial analysis and recommended that the law remain as it stands, with no amendment.⁸⁶ The 2006 report found that there is medical support for a higher incidence of psychiatric disorders in new mothers in the first year following childbirth, and at least some medical evidence linking certain mental disorders in breastfeeding mothers to the effect of lactation on neurotransmitters. The UK Law Commission rejected proposals to expand the wording of the offence to cover mental disturbances arising from "circumstances consequent upon that birth", as it wanted to retain a tight focus on psychiatric disorders triggered by childbirth (and very possibly lactation). For the same reason, the Law Commission felt that the limitation of the offence to biological mothers was appropriate, since males or other people who care for young children tend to kill children in notably different circumstances.

Some asserted that infanticide could be dealt with by using the defence of diminished responsibility against a charge of murder. The Law Commission disagreed:

Infanticide cases are unique given the status of the perpetrator and victim, and the link between childbirth and some kinds of psychiatric disorder. We consider that the lesser category of offence, and consequently the more lenient sentences that are customary, are warranted.⁸⁷

The Commission felt that it was not appropriate to place infanticide under the heading of murder, particularly since this might lead to higher sentences.⁸⁸

A contrasting view was taken by the New South Wales (Australia) Law Reform Commission, which recommended that a similar statute on infanticide should be repealed in New South Wales on the grounds that a separate crime of infanticide "is no longer necessary as a means of mitigating culpability because the defence of diminished responsibility is now available as a partial defence to reduce murder to manslaughter where an offender kills in a state of significant mental impairment".⁸⁹

Opponents of this view asserted that the separate crime was preferable because it took into consideration the effect of external stresses such as poverty, isolation and lack of support rather than focussing solely on internal mental states. It was

⁸⁶ The Law Commission (Law Com No 304), *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide*. November 2006, Chapter 8, www.official-documents.gov.uk/document/hc0607/hc00/0030/0030.pdf, accessed 22 April 2008.

⁸⁷ At paragraph 8.36.

⁸⁸ The Law Commission also considered a possible procedural problem which could arise, when there is no psychiatric evidence to support a charge of infanticide because the mother in question denies that she has killed the infant. The recommendation was that the trial judge should have the power to order a medical examination of the defendant with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present. If such evidence was produced and the defendant wishes to appeal, the judge should be able to refer the application to the Court of Appeal and to postpone sentence pending the determination of the application. At paragraph 8.46-ff.

⁸⁹ Law Reform Commission, *New South Wales (Australia), Report 83 (1997) – Partial Defences to Murder: Provocation and Infanticide*, Chapter 3, available at www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP3, accessed 18 April 2008.

argued that a separate criminal offence “recognises the particular experiences and difficulties which women commonly face following childbirth and in child-raising.” Another concern was that abolishing the separate offence might result in heavier sentences for infanticide which are not warranted:

It may be contended that women who kill their young children often do so in tragic circumstances as a result of a condition such as severe depression, and should be treated with leniency by the law. If infanticide were abolished, then based on past sentencing patterns, it may be suggested that the leniency currently afforded to these women could not be guaranteed.⁹⁰

At the moment, the Namibian courts tend to apply somewhat more lenient sentences for infanticide than for other forms of murder, in recognition of its unique features. Namibian law already allows for a defence of mental illness or mental defect, and for diminished responsibility as a mitigating factor in respect of sentencing where the impact of the mental illness or defect was not sufficient to relieve the accused of all responsibility for his or her actions.

CRIMINAL PROCEDURE ACT 51 OF 1977, section 78

(6) If the court finds that the accused committed the act in question and that **he at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act**, the court shall **find the accused not guilty by reason of mental illness or mental defect**, as the case may be, and direct that the accused be detained in a mental hospital or a prison pending the signification of the decision of the State President.

(7) If the court finds that the **accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect**, the court may take the fact of such diminished responsibility into account when **sentencing** the accused.⁹¹

However, the concept of diminished responsibility has not been specifically cited in infanticide cases in Namibia.

