Child abandonment in Portugal: legislation and institutional care

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Until recently, historians have been suspicious about the effectiveness of legal pronouncements, arguing that laws did not have a serious effect on actual practice. Such an argument was linked to an emphasis upon social history, which enquires into the reality of everyday life. This view is not without foundation. Nevertheless if we regard positive laws as the result of an elite's will to influence social practice, research into the law can focus at three levels. On the first level, the study of general laws, proclaimed by the central power, sheds light on the intentions of the ruling class, which generally tends to reformulate or adapt current practice. On a second level, the local regulation of institutions should be considered, and in particular written records of their meetings. Local regulations should coincide with the general framework of the law, although they generally reflect local needs and circumstances. Finally, at a third level, we should observe what Bourdieu calls the *habitus*, that is, rules that are accepted by social use.[1] They are not usually written in normative texts, though they can often be inferred through documents.

This article does not have the ambition of comparing the different legal systems in Europe. My concern is to summarize a narrow topic in the legal history of Portugal: the laws relating to offences against children's lives (infanticide, abortion and 'suppression of child delivery' (*supressão de parto*)), the juridical status of children (legitimate, illegitimate, orphans, adopted or made legitimate and foundlings), and the assistance rendered to abandoned children. I have deliberately simplified most of these topics:

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the legal historian knows that juridical reality is more complex than appears in my text. What follows, then, is more schematic than analytical: it provides an approximate picture of children's rights and duties according to law.

Because I have dealt with seventeenth-century laws elsewhere my analysis here is confined to the eighteenth century.[2] Yet my choice is directed by two other factors: first, my intention is to illustrate how legal issues were still vague and imprecise during the eighteenth century;[3] and second, to show that the paths that had been traced in the preceding century were not altered, rather, laws and their content became clearer and richer.

ATTEMPTS AGAINST THE CHILD'S LIFE: INFANTICIDE, ABORTION AND 'SUPPRESSION OF CHILD DELIVERY'

An examination of the laws concerning offences against a child's life is useful for the historian of childhood primarily for two reasons. In the first place, in the minds of contemporaries the most important reason for the foundation of foundling homes was the need to avoid infanticide. In many texts, instances of newborn children found dead were a common spectacle that provoked horror among contemporaries.[4] Many historians suspect that infanticide was a common practice before the massive structures of assistance for foundlings were set up in the eighteenth century.[5] The value placed on children is believed to have changed from pre-industrial societies to the present time. Infanticide was arguably a likely practice, especially since it usually remained unpunished. Moreover, emphasis on female honour meant that infanticide of illegitimates fulfilled a social need.

In this social context, knowing how the law dealt with the life of children becomes crucial, because there is a contradiction between the respect for human life according to Christian doctrine and the likelihood of infanticide. The intentional killing of an infant became a particularly serious offence if it had not received baptism, because in Catholic theology the child had to live long enough in order to be baptized and thus safeguard its soul.

Seventeenth-century jurisprudence regarded abandonment as lawful, provided that it did not cause the child's death and that the parents were poor or honour was endangered.[6] However, there were several ways of terminating a child's life: infanticide, abortion and 'suppression of child delivery'. While the definitions of the first two crimes have not changed since the eighteenth century, the third refers to an offence of subtle definition: it designated cases where pregnancies, secret or of public

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knowledge, reached their end without either the community or the authorities knowing what happened to the child.

As some contemporaries noted, Portuguese law did not mention infanticide.[7] Infanticide cases were resolved by the application of Roman law, in which infanticide was equated with parricide, and thus punished with death. Nevertheless, the *Ordenações Filipinas* (1603) refer to parricide only as the death of parents at the hands of their children and not the reverse.[8]

The absence of a specific law to deal with infanticide leaves open three hypotheses regarding the extent of its practice. The first is that infanticide hardly ever happened in practice, so that there was no pressure for the creation of specific laws. In the few cases where women were tried for infanticide, Roman law could be applied. Second, it could be argued that infanticide was too common; therefore, it was ignored by the authorities, who either did not feel the need to reinforce its prohibition or simply were confronted with so widespread a practice that they did not have the ability to prevent it. Finally, infanticide could be perceived as the result of 'omission' and not 'commission', that it was the lack of care in looking after the child that caused death. Thus, death could be regarded as accidental in an era in which this type of accident did not need justification.[9]

Given the sources available, whether infanticide was common or not before the period of massive abandonment may perhaps never be answered. Trials for infanticide have always been exceptional and aberrational; fictional literature does not refer to the killing of newborn children, and iconography (except in the 'Massacre of the Holy Innocents') does not normally represent it. Nevertheless, mention is made of the killing of children in church penitentials, but we do not know how often people were punished for such offences in ecclesiastical courts.[10]

Turning now to another form of attack against a child's life, abortion, Roman law equated it to infanticide, and punished it in the same way.[11] In Portuguese civil law, only one reference to women suspected of making others abort has been found in the *Regimento de Quadrilheiros* of 1570, which was promulgated between the first publication of the *Ordenações Manuelinas* (1521) and the *Ordenações Filipinas* (1603).[12]

Cases of suppression of child delivery, inferred when there was no record that children had been born to pregnant women, were nevertheless included in the *Regimento*. When such cases occurred, three hypotheses can be made about the fate of the fetus: it had been born dead, it had been abandoned or it had been killed. The only way to avoid this offence would have been to force pregnant women (only the unmarried ones, though) to report their condition to the authorities. The fact that married women

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tended to escape investigation seems to be very significant, because it indicates that the concern was primarily with the conduct of the unmarried women, and not with the fate of the children. In France, a law of Henri II made *déclarations de grossesse* compulsory in 1556, although it tended to be ignored, and needed to be confirmed twice.[13] Some French historians have studied illegitimacy through sources that are derived from this law and consist mainly of accusations of paternity made by unmarried mothers.[14] In Portugal, such a law might have led to the same result, but no Portuguese historian has yet found the same type of source for the seventeenth and eighteenth centuries. Nevertheless, this law was the pretext for the creation of another law in 1806 which created an obligation on the part of unmarried mothers to declare pregnancy to the authorities.[15]

The legal framework of childhood in Portugal: foundlings, orphans, legitimate and illegitimate children

