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# AN HISTORICAL OVERVIEW OF INFANTICIDE IN SOUTH AFRICA

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## 1 Introduction

Infanticide is the practice of intentionally killing an infant of a given species<sup>1</sup> by the parents themselves or with their consent.<sup>2</sup> Infanticide used to be practiced for various reasons such as the fact that a baby was born out of wedlock, for economic reasons (for example population control),<sup>3</sup> for sex selection or ridding society of potentially burdensome deformed members.<sup>4</sup> Silverman remarks that infanticide is the oldest method of family planning.<sup>5</sup> It was a more popular method of population control than abortion – it was safer for the mother and the gender of the baby was known.<sup>6</sup>

It is important to note that two types of infanticide are found in the literature: on the one hand the killing of a healthy but unwanted child, and on the other hand the killing of ill, malformed, weak or sickly babies.<sup>7</sup> Roman and certain other ancient cultures regarded the birth of a deformed baby as a bad omen and therefore babies who were born with even a minor defect, such as a cleft palate, harelip or missing finger, were put to death.<sup>8</sup>

Various methods were used to commit infanticide: sometimes a family member killed the baby by strangling it,<sup>9</sup> the baby was often drowned as the water would

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1 Burchell & Milton *Principles of Criminal Law* (2006) 673. At n 38 these authors also provide a definition of neonaticide, viz the killing of an infant within twenty-four hours of birth. See also Faber "Infanticide, especially in eighteenth-century Amsterdam; with some references to Van der Keessel" 1976 *Acta Juridica* 253; Langer "Infanticide: A historical survey" 1974 *History of Childhood Quarterly* 353. For the purposes of this article, the term "infanticide" is used to include "neonaticide".

2 Williams *The Sanctity of Life* (1958) 26.

3 Voirol "Hush little baby; don't say a word: saving babies through the no questions asked policy of 'Dumpster Baby Statutes'" 2002 *Thomas M Cooley Journal of Practical & Clinical Law* 117; Faber (n 1) 253; Wilkinson "Classical approaches to population and family planning" 1978 *Population and Development Review* 442; Williams (n 2) 26.

4 Silverman "Mismatched attitudes about neonatal death" 1981 *The Hastings Center Report* 12. See also Langer (n 1) 354.

5 Silverman (n 4) 12.

6 Wilkinson (n 3) 451.

7 Moseley "The history of infanticide in Western society" 1986 *Issues in Law and Medicine* 345.

8 See Aish HaTorah: <http://www.aish.com/seminars/worldperfect/wp03n11.htm> (27 May 2007).

9 Wilkinson (n 3) 450.

muffle its cries, or it was simply abandoned.<sup>10</sup> The rationale behind exposure or abandonment was to afford the baby the opportunity to be found and raised by a Good Samaritan.<sup>11</sup> Such a baby was therefore left shortly before dawn to provide him or her with the maximum daylight to be found and rescued.<sup>12</sup>

Since infanticide is as old as mankind itself, this practice will be discussed with reference to examples from Greek and Roman mythology, as well as extracts from Greek and Roman literature. The way in which infanticide was discussed by authorities on Roman law, canon law, Roman-Dutch law and English law will then be examined. Finally, infanticide, as it is treated in present-day South African law will be considered. This article will attempt to illustrate that despite the fact that South African legislation is designed to protect the lives of people, especially children, infanticide is still committed, albeit on a smaller scale and for different reasons.

## 2 Historical background

### 2.1 Greek and Roman mythology

According to Wilkinson "[i]nfanticide in the form of exposure of infants was deeply rooted in Greek mythology even in legends of infant gods, from Zeus downwards, being exposed but rescued, as well as heroes and heroines."<sup>13</sup>

Two well-known examples of attempted infanticide of healthy but unwanted babies are those of Zeus and Oedipus. Zeus was left by his mother Rhea on the island Crete. He survived because Gaia (goddess of the Earth or the Mother goddess) and some nymphs took him under their care.<sup>14</sup>

Oedipus's father, Laius, King of Thebes, learnt from an oracle that his son, borne by Queen Jocasta, would eventually kill him (the king) and marry his mother (the king's wife).<sup>15</sup> In order to prevent this prophecy from being fulfilled, Laius ordered a herdsman to kill the child. The herdsman, however, felt sorry for the baby Oedipus and did not kill him. He pierced his feet and left him to die on a distant mountainside – a common practice used in ancient Greece to dispose of unwanted babies.<sup>16</sup> However, the baby was found by a shepherd

10 Rawson "Children in the Roman familia" in Rawson (ed) *The Family in Ancient Rome: New Perspectives* (1986) 172; Voirol (n 3) 117; Price: [http://www.christiancadre.org/member\\_contrib/cp\\_infanticide.php](http://www.christiancadre.org/member_contrib/cp_infanticide.php) (19 June 2007).

11 Rawson (n 10) 172; Wilkinson (n 3) 450.

12 Wilkinson (n 3) 450.

13 *Idem* 448.

14 Bellingham *An Introduction to Greek Mythology* (1989) 15-16; Cotterell *Illustrated Encyclopedia: Classical Mythology* (2000) 42.

15 Bellingham (n 14) 94-95; Bulfinch *Myths of Greece and Rome* (1981) 143; Cotterell (n 14) 66.

16 Bellingham (n 14) 94; Wilkinson (n 3) 448.

and given to the childless King Polybus of Corinth who adopted the baby. Eventually Oedipus unwittingly fulfilled the prophecy when he killed his father and married his mother.

But mythological tales also concern the disposal of disabled, unwanted babies. There is the story of Hephaestus, the son of Zeus and Hera.<sup>17</sup> Since Hephaestus was born lame, his mother, Hera, tried to drown her imperfect child, but she was thwarted by the sea nymphs who rescued the baby and took him to the beach.<sup>18</sup> This is an example of the second type of infanticide, namely the killing of a deformed infant.