⁹⁰ Id. Despite this recommendation, the offence of infanticide has not yet been repealed in New South Wales. See Crimes Act 1961 (reprint as at 1 June 2005), 8: Crimes against the person, section 178: Infanticide.

⁹¹ Section 85 of the Criminal Procedure Act 25 of 2004, which has been passed by Parliament but is not yet in force, retains these two possibilities, with some changes in the procedure for dealing with them. The procedure outlined in the new Criminal Procedure Act is expected to be supplemented by provisions in a forthcoming Mental Health Act.

5. RECOMMENDATIONS FOR NAMIBIA

We propose the following measures to reduce the incidence of infanticide and baby-dumping:

Encourage steps to prevent unwanted pregnancies

We would suggest that contraceptives should be provided to women and girls in a non-judgemental manner. The forthcoming Child Care and Protection Act should allow teenage girls and boys access to contraceptives without parental permission. Efforts to educate both young women and men about their bodies and about conception and contraception should be intensified. Even more importantly, efforts to promote gender equality in the area of sexuality need to be intensified, so that men and women are equally empowered to control their own fertility, without fear of violence or negative social repercussions.

Provide information about legal abortion

It is currently possible for pregnant women to obtain a legal abortion in certain limited situations – such as where the pregnancy results from rape or incest or unlawful intercourse with a person with severe mental disabilities; where the mother's life is at risk or there is a serious threat to her physical or mental health; or where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that the child will be irreparably seriously handicapped. However, these provisions for legal abortion are seldom used and many women may be unaware that they exist. Clear information should be provided by clinics and other public agencies on this option in appropriate situations. In the longer term, we would also suggest that the law on abortion should be re-examined to see if the grounds for legal abortion should be expanded.

Provide non-judgmental support for pregnant women

Pregnant women, including young women, need more support from society. The pregnancy may have been the result of an error in judgment, a failure of contraception, or the result of rape or sex which resulted from some more subtle form of coercion. But once the pregnancy is a fact, the woman who is about to be a mother needs support from society instead of a judgmental approach. No matter what the circumstances of the pregnancy, the infant about to be born is blameless and deserves the best possible start in life. The best way to do this is to ensure that the mother gets appropriate counselling along with pre-and post-natal care. A pregnant woman who has no place to stay – such as where she has been evicted from her family home because the family disapproves of the pregnancy – should be accommodated in a place of safety or shelter.

Provide safe havens for the deposit and care of unwanted infants

Namibia's existing legal framework would need only minimal alteration to provide for safe places to leave unwanted babies. The key changes would be (a) to provide that parents who leave infants at designated places (such as hospitals) will not be

prosecuted for child abandonment; (b) to provide safeguards for fathers and other family members who might be willing to take responsibility for the child by providing for registers similar to the putative father registers used in the United States; (c) to ensure that the forthcoming law reforms on adoptions provide for abandonment as a grounds for dispensing with parental consent to adoption, perhaps with a short period during which either parent could reclaim the infant; and (d) to ensure that no child is put up for adoption before police reports of missing children are checked (as a safeguard against fraudulent misuse of safe havens). Provisions implementing these measures should be included in the forthcoming Child Care and Protection Act.

Consider enacting a separate crime of infanticide

Namibia should consider a statute similar to Zimbabwe's Infanticide Act.⁹² The key argument in favour of this approach is that this might make it easier for the court to take into account the unusual psychological and biological factors which are peculiarly relevant to this kind of case. The key counterargument is that this is not really necessary since the Namibian courts are already treating infanticide with appropriate sensitivity when it comes to sentencing.

Increase information and awareness for pregnant women

Pregnant women should be alerted to the range of possibilities for dealing with an unwanted pregnancy, or for a pregnancy that they feel financially or emotionally ill-equipped to handle. For example, a woman might be prevented from abandoning a child if she knew how to get child maintenance from an absent father or how to access a state maintenance grant. New mothers might benefit from being told how to recognise post-natal depression and where to get help if they think they are experiencing this problem. Pregnant women and new mothers would both benefit from access to counselling about their options, or about issues such as parenting skills. Radio could be used for broad dissemination of information about adoption and post-natal depression.