As in other areas of continental Europe whose laws were influenced by Roman law, legislation in Portugal reflects the legal heritage of the Roman Empire: children were not persons in the eyes of the law; paternal power was extended over slaves, domestics, apprentices and children.[16] Thus some laws of the Philippine code retained categories of persons which were obsolete.[17] *Patria potestas*, the power that a *pater familias* had over the members of his household, retained its essence intact in Portuguese law, although it was no longer unlimited as it had been during the Roman Empire. In Rome, a father, at least in legal theory, had the right of life and death over the members of his family (including his wife).[18] In Portuguese law, the right to 'constrain and punish', that is, the father's power to superimpose his will on his sons and daughters, was retained in the *patria potestas*. Though in Roman law *patria potestas* ended with the death of the *pater familias*, in Portugal it was restricted to the minority of the child. Majority was fixed in Portuguese law at 25 years, although a father was able to emancipate his children before that age; married minors were also freed from paternal power.[19] Paternal power was of course a father's duty: if he failed to exercise it, someone who might perform *patria potestas* had to be found. The juridical status of children varied precisely according to the presence or non-presence of a father. In the absence of a father, attribution of the *patria potestas* to orphans, illegitimate children and foundlings had to occur.

Thus, according to the law in force in Portugal in the eighteenth century, we can define the different status of children in five categories, which I shall discuss below: legitimates, illegitimates, orphans, foundlings, and adopted children.

Legitimates

Legitimates were children born of a lawful marriage contracted between their parents or of one subsequently legitimated by any of the civil or ecclesiastical procedures available. A child born to a married woman was always legitimate, under the Roman principle that 'pater es quam nuptias demonstrant'.[20] In some cases where it was evident that the husband could not be the father, some devices were created in order to deny legitimacy to the child. Allemand-Gay has shown that they were based exclusively upon estimates of the duration of pregnancy, although the criteria varied across courts and even in the same court.[21] In Portuguese law, a wife and her lover could be killed by her husband for adultery without legal prosecution.[22] Women did not fear the law, but rather their husbands: in Porto, several cases can be found of children abandoned because their mothers feared punishment from their husbands.[23] Another woman who had a son by a black lover managed to obtain a white child from the administrators of the foundling home in exchange for her mulatto infant whose presence would have allowed her husband to kill her.[24]

Illegitimates

Those born out of wedlock present the most complex problem of categorization. The church and the state distinguished between a variety of situations of illegitimacy that were nevertheless based upon the possibility of marriage of the presumptive parents. According to the logic of such distinctions among the illegitimate, there were children whose parents could contract marriage and those whose illegitimacy was aggravated by the fact that marriage of their parents was impossible. The former, those whose parents were able to contract marriage under the precepts of canon law, were the so-called 'natural children'. The latter, the 'spurious' issue of 'damned intercourse', resulted from sacrilegious, adulterous or incestuous relations, situations in which their parents could not marry.

The fundamental problem which illegitimacy raised was that of inheritance. Portuguese laws made a clear distinction between bastards of noble origin and others. An unprivileged man's bastard son could inherit in the same way as his father's legitimate children: it sufficed that he was the natural son of unmarried parents or of his father's *only* mistress.[25] This law excluded from inheritance 'spurious' children and the commoner's illegitimate children born of 'public women', that is, prostitutes. Noblemen, on the other hand, could leave only the *terça*[26] to their bastards, and then only if they did not have any legitimate descendants.[27]

There was also the possibility for property-owning families to disinherit a girl who had intercourse or married without her father's consent under the age of 25: even her brothers and sisters could claim she did not have any inheritance rights.[28]

Natural children could inherit all kinds of property except crown property, unless it was otherwise stated in a formal proclamation issued by the king.[29] Those most deprived of inheritance rights were 'spurious' children: they could only inherit from their brothers, and their parents could not inherit from them.[30] They could not even inherit *foros* (contracts for rented property) unless they were legitimated by royal charter.[31]

Thus far, the categories of children which we have analyzed could not overlap: a child could not be legitimate and illegitimate at the same time. But the situation concerning orphans and foundlings is more complex because an orphan could be *either* legitimate or illegitimate; likewise a foundling could be either legitimate or illegitimate, and could also be an orphan. Without considering such complex situations, let us include both foundlings and orphans in a broad category, that of children whose situation required some form of supervision or even assistance from the central authorities.

Orphans and foundlings

To be considered an orphan under the law, it was necessary only to have no father. Thus illegitimate children were associated in some laws with orphans, because only the mother was known. Although the law was also designed to protect the maternal inheritance, a child without a mother did not have the status of an orphan.[32]

As for *patria potestas*, any man among the child's kin, preferably in his father's line, could perform the role by being designated 'tutor'. Such a person had the obligation to take care of the orphan's property until adulthood, when it was passed over to the orphan. Before 1521, judges were responsible for drawing up inventories of such property and seeing that the orphan was not defrauded of his inheritance. As some complaints emerged about the integrity of the inheritances received by these minors at 25 years of age, the office of a special judge to deal with orphans was created in the *Ordenações Manuelinas*. The problem of orphans also received special attention from the jurists. Some treatises can be found for the eighteenth century.[33]

The main difference between foundlings and orphans is that the former were individuals deprived of known parents, whereas orphans had at least one known parent and thus access to inheritance. Concern for orphans in Portuguese law was thus mainly directed to the preservation of the patrimony to which they would succeed, as well as to their upbringing

when they did not have anyone to care for them. On the other hand, concern for foundlings was primarily directed to their rearing, and to the institutions that were responsible for assisting them. They were under the authority of the institutions who cared for them until they were seven, when they passed to the authority of the Judges of the Orphans until adulthood. Both the foundling home and the *Juiz dos Orfãos* were responsible for abandoned children; the father who abandoned them was presumed to have lost paternal power over them, although no major obstacles were put in the way of taking back foundlings, at least in Porto.[34]

Legitimated or adopted children

In Portugal, there was no adoption legislation in the eighteenth century.[35] The only issue considered by the law was the possibility of the legitimation of a child, the only mechanism to formalize the integration of a bastard into the family. Such a procedure was designed to legitimate bastards, who would have access to inheritance alongside legitimate heirs, although it seems that no other procedure was available to individuals who wanted to adopt any other children. In civil law, three procedures existed in order to legitimate a child:

1 subsequent marriage of the parents, valid only for 'natural' children
2 *carta de perfilhacão*: the issuance of a public document registered by a notary, also valid for 'natural' children
3 'spurious' children legitimated by royal charter.

