

CHAPTER 5

COMBATting BABY DUMPING IN OTHER JURISDICTIONS

5.1 INTRODUCTION

In this chapter, the laws related to baby dumping are analysed and evaluated. In particular, the existing laws related to baby dumping and related crimes in other countries namely, India, England and Wales, the United States, Australia and New Zealand are examined in this chapter. It is necessary to evaluate these laws to understand and appreciate the differences between the laws implemented in Malaysia and the laws implemented in other jurisdictions.

5.2 LAWS RELATING TO BABY DUMPING

Malaysia has no specific laws on baby dumping. The same situation applies in India⁵²⁵ and most other countries where the term “baby dumping” is not mentioned or defined in the relevant statutes. In Malaysia, the existing provisions of the Penal Code are commonly invoked to punish the offender in baby dumping cases. In contrast, baby dumping laws in the United States where the safe haven laws have been enacted are said to be far more advanced. For this reason, preference is given to the United States in the discussion on baby dumping laws in this study for comparison with the local law of Malaysia.

⁵²⁵ Based on the references made from the Indian Penal Code and Malaysian Penal Code, the term baby dumping is not used to indicate the punishment of the crime.

This section covers three sub-topics relating to baby dumping laws implemented in different countries including India, the United States and the United Kingdom. Since the Malaysian Penal Code was adopted from the Indian Penal Code, a comparison of the laws related to baby dumping is warranted. The laws in the United States and the United Kingdom are relevant to Malaysia because of the applicability of common law in those jurisdictions. The Malaysian legal system is predominantly based on English common law as a result of British colonisation. However, in certain circumstances where the laws are not suitable to be applicable locally, UK's (English) laws are not discussed here.⁵²⁶

5.2.1 Indian Penal Code

In this section, the Indian Penal Code (particularly Sections 317 & 318) is evaluated and compared with the Malaysian Penal Code in the context of baby dumping. It is to be noted that the term "baby dumping" is not mentioned in either of the Acts. Therefore, the closest provisions relating to baby dumping are analysed. Below is the analysis of Sections 317 & 318 of the Indian Penal Code as mentioned in Ratanlal & Dhirajlal's Law of Crimes textbook.⁵²⁷

⁵²⁶ English law is applicable only to the extent permitted by local circumstances and inhabitants, and subject to qualifications necessitated by local circumstances. Wan Arfah Hamzah, 2009, A First Look At The Malaysian Legal System, Oxford Fajar Sdn. Bhd. p. 132.

⁵²⁷ Ratanlal & Dirajlal, 2012, *Law of Crimes*, Bharat Law House, New Delhi, p. 1574.

Section 317 of the Indian Penal Code states:

“Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation- This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.”

As explained in Ratanlal’s⁵²⁸ textbook, the phrase “exposure and abandonment of child under twelve years by parents or person having care of it” means that the person, be it the father or the mother of the child under the age of twelve years, or who is responsible for taking care of the child, exposes or leaves such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years or with fine, or with both. Moreover, the phrase “Whoever being the father or mother or having the care of such child” means that both (father and mother) are equally bound by ties of duty, and this should be implemented equally whether the child is born out of wedlock or is an illegitimate child. The person who has the immediate care of the child is the person who is held responsible for the child.

A parent who is absent but who has provided duly for the maintenance and protection of his child will not be criminally answerable for the child’s abandonment by the person in whose charge he has left it in. The offence can be in the form of desertion of the child by a person who is bound by nature to support and protect it, or

⁵²⁸ *Ibid.*

who has taken on himself that duty, whether by adopting the child or by way of contract with the parent or any other way.

The term “twelve years” in the Code refers to the fixed period during which a child is protected from abandonment by its father, mother or guardian while “expose” literally means to physically put outside so that such putting outside involves some physical risk to the person who was put out. In reference to a child, this would mean putting it somewhere, where it could not receive the protection necessary for its tender age. For instance, putting it outside the house, where it would be exposed to the risk of climate, wild beasts, and the like. The exposure mentioned by the Code is one in which danger to life might immediately ensue.

As the term “leave” comes in immediate juxtaposition with the word “expose,” the word “leaving” refers to the act of leaving by *ejusdem generis*⁵²⁹ which means leaving at the risk of exposure and indicates an offence only slightly distinguishable from exposing. It does not mean leaving in the large sense of abandonment but must be construed in strict connection with the word “exposure”.