Medea,<sup>19</sup> “a witch, a feminist and a powerful woman”,<sup>20</sup> was married to Jason (who is famous for his efforts to obtain the Golden Fleece), but when he spurned Medea in order to marry Glauce, a Theban princess, she took revenge by murdering the two sons she had by him.<sup>21</sup>

Other Greek gods or demi-gods who were exposed at birth and left to die, but eventually rescued, were Poseidon, Asclepius, Amphion, Ion and Perseus.<sup>22</sup> From this we can deduce that it was a common practice amongst the Greek gods to dispose of their unwelcome children.<sup>23</sup>

Greek and Roman mythology are closely related, since the Romans often “romanised” Greek gods and tales. Probably the most famous example from Roman mythology of healthy babies who were abandoned in order to kill them, is that of Romulus, the mythic founder of Rome, and his twin brother, Remus.<sup>24</sup> They were the sons of Rhea Silvia, the only child of Numitor, king of Alba Longa, and Mars, the Roman god of war. Amulius, the brother of King Numitor, had deposed his brother as king and ordered his servants to kill the twins. Instead of murdering the twins, the servants cast them into the Tiber. According

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17 Bulfinch (n 15) 22; Cotterell (n 14) 46.

18 There is also another version of this story, according to which Hephaestus' father, Zeus, flung him from Mount Olympus to the volcanic island of Lemnos because he had interfered in a quarrel between Zeus and Hera. According to this version of the legend, Zeus' act resulted in Hephaestus being lame. See Bulfinch (n 15) 22; Cotterell (n 14) 46.

19 Bellingham (n 14) 74; Cotterell (n 14) 60.

20 Schwartz & Isser *Child Homicide: Parents Who Kill* (2007) 6.

21 As a result of the well-known myth about Medea, infanticide and filicide (the killing of one's child of any age) are nowadays called the Medea syndrome. See Wen Chen Wu “Culture is no defence for infanticide” 2003 *American University Journal of Gender, Social Policy and the Law* 978; Schwartz & Isser (n 20) 7.

22 Bennett “The exposure of infants in ancient Rome” 1923 *The Classical Journal* 344; La Rue van Hook “The exposure of infants at Athens” 1920 *Transactions and Proceedings of the American Philological Association* 137.

23 Bennett (n 22) 344.

24 Livy 1 4 3-8. See also Langer (n 1) 354.

to legend they were then found by a she-wolf who raised them – hence the famous statue of the she-wolf suckling Romulus and Remus.<sup>25</sup>

## 2.2 Greek and Roman literature

From Greek literary sources we gather that the Greeks did not raise all their offspring; they killed “weak, deformed, or unwanted children.”<sup>26</sup> Plato explains the rite of *amphidromia* that had to be performed before an infant was accepted into the family circle by the father of the household: if the baby was not accepted it was exposed and left to die.<sup>27</sup> Proof that the Greeks did not raise more than one or two of their children can also be found in Polybius.<sup>28</sup> This Greek author advocated infanticide, not only of imperfect infants, but also of healthy children for purposes of population control.<sup>29</sup> Aristotle strongly favoured the enactment of a law that provided that deformed infants should not be reared but be exposed to die.<sup>30</sup> He furthermore advocated infanticide as a means of birth control.<sup>31</sup>

Exposure was probably the most popular way in which the ancient Greeks discarded unwanted babies.<sup>32</sup>

La Rue van Hook mentions that in Greek culture a girl was not as welcome as a boy since a son could perpetuate the family and could help to protect the state in times of war.<sup>33</sup> Moreover, a dowry had to be provided for girls and they could not help to defend the state.<sup>34</sup> Consequently more girls than boys were exposed.<sup>35</sup>

The Romans had a rite similar to the Greek *amphidromia*: “After eight days the child was formally accepted into the family clan by a solemn ceremony at the domestic hearth”,<sup>36</sup> or it was rejected by the *paterfamilias*.

According to Seneca, the Romans drowned infants who were weak and abnormal at birth: “liberos quoque, si debiles monstrosique editi sunt,

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25 Cotterell (n 14) 78-79.

26 Barton “When murdering hands rock the cradle: An overview of America’s incoherent treatment of infanticidal mothers” 1998 *Southern Methodist University Law Review* 594.

27 Plato *Theaetetus* 160e-161a. See also Williams (n 2) 26.

28 Polybius *Histories* 36 17 7.

29 *Idem* 36 17 7-8.

30 Aristotle *Politics* 7 14 10. See also La Rue van Hook (n 22) 142; Le Roux “Aspekte van eutanasie in die strafreg” 1979 *De Jure* 74.

31 Aristotle (n 30) 7 14 10. See also Langer (n 1) 354.

32 Herodotus 1 112 and 116.

33 La Rue van Hook (n 22) 136; Golden “Demography and the exposure of girls at Athens” 1981 *Phoenix* 316.

34 La Rue van Hook (n 22) 136.

35 *Ibid.*

36 Durant *Caesar and Christ* (1944) 56.

mergimus.”<sup>37</sup> This is confirmed by Livy who wrote that it was regarded as a bad omen when a baby was born with abnormalities.<sup>38</sup> Such a baby had to be removed from the earth and was consequently drowned. He discussed a specific incident where a baby, who was abnormally big at birth, was put into a chest while still alive and thrown into the sea to drown.<sup>39</sup>

Tacitus related that babies were also killed as a form of birth control and he criticised the Germanic tribes for lacking a similar practice in their culture.<sup>40</sup> He also launched a scathing attack on the Jews, who chose not to control their numbers, but preferred to increase their population and who regarded it as a crime to murder an *agnatus* (a relative, offspring).<sup>41</sup>

In Roman literature – as in Greek – a girl was not as welcome as a boy. According to Lucius Apuleius a girl was regarded as belonging to an “inferior sex” (*sexus sequioris*) and he described how a particular husband ordered his wife to kill the baby she was expecting should it turn out to be a girl.<sup>42</sup>

Although Dionysius of Halicarnassus was a Greek historian, he wrote Roman history. In his work he praised the methods used by Romulus to control the Roman population effectively. According to him, the Greeks should have followed the example set by Romulus.<sup>43</sup> Romulus obliged Roman citizens to bring up all their male children and the first born of the females; only deformed children under the age of three years could be disposed of by way of exposure.<sup>44</sup>

### 3 Legal history

#### 3.1 Roman law to the rise of Christianity

It is important to take cognisance of the operation of the Roman *familia* before the practice of infanticide in Roman law is considered. Ulpian provides a definition of the Roman *familia*: according to him, the *familia* includes things (for example assets) and persons (that is, a wife, sons, daughters, adopted children and slaves).<sup>45</sup> The *paterfamilias* was the head of the family.<sup>46</sup> According to

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37 Seneca *De Ira* 1 15 2: “We also drown children who are born weak and deformed” (own translation).