It would be interesting to know whether the institution of the *perfilhacões* filled the juridical gap concerning adoption of children. Notarial acts include some *cartas de perfilhacão* but it is not known if they were used in order to include relatives or strangers in the family. Probably, people preferred non-formal procedures of integrating children. As children deprived of families, foundlings could be used as a resource for families needing an heir, an extra child or simply a free worker or servant.

The fact that some women or couples could try to have direct heirs in a fraudulent manner is attested by the law concerning *partos supostos* (false child deliveries). The offence was punished with banishment for life (the most severe penalty apart from death) and also loss of all property of the offender. The law also contemplated means of depriving the false son or daughter of the inheritance.[36] It is not likely that there was a significant number of women with false children. Yet the fact that the law existed reminds us that distribution of children among families is not equal: if some couples had too many children, others simply did not have any at all.

ASSISTANCE TO FOUNDLINGS: LAWS FROM THE FIFTEENTH TO THE NINETEENTH CENTURY

Although they mention only foundlings and not illegitimate children, the laws of Portugal first referred to care of children in the *Ordenações Afonsinas* (up to 1521). Under this law, the father was obliged to pay for the upbringing of his illegitimate child, although the mother would take care of him or her until the age of three. She could, nonetheless, ask the father to pay for any expenses she might incur during that period. The same rule applied to legitimate children when their living parents separated.[37]

The next legal compilation published, the *Ordenações Manuelinas* (from 1521), mentioned the word *engeitado* for the first time in Portuguese law, the most common designation for a foundling in the Portuguese language.[38] Although adhering to the principle that fathers, married or single, were to pay the costs of supporting their children, it established a hierarchy of responsibility: if fathers could not pay, then mothers should and, in the event that neither could support the child, it was the kin's obligation to do so. In the event that no support was forthcoming, the town would send them to hospitals or *albergarias* generally responsible for foundlings and pay for their upbringing from the town's own funds. Finally, in the absence of such hospitals, children were to be cared for through town council funds; if these were not available, a special tax could be imposed on the town's inhabitants. This law remained almost unchanged until the *Ordenações Filipinas* (1603), although it does not seem that local hospitals were ever obliged to spend their funds on needy children.

In substance, then, the *Ordenações Manuelinas* established the system of assistance to foundlings in Portugal: the *concelhos* were to be in charge of children when they had no family. The situation was not to change until the nineteenth century, although some councils received specific funds from the king and/or made contracts with local *misericórdias* that discharged them from assistance to foundlings, while continuing to pay for their upbringing.

The next compilation, the *Ordenações Filipinas*, did not alter what had been established in the *Ordenações Manuelinas*. It only added that the *concelhos* could decide to impose an extra tax on the inhabitants in order to assist foundlings without permission from central authorities. This exemption is curious because the law admitted it was the only exception to the principle that all extra taxation needed specific authorization.[39] This law must have created abuses, since councils tended to collect funds under

the pretext of providing for foundlings and then apply the money to other uses. Some Portuguese historians of administrative institutions even claim that fraud reached the point of the registering of 'fictive' foundlings in council books.[40] It must be noted that the parish in Portugal did not have any responsibility for the rearing of foundlings, as it did in England, although basically the principle was the same: the community was to pay for its own 'rejected' children. Although councils were free to tax whenever they felt the need, Portuguese kings also often channelled public funds into the upbringing of foundlings.[41]

The obligation of the councils to assist foundlings ceased when they reached the age of seven; from this age they would be the responsibility of the Judges of Orphans.[42] At this point, foundlings were associated with orphans. Foundlings did not have an inheritance, and the responsibility of the Judges was limited to finding them a place in the labour market. They could find an employer or simply a family for the children to stay with, and ensure they received the wages to which they were entitled. Responsibility ceased when foundlings reached the age of 20.[43]

In 1783, Pina Manique, head of the police (the *Intendência da Polícia*), promulgated what was to be the most important law concerning foundlings published in Portugal. This law was in force through the nineteenth century, when new law promulgated as part of liberal reforms continued its basic principles. Not only was it directed to all the kingdom (including the colonies), but also it provides evidence that the Portuguese rulers shared the ideas of the Enlightenment. Basically, the law ordered the establishment of institutions to assist foundlings in all the cities and towns which were administrative centres. The most interesting point about this law is its rhetoric; it affirmed a belief that the number of its subjects was one of the major sources of wealth to the kingdom and that the kingdom was underpopulated. Moreover, by infanticide and the death of abandoned children the state was deprived of useful citizens. The establishment of *rodas*[44] would avoid such losses, because abandonment could take place anonymously and without penalty. Yet the law did not change what had been decided earlier in the case of Lisbon: councils were to support foundlings until seven and then Judges of Orphans were to take them in charge. The only novelty was that the police were to supervise assistance to foundlings: the *Intendência* was to receive an annual listing of the foundlings from each *comarca*.[45] Thus, the pretext for the intervention of the police force was the need to avoid infanticide.

The foundation of new *rodas* following the prescriptions of the 1783 law did not take place in the way the *Intendência* expected: in 1800, a confidential document refers to the lack of *rodas* in some areas of the

kingdom. This document is very interesting because it refers to the sale of children to Spain and to the participation of the *rodas* in a 'commerce' in foundlings.[46]

ADVANTAGES CONCEDED TO WET-NURSES

Legislation with respect to orphans included rewards to those who brought up children without payment. According to law, these children could be kept as workers without payment after the age of seven, for the number of years for which the 'foster' parents had not been paid for their care.[47] The tradition of assisting families who brought up needy children was nevertheless reinforced for foundlings, and from the beginning of the sixteenth century specific laws were passed to reward wet-nurses and their families. The first charter in respect of wet-nurses dates back to 1502 and conceded important privileges that were to last during the first three years of care for the foundling. The advantages consisted of a long list of exemptions from obligations that could be imposed by the council, among them the payment of some of the taxes the *concelho* could impose on its inhabitants, and the obligation to give shelter to other individuals or cede farm goods and horses.[48] On 29 January 1532 another charter continued such privileges until the sixth year of the foundling's upbringing.[49] Nevertheless, in 1576 some limitations to these privileges were made, such as financial contribution to the erection of public buildings, the obligation to fulfil various tasks on the council and to give up animals kept for commercial purposes.[50]

If sixteenth-century laws favouring wet-nurses placed particular stress on exemption from council obligations, in the seventeenth century charters of privilege stated military exemptions. In 1654 a law exempted the wet-nurses' husbands from the war[51] and some years later the sons of wet-nurses were also freed from recruitment.[52] In 1787 military exemptions given to both husbands and sons were confirmed.[53] Although the 1654, 1695 and 1787 charters applied only to Lisbon, they may have been valid elsewhere.[54]

The existence of those privileges suggests that there was a need to encourage the supply of net-nurses, by giving them supplementary motives to care for foundlings, in addition to their fees. On the other hand, the upbringing of foundlings could be the occasion for the development of family strategies, as not only the wet-nurses but also the members of their families could benefit from the privileges.

