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**WHEN MOTHERS KILL: LESSONS FROM THE ENGLISH LAW
FOR MALAYSIA**

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Abstract

Infanticide as a particular gender-related crime has been and continues to be a constant feature of human life. The killing of dependent offspring has sparked mixed reactions from the public as such act is considered to be inhuman, uncivilized and universally condemned. Despite its long history, such phenomena may be driven by gender preferences, the nature of the unfortunate children being unwanted, vulnerable and disabled as well as the unstable relationship between partners. The prosecution of infanticide offenders has led to sentencing inconsistencies from imprisonment to death penalty. Despite the considerable interests generated by this topic, there appears to be a lacuna in the literature given that most research is mostly concerned with either the crime or the law alone, leaving a gap in the Malaysian literature. It is within this context that this paper seeks to examine the gendered crime, the legislation and the sentencing pattern in England and Wales. Also, this article aims at analysing the relevant laws governing such crime in Malaysia. This paper employs a doctrinal analysis using secondary data from academic journals, books, and online databases. The authors contend that despite being described as a gender-selective killing, women offenders should be given better protection within the criminal justice system as they are usually the biological mother having mental disturbance after childbirth.

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1. Introduction

Infanticide, which means the killing of babies has been a practice since early civilizations in Mesopotamia, Greece, Rome, Saudi Arabia and China and was apparently condoned (Palermo, 2002). Since such time historians and anthropologist have been concerned with such crime (Hoffer and Hull, 1981, Harris, 2003) and in many jurisdictions and at all level of the society (Williamson, 1978). Within the global context, the literature indicates that throughout history and across many cultures, child abuse and murders of children have occurred (Benitez et al., 2013). In early Japan, in 800 A.D, child abuse, neglect and the killing of children or infanticide were closely related to the efforts to decrease family size. Early literature in Japan also shows that children in Japan were disposed of through infanticide, desertion, child trafficking and adoption (Kouno, 1995). This paper begins by underlying the problem statement which generates the ground of this article. Next, the paper highlights the research question to address the issues in the problem statements. The paper follows with the purpose of the study and the methodology adopted by this paper. Subsequently, the paper outlines the findings and end with a conclusion.

2. Problem Statement

Within the global sphere, many jurisdictions have created legislations regulating infanticide. For instance, under section 178(1) of the Crimes Act 1961 in New Zealand, infanticide law is significantly different from that of other jurisdictions that have infanticide as a statutory offense (Dean, 2004). In England, despite being a statutory offence, the murder is the charge for the majority of women and infanticide becomes a defence to such a charge (Arora et al., 2017; Dean, 2004). The basis for such legislation is medical in that the leniency provides for is justified on the ground that the balance of offender's mind was disturbed after giving birth (Weare, 2017; Brennan, 2007). In Malaysia, section 309A of the Penal Code (Act 574) regulates infanticide, which provides that such act was inflicted by mother, when at the time of the act, she was not entirely recovered after giving birth and her mind was disturbed.

Despite the leniency granted to the offenders, infanticide legislation seems to be vague, loose and ambiguous. Even though the English Infanticide Act 1938 serves as a model for other countries, including Malaysia, in most cases it is available for mothers only and reinforces gender stereotypes (Loughnan, 2012a; Brennan, 2007). When infanticide has been committed, it is likely to have been gender biased, usually against females (Loughnan, 2012a; Sykora, 2000). Similar to American approach, the Infanticide Act in England assumes that not all women who murder their children have mental illness and the infanticide law does not require physical or mental examination as it only presumes psychological illness (Weare, 2017). Even though the courts in England have taken a firm position in rejecting postpartum depression as a complete defence to varying degrees of murder when presented with fact patterns, such situation does not demonstrate the necessary legal definition of insanity (Loughnan, 2012b). The extent to which the court determines the balance of mind of the offender, which was disturbed after giving birth and also the benchmark for judges in sentencing such offenders is highly questionable (Shariff, 2012). It is contended that if the child dies as a result of abandonment and such act is done by the mother immediately after the child's birth she might receive a lesser punishment, provided she could establish that she was mentally disturbed as a result of giving birth.

3. Research Questions

This study intends to address several important issues, namely on how do judges in England and Wales sentence female offenders under the Infanticide Act 1938. Another research question is what lessons can the Malaysian courts learn from such sentencing?

4. Purpose of the Study

This research was conducted to achieve several critical objectives as follow: firstly, to examine the legal position taken by judges in sentencing female offenders under the Infanticide Act 1938 in England and Wales. Secondly, to explore the lessons that could be learned for the Malaysian courts from the legal position and experiences in England and Wales in sentencing female offenders in similar cases.

5. Research Methods

This study employs a doctrinal analysis using a library-based method to review the literature on infanticide law in Malaysia critically. The primary data relates to Penal Code, while the secondary data refers to textbooks, articles in academic journals, law reports, and working papers, commentaries on case laws, online sources as well as on online database sources such as Westlaw, HeinOnline, Lexis Nexis, Sage Publication and Emerald.