38 Livy 27 37 5-6.

39 *Ibid.*

40 Tacitus *Germania* 19 5.

41 Tacitus *Historiae* 5 5.

42 Lucius Apuleius *Metamorphoses* 10 23.

43 Dionysius of Halicarnassus 2 15 1-2.

44 *Ibid.*

45 D 50 16 195 1-5. See also Buckland *A Text-Book of Roman Law from Augustus to Justinian* (1963) 101-102; Kaser (trl by Dannenbring) *Roman Private Law* (1984) 37, 74-76.

Roman law he had the power of life and death (*ius vitae necisque*)<sup>47</sup> over the members in his household and could therefore decide whether or not a child should be reared.<sup>48</sup>

Gaius writes about the unusual powers that the *paterfamilias* had according to Roman law:

Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est. Fere enim nulli alii sunt homines qui talem in filios suos habent potestatem qualem nos habemus.<sup>49</sup>

The following sentence from Justinian's *Institutiones* echoes that of Gaius regarding the power of the *paterfamilias*:

Ius autem potestatis quod in liberos habemus proprium est civium Romanorum: nulli enim alii sunt homines qui talem in liberos habeant potestatem qualem nos habemus.<sup>50</sup>

To some extent these powers of the head of the family were later limited since the *paterfamilias* was not allowed to kill his son without listening to him and accusing him before the prefect or provincial governor.<sup>51</sup> However, at the time of the Roman Empire (27 BC - AD 476) the *patriapotestas* of the *paterfamilias* was restricted.<sup>52</sup> Durant remarks that these powers of the *paterfamilias* were checked "by custom, public opinion, the clan council, and praetorian law; otherwise they lasted to his death, and could not be ended by his insanity or even by his own choice."<sup>53</sup>

As mentioned earlier, a child became a member of the household of the *paterfamilias* if he was accepted into the family and the clan at a solemn ceremony at the domestic hearth.<sup>54</sup> After he or she was born, the baby was laid at the father's feet and only after the *paterfamilias* had taken him or her in his arms (*ius tollendi, suscipiendi*), thereby indicating the legitimacy of the baby and willingness to raise the child, did the baby become a member of the

46 Van Zyl *History and Principles of Roman Private Law* (1995) 87-88. See also Kaser (n 45) 74-76, 304-306; Moseley (n 7) 349.

47 Cicero *De Domo Sua* 29 77: "*vitae necisque potestatem*"; Dionysius of Halicarnassus 2 26 4; Moorman *Verhandelinge over de Misdaden en der selver Straffen* (1764) 2 6 3. See also Borkowski & Du Plessis *Textbook on Roman Law* (2005) 115; Buckland (n 45) 102-103; Voiroi (n 3) 118; Kaser (n 45) 74-76, 305-306; Wen Chen Wu (n 21) 979.

48 Borkowski & Du Plessis (n 47) 114; Wilkinson (n 3) 449.

49 Gaius 1 55: "Likewise our children, whom we begot from a legal marriage, are under our authority. That law is peculiar to the Roman people for there are no other people who have such power over their children as we have" (own translation). See also Buckland (n 45) 102.

50 I 1 9 2: "However the right of authority we have over our children is peculiar to Roman citizens: for there are no other people who have such authority over their children as we have" (own translation).

51 D 48 8 2.

52 Hadley *Introduction to Roman Law: In Twelve Academical Lectures* (1904) 123.

53 Durant (n 36) 57.

54 *Idem* 56.

household.<sup>55</sup> During the Roman Empire this ceremony became obsolete and was ended by a praetorian procedure “which required fathers to recognise their children”.<sup>56</sup> Otherwise the baby could be disowned and cast out (*expositus*).<sup>57</sup>

As early as the Twelve Tables, it was laid down that a baby who was terribly deformed at birth must be quickly put to death.<sup>58</sup> “deinde cum esset cito necatus tamquam ex duodecimo tabulis insignis ad deformitatem puer, brevi tempore ...”.<sup>59</sup>

Ulpian was of the opinion that should a woman give birth to a malformed baby (*non humanae figurae*) this should not be held against her, and that the parents should not be penalised if they had observed the statutes.<sup>60</sup>

Since the *paterfamilias* had absolute power over his family members, infanticide was not regarded as murder or any other crime.<sup>61</sup> One of the immediate family members, like the father or mother, killed the infant soon after birth – often by abandoning the baby and leaving it to die of exposure, by smothering the child or by drowning the newborn.<sup>62</sup> This was an inexpensive and quick way of killing the child.<sup>63</sup> Even at the end of the Republican era the *Lex Pompeia de Parricidio* (a comprehensive statute on the killing of relatives by relatives) did not mention the random killing of a child by his or her father.<sup>64</sup> The term *parricidium* excluded the killing of a son by his father (*quod et occidere licebat*), but included cases where another relative (like the mother or grandfather) killed a child, in which case it was regarded as murder.<sup>65</sup> The law became increasingly unsympathetic towards infanticide, specifically exposure as a means of getting rid of unwanted babies.<sup>66</sup>

With the rise of Christianity there came a further change in attitude towards infanticide, and thenceforth it was regarded as a serious crime, namely murder, since all human life was regarded as inviolable.<sup>67</sup> In AD 318 the Roman emperor Constantine decreed that the killing of a child constituted a crime,

55 Bennett (n 22) 346.

56 Buckland (n 45) 102.

57 *Ibid.*

58 Cicero *De Legibus* 3 8 19.

59 “[T]hereafter after he had been quickly put to death according to the (law laid down by the) Twelve Tables (namely) that terribly deformed children must immediately be killed ...” (own translation).