THE STATUS OF FOUNDLINGS IN LAW AND IN JURISPRUDENCE

During the seventeenth and eighteenth centuries, evidence on the legal status of foundlings is fragmentary. As foundlings were integrated in a wider group – the poor – they could benefit from the privileges of the latter. These privileges included the possibility of choosing to be tried in the royal court instead of other courts, and the powers of appealing against court decisions without time limits and of suspending debts. Finally, they could not testify in court, because they were judged not morally capable.[55]

One problem that had to be solved was the determination of the legitimacy or illegitimacy of foundlings. This question was crucial, since no searches of paternity were made, and yet the social integration of the foundling might depend on paternity. Although some jurists tended to believe that foundlings should be devoted to the learning of crafts or to the army,[56] their inclusion in many occupations, such as those provided by the church or public institutions, depended on legitimacy. On the other hand, it was fundamental to determine whether or not foundlings could inherit. The problem was difficult to solve and not all jurists agreed. The jurisprudence arrived at a compromise between two alternatives. Pursuant to the juridical principle that in cases of doubt the more favourable hypothesis was to be assumed, jurists admitted the presumptive legitimacy of foundlings.[57] Nevertheless, there were restrictions that required proof of legitimate birth or papal dispensation. Such restrictions related to foundlings who wished to inherit alongside legitimate children, to receive holy orders and to be admitted to the Inquisition.[58]

The question of the position of fathers who abandoned their *patria potestas* was easier to solve. Authors agreed unanimously that the moment the father had abandoned his child, he lost his rights over him or her. The decision was also valid for abandoned slave children, who gained freedom through abandonment.[59]

Although the general framework of the legal status of foundlings during the eighteenth century has been traced, the rights of foundlings were fully defined by law only at the beginning of the nineteenth century. No significant change from the pattern outlined above, however, took place.[60]

CHARITABLE INSTITUTIONS CONCERNED WITH FOUNDLINGS

Assistance to foundlings must be measured with reference to the broader network of charitable institutions in a given region. Generally, care for foundlings was related to help for other categories of needy children, as well as for sick adults and sometimes the handicapped. Not only were

children to be cared for by institutions which also helped adults, but often interaction between different institutions was the rule.

In Portugal, a significant issue that cannot be observed in any other southern European country is the incorporation of a significant number of institutions of assistance under the administration and authority of the *misericórdias*. The *misericórdias* were lay confraternities, under the direct protection of the king, that were founded from 1498 onwards in the majority of cities of the kingdom and its colonies. The expansion of the *misericórdias* in the years before 1750 was marked: there were 11 in the Atlantic archipelagoes of Madeira and the Azores, 16 in Brazil, 3 in Angola and about 29 in Asia, including those of India, Japan and Indonesia, as well as the countless confraternities established in continental Portugal, not only in cities but also in small towns and even villages.[61]

The functioning of each institution was autonomous. Confraternities had their own statutes, which were subject to royal approval. But, even if they adopted the *Compromisso* of Lisbon, as was often the case with new *misericórdias*, they were independent local bodies. Although the *misericórdias* might have different regulations, the basic principles governing their activity were the same. These principles were the fourteen spiritual and corporal works of mercy, which gave unity to the multiple confraternities existing in the Portuguese territories. According to such principles, each confraternity organized a wide range of activities: burials (for members, non-members, the poor and those sentenced to death), assistance to prisoners, care of the sick poor, domestic relief for the 'shame-faced' poor and dowries for poor orphaned girls. These activities were to be performed through the volunteer work of its members, organized in different institutions which the *misericórdias* could administer. From reclusive institutions for women to colleges designed for orphans and from general hospitals to leper houses, the confraternities often took charge of the most important local institutions of charity. *Misericórdias* also accumulated important patrimonies, as the ceremonies they performed for burials guaranteed the accumulation of pious legacies and inheritances. Furthermore, the *misericórdias* were also authorized by the king to collect alms: their *mamposteiros* (licensed alms collectors) could cover the entire kingdom in search of donations.[62]

Caring for others was not the only concern of the *misericórdias*. They also provided prestigious funerals for members and their families, had important roles in the local processions and could assist their own members in need. The orphans of members could receive dowries and impoverished members' families could receive secret domestic relief. Other advantages for ruling members were the privileges institutionalized by the

king in 1502, which exempted them from the performance of tasks imposed by the councils.[63] In any case, the importance charity assumed in this baroque Catholic society sufficed to make membership of the local *misericórdia* a symbol of status. The *misericórdia* was a source of power that seems to have competed on equal terms with two other local authorities: the town council and the bishop's chapter. Although the confraternity was not subject to ecclesiastical jurisdiction or administration, the local clergy often occupied high posts in its ruling bodies. Likewise, the local nobility, as members of the best families, tended to share such positions with clergymen. *Misericórdias* became important elements in the local political arena.

The members of the confraternity could not be manual workers. Besides the negative connotation of manual work in *ancien régime* societies, members had to be free from work duties in order to be available to help in the confraternity's tasks. Membership was stratified within the confraternity itself: there was a divide between noble and non-noble members, with the ruling posts reserved for noblemen. Non-noble members tended to be either merchants or master craftsmen who owned their workshops. This discrimination was even included in the *Compromissos*, which defined precisely the 'rights and duties' of each class of member. The qualifications for membership of the *misericórdias* created a divide between those who were to give and those who were to receive relief: members on the one side and prisoners, those under the death sentence and the sick poor on the other. In the worst scenario, members were to be helped secretly as shame-faced poor, or their orphaned girls could be given dowries.