6. Findings

Below are the findings of the research:

6.1. International Instruments on Children's Right to Life

The constitutional basis of the legal protection for infants under the infanticide law is the right to life, which commences at the moment of conception. However, it is universally recognized that the legal state of life is measured from the quickening in the womb, or from birth. The denial of such right would mean a denial of the existence of such fundamental rights that govern all other existing rights. At the broader international context, Article 7 of the United Nation's Convention on the Right of the Child (1989) (CRC), for which England and Wales and Malaysia are signatories, justifies that every child has the right to know and to be cared for by his parents. This primary focus of the CRC is the "best interests of the child." In its broad interpretation, the right to life for children means that the right not to be killed. On the one hand, this right implies that the State will not subject children to the death penalty and protect the lives of children by taking appropriate measures to deal with the crime of infanticide (Mohd, 2015). The criminality of infanticide, baby dumping, and the concealment of birth by secret disposal of a dead body, neglect, exposure and abandonment of children under the age of 12 years contravene the right to survival under Article 6 of the CRC and the right to dignity under Article 19 of the CRC.

6.2. Infanticide Law in England and Wales

The English common law considers the moment of live birth when a legal person comes into existence, which involves legal rights, in particular, the right to life (Loughnan, 2012a; Warren, 1989). As suggested by Meldman that 'life' is the immediate gift of God and a right inherited by nature on every

individual (Griffith, 2015; Loughnan, 2012b; Meldman, 1968). Significant international human rights instruments and standards such as the International Conventions on Civil and Political Rights (ICCPR), and the Conventions on Elimination of all form of Discrimination against Women (CEDAW) have emphasized that every human being has the inherent right to life as protected by law (Chantler et al., 2009).

Early literature showed that when the Infanticide Act 1922 was first introduced in England, the offence was referred to as the death of 'newly born child' rather than the death of a child under the age of 12 months and no reference to lactation was made (Griffith, 2015; Loughnan, 2012b; Osborne, 1987). The English Infanticide Act 1922 suggests the medicalization of infanticide, which would prevent the courts from passing death sentences (Weare, 2017; Loughnan, 2012b; Bogecho, 2003). Infanticide was considered to be unique and separated from other child killings. Also, the Infanticide Act 1922 provides a partial defence for the offenders and assumes that such offenders suffered from postpartum psychosis (Griffith, 2015; Loughnan, 2012b; Shelton et al., 2010).

The creation of Infanticide Act 1922 separated the offense of infanticide from murder, reducing it to the level of manslaughter, a mitigation framework for mothers who killed their newly-born children (Loughnan, 2012b; Cunliffe, 2009). However, the scope of the Act seems to be unclear as to the age of a new-born. After the passing of Infanticide Act 1922 and 1938, the term infanticide was defined more strictly (Loughnan, 2012b; Jackson, 2006). Medical evidence suggests that the child may not have been delivered when it died, and the offenders were occasionally convicted of murder. Such a situation led to the Report of the Commission into Capital Punishment 1949 - 1953 that called for legal transformation on child killing (Loughnan, 2012b; Harris, 2003).

Section 57 of the Coroners and Justice Act 2009 amended the Infanticide Act 1938. Section 1 of the 2009 Act provides that where a woman causes the death of her child under 12 months old when her mind was disturbed and she has not fully recovered from giving birth or lactation, she shall be liable for murder, and guilty of the offence of manslaughter. Hence, the prosecution must prove the following elements: 1) The death was caused by a wilful act or omission; 2) The baby was less than twelve months old and 3) The balance of her mind was disturbed due to having given birth to the child and lactation.

It is evident that the legal position in England and Wales provides for the partial defence of infanticide for both murder and manslaughter. Such defence is only a partial defence and indicates that women convicted of infanticide will not be convicted of the initial charge of either murder or manslaughter, but they will still face some form of criminal prosecution (Griffith, 2015; Loughnan, 2012b). Before the Homicide Act 1957 which introduced the partial defence of diminished responsibility for murder cases, infanticide provided an essential means of selecting a more lenient sentence for a mother found guilty of killing her infant than the mandatory life sentence or death sentence applying to murder at the time (Loughnan, 2012b). Consequently, the mens rea for infanticide does not require any intention to kill or cause serious bodily harm. Therefore, cases of manslaughter would fall within the elements of infanticide.

Section 1 of the 2009 Act suggests that conviction for infanticide is likely if the women offender kills her child under the age of 12 months and if she has not recovered from the effect of giving birth or lactation (Griffith, 2015; Telford, 2012). Mental disorders such as post-natal depression will fall within

the category envisaged by this section. The offence may be regarded as manslaughter if, at the time of the offence, the balance of the offender's mind was disturbed since she has not fully recovered from childbirth, or because of lactation (Jefferies, Horsfall, & Schmied, 2017; Weare, 2017; Griffith, 2015; Marks and Kumar, 1993). Upon conviction, the maximum sentence a judge can impose for manslaughter is imprisonment for life. Thus, the English law seems to recognize a link between the biological changes in women associated with childbirth, lactation and mental illness (Jefferies, Horsfall, & Schmied, 2017; Griffith, 2015; Loughnan, 2012b). The Infanticide Act 1938 provides the prosecutor with an alternative to a charge of murder where a mother has murdered her child before 12 months old (Griffith, 2015).