The narrower construction of the words “expose or leave” is strengthened by the insertion of those striking words “in any place.”⁵³⁰ Thus, to make the “leaving” of a child an offence under Section 317, the child must be left without protection.

Furthermore, the word “leave” coupled with the word “expose”, must be based on the principle of *noscitur ex sociis*⁵³¹ which is considered to some extent emphasising

⁵²⁹ Of the same kind. Oxford Dictionary of Law, 2009, Edited by Jonathan Law and Elizabeth A. Martin, p. 192.

⁵³⁰ *Ibid.*

⁵³¹ Known by its associates. Oxford Dictionary of Law, 2009, Edited by Jonathan Law and Elizabeth A. Martin, p. 370.

more on the word “expose” and must be construed as meaning to leave under circumstances more or less resembling those of an exposure.

The gist of the offence is the exposure or act of leaving done with the intention to wholly abandon. The manner of exposing or leaving and the consequences likely to ensue are not essential requirements but are taken into consideration in passing the sentence.⁵³² This section does not apply to a case of mere neglect or temporary abandonment. The legislature looks rather to the intention of the accused than to the consequences of the act done.

Consequently, the expression “if the child dies in consequence of the exposure”⁵³³ refers to a child who “dies from cold or other result of exposure”. Hence, where a newborn child was exposed, and it died after but not, except remotely, on account of its exposure, the mother will be acquitted of murder and convicted under this section. If the death was caused by other reasons but not the exposure, this section will not be applicable.

This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure. However, the objective of this section⁵³⁴ is to prevent the abandonment or desertion by a parent of his or her children of tender years in such a manner that the children are incapable of taking care of themselves and may run the risk of dying or being injured. The section will not be applicable if the children are left under the care of another. This section⁵³⁵ is applicable when a child is exposed, and no death supervenes. If the act of

⁵³² Refer to phrase “With the intention of abandoning such child” in Section 317 of the Indian Penal Code.

⁵³³ Section 317 of the Indian Penal Code.

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

baby dumping involves death, the conviction must be under Section 302 or Section 304. The offence is complete notwithstanding that no actual danger of risk or danger arises to the child's life. There are three ingredients of the crime in this section:⁵³⁶ (i) the person coming within its purview must be father or mother or must have the responsibility of care of the child; (ii) such child must be under the age of twelve years; and (iii) the child must have been exposed or left in any place with the intention of wholly abandoning it.

5.3 BABY DUMPING AND RELATED CRIMES

The term "baby dumping" is also associated with other similar acts such as neonaticide⁵³⁷ and infanticide.⁵³⁸ It is important to discuss the acts related to baby dumping to gain a more comprehensive understanding of all the possible actions directly associated with baby dumping. The purpose is to develop a definition for the term "baby dumping". The treatment of the crime of baby dumping is also discussed by reference to the relevant terms related to the act.

5.3.1 Neonaticide

Neonaticide refers to the act of ending the life of an infant within 24 hours of its birth. Neonaticide is a crime that is primarily committed by the mother. The prevalence

⁵³⁶ *Ibid.*

⁵³⁷ Neonaticide means the act of killing a baby within the first 24 hours of its life. Oxford Dictionary of Law, 2009, Oxford University Press. p. 367.

⁵³⁸ Infanticide means the killing of a child under 12 months old by its mother. If the mother can show that the balance of her mind was disturbed because of the effects of the childbirth or lactation, she will be found guilty of infanticide, rather than murder, and punished as though she was guilty of *manslaughter (Infanticide Act 1938 s. 1). Most cases of infanticide are dealt with by probation or discharge. Oxford Dictionary of Law, 2009, Oxford University Press. p. 282.

of neonaticide is often difficult to determine because newborns are most often dumped without having been discovered and mothers are most likely to dispose of the infant in very isolated areas.

There are a few strategies that can help prevent mothers from committing neonaticide. Firstly, mothers who have a tendency to commit neonaticide should seek psychiatric counselling. In the United States, safe haven laws⁵³⁹ have been implemented in all 50 states in order to reduce the number of abandoned babies and neonaticide cases. Safe haven laws are applied differently in each state.⁵⁴⁰ Despite these laws, mothers abuse this privilege by still abandoning their babies in public places within the first few days of birth.