The most important feature of Portugal's *misericórdias* is that they created a quite homogeneous welfare system, as flexible as local regulation permitted, without being subjected to the bureaucracy of a central authority. The incorporation of medieval charitable institutions into larger ones, which took place throughout southern Europe, occurred within the framework of the *misericórdias* in the Portuguese case – or, more exactly, the regrouping of municipal institutions started during the fifteenth century even before the foundation of the first *misericórdia* in Lisbon, but was absorbed by the *misericórdias* in the sixteenth century.[64] Most municipal medieval hospitals of the main cities of the kingdom passed under the administration of the local *misericórdias*.

In a context of progressive reinforcement of royal power, the *misericórdia* was arguably a subtle strategy to withdraw assistance from the control of the ecclesiastical authorities. If charity is seen as a means of social pacification – in the sense that inequality is justified by the fact that the rich are supposed to share their property with the poor on a voluntary,

generous basis – its control becomes crucial. In a context where charity was highly valued, kings could obtain moral profit out of the protection of the institutions of assistance. Not that ecclesiastical dignitaries were excluded from the *misericórdias*: the truth is that they could be members and often performed duties. Yet they were to fulfil them in the context of an institution that was under the king's patronage and did not – at least officially – submit to any cathedral chapter or any monastery. The *misericórdias* thus performed a double role: on the one hand they helped to lessen social conflict, and on the other they increased the prestige of the king. At the local level they pacified society, since the rich and the powerful gave of their time, and often their property, to assist the poor, thus compensating for social and economic inequality; on the other hand, they drew the king's benevolence closer to the common people.

The extent of the *misericórdias'* monopoly of the administration of charitable institutions is not known. There were some exceptions to the incorporations in the fifteenth and sixteenth centuries and new institutions independent of the *misericórdias* were founded between the seventeenth and eighteenth centuries. But we do not know the importance of such non-*misericórdia* institutions in the political life of the cities nor the number of recipients of their assistance. The information available suggests that the local *misericórdias* tended to administer the main general hospitals in the important cities of the kingdom and a number of smaller institutions whose capacity and character varied.

If by law foundlings were to be supported financially by the local councils, the *misericórdias* often assumed the obligation of providing effective assistance for them. This was a local arrangement, formalized by a contract between the *misericórdia* and the council. In the kingdom of Portugal we know of such contracts for Lisbon (1635),[65] Porto (1685),[66] Coimbra (1708)[67] and Evora (1767–1768),[68] although it is possible that other smaller towns also transferred responsibilities for care to the *misericórdias*. In Brazil, Africa and Asia similar arrangements were made in some cities, such as Bahia, Luanda, Goa and Macau.[69] In places where such contracts did not exist, assistance for foundlings was entirely the responsibility of the municipality.

Evidence suggests that the *misericórdias* tended to keep their financial assets quite separate from expenses for foundlings. Although their statutes included a clause on deprived children, they always made clear that foundlings were the council's financial responsibility. In exchange, care for foundlings was carried out without any remuneration from the council authorities.

Unlike in other southern European states, foundlings were inevitably cared for only by two alternative institutions: the council or the

misericórdia. In no case was a cathedral chapter charged with them, or a confraternity other than the *misericórdia*. Compared with the rest of southern Europe, Portugal is striking for is homogeneity. This can also be observed in the fact that the wheel (a device through which children could be left at institutions anonymously) was the national instrument of abandonment, used widely in Portugal as well as in Brazil even before its legalization in 1783. The *Ordem circular de Pina Manique* of 1783 referred to the institutions responsible for foundlings as *rodas*, even before the law mentioned explicitly that the wheels were to be adopted in every such institution.[70] The foundling homes were widely known as *rodas*, a sign that came to symbolize the institutions themselves. Unlike in Spain or Italy, where not all cities possessed these wheels, in Portugal most main towns possessed one by the end of the eighteenth century and the foundling hospitals of Lisbon and Porto had installed them at least since the seventeenth century. The use of the wheel meant that there was an indiscriminate acceptance of children, since abandonment was anonymous. Since there was no control of admissions, large numbers of children were abandoned. The figures known for the Portuguese foundling hospitals are striking for their high numbers relative to the urban populations.[71]

Even if there were wheels in every head of *concelho* (the parish that was the administrative centre of the group of parishes comprising the *concelho*), transporting the children to the main hospitals of the large cities was common. Local authorities were always eager to reduce expenditure on the children and it is possible that abandoners also found it suitable for children to be sent far away. Transport might be either clandestine or semi-official. Each hospital in a larger city had its own hinterland.[72] The conditions of transport were inhuman: some children were carried in groups of two or more in baskets and died on their way to the foundling home. A text from the *Intendência Geral da Policia* even acknowledged a fear that those children could die as 'pagans'.[73] It is possible that the *misericórdias* who cared for foundlings in the larger cities were financed by the council, and had no real need to control expenses, and that therefore few attempts were made to discover the origins of foundlings.

When the council was responsible for the foundlings, the local structure included a woman to receive foundlings at the wheel – the *rodeira*, who was later to recruit wet-nurses for the children. Also, an officer of the local council was to keep registers of the children and to supervise expenses. Generally the council rented or owned a house where the *rodeira* lodged and where children boarded until they were given to wet-nurses. When the *misericórdia* was in charge of foundlings, the functions of the council were restricted to regular financing of expenses. All other tasks were performed

by members of the *misericórdia*, who also recruited the personnel to care for the foundlings: wet-nurses to attend them on reception and to breastfeed them. Generally the *misericórdias* employed their own medical staff to care for the children until wet-nurses were found, and to treat them when they were ill.

Cooperation existed between the civil authorities who assisted foundlings and the church. Foundlings were generally baptized in the parish where the wheel was located. The recruitment of wet-nurses also relied on certificates issued by their parish priests that certified the availability of breast milk, the condition of the woman's own child and other issues such as good *mores* or good blood. Once they were admitted as nurses, payments were often made to them against a certificate issued by the parish priest that the child was still living. Strict cooperation was thus needed, and parish priests were exhorted by the authorities not to ask for money for writing such documents.

Once the foundlings reached the age of seven, the responsibility for them passed to the Judge of Orphans, who was in charge of integrating the foundling into society through adoption by a family or insertion in the labour market. Legally, foundlings over seven were treated as orphans.