Encourage adoption and expanded fostering arrangements

Formal adoptions are not common in Namibia, although fostering by extended family members often takes place. There should be a public awareness campaign to encourage more use of formal adoption in appropriate cases. The forthcoming Child Care and Protection Act should also provide for the possibility of long-term fostering arrangements in which foster parents and biological parents share some parental rights and responsibilities, since some families may be reluctant to support adoption with its full severing of ties to the biological family. It would be useful to provide a legal framework for the informal fostering arrangements often utilised in practice by extended family members, and to encourage pregnant women to consider making such arrangements if they do not feel that they will be able to care for their child.

⁹² In Parliamentary debate in 2007, the Minister of Justice and Attorney-General, Hon Iivula-Ithana, noted that baby-dumping "inasmuch as it is falling in the category of crime" is "a crime of its own kind". Hansard, National Assembly, 26 September 2007.

Revise the policy on pregnancy amongst school girls

The Ministry of Education is about to initiate a process for revising the current policy on pregnancy amongst schoolgirls. We suggest that the revised policy should take a supportive approach instead of a punitive one so that schoolgirl mothers get help to complete their studies and thus have no motivation to try to conceal their pregnancies.

Encourage boys and men to take greater responsibility for their children

Most children will benefit from having two caring and involved parents. Furthermore, the prospect of a new baby would probably appear less daunting if the mother knew that the daily responsibility for the child and the expenses of child-rearing were going to be cooperatively shared. It is imperative for Namibia's future that boys and men be encouraged to take responsibility for the consequences of their sexual activities, and to play both a financial and an emotional role in the upbringing of the children they father. Taking steps to promote more gender equality in the acceptance of parental responsibilities would not only assist in reducing infanticide and baby-dumping, but would undoubtedly be to the benefit of all children.

ANNEXURE:

Post-partum depression

Definition

Post-partum depression is severe depression in a woman after she has given birth. It may occur soon after delivery or up to a year later. Most of the time, it occurs sometime in the first 4 weeks after delivery.

Causes, incidence, and risk factors

Expected mood changes: Women commonly have mood changes during pregnancy. They are caused by changes in hormone levels. Many mood changes are normal and even expected, since having a baby can lead to several lifestyle changes. Support from your family and friends can help.

Post-partum blues: Approximately 50 - 70% of women may experience depression for a short time after pregnancy. These are feelings of anxiety, irritation, tearfulness, and restlessness that are often called "the post-partum blues." This generally occurs in the first few weeks after pregnancy and goes away soon, without the need for treatment.

Post-partum depression: Post-partum depression is a more serious condition that affects between 8 - 20% of women after pregnancy, especially the first 4 weeks. It is necessary to seek medical attention to treat post-partum depression. You may have a higher chance of post-partum depression if you:

- had a mood or anxiety disorder prior to pregnancy, including depression with a previous pregnancy
- have a close family member who has had depression or anxiety
- had something stressful happened to you during the pregnancy, including illness, death or illness of a loved one, a difficult or emergency delivery, premature delivery, or illness or abnormality in the baby
- are under age 20
- did not plan the pregnancy or do not want the pregnancy
- currently abuse alcohol, take illegal substances, or smoke (these are also serious medical health risks for the baby)
- have little support from family, friends, and a significant other
- have a poor relationship with your husband, boyfriend, or significant other or are unmarried
- previously attempted suicide
- have financial problems (low income, poor housing)
- received poor support from your parents in childhood.