Although the intention behind safe haven laws is to prevent babies from being murdered, the laws are not free from controversy. Because safe heaven laws require the identities of the birth parents to be protected, critics have condemned the laws for promoting parental irresponsibility. Unfortunately, there is no data available to support the effectiveness of these measures.⁵⁴¹

⁵³⁹ Many State legislatures have enacted legislation to address infant abandonment and infanticide in response to a reported increase in the abandonment of infants. Beginning in Texas in 1999, “Baby Moses laws” or infant safe haven laws have been enacted as an incentive for mothers in crisis to safely relinquish their babies to designated locations where the babies are protected and provided with medical care until a permanent home is found. Safe haven laws generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for surrendering the baby to a safe haven. See Child Welfare Information Gateway, 2013, “Infant Safe Haven Laws”, available at <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/>

⁵⁴⁰ Different laws are applied in different states.

⁵⁴¹ Golden, K. E. 2007. *Child Welfare and Infant Abandonment Policy: A Case Study of the Massachusetts Baby Safe Haven Law*. (Master Thesis). Tufts University. p. 3.

5.3.2 Cases related to maternal neonaticide

Mental health and legal professionals acknowledge that neonaticide occurs as a result of mental health problems. It is curious then that only 6 out of more than 85 cases are referred for psychiatric treatment and counselling as being part of their sentence. Resnick⁵⁴² reports that mothers who commit neonaticide are usually sentenced to prison or probation, while mothers who commit filicide are usually hospitalised.

For example, a 14-year-old girl was convicted of first-degree murder despite claiming that she was not aware of her own pregnancy at the time of birth. When she gave birth, she cut her baby's umbilical cord with scissors by herself and wrapped the baby in a plastic bag which she then later dumped in a kitchen trash can.⁵⁴³ She was eventually sentenced to 20 years in prison. The severity of her punishment is still debated. Can 20 years of imprisonment rehabilitate her to become a more productive adult and would this kind of punishment really deter similar crimes from taking place?

To cite another case, Lisa, a mid-adolescent was found to have suffered from post-traumatic stress where she experienced nightmares, depression, over-independence on her parents and suicidal thoughts. She pleaded guilty to manslaughter⁵⁴⁴ and was sentenced to 4 years' imprisonment. Lisa and her parents were referred for therapeutic evaluation and counselling. The court felt that the sentence was needed not only to punish Lisa for her wrongful act but to also deter others from committing similar acts.

⁵⁴² Resnick, P. 1970. Murder of the newborn: A psychiatric review on neonaticide, *Am. J. of Psychiatry*. 126. p. 1414-1420.

⁵⁴³ *People v. Doss*, 214 IL App. 3d 1051; 574 NE 2d 806 (1991).

⁵⁴⁴ Atkins, E., Grimes, J.P., Joseph, G.W., and Liebman, J. 1999. Denial of pregnancy and neonaticide during adolescence: Forensic and clinical issues, *Am. J. of Forensic Psychol.*, 17 (1), 5-33.

5.3.3 Cases related to the paternal neonaticide

With rare exceptions, neonaticide is usually committed by the mother who delivers the baby on her own. The fathers are nowhere to be found at the time, or even afterwards, in most cases. However, there are cases in which the father of the newborn commits the crime of neonaticide. In one of the cases that Kaye, Borenstein and Donnelly (1990)⁵⁴⁵ found, a man from a wealthy family, who had average intelligence, and was an alcoholic and psychopath, had impregnated a fellow inmate at a psychiatric centre. He wrote a document in favour of infanticide and felt after killing his newborn son in the mother's hospital room, that he had saved his own social reputation and spared the woman a responsibility she could not handle. He was found guilty of second-degree murder and was sentenced to 25 years to life imprisonment.

In another case, the father was present at the delivery of his deformed and cyanotic son, who was also diagnosed as having genetic abnormalities associated with trisomy 13 syndrome which is invariably fatal. After the baby was revived and the doctor was occupied with the mother, the man picked up his son, bent down and smashed the baby's head on the floor, killing him instantly. He pleaded temporary insanity and was not convicted in either of two trials.