60 *D* 50 16 135.

61 Boswell *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1988) 58-59; Buckland (n 45) 102-103; Durant (n 36) 57; Kaser (n 45) 304-307; Thomas *Textbook of Roman Law* (1976) 414.

62 Price: [http://www.christiancadre.org/member\\_contrib/cp\\_infanticide.php](http://www.christiancadre.org/member_contrib/cp_infanticide.php) (14 June 2007).

63 *Ibid.*

64 *D* 8 8 2. See also Buckland (n 45) 103; Hadley (n 52) 120.

65 Silverman (n 4) 12.

66 Rawson (n 10) 172.

67 Langer (n 1) 355; Voirol (n 3) 118; Wen Chen Wu (n 21) 979.

called *parricidium*,<sup>68</sup> and by AD 374 infanticide became an offence in Roman law for which a citizen could be punished by death.<sup>69</sup> Offenders were, however, seldom prosecuted.<sup>70</sup>

The *Codex Theodosianus* determined that *parricidium* (the murder of a relative) was not to be punished in the usual way, but exceptional and more extreme means had to be used to punish the guilty party: such a person had to be sewn into a bag filled with snakes and thrown into the nearest sea or river.<sup>71</sup>

In conclusion, it seems that even the Roman-law authorities distinguished between the killing of a healthy baby (*parricidium*) and that of a deformed baby or *monstrum*. As the law developed it became more intolerant towards a person who committed *parricidium*, but more lenient towards those who killed a malformed infant.

### 3.2 Canon law

Canon law was developed by the Roman Catholic Church for use in the ecclesiastical courts.<sup>72</sup> Canon law used Roman law as point of departure, but developed and simplified Roman law and abolished its unnecessary formalism.<sup>73</sup> Both Roman and canon law were eventually received in the Dutch provinces.<sup>74</sup>

Life was held sacred by the Church, whether it was the life of an adult or a child, and infanticide was regarded as a crime. The Decretals of Pope Gregory IX contains texts that describe the proper punishment for infanticide, namely that the perpetrator should be punished for three years during one of which he may only have bread and water.<sup>75</sup> Negligent, as well as intentional infanticide was punishable under canon law.<sup>76</sup>

De infantibus autem qui mortui reperiuntur cum patre et matre et non apparet, utrum a patre vel a matre oppressus sit ipse vel suffocatus, vel propria morte defunctus, non debent inde securi esse parentes, nec etiam sine poena.

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- 68 C 9 17 1. See also Borkowski & Du Plessis (n 47) 115; Voirol (n 3) 118; Langer (n 1) 355; Moseley (n 7) 352.  
 69 Langer (n 1) 355; Moseley (n 7) 351.  
 70 Borkowski & Du Plessis (n 47) 114; Thomas (n 61) 415.  
 71 C Th 9 17 1.  
 72 Borkowski & Du Plessis (n 47) 364; De Vos *Regsgeschiedenis* (1992) 76; Wessels *History of the Roman-Dutch Law* (1908) 130.  
 73 Borkowski & Du Plessis (n 47) 364; De Vos (n 72) 77; Wessels (n 72) 132.  
 74 De Vos (n 72) 83-84; Wessels (n 72) 132.  
 75 *Corpus Iuris Canonici Decret Greg Lib V Tit X cap III*.  
 76 *Corpus Iuris Canonici Decret Greg Lib V Tit X cap III*. "However, regarding infants who are found dead with the father and mother and it is not certain whether the infant was smothered or suffocated by the mother or father or died a natural death, hence not even careless parents must go unpunished" (own translation).



The Decretals of Pope Gregory also prescribed that if a father exposed a child, that child had to be set free from the *potestas* of his father.<sup>77</sup> If the child was found by someone, that person could not obtain any right over the child and consequently such a child was to be raised as a freedman and not a slave<sup>78</sup> (“Nam et hoc casu in ingenuitatem libertus et servus in libertatem eripitur ...”).<sup>79</sup> The inference is that previously foundlings were raised as slaves, but this decree changed the position.

The attitude of the Roman-Dutch authors was less rigid than that of the canonists regarding infanticide.

### 3.3 The Roman-Dutch authorities

A crime called *crimen expositionis infantis* existed in Roman-Dutch law.<sup>80</sup> This crime could be subdivided into two categories: The first is abandoning a young child without the intention of killing it (this could be because parents did not have the financial means to support a child), but leaving it in a place where it was likely to be found and raised by other people.<sup>81</sup> The second consisted of the abandonment of a child with the intention of killing it.<sup>82</sup> The former was punished more leniently than the latter, which was punishable by death.<sup>83</sup> The opinions of a few Roman-Dutch authors on this issue will be discussed below.

One of the best-known Roman-Dutch authors, Grotius (1583-1645), was of the opinion that a body must have a soul or a spirit in order to be regarded as a human being. Deformed babies (that is, *monstra*) lacked a soul and therefore had to be killed immediately by means of suffocation.<sup>84</sup>

Antonius Matthaeus II (1601-1654) gives a lengthy exposition of this crime. Also, according to him a distinction had to be drawn between the two categories mentioned above. Someone who had abandoned a child with the intention of killing it should be punished according to the *Lex Cornelia* and the *Lex Pompeia* in the same way as someone who had committed *parricidium*.<sup>85</sup> However, someone who exposed an infant where it could be found by

77 *Corpus Iuris Canonici Decret Greg Lib V Tit XI cap I.*

78 *Ibid.*

79 *Ibid.*

80 Hewett (trl) & Stoop (ed) *Matthaeus De Criminibus* Vol 2 (1987) 47 2. See also Burchell & Milton (n 1) 673; Hunt & Milton *South African Criminal Law and Procedure* (1990) 366; Snyman *Strafreg* (1999) 441.