Foundlings managed to involve a significant corpus of Portugal's institutions in their upbringing: the councils, sometimes the *misericórdias*, the Judges of Orphans and the parish priests. If we add to such institutions the multitude of women who breastfed them and the individuals who abandoned them, and if we bear in mind the high numbers of foundlings in Portugal, a high proportion of the population can be stated to have been involved in some form of child abandonment.

CONCLUSION

While Portuguese law on offences against children, and in particular infanticide, before the nineteenth century may be regarded as imprecise, laws regulating foundlings and their care were more definite and existed in Portugal since the sixteenth century. The law regarding child abandonment was probably the most developed segment of the laws concerning children in Portugal. The thrust of the law of child abandonment was to encourage mothers to place children in care by making the admission process anonymous, and to provide an incentive for women to serve as wet-nurses by granting their husbands and sons exemptions from military service. In the law of Pina Manique (1783), the system reached maturity; the head of the recently created central police (see note 12) established a structure to assist foundlings in each administrative division. But this law built upon earlier practice: by the late

seventeenth century nearly every city had already created agreements with the local *misericórdia* to establish *rodas*.

There was no contradiction between the existing laws and the newly created institutions for foundlings. Rather, the laws seem to have been a response to institutional developments. Thus they were a response by a wide array of members of society including the hospitals, the town councils, the wet-nurses, the priests and the abandoners to the needs of the children themselves.

ENDNOTES

1 Pierre Bourdieu, *Choses dites* (Paris, 1987), pp. 75–93.

2 See Isabel dos Guimarães Sá, 'Abandono de criaças, infanticidio e aborto na sociedade portuguesa tradicional através das fontes juridicas', *Penélope* 8 (1992), 75–89.

3 From the fifteenth to the eighteenth centuries three compilations of laws were in force: the *Ordenações Afonsinas*, from the second half of the fifteenth century to 1521, the *Ordenações Manuelinas* from 1521 to 1603, and from then onwards until the codes elaborated in the nineteenth century the *Ordenações Filipinas* (1603). For the whole of the eighteenth century, the *Ordenações Filipinas* were in use, although supplemented by new laws, also available in compilations (see Joel Serrão ed., *Dicionário de História de Portugal* (Porto, 1985), 'Ordenações'). As many issues were not included in Portuguese laws, the *Ordenações Filipinas* also declared which sources of law remained valid and in what order: first, Roman and canon law, the former being preferred to the latter; second, the 'glosas' from Acúrcio and comments by Bártolo, unless they were contradicted by the common opinion of the jurists; finally, the monarch could decide upon specific cases (*Ordenações Filipinas*, livro II, tit. 64).

4 In the Spanish, Italian and Portuguese cities the death of small children was invariably the motive that justified the foundation of foundling homes. In the Middle Ages, the Hospitals of the Holy Spirit in Rome were supported by popes because they were disturbed by the sight of children fished out of the Tiber and brought to their presence by fishermen (John Boswell, *The kindness of strangers. The abandonment of children in Western Europe from Late Antiquity to the Renaissance* (London, 1988), Illustrations 15–17). In Germany a crucial issue in the debate concerning the foundation of foundling homes during the eighteenth century was also whether the number of infanticides decreased with legal abandonment. See Otto Ulbricht, 'The debate about foundling hospitals in Enlightenment Germany: infanticide, illegitimacy and infant mortality rates', *Central European History* 18 (1985), 216–19. In Porto's case, a royal order authorizing the foundation of the foundling home mentioned the finding of many dead children on beaches and in other 'strange' places (Arquivo da Assembleia Distrital do Porto (hereafter AADP), *Livro 1 do Registo*, 4). In Brazil, a bishop is said to have given orders to pick up children from dunghills (Laima Mesgravis, 'A assistência à infância desamparada e a Santa Casa de S. Paulo: a Roda dos Expostos no século XIX', *Revista de História* (Brasil) 103 (1975), 413).

5 Among others, Jean-Louis Flandrin, *Le sexe et l'Occident* (Paris, 1981), 203.

6 Francisco Mostazo, *De causis piis in genere, et in specie…*, vol. I (Lugduni, 1700), liber IV, cap. XI, n. 77; Gabriel Alvares Velasco, *De privilegiis pauperum et miserabilium personarum* (Madrid, 1630), p. 2, q. 65, §2, nn. 180–2, 185 and 207–14; B. Gragoso, *Regiminis republicare christianae* (Lugduni, 1641), part III, lib. I, §III, epit. 126.

7 A. J. de Gouveia Pinto, *Exame crítico e histórico sobre os direitos estabelecidos pela legislação antiga e moderna, tanto pátria como subsidiária, e das nações mais vizinhas e cultas, relativamente aos expostos ou engeitados* (Lisbon, 1828), p. 34; P. J. de Melo Freire, *Institutiones Juris Civilis et Criminalis Lusitani...*, vol. 5 (Lisbon, 1794), tit. 9, art. 14.

8 *Ordenações Filipinas*, livro v, art. 1.

9 To give an example, wet-nurses boarding in Porto's foundling home often killed foundlings while they slept, and the punishment was merely dismissal, and even then this was not always the case (AADP, *Livro 1 das Entradas e Termos das Amas*, 51–165).

10 Richard Trexler, 'Infanticide in Florence: new sources and first results', *History of Childhood Quarterly* 1 (1974), 98–116. In Portugal, references can be found to infanticide in penitentials. As an example, see M. Navarro, *Manual de confessores e penitentes* (Coimbra, 1552), 173.

11 'De Agnoscendis et alendis liberis vel parentibus vel patronis vel libertis' (para. 4), from *Corpus Iuris Civilis, Digesta*, xxv, 3, quoted by Pinto, in A. J. de Gouveia, *Compilação das providências que a bem da criação dos Expostos ou Engeitados se tem publicade e achão espalhadas em diferentes artigos da legislação pátria, a que acrescem outras...* (Lisbon, 1820), 14. Nevertheless, it should be noted that a Roman law punishing infanticide did not appear before the fourth century AD (Flandrin, *Le sexe et l'Occident*, 210).

12 This *Regimento dos Quadrilheiros* established a police force in the towns and cities of the kingdom. Its officers, the *quadrilheiros*, were replaced in 1760 by the *Intendência Geral da Policia*. Among a list of possible criminals – burglars, witches, prostitutes, gamblers – there were these *movedeiras*, women accused of provoking miscarriages. See *Collecção cronológica de várias leis, provisões e regimentos de El-Rey D. Sabastião* (Coimbra, 1819), 22.