There were earlier cases in which the partners were involved in either assisting the birth or in the destruction of the newborn. In the case of *People v. Campbell* (1895),⁵⁴⁶ John Campbell and Nancy Cook were indicted for neonaticide. However,

⁵⁴⁵ Kaye, N.S., Borenstein, N.M., and Donnelly, S.M. 1990. Families, murder, and insanity: a psychiatric review of paternal neonaticide, *Journal of Forensic Science.*, 35 (1), p. 133-139.

⁵⁴⁶ 159 IL 9; 42 NE 123 (1895)

Campbell alone was tried and sentenced to 14 years. His conviction was based on the sole testimony of Cook, who insisted that she had not seen the baby but had delivered a live premature child. Campbell took the child and disposed of it. No body or remains were discovered. The sentence was reversed by the appellate court on grounds that the testimony of Cook required corroborative evidence. However, the judges said that neonaticide presented the greatest difficulties in identifying the corpus delicti, body of a murder victim, and each case must depend upon its own peculiar circumstances. The decision also stated that the baby's death could be established without direct proof if the circumstantial evidence was cogent enough. This precedent also contributed to the variations in sentencing and indictments.⁵⁴⁷

In contrast, the judge who sentenced Amy Grossberg and Brian Peterson made the opposite decision; he gave Peterson a slightly shorter prison term and three years less probation. This is because Peterson had plea bargained and pleaded guilty to manslaughter before Grossberg. If he had been more "chivalrous" (a term used by the prosecutor), he would have driven her to an emergency care facility rather than meeting her at a motel for the delivery and disposition of their baby.⁵⁴⁸

According to Resnick,⁵⁴⁹ fathers appear to receive more severe sentences than mothers for neonaticide and filicide. However, in some cases, this is not the case. Parness⁵⁵⁰ argued for legislation that would provide for criminal prosecution of and penalties for biological fathers for pre-birth damage, such as providing drugs to the

⁵⁴⁷ *Ibid*

⁵⁴⁸ *Ibid*

⁵⁴⁹ *Ibid*

⁵⁵⁰ Parness, J.A. 1993. Pregnant dads: the crimes and other misconduct of expectant fathers, *Oregon Law Rev.*, 72, 901-918.

expectant mother, physically abusing her or failing to provide financial support during the pregnancy which might contribute to malnutrition or lack of care. He also proposed that pregnant females be given information on the responsibilities of expectant fathers when they are given information about their own prenatal care.

5.3.4 Infanticide

This section deals with infanticide cases. A comparison of cases in different countries has been made to understand the differences in terms of its definition and the comprehensiveness and severity of punishment related to infanticide, all of which vary from country to country. Being a common law country, Malaysia has modelled its law based on the UK legal system. The question is whether UK laws are suited to be applied in Malaysia?

5.3.5 Infanticide law in Australia

In Australia, the crime of infanticide is well recognised in New South Wales (NSW), Tasmania (Tas), and Victoria (Vic) but there are no infanticide provisions in the Australian Capital Territory, Queensland and South Australia. Infanticide is defined as:⁵⁵¹

“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 section the offence would have amounted to murder, she shall be guilty

⁵⁵¹ Section 22A of the Crimes Act 1900 in New South Wales.

of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child.”

The age requirement for infanticide varies from jurisdiction to jurisdiction. In NSW and Tasmania, the child must have been under 12 months when murdered (Section 22A of the Crimes Act 1900 (NSW); Section 165A of Criminal Code Act 1924 (Tas)). In Victoria, under Section 6(1)(a)-(b) Crimes Act 1958 (Vic), the child must have been under two years of age when the crime took place. The NSW and Tasmanian provisions require the following elements to be proven: (1) that a mother has caused her own child’s death (aged under 12 months) by an act or omission; (2) a “wilful” mental element, in that the act or omission must have been intentional or at least reckless; and (3) the mother’s mental balance to have been disturbed by the effect of childbirth (Tasmania) or lactation after childbirth (NSW only).