81 Decker *Simon van Leeuwens' Commentaries on Roman-Dutch Law (Roomsche Hollandsche Recht)* trl by Kotzé (1923) 4 34 3. On this distinction see also Burchell & Milton (n 1) 673; Snyman (n 80) 441 and *R v Oliphant* 1950 1 SA 48 (O).

82 Leeuwen (n 81) 4 34 3. See also Burchell & Milton (n 1) 673; Hunt & Milton (n 80) 366; Snyman (n 80) 441.

83 Burchell & Milton (n 1) 673.

84 Grotius *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (1939) 1 3 5.

85 Matthaeus (n 80) 47 16 2.

someone else had to be punished *extra ordinem* (in other words more leniently).<sup>86</sup> And such a person also lost his *patriapotestas*.<sup>87</sup>

For Matthaeus too it was important to distinguish between a human being who was merely misshapen, but had a soul, and one who lacked a soul and was therefore a *monstrum*.<sup>88</sup> The killing of someone with a soul, as opposed to a *monstrum*, was regarded as murder:

Sed non inepte fortasse fecerit qui diviserit utramque sententiam, et sine fraude monstra caedi dixerit, si non tantum figura sit monstrosa ...<sup>89</sup>

A clear distinction between the mere killing of child (referred to under the broad term *parricidium*) and exposure is drawn by Leeuwen (1626-1682).<sup>90</sup> The punishment for parricide was severe: the guilty parties were tortured on a wheel until they died.<sup>91</sup> Women guilty of killing their infants were often strangled with a cord tied to a stake.<sup>92</sup> Those who had exposed their infants were punished less severely, although the punishment was still harsh; they were, for example, whipped, branded and banished.<sup>93</sup> Leeuwen further draws a distinction between those who left their infants in inhabited places where they could easily be found and raised by a Good Samaritan, and those who left their infants in uninhabited places where they would in all likelihood die.<sup>94</sup>

This was also the law that applied in Friesland. Huber (1636-1694) distinguishes between exposure as a means of disposing of an infant and putting the infant to death.<sup>95</sup> If the baby was left in an uninhabited place so that the chances of the baby being found were slim, the punishment would be more severe than in those instances where the baby was left in inhabited places where it could more easily be found and raised by someone else.<sup>96</sup> Mothers who had the intent to cause the death of their babies were punished in an inhumane and cruel manner – they were sewn into a bag and drowned.<sup>97</sup>

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86 *Ibid.*

87 *Ibid.*

88 *Idem* 48 5 6.

89 *Ibid.*: “But it would perhaps not be inappropriate to divide the two opinions and say that monsters can be killed without punishment, if not only their form is monstrous ...” (own translation).

90 Leeuwen (n 81) 4 34 2.

91 *Ibid.*

92 *Idem* 4 34 3.

93 *Ibid.*

94 *Ibid.*

95 Huber *Heedensdaegse Rechtsgeleertheyt* 6 13 33-34 (see *The Jurisprudence of my Time* (trl by Gane) (1939)).

96 *Idem* 6 13 32-33.

97 *Idem* 6 13 33.

Johannes Voet (1647-1713) distinguishes between babies born with a human form and so-called “monsters” who did not have a human form.<sup>98</sup> Parents did not have to rear the latter. They could be strangled or drowned with impunity.<sup>99</sup>

Although Moorman (1696-1743) regarded the murder of a child as a terrible crime, for which the death penalty could be imposed,<sup>100</sup> he, too, was of the opinion that *monstra* could be killed with impunity.<sup>101</sup> He did not regard infants born with deformities as children and was of the opinion that they should be suffocated:

Hoe verre monstreuse geboortes kunnen gedood worden, en wie dat eigentlijk voor monsters te houden zyn, verdient, hier ondersogt en nagespoort te worden; wien aengaande het bekend ende uitgemaekte saek is, dat monsters en wanschapene geboortes voor geen kinderen worden gerekent, en dat men gewoon is deselve in deese handen te smoren.<sup>102</sup>

According to Van der Keessel (1738-1818) only a person born with a body that could contain a spirit should be regarded as a human being.<sup>103</sup> He relied on Grotius who wrote that *monstra* were not regarded as human beings and ought to be suffocated immediately.<sup>104</sup> Van der Keessel, however, had a less extreme approach than Grotius. His view was that this should be done only after consultation with an official (*magistratus*) and skilled doctors.<sup>105</sup> He believed that such infants should not be killed immediately, but that drastic steps should only be taken, once it was clear that the infant was not a human being with a spirit.

Also Van der Linden (1756-1835) was of the opinion that deformed babies (*monsters of wanschapene geboorten*) should not be allowed to live, but should be suffocated (*smooren*).<sup>106</sup> The killing of such a baby did not constitute the crime of murder.<sup>107</sup> He mentioned that it was a prerequisite for child murder that the baby must have been carried full term and must have been born alive.<sup>108</sup>

98 Voet *Commentarius ad Pandectas* 1 6 13 (see Gane *The Selective Voet Being the Commentary on the Pandects* (1955).

99 *Ibid.*

100 Moorman (n 47) 2 3 1, 2 6 14, 2 6 16 & 2 6 19.

101 *Idem* 2 6 9.

102 *Idem* 2 6 19. “It will be examined and researched here to which extent babies born with deformities should be killed and who should be regarded as monsters; when it is a known and clear-cut case that monsters and deformed babies are not regarded as children, they may be smothered” (own translation).

103 Van der Keessel *Praelectiones* 1 3 5 (see Van Warmelo, Coertze & Gonin (eds) Van der Keessel: *Praelectiones Iuris Hoediemi ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* (1961).