13 This law was confirmed in 1698 and reinforced by Louis XIV in 1708. See A. Dupuis, 'Avant la pilule, deux édits royaux de 1556 et 1708 (sur les déclarations de grossesse)', *Vieux Papier* (Paris) 25 (1968), 241–5, where such laws are transcribed.

14 As for example, Jacques Depauw, 'Amour illégitime et société à Nantes au XVIIIe siècle', *Annales E.S.C.* 27 (1972), pp. 1155–82, and Alain Lottin, 'Naissances illégitimes et filles-mères à Lille au XVIIIe siècle', *Revue d'Histoire Moderne et Contemporaine* 22 (1975), 61–88.

15 The *alvara* of the 18 October 1806, §VIII, renewed explicitly §4 of title 73 of livro i: see António Delgado da Silva, *Collecção da Legislação Portuguesa, desde a ultima compilação das Ordenações* (Lisbon, 1826–1830), vol. v, 414–18.

16 See Boswell, *The kindness of strangers*, 27.

17 *Ordenações Filipinas*, livro v, tit. 41). This law ascribes the same penalty to slaves that murder their master and to sons and daughters who murder their father or mother. Another law allowed the father to imprison his slave as well as his son, although other forms of private imprisonment were forbidden (*Ordenações Filipinas*, livro v, tit. 95, §4).

18 Although paternal power in Rome seemed to be unlimited, some authors suggest that its incidence was weakened by the fact that generations did not overlap due to low life expectancy. See Richard Saller, 'Patria potestas and the stereotype of the Roman family', *Continuity and Change* 1 (1986), 7–22.

19 *Ordenações Filipinas*, livro iii, tit. 9, §3 (concerning emancipation); livro i, tit. 88, §6 and livro iii, tit. 42, §4 (concerning married minors).

20 No law in the *ordenações* deals with this issue and it can be presumed that the Roman principle was in use. For other European countries see Paul Ourliac and J. de Malafosse, 'Le droit familial', in *Histoire du droit privé*, vol. iii (Paris, 1968), 51, and

Marie-Thérèse Allemand-Gay, 'Le droit de la filiation illégitime à la fin de l'Ancien Régime', *XVIIIe Siècle* 12 (1980), 251–69.

21 Only France is considered; see Allemand-Gay, 'Le droit de la filiation', 269.

22 *Ordenações Filipinas*, livro v, tit. 38, §1, p. 1188. The law only banished cases in which a commoner killed a nobleman for adultery with his wife. Between men of equal status the killing of both the adulterous wife and her lover went unpunished. The betrayed husband was entitled to his adulterous wife's dowry (*Ordenações Filipinas*, livro v, tit. 113, §3).

23 AADP, *Livro 1 das Entradas*, 214 and 223 (*Maria* and *Vitória*, both abandoned in 1701). In the latter case, it is stated that the husband had just arrived in a ship and the wife abandoned the child in order to save her life.

24 AADP, *Livro 32 das Saidas*, 408–9. In order to maintain secrecy, the pages of the book where the list is contained were stitched together.

25 *Ordenações Filipinas*, livro iv, tit. 92. This law could be interpreted as an authorization for a married man to have one concubine.

26 The Portuguese inheritance system divided the estate in two parts: the *legitima*, formed of the property to be divided between the legal heirs, and the *terca*, which the testator was free to bequeath. The *terca* (the word meant literally a third of the estate, but the proportion could vary) could be used to benefit one of the legal heirs, increasing his estate, or to benefit any other person or religious institution. On the implications of this system in household formation and family patterns, see Helena Osswald, 'Dowry, norms, and household formation: a case study from North Portugal', *Journal of Family History* 15 (1990), 210–12.

27 *Ordenações Filipinas*, livro iv, tit. 92, §1 and 3.

28 *Ibid.*, tit. 88, §1 and 2.

29 *Ordenações Filipinas*, livro ii, tit. 35, §12.

30 *Ordenações Filipinas*, livro iv, tit. 93.

31 *Ibid.*, tit. 36, §4.

32 Inventories of the property left by the mother to her children had also to be drawn up. See *Ordenações Filipinas*, livro i, tit. 88, §§7, 8 and 9.

33 Jerónimo Couceiro de Almeida, *Tratado orphanológico e prático, formado com as disposicões das Leis Pátrias* (Lisbon, 1794); Diogo Camacho de Aboym Guerreiro, *De munere judicis orphanorum opus* (Coimbra and Lisbon, 1699–1735); António de Paiva e Pona, *Orphanologia prática em que se secreve tudo que respeita aos inventários partilhas...* (Lisbon, 1713); Manuel António de Campos, *Tratado prático juridico civil e criminal...* (Lisbon, 1765 and 1768).

34 There was one particular case where it was conceded that even if Roman law admitted the loss of paternal power, Portuguese law retained it for the bastards of commoners (AADP, *Livro 1 do Registo*, 134).

35 The situation could be similar to the Spanish one, where there was an absence of any law concerning adoption of children less than seven years old. See Juan Garcia Gonzalez, 'Expósitos, beneficencia y prohijamiento', in *Estudios juridicos en homenaje al professor José Santa Cruz Teijero* (Valencia, 1974), 322.

36 *Ordenações Filipinas*, livro v, tit. 55.

37 *Ordenações Afonsinas*, livro iv, tit. 92, §§1 and 2. This law governing payments for the upbringing of illegitimate children is identical to that operating in the Basque country. See Lola Valverde, 'Illégitimité et abandon d'enfants au Pays Basque à l'Age Moderne', (unpublished paper delivered to the *10th International Economic History Conference*, Leuven, 1990, available in the library of the Cambridge Group for the History of Population and Social Structure; this paper is also to be published in John Henderson

and Richard Wall eds., *Poor women and children in the European past* (London, Routledge, forthcoming 1994), as 'Illegitimacy and the abandonment of children in the Basque Country, 1500–1800').

38 The popularity of the word *engeitado* rivals the word *exposto*, although the second seems to be more used during the nineteenth century. The etymology of the word *engeitado* is interesting because it comes from the verb *engeitar*, which means 'to reject'.

39 *Ordenações Filipinas*, livro I, tit. 66, §41.