The standard required to prove a “disturbance” of mind is lower than that required for the defence of mental illness.⁵⁵² This means that the prosecution in NSW must prove that the woman’s mind was disturbed by not having fully recovered from “the effect of giving birth to the child or by reason of the effect of lactation consequent upon giving birth” while the Tasmanian provision is limited to the “effect of giving birth”. Each state also differs when it comes to sentencing; in Victoria, the offence of infanticide carries a maximum sentence of 5 years imprisonment compared to 25 years in NSW, and 21 years in Tasmania.⁵⁵³

⁵⁵² *Ibid*

⁵⁵³ *Ibid*

5.3.6 Infanticide law in New Zealand

In New Zealand, baby dumping is known as infanticide and is considered a statutory offence.⁵⁵⁴ In New Zealand, the age of the child (victim) can be of any age between birth and 10 years:⁵⁵⁵

“Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder or manslaughter, and is liable to imprisonment for a term not exceeding 3 years.”

The provision specifies that the *mens rea* for the act of causing death (for infanticide) is different from the *mens rea* for murder or manslaughter. It would appear to require a fundamental relationship between the offence and the mental disturbance being the only diminished responsibility provision in New Zealand legislation. The maximum penalty for the offence is limited to 3 years imprisonment, which is somewhat more lenient as compared to other legislations.

When a woman is charged with infanticide under the aforesaid section, the prosecution needs to prove both the *actus reus* and the disturbance of mind to obtain a conviction. Section 178(3) of the Crimes Act 1961 allows for a finding of not guilty by reason of insanity.

“Where upon the trial of a woman for infanticide, or for the murder or manslaughter of any child of hers under the age of 10 years, the jury are of opinion that at the time of the alleged offence the balance

⁵⁵⁴ Dean, P.J. 2004. “Child homicide and infanticide in New Zealand”. International Journal of Law and Psychiatry, 339.

⁵⁵⁵ Section 178(1) of the Crimes Act 1961 (New Zealand Government 1961).

of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she was insane, the jury shall return a special verdict of acquittal on account of insanity caused by childbirth.”

Overall, the legislation would appear to take into consideration the psychiatric conditions of the mother following childbirth such as puerperal psychosis and postnatal depression. It can be observed that in New Zealand, there is no inclination to impose severe punishment on women who kill their children. Infanticide appears to be broadly applied and often with no real evidence of psychiatric disturbance. A recent piece of legislation that was introduced allows for discretionary sentencing for murder which states:⁵⁵⁶

“An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.”

While Australian courts may impose up to 25 years’ imprisonment (depending on the state), in Malaysia and New Zealand, the maximum sentence of 3 years’ imprisonment is considered very lenient. Out of the three countries, only Malaysia applies monetary punishment in the form of a fine. Thus, with the rise of baby dumping cases nationwide, it seems appropriate that the law should be reviewed to ensure that the wrongdoer is punished accordingly. But first, the term “baby dumping” must be defined properly and should be distinguished from infanticide. Very importantly, the

⁵⁵⁶ Section 102 (1) of the Sentencing Act 2002 (New Zealand Government 2002).

mental state of the wrongdoer should be taken into consideration as severe punishment should not be imposed on a mentally disturbed woman.

In analysing the comprehensiveness of punishment for baby dumping, the crime rates before and after the implementation of the measures should ideally be taken into account. It would be interesting to see what the statistics would reveal after a thorough revision of the punishment for baby dumping.

5.3.7 Infanticide Law in England and Wales

In England and Wales, before the law was amended, judges were required to pass a mandatory sentence of death on mothers upon conviction of murdering their babies⁵⁵⁷. The current position of the law is found in the Infanticide Act, 1938.⁵⁵⁸ The relevant provisions of the Infanticide Act, 1938 are reproduced below:

(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.”⁵⁵⁹

(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

⁵⁵⁷ The Infanticide Act 1922 in England and Wales abolished the death penalty for a woman who deliberately killed her newborn child, while the balance of her mind was disturbed as a result of giving birth, by providing a partial defence to murder. The sentence applied previously was the same as manslaughter. This Act however has been repealed by the Infanticide Act 1938.

⁵⁵⁸ The Infanticide Act 1938 of England and Wales.

⁵⁵⁹ Section 1 of the Infanticide Act 1938 of England and Wales.

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”.⁵⁶⁰

(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”.⁵⁶¹

Considering the laws in the UK relating to infanticide, many are of the opinion that sentencing death to a person for the act of infanticide is inappropriate.