Symptoms

Most of the symptoms are the same as in major depression. In addition to depressed mood, you may have the following symptoms nearly every day:

- negative feelings toward the baby
- lack of pleasure in all or most activities
- decreased appetite
- loss of energy experienced
- feeling withdrawn, socially isolated, or unconnected
- feelings of worthlessness or guilt
- agitation and irritability
- trouble sleeping
- difficulty concentrating or thinking
- thoughts of death or suicide (a suicide plan).

Signs and tests

There is no single test to diagnose post-partum depression. Your doctor may have you complete a questionnaire at your office visit to look for signs of depression or risks for depression. Sometimes depression following pregnancy can be related to other medical conditions. Hypothyroidism, for example, causes symptoms such as fatigue, irritability, and depression. Women with post-partum depression should have a blood test to screen for low thyroid hormones.

Treatment

The treatment for depression after birth often includes medication, therapy, or a combination of both. There are several types of antidepressant medications that may be given to breastfeeding mothers. If you are thinking of harming yourself or your infant, seek immediate medical help. If depression is diagnosed, you may need to be followed closely for at least 6 months.

Support groups

Participating in support groups may be valuable, but should be combined with medication and formal psychotherapy.

Expectations (prognosis)

Medication and professional counseling are often successful in reducing or eliminating symptoms.

Complications

If left untreated, post-partum depression can last for months or years, and you may be at risk of harming yourself or your baby. The potential long-term complications are the same as in major depression.

Calling your health care provider

Notify your doctor or paediatrician if you experience depression after pregnancy. Do not be afraid to seek help immediately if you feel overwhelmed and are afraid that you may hurt your baby.

Prevention

Having good social support from family, friends, and co-workers probably helps to reduce the seriousness of post-partum depression, but may not prevent it. Screening questionnaires may help with early detection of depression or risks for depression.

based on information from *MedLine Plus Medical Encyclopedia*, updated on 23 January 2007, www.nlm.nih.gov/medlineplus/ency/article/007215.htm
Medline Plus is a service of the US National Library of Medicine and the National Institutes of Health.

A 1999 study in Khayelitsha, South Africa, found that postnatal depression is nearly three times more common amongst women in this community than in women from the developed world, and is associated with disturbances in the mother-infant relationship. High rates of post-natal depression combined with widespread poverty could put children at especially high risk for developmental problems. Policies should address these twin threats through poverty alleviation and targeted interventions for depressed mothers.

Post-natal depression occurs in about 10 percent of new mothers in wealthier countries, where it has an adverse impact on the relationship between mother and baby. This can have a negative effect on the children's emotional development and their ability to learn. Studies in developed nations show that post-natal depression is due to psychological and social causes rather than biological factors.

Khayelitsha is a settlement on the fringes of Cape Town. Unemployment, poverty and overcrowding are rife. The researchers interviewed 147 women who had given birth two months earlier. Mothers were also filmed interacting with their babies.

Important findings of this research include:

- Over a third of new mothers suffer from postnatal depression – around three times as many as in developed countries.
- Social adversity is endemic in Khayelitsha but is not a risk factor for post-natal depression in this context.
- Instead, maternal depression is related to poor emotional and practical support from the partner. The absence of the partner in the home also has an adverse effect on the mother-child relationship.
- Post-natal depression is associated with higher levels of maternal insensitivity and lower levels of infant positive engagement in mother-infant interactions.
- The quality of mother-child interaction in Khayelitsha is rated as poorer than in Britain. This may be due to high levels of social adversity which exist in this peri-urban context.

In settlements like Khayelitsha, where social adversity and post-natal depression are high, children are likely to be at special risk, since both factors have a negative effect on child development. Thus, maternal health programmes could also improve the welfare of children by:

- addressing the problem of post-natal depression
- targeting social and economic risk factors for maternal depression
- improving the quality of mother-child interactions in peri-urban settlements.

PJ Cooper, M Tomlinson, L Schwartz, M Woolgar, L Murray and C Molteno, "Postpartum depression and the mother-infant relationship in a South African peri-urban settlement", *British Journal of Psychiatry* 175 (1999), summary from www.id21.org/id21text/h3pc1g1.html



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