104 *Ibid.*

105 *Ibid.*

106 Van der Linden *Koopmans Handboek* (1806) 2 5 2.

107 *Ibid.*

108 *Ibid.*

Exposure (*te vondeling leggen*) is discussed along the same lines by Van der Linden: If it was done with the purpose of killing the child, it was regarded as murder for which the punishment was the death penalty.<sup>109</sup> In those cases where it was not the purpose to kill the child (*onvoorzigtige doodslag*), the guilty party was punished with another, less severe, punishment such as “confinement, lijfstraffe, of bannissement”.<sup>110</sup>

To summarise, as Roman law developed, so did the *patriapotestas* diminish and with it the *ius vitae necisque* of the *paterfamilias*. By the seventeenth century, the Roman-Dutch authors, discussed above, were opposed to the killing of healthy babies.<sup>111</sup> Those who committed *infanticidium* (also classified as *parricidium*) had to receive the most severe punishment, but these authors were of the opinion that *monstra* should rather be killed and not raised. If a mother exposed her baby and left it in a place where it was likely to be found and raised by someone, this was regarded as mitigating circumstances when it came to the question of punishment. In contrast, if a mother left her child in a solitary place where it was not likely to be found and it died, it was regarded as murder and was punished as such.

### 3 4 English law

A superficial perusal of case law regarding infanticide confirms the fact that South African courts frequently relied on English law. In view of the fact that English law significantly influenced legal development in this field, a brief exposition of its development in England will be given.

In 1803 the *Malicious Shooting or Stabbing Act*<sup>112</sup> was introduced according to which infanticide (or the procurement of the miscarriage of any woman) had to be tried in the same way as murder and the crime had to be punished by death.<sup>113</sup> The Act further determined that a prerequisite for this crime was that the birth must have been completed and the baby born alive.<sup>114</sup> The result was that infanticide could be committed without impunity where part of the baby's body was still inside the mother, since it was difficult to obtain evidence to

109 *Idem* 2 5 12.

110 *Idem* 2 5 12-13.

111 See also Labuschagne “Aktiewe eutanasie van 'n swaar gestremde baba: 'n Nederlandse hof herstel die *ius vitae necisque* in 'n medemenslike gewaad” 1996 *SALJ* 216.

112 43 Geo 3 c 58 (also known as *Lord Ellenborough's Act*).

113 *Ibid.*

114 See, too, Langer (n 1) 360.

prove otherwise.<sup>115</sup> It is not surprising that infanticide flourished in England in the early nineteenth century.<sup>116</sup>

As a consequence of the economic and social conditions in mid-nineteenth century England,<sup>117</sup> mothers had to work in factories and fields and often had no other choice than to leave their children in the care of professional nurses.<sup>118</sup> These nurses were often referred to as "killer nurses" since they quickly got rid of the babies in their charge.<sup>119</sup> Extremely difficult economical conditions led mothers into paying a small premium to enrol their babies at burial clubs that would pay a benefit to the mothers in the event of the death of their babies.<sup>120</sup> Some mothers even registered their babies at more than one burial club; and when the babies died they could collect money from the different burial clubs.<sup>121</sup> This practice was known as "baby farming".<sup>122</sup> Langer indicates that "[b]y 1860 this became the subject of much official agitation, which led to the British Parliament introducing the first *Infant Life Protection Act*<sup>123</sup> in 1872."<sup>124</sup> This Act made provision for the compulsory registration of all households in which more than one child under the age of one were in the charge of a nurse or day care provider for more than twenty-four hours.<sup>125</sup> Importantly, in terms of this Act all deaths, including still-births, had to be reported immediately.<sup>126</sup>

Although the killing of a child was regarded as murder for which the mandatory punishment was the death sentence, English courts and juries were reluctant to convict mothers for the murder of their newborn infants.<sup>127</sup> In an attempt to reform the strict legislation in this regard, the Infanticide Act was introduced in 1922.<sup>128</sup> The purpose of this Act was "to mitigate the application of the law of murder to mothers who kill their new-born babies whilst suffering from the effects of childbirth."<sup>129</sup> The Act applied to those cases where a woman killed

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115 *Ibid.*

116 *Ibid.*

117 Law Reform Commission New South Wales: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP3> (7 March 2008).

118 Langer (n 1) 360; Silverman (n 4) 13.

119 Langer (n 1) 360; Silverman (n 4) 13.

120 Langer (n 1) 360; Silverman (n 4) 13.

121 Langer (n 1) 360; Silverman (n 4) 13.

122 Silverman (n 4) 13.

123 35 & 36 Vict c 38.

124 Langer (n 1) 361; See also Silverman (n 4) 13. According to s 27 of the Offences against the Person Act 1861 (24 & 25) Vict c 100, persons charged with the abandonment or exposure of a child under the age of two years, thereby jeopardising its health or life, had to be punished to penal servitude.

125 The Infant Life Protection Act, 1872 (35 & 36 Vict c 38) s 2. See also Langer (n 1) 361.

126 The Infant Life Protection Act, 1872 (35 & 36 Vict.c 38) s 8. See also Langer (n 1) 361.

127 Silverman (n 4) 13.

128 12 & 13 Geo 5 c 18. See also Ashworth *Principles of Criminal Law* (2008) 280; Card, Cross & Jones *Criminal Law* (2006) 294.

129 Ashworth (n 128) 280.

her new-born baby because she suffered from psychological effects after birth, like puerperal psychosis.<sup>130</sup>

The 1922 Act was replaced by the Infanticide Act of 1938.<sup>131</sup> This Act introduced two significant changes, namely that the definition of “new born child” was replaced by “child under the age of twelve months”<sup>132</sup> and furthermore it included mothers who had not fully recovered from the effects of lactation.<sup>133</sup> This was an extension of the provisions of the 1922 Act that included only mothers who had not fully recovered from the effects of birth as a ground for mental disturbance.<sup>134</sup> The 1938 Act offered an opportunity to the jury to change a verdict of guilty of murder to a verdict of guilty of infanticide if the prescribed conditions were met.<sup>135</sup>

A woman who had killed her baby could therefore either be charged with infanticide, or she could raise infanticide as a defence.<sup>136</sup> It should be noted that this defence was available only to the mother and that if the baby was killed by any person other than the mother, it would still constitute murder.<sup>137</sup> Although it has been amended, the Infanticide Act of 1938 is still in force.<sup>138</sup>