5.3.8 Infanticide law in Malaysia

In Malaysia, infanticide is regulated by Section 309A of the Penal Code which states:

“When any woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act of omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, be guilty of the offence of infanticide.”⁵⁶²

Section 309A of the Penal Code states that an offence of infanticide is committed when a woman by wilful act or omission causes her child’s death, and at the time of the act or omission, the woman had not fully recovered from the effect of giving birth and her mind was disturbed. Section 309B⁵⁶³ provides that whoever commits the offence of infanticide shall be punished at the discretion of the court, with imprisonment

⁵⁶⁰ Section 2 of the Infanticide Act 1938 of England and Wales.

⁵⁶¹ Section 3 of the Infanticide Act 1938 of England and Wales.

⁵⁶² Section 309A of the Malaysian Penal Code.

⁵⁶³ Section 309B of the Malaysian Penal Code.

for up to 20 years and, shall also be liable for a fine. Under ordinary circumstances, the wilful killing of one's child is murder but because the law recognises that in some cases, at the time of the crime, the woman had not fully recovered from the effect of giving, as a result of which the balance of her mind was disturbed, the woman will be guilty of infanticide instead.⁵⁶⁴

The above provision relates to the crime of baby dumping even though the term "baby dumping" is not found anywhere in the Penal Code. Apart from relying on the law to deal with the baby dumping issue, an alternative measure is to allow mothers to surrender their babies to the relevant authority without the fear of being prosecuted. This is comparable with the safe haven law measures implemented across the United States. In Malaysia, baby hatches have been set up in various Malaysian hospitals and relevant organisations, providing an option for anyone to leave their unwanted babies. In Malaysia, there are no safe haven laws yet but the fear is that the public may regard punishment for the crime of baby dumping to be inhumane and as a result call for the implementation of such lenient laws. However, this may not solve the problem of the rise in baby dumping cases. It is argued that although there is much merit in setting up baby hatches, the law still needs to be enforced more strictly to deter the crime, to control the number of baby dumping cases, to punish the irresponsible parents who dump their babies and to prevent the human trafficking of innocent children.

⁵⁶⁴ Termizi, Mazbah and Abdullah, Nurhidayah and Mohd Jaafar, Noor Ismawati (2016) Comprehensiveness of punishment for baby dumping: Definition, severity and coverage. In: Regional Conference on Science, Technology and Social Sciences (RCSTSS 2014): Business and Social Sciences. Springer Science & Business Media Singapore, Singapore, pp. 765-774. ISBN 978-981-10-1456-7

Babies are human beings and their right to live should be protected under the law. Killing babies or leaving them to die is the same as killing an adult and such a crime must be prosecuted unless a relevant defence is applicable. An analysis of the relevant court cases in Malaysia is needed to understand why in some cases the defendants who dump their babies are absolved from punishment for murder even though the victim (baby) is found dead. Perhaps, issues like witnesses, expertise and the age of the offender, as well as mental capacity are factors which are considered before the court sentences the offender for murder for the case of baby dumping.

To relate this to the theory of law, Wechsler stated:

“Whatever views one holds about the penal law, no one will question its importance to society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only its power to destroy. Nowhere in the entire legal field is more at stake for the community or the individual.”⁵⁶⁵

It is important to ensure that the law penalises the wrongdoer accordingly because it is not a crime if there is no punishment.

5.4 LAWS RELATING TO NEONATICIDE AND INFANTICIDE

After understanding the differences between neonaticide and infanticide, it is now important to analyse how the laws treat the two crimes. By comparing the laws on

⁵⁶⁵ Wechsler, H. 1952. “The Challenge of a Model Penal Code”. *Harvard Law Review Association*. Vol. 65, No. 7 (May, 1952), pp. 1097-1133.

neonaticide and infanticide in the United States with such laws in England and Wales, it is interesting to observe how the courts vary in their approaches to punishment.

5.4.1 Laws relating to neonaticide and infanticide in the United States

In the United States, neither neonaticide nor infanticide constitutes a separate offence from homicide. The lack of statutory separation has produced widely inconsistent charges in neonaticide and infanticide cases, ranging from unlawful disposition of a body to first-degree murder. Neonaticides and infanticides are typically charged under state murder and manslaughter statutes. For example, in one sample of forty-two defendants in neonaticide cases, twenty-nine were charged with murder. In another sample of eight neonaticide cases, one defendant was convicted of first-degree murder, two of second-degree murder, three of involuntary manslaughter, one of negligent homicide, and one for “unspecified murder.” This frequent treatment of neonaticide and infanticide as either murder or manslaughter merits further review at the state level, as well as the federal level given the occasional federal jurisdiction in such cases.