40 José Capela, 'Entre Douro e Minho 1750–1830. Finanças. Administração e bolqueamentos estruturais no Portugal Moderno' (unpublished Ph.D. thesis, University of Minho, 1987).

41 Pinto, *Exame crítico*, 175–77; Silva, *Collecção de Legislação*, vol. 1763–1774, 225.

42 'Alvará de 31 de Janeiro de 1775' in Silva, *Collecção da Legislação*, vol. 1775–1790, 4. This law responded to a request made by the administrators of the Hospital de Todos os Santos of Lisbon and only mentions the capital of the kingdom. Until then, the foundlings were cared for until the age of nine. As is explained in the text, this measure was designed to diminish expenses, as the hospital was overloaded with children.

43 'Alvará de 31 de Janeiro de 1775', §8 in Silva, *Colleção de Legislação*, vol. 1775–1790. Majority for foundlings therefore was age 20 instead of 25.

44 The law referred to foundling hospitals by the name of the instrument that served for the physical deposition of the foundlings: the wheel.

45 A *comarca* was an administrative and jurisdictional unit formed by a group of *concelhos*.

46 Arquivo Nacional da Torre do Tombo (hereafter ANTT), *Livro nº 6 da Intendência Geral da Policia*, 70–2. See also Damião Peres, 'Expostos' in *História de Portugal*, vol. 6 (Barcelos, 1934), 635. Nevertheless, in the nineteenth-century Algarve foundlings were still 'exported' to Spain (Nuno Cortes, 'O abandono de crianças no Algarve. O caso dos expostos de Louié (1820–1884)' (unpublished Master's thesis, University of Porto, 1991), 66.

47 *Ordenações Filipinas*, livro I, tit. 88, §12.

48 The charter was destined for the Hospital de Todos os Santos of Lisbon. Quoted by Pinto, *Exame crítico*, 187–8.

49 Pinto, *Exame crítico*, 188–9.

50 Pinto, *Exame crítico*, 189; Manuel Fernandes Tomás, *Repertório ou Indice Alfabético das Leis Extravagantes*, vol. 1 (Coimbra, 1815), 49.

51 *Ordenações Filipinas*, 5th edn (Lisbon, 1747), 395–6.

52 Decree dated 22 December 1695, in *Ordenações Filipinas*, 5th edn, 396.

53 'Alvará de 31 de Marco de 1878' in Silva, *Collecção da Legislação*, vol. III, 430–1.

54 At least in Porto, the register books mention privileges accorded to wet-nurses from the first half of the eighteenth century.

55 António Hespanha, *História das instituições. Epocas medieval e moderna* (Coimbra, 1982), 228.

56 Mostazo, *De causis piis*, vol. I, liber IV, cap. XI, n. 59.

57 Mostazo, *De causis piis*, vol. I, liber IV, cap. IX, nn. 73–6; Fragoso, *Regiminis republicae*, vol. III, part III, liber I, §III, nn. 133–4; Manuel Alvares Pegas, *Tractatus de exclusione, inclusione, successione et executione majoratus* (Lisbon, 1686), part 5, cap. LXIII, nn. 1, 2, 3 and 7.

58 Mostazo, *De causis piis*, vol. I, liber IV, cap. XI, nn. 75–6; Freire, *Institutiones iuris*, vol. II, tit. VI, §VIII.

59 Velasco, *De privilegiis pauperum*, part 2, q. 65, §2, n.s. 192–4; Fragoso, *Regiminis*

republicae, vol. III, part III, lib. I, §III, n. 132; Mostazo, *De causis piis*, vol. I, lib. IV, cap. XI, n. 78; Pegas, *Tractatus de exclusione*, part 5, cap. LXIII, n. 6.

60 Pinto, *Exame crítico*, 241; Loiseau, M., *Traité des enfants naturels, adulterins, incestueux et abandonnés…* (Paris, 1811), 768–804.

61 See the map in A. J. R. Russell-Wood, '*Fidalgos' and philanthropists. The 'Santa Casa da Misericórdia of Bahia', 1550–1755* (London, 1968), 24–5.

62 Victor Ribeiro, *História da beneficência pública em Portugal* (Coimbra, 1907), 59–65 and 70.

63 Ribeiro, *História da beneficência*, 63 and 76.

64 *Ibid.*, 84–5.

65 Victor Ribeiro, 'A Santa Casa da Misericórdia de Lisboa', *Memórias da Academia Real das Ciências*, New Series, Class 2, vol. IX, part II (Lisbon, 1902), 396.

66 AADP, *Livro 1 do Registo*, 15–31.

67 A. César Anjo, 'Assistência a criaças expostas em Portugal', *Amatus Lusitanus* 7 (1950), 427.

68 Gabriel Pereira, *Documentos históricos sa cidade de Evora* (Evora, 1887–1891), 254.

69 Russell-Wood, '*Fidalgos' and philanthropists*, 234.

70 'Ordem circular de 24 de Maio de 1783' in AADP, *Livro 1º do Registo*, 150–2.

71 No scholar has yet drawn up a complete account of the foundlings entered in the records of the Hospital de Todos os Santos of Lisbon. Data available suggest that by the end of the seventeenth century 500 children might be abandoned in a single year and by the second decade of the eighteenth century nearly 700. By the middle of the century 1,000 per year might be abandoned and in the final years of the Hospital almost 2,000. See Ribeiro, 'A Santa Casa', 397–404.

In Porto, a city of about 40,000 inhabitants by the end of the eighteenth century, about 60,000 children per year had been abandoned throughout the century. The number of children received each year varied between 800 and 1,500 during its last two decades. Less-populated urban centres, with fewer than 20,000 inhabitants, such as Guimarães and Braga (Minho) kept their intake of children below 15,000, the average number of foundlings range from 50 to 130 per year in both institutions. See Isabel dos Guimarães Sá, 'Abandono de criaças, ilegitimidade e concepções pré-nupciais em Portugal: estudos recentes e perspectivas' (paper presented to the *III Congresso da Associación de Demografia Historica*, to be published with its proceedings).

72 The means of transporting foundlings to Lisbon from areas as distant as Almada, Setúbal, Torres Vedras and Abrantes are criticized in ANTT, *Livro nº 2 da Intendência Geral da Policia*, 30.

73 ANTT, *Livro nº 2 da Intendência Geral da Policia*, 37–9.