#### 4 South African law

One of the earliest reports of infanticide in South Africa was the case of the slave woman, Susanna van Bengale.<sup>139</sup> This unfortunate mother was condemned to death and executed in a most inhumane manner on 13 December 1669.<sup>140</sup> Her baby was ill and according to those who testified against her, she had strangled “her infant, a half-caste girl”.<sup>141</sup> Her punishment was that her “breast be ripped from her body by red-hot irons, and that she

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130 Ashworth (n 128) 280; Barton (n 26) 596; Ormerod *Smith & Hogan Criminal Law* (2005) 498.  
 131 1 & 2 Geo 6 c 36. See also Ashworth (n 128) 280; Card, Cross & Jones (n 128) 294-295; Langer (n 1) 365 n 27.  
 132 Infanticide Act, 1938 (1 & 2 Geo 6 c 36) s 1.  
 133 *Ibid.*  
 134 Infanticide Act 1938 (1 & 2 Geo 6 c 36) s 1. See also Ashworth (n 128) 280; Barton (n 26) 596; Card, Cross & Jones (n 128) 294-294; Ormerod (n 130) 498; Williams (n 2) 36-37.  
 135 Infanticide Act 1938 s 1(2). See also Card, Cross & Jones (n 128) 294.  
 136 Infanticide Act 1938 (1 & 2 Geo 6 c 36). See also Ashworth (n 128) 280; Ormerod (n 130) 498.  
 137 Ormerod (n 130) 498.  
 138 See also Card, Cross & Jones (n 128) 294-295.  
 139 Böeseken *Slaves and Free Blacks at the Cape 1658-1700* (1977) 31.  
 140 *Ibid.* See also De Kock *Those in Bondage: An account of the Life of the Slave at the Cape in the Days of the Dutch East India Company* (1950) 184; Leibbrandt *Precis of the Archives of the Cape of Good Hope Journal, 1662-1670* (1901) 308-309; Van Niekerk “Criminal justice at the Cape of Good Hope in the seventeenth century: Narratives of infanticide and suicide” 2005 (11-2) *Fundamina* 142-145.  
 141 Leibbrandt (n 140) 308-309.

then be burnt to ashes".<sup>142</sup> Eventually she was sewn into a sack and drowned.<sup>143</sup>

During the 1830s the law did not distinguish between child murder and other forms of murder and the death sentence was the punishment for both offences.<sup>144</sup> Several cases of infanticide were reported in the rural districts near Cape Town.<sup>145</sup> The facts of these cases were similar: The women were unmarried and the act of infanticide was committed out of fear of being ostracised by the community because the babies were born out of wedlock.<sup>146</sup> It was only in 1845 that legislation<sup>147</sup> was enacted according to which mothers who had killed their offspring could be convicted of concealment of birth rather than child murder, since the punishment for the former was not the death penalty.<sup>148</sup>

South African law regarding infanticide has been influenced by both Roman-Dutch and English law.

*R v Adams*<sup>149</sup> was the first reported case in the Supreme Court of the Cape of Good Hope in which the accused was charged with the common-law crime of *crimen expositionis infantis*. In this case Christina Adams, who had abandoned her baby boy on the day of his birth, was found guilty of *crimen expositionis infantis*.<sup>150</sup> The Court referred to the fact that infanticide was a specific crime which had to be treated in a particular way in terms of English law: "[T]he crime *expositionis infantis* was well known to the common law of the Colony, but had been made a crime in England by Statute".<sup>151</sup> As far as could be ascertained there were no decided cases after the *Adams* case where the accused was charged with the crime *crimen expositionis infantis*. After the *Adams* case the perpetrators were instead charged with concealment of birth under Cape Ordinance 10 of 1845.<sup>152</sup>

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142 *Idem* 308.

143 Böeseken (n 139) 31; Leibbrandt (n 140) 308-309.

144 Van der Spuy "Infanticide, slavery and the politics of reproduction at Cape Colony, South Africa, in the 1820s" in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (2002) 131.

145 Scully "Narratives of infanticide in the aftermath of slave emancipation in the nineteenth-century Cape Colony, South Africa" 1996 *Canadian Journal of African Studies* 88-89.

146 *Idem* 96.

147 Ord 10 of 1845 (C).

148 Van der Spuy (n 144) 131.

149 (1903) 20 SC 556. Regarding "exposure" as a crime, see also *S v Bengu* 1965 1 (NPD) at 303G-H.

150 *R v Adams* 556-557.

151 *Idem* 557.

152 *R v Arends* 1913 CPD 194; *R v Verrooi* 1913 CPD 864.

The next reported case from which the development regarding infanticide may be gleaned was reported in *Rex v Oliphant*.<sup>153</sup> The accused gave birth to a baby boy. She tried to conceal the birth of the baby by dropping him in a dam. In this case the accused was charged with "concealment of birth" under section 113 of the General Law Amendment Act 46 of 1935 which, according the judge, echoed English law: "The language here [ie s 113] employed has been borrowed largely from the relevant English Acts".<sup>154</sup> This is an example of how English law was received into South African law and became part of South African law. In this way the legislature confirmed that the English law forms part of our law. Although the court applied English law as it was received into Act 46 of 1935 in the *Oliphant* case, the judge still relied on Matthaeus II, Leeuwen and Carpzovius to prove that the crime known as *crimen infantis expositionis* existed in South African law.<sup>155</sup> The court pointed out that the latter crime has become a statutory crime in our law.<sup>156</sup> The inference is that section 113 of the General Amendment Act 46 of 1935 is a fusion of Roman-Dutch and English law.

An interesting case is that of *De Bellocq*.<sup>157</sup> The accused drowned her baby while bathing it.<sup>158</sup> She was charged with murder and subsequently found guilty of murder. Since extenuating circumstances were found she was sentenced in terms of section 349 of the Criminal Procedure Act 56 of 1955. This meant the accused was discharged on condition that she could be called upon for sentence within six months.<sup>159</sup> The sentence proves that the focus has changed and that the court has become more sympathetic towards the perpetrator. The court recognised the fact that the accused was in a highly emotional state when she killed her baby. However, the court still did not recognise "infanticide" as a separate crime, but rather regarded the act as "mercy killing", and added that euthanasia is still a crime in South African law.<sup>160</sup>

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153 *R v Oliphant* 1950 1 SA 48 (O).