In an article written by Iffy and Jakobovits,⁵⁶⁶ the authors pointed out that, as of that year, there was no American law that required consideration of the mother’s mental state when she committed neonaticide or infanticide, other than usual concerns in homicide cases about the defendant’s ability to “know” and “appreciate” the wrongfulness of her acts when she committed them.

⁵⁶⁶ Iffy, L and Jakobovits, A. 1992. Infanticide: new medical considerations, *Medical and Law*, 11, 269-274.

Unlike the British pattern and others, not only does each American state have its own laws for all imaginable infractions, but in some areas, as is true here, there may not even be a Federal law that acts as a guideline. “With such great diversity among jurisdictions, it does not seem likely that a uniform policy of humanitarian response to infanticides resulting from postpartum psychosis will soon emerge.”⁵⁶⁷ One could add that a uniform policy toward neonaticidal mothers is equally unlikely, although moves toward a “policy of humanitarian response” may be encouraged by the work of Wexler and Winick⁵⁶⁸ and others in the approach they have called therapeutic jurisprudence. In addition, laws sometimes remain on the books long after they are appropriate or relevant. A third caveat is that there are situations where Federal law supersedes state law, as when certain crimes occur at a Federal facility (Assimilative Crimes Act, 18 U.S.C. 13) or among Native Americans (Major Crimes Act, 18 U.S.C. 1111).

5.4.2 Laws relating to neonaticide and infanticide in State Courts

Criminal law traditionally falls within the domain of the states, placing the vast majority of neonaticide and infanticide cases in state courts. To varying extents, many states have adopted the Model Penal Code, developed by the American Law Institute, which grades homicide offences according to one’s state of mind. Similarly, the common law underlying many other state criminal codes defines murder as the unlawful killing of another human being with malice aforethought. Modern state statutes

⁵⁶⁷ Katkin, D.M. 1992. Postpartum psychosis, infanticide, and criminal justice, in *Post-partum Psychiatric Illness: A Picture Puzzle*, Hamilton, J.A. and Harberger, P.N., Eds., University of Pennsylvania Press, Philadelphia, 275-281.

⁵⁶⁸ Winnick, B.J. 1997. The jurisprudence of therapeutic jurisprudence, *Psychol., Public Policy and Law*, 3, 184-206.

generally provide distinctions between first and second-degree murder, with first-degree murder typically codified as killing, committed either with premeditation or during an enumerated felony, and second-degree murder being all others.

Some commentators have noted that when neonaticides and infanticides are charged as murder, they often fail to meet all of the statutory elements of the murder charge. For example, intent may be hard to prove given the impulsive nature of these killings. Another common challenge in charging neonaticide cases as murder is proving that the victim was born alive. This requirement, not at issue in murder cases generally, is specifically necessary in the instance of a neonaticide because stillborn births occasionally occur and “one cannot kill (someone) already dead.” Accordingly, for both reasons, murder convictions for neonaticides and infanticides have been reversed on grounds of insufficient evidence.

Common law legal defences have not consistently disposed of these in state courts. Nonetheless, the defence of insanity, which entitles a defendant to an acquittal, has been used frequently and successfully. One study on infanticide cases revealed that one-third of the cases studied had successfully argued an insanity defence, versus the less than one per cent successfully argued in all felony cases.

5.4.3 Laws relating to neonaticide and infanticide in England and Wales

British Law has, since the Infanticide Act 1922 (U.K.) and Infanticide Act 1938 (U.K.), regarded postpartum psychosis⁵⁶⁹ as a means of reducing the charges for

⁵⁶⁹ Postpartum psychosis as a criminal defence, has resulted in varying outcomes and must be considered based on the facts of each case. It has not received full acceptance by the medical and psychiatric professions but a descriptive term that applies to a number of mental disorders that can be experienced

neonaticide and infanticide from murder to manslaughter, although in truth this condition is not applicable to neonaticide. In New South Wales (Australia), laws based on the Infanticide Act 1938 (U.K) were adopted, enabling a judge to sentence a woman who had committed neonaticide or infanticide for manslaughter which meant that a discretionary sentence could be given. This was considered to “offer a humane means of dealing with women who became ‘temporarily deranged’ as a result of the after-effects of childbirth.”⁵⁷⁰ The New South Wales Law Reform Commission recognised that there may actually be different causes for neonaticide and infanticide, ranging from the hidden pregnancy of the single woman to the overwhelming socio-economic stress of another child to raise rather than only the postpartum psychosis. Accordingly, the Commission recommended that the crime labelled “infanticide” be abolished in New South Wales. They anticipated that such child killings would then be handled with a defence of diminished responsibility⁵⁷¹. In England, the Criminal Law Revision Committee recommended amending the Infanticide Act 1938 to allow for environmental or other stresses, and it was entered into the Criminal Code Bill of 1989 as clause 64 (1).⁵⁷² Changes in attitude, even before passage of these laws, resulted, according to d’Orban,⁵⁷³ in shorter or suspended sentences, sometimes with mental health commitments, and with a small percentage serving short terms.

after childbirth. See Brusca, A.D. (1990). “Postpartum Psychosis: A Way Out for Murderous Moms” in *Hosfra Law Review*, 18(4), 1133-1170.

⁵⁷⁰ New South Wales Law Reform Commission, 1997, p. 102

⁵⁷¹ *Ibid.*

⁵⁷² Mackay, R.D. 1993. “The consequences of killing very young children”, *Criminal Law Rev.*, 59, 21-30.

⁵⁷³ d’ Orban, P.T. 1979. “Women who kill their children” *Br. J. of Psychiatry*, 560-571.

Overall, British law, and its derivatives in former colonies such as Canada and Australia, tend to view neonaticide specifically and infanticide to a lesser degree owing to psychological disorder which requires treatment rather than punishment. As dreadful as the crime is, in truth, the homicidal mother is a bigger threat to herself than to society which is one of the principal reasons for imprisoning someone.⁵⁷⁴ The more recent laws also avoid the earlier legal connections to lactation and hormonal upsets as the basis for such tragic acts, which had an anti-female aura. In almost all cases of neonaticide, after all, the mother had not begun to breastfeed the newborn, so lactation was not a major factor. The baby is an “it” as Amy Grossberg and many others in her position have indicated.⁵⁷⁵ That leads to some interesting philosophical as well as legal questions.

Scottish law, on the other hand, does not differentiate between neonaticide, infanticide and other forms of homicide as English and Welsh laws do, but it does differentiate in practice between the sexes.⁵⁷⁶ In 15 cases of infanticide committed by males, 12 of those convicted were remanded to custodial care; of the 8 women’s cases, 2 were hospitalised (none of the men were), 2 were imprisoned, and the other 4 were placed on probation. In Marks and Kumar’s earlier study in England and Wales (1993), they found that 80% of the neonate cases were due to relatively non-violent means (e.g. suffocation) or neglect, but in Scotland, they found more violence.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ Marks, M.N. and Kumar R., 1996. *Infanticide in Scotland*, Med., Sci. and the Law, 36, 299-305.

5.5 CONCLUSION

While Malaysia relies on the Penal Code, in particular Section 317, 318 and 309A, to deal with the baby dumping cases, England and Wales and some states in the United States have specific laws to address the crime. In those jurisdictions, each crime has its own punishment. The terms used categorise the crime and its punishment which further identifies suitable punishment based on the facts of each case. While in the United States, laws have been enacted to allow the unwanted babies to be surrendered without the mothers being charged, in Malaysia, although baby hatches exist, there are no specific laws governing or regulating the implementation of such measures. It is argued that Malaysia needs to clarify the law concerning baby dumping and related acts and treat the act of baby abandonment and the act of killing or harming babies as separate and distinct. One question that may be pertinent is whether or not child abandonment should be made a *mens rea* crime or a strict liability one. In considering which legal approach is more suitable to be adopted in Malaysia, the researcher opines that public sensitivity towards this issue should be taken into account. Failure to prosecute the offender fairly may result in the rise in baby dumping cases. However, if the punishment fails to deter the commission of the crime, then one should consider all the contributing social factors leading to the crime. The conclusion and recommendations of this study are discussed in the following, final chapter.