154 *Idem* at 51.

155 *Idem* 50-51

156 *Idem* 51.

157 *S v De Bellocq* 1975 3 SA 538 (T). See also Le Roux (n 30) 79.

158 The accused gave birth to a premature baby, but after a few weeks it became clear that the baby suffered from toxoplasmosis. While she was still residing in France and before coming to South Africa, the mother had studied medicine for four years. Consequently she knew that the child would not live for any length of time and would be severely mentally challenged. One day, while she was still in a highly emotional state and probably still in puerperal stage, she decided to drown the baby while bathing it.

159 Strauss "Onvrywillige genadedood: 'n belangwekkende Transvaalse beslissing" 1969 *THRHR* 391.

160 *S v De Bellocq* 539A-C.



It was only in 1987, in the *S v Jokasi* case, that it was first suggested in an *obiter dictum* that infanticide should be recognised as a separate crime as in English law.<sup>161</sup> The judge raised the question whether special provision should be made for women who have not emotionally recovered after giving birth as in the English Infanticide Act of 1938.<sup>162</sup> *In casu* the judge mentioned that during the period from 1 July 1985 to 1 June 1986 there were thirty-three recorded cases of infanticide and he made a plea for more research to be done on this subject in order to facilitate the court's task when it came to sentencing the accused.<sup>163</sup>

The current position in South African law is that infanticide is not recognised as a separate crime, but as the common-law crime of murder.<sup>164</sup> This also applies to a parent who abandons a baby with the intention of killing it; if the infant dies, the parent can be charged with murder, or if the baby does not die, with attempted murder.<sup>165</sup> In a case where the parent negligently abandons a child, the parent can be charged with culpable homicide.<sup>166</sup>

Because there is no separate legislation dealing with infanticide in South African law as in English law, the lives of children are only protected by way of general legislation. The right to life in general is entrenched in the Constitution of the Republic of South Africa, 1996,<sup>167</sup> and is characterised as “the most fundamental of all human rights”.<sup>168</sup> There is no specific legislation which protects the lives of children, particularly neonates, although the Constitution of the Republic of South Africa, 1996 makes specific reference to the rights of children in section 28.

Despite the fact that there are legislative measures<sup>169</sup> to protect children in South Africa, the brutal killing of babies by their mothers has not decreased. Media reports affirm that socio-economic circumstances impact on the occurrence of this crime: the reasons for killing babies vary from AIDS and extramarital affairs to poverty.<sup>170</sup>

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161 *S v Jokasi* 1987 1 SA 431 (ZCS).

162 *Idem* 434H-I.

163 *Idem* 435H-436J.

164 Criminal Procedure Act 51 of 1977 s 258(d); Hunt & Milton (n 80) 366.;

165 Hunt & Milton (n 80) 366.

166 Criminal Procedure Act 51 of 1977 s 259(c). See also Hunt & Milton (n 80) 366.

167 S 11.

168 Carstens & Pearmain *Fundamental Principles of South African Medical Law* (2007) 27.

169 Children's Act 38 of 2007.

170 *City Press* 23 Feb 2003; *Independent on Saturday* 5 Aug 2006; *Saturday Star* 5 Aug 2006; *Pretoria News* 9 Feb 2008 and 20 May 2008.

In some cases the baby is merely abandoned, and it is not always easy to determine who the mother is.<sup>171</sup> In cases where the mother cannot be found, it is impossible to make an arrest. Thus it is possible that infanticide is often committed without it receiving media attention or reaching a court.

## 5 Conclusion

Infanticide has been practised since time immemorial. It features in Greek and Roman mythology and in ancient law. In antiquity, babies could be killed at the whim of the head of the household whether the baby was healthy or deformed. Ancient cultures, such as the Greek and Roman cultures, had a different outlook on the value of life and did not value life to the same extent that we do today.<sup>172</sup> In present day South Africa, life is valued to the extent that the right to life is entrenched in the Bill of Rights.<sup>173</sup>

With the rise of Christianity there came a change of attitude regarding infanticide and the lives of children were comprehensively protected. Although canon law impacted on Roman-Dutch law, the emphasis in the case of Roman-Dutch law is less on the protection of the child than in canon law.

By the the sixteenth to the eighteenth centuries, a further change in attitude occurred: the killing of a healthy baby was regarded as murder, while a deformed baby was not raised, but rather put to death. Legal development in England culminated in two Acts (the Infanticide Acts of 1922 and 1938) which catered specifically for this *sui generis* crime by protecting the victim, but which also revealed compassion and sensitivity towards the perpetrator. Despite the fact that the development of South African law regarding infanticide has been influenced by English law, we still do not have an Infanticide Act. Consequently, acts of infanticide still occur in South Africa, as is proved by incidents reported in the media. The Children's Act<sup>174</sup> does not make special provision for the protection of the lives of children.<sup>175</sup> Apart from this, the definition of "child" is very wide. It defines a child as "a person under the age of eighteen years".<sup>176</sup> This means that there is not a special form of protection for neonates, including premature babies, in this Act. These individuals are very

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171 *Daily News* 1 Apr 2003.

172 Williams (n 2) 27.

173 Constitution of the Republic of South Africa, 1996, s 11.

174 Act 38 of 2005.

175 It should be noted that according to the Child Care Act 74 of 1983 s 50(1)(b) a person who abandoned a child was guilty of an offence. Upon its full commencement (only certain sections came into operation on 1 July 2007), the Children's Act 38 of 2005 will repeal the Child Care Act in its entirety. S 305(3) of the Children's Act echoes that particular section of the Child Care Act.

176 S 1.

vulnerable and need special protection. In the case of infanticide the perpetrators should also be afforded some form of protection since they do not pose a threat to society, but act for emotional reasons.

One may conclude by saying that there is a need for legislation that particularly protects the rights and lives of newborn babies, since not even the Constitution sufficiently protects newborn infants and infanticide is still rife.<sup>177</sup>

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177 Since this is not the purpose of this article, it will not be investigated here, but in a later research project.