Commentators indicate that the English infanticide law was created explicitly for desperate women who wanted to conceal their illegitimate pregnancy for fear of social disgrace and poverty (Weare, 2017; Griffith, 2015; Harris, 2003). Such problems resulted in the eventual murder of the child shortly after its birth. The Infanticide Act 1938 in England and Wales serves as a quintessential example to other jurisdictions in the world such as Canada, New Zealand and some states in Australia (Ryznar, 2012). Thus, in England and Wales, mothers who are found to have killed their new-borns are convicted of infanticide and given probation sentences (Weare, 2017; Griffith, 2015; Marks, 2006).

Early cases suggest that the courts were somewhat lenient in deciding infanticide cases. For example, in *R v Sainsbury* (1989) 11 Cr App R (S), 535, the trial judge sentenced the accused to a twelve-month imprisonment sentence. However, the Court of Appeal quashed such conviction and substituted it with a three-year probation order. The Court held that the welfare of society does not demand a custodial sentence for the infanticide offender and that jail sentence would 'risk' the well-being of the community. Similarly, in *R v Lewis* (1989) 11 Cr App R (S) 577, 579, the defendant was charged with manslaughter for killing her infant. The Court of Appeal again quashed a twelve-month custodial sentence and substituted it with a three-year probation order. The Court emphasized that the defendant needed treatment, making this a condition of the order. These decisions seem to suggest that the leniency of the courts for infanticide offenders is due to the high level of compassion and sympathy from the courts. Furthermore, these offenders are considered as less dangerous than other killers.

In *Kai-Whitewind*, (2005) 2 Cr App Rep 31, the defendant was charged with killing her babies. The court convicted her of murder. Judge LJ raised the question as to the manner in which the law should deal with cases where a mother suffering from a postpartum psychiatric disorder killed her child, but denied the killing. In another recent case, *R. v. Lisa Gore (Deceased)* (2007) EWCA Crim 2789, the defendant was charged with two offences, infanticide and attempting to conceal the birth of her child. The judge had the benefit of a full psychiatric report and a pre-sentence report from a sympathetic probation officer. In her sentencing remarks, Steel J adopted the suggestion of the probation officer that the appellant was in need of help rather than punishment and sentenced her to a probation order for three years with a condition of psychiatric treatment.

The origins of infanticide law are twofold; firstly, the public's concern about the harsh criminal treatment of young, single, and low-income women, and secondly, on the legal justification to justify the lenient treatment of these women (Jefferies, Horsfall, & Schmied, 2017; Weare, 2017; Loughnan, 2012a; Lansdowne, 1990). If infanticide was abolished and the women who currently rely on it were convicted of manslaughter by diminished responsibility, their sentences may well not be so lenient (Loughnan,

2012a; Lansdowne, 1990). In achieving greater sentencing consistency in infanticide cases, it has been suggested that such crime should be separated from the general murder and manslaughter, as is currently done in England (Loughnan, 2012b; Zdenkowski, 1997). Such is the case because women who commit the crime of infanticide received lenient treatment which started in the seventeenth century England mainly because of the harsh punishment requirements codified in British law (Griffith, 2015; Loughnan, 2012b; Kohm et al., 2002).

Most western jurisdiction including England and Wales, have adjusted the penalty for infanticide for probation and mandatory psychiatric treatment, which is less severe than a custodial sentence and which recognizes the unique biological changes that occur at childbirth (Jefferies, Horsfall, & Schmied, 2017; Weare, 2017; Loughnan, 2012; Spinelli, 2005). In England and Australia, prosecutors have reduced the charge from murder to infanticide at the early stage of the prosecution, and if convicted, the offenders will receive probation order with psychiatric treatment (Griffith, 2015; Loughnan, 2012a; Fazio and Comito, 1998). However, the Law Commission in 2006 recognized the difficulties facing the court when a defendant is in denial and unwilling to submit to psychiatric examination, as she perceives the purpose of such investigation as an attempt to prove her guilt. In such cases, such mother is unlikely to have any other defence and is, therefore, more likely to be convicted of murder rather than infanticide.

6.3. Infanticide Law in Malaysia

Within the local context in Malaysia, the Federal Constitution, which is the supreme law of the land, regards the fundamental liberties on the notion of “life” including Article 5 and Article 8 rather highly. Article 5(1) provides that no individual shall be deprived of his life or personal liberty, save by law. Article 8(1) provides that all people are equal before the law and entitled to the equal protection of the law. Das (2002) contends that felonious crime such as infanticide contravenes the spirit of Article 5 and Article 8 of the Constitution. G Sri Ram JCA, in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Another* (1996) 1 MLJ 261, at the Court of Appeal opined that ‘life’ under Article 5 meant more than mere existence. Given a broad and literal meaning, life incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Section 309A of the Penal Code (Act 574) regulates infanticide in Malaysia provides that when a woman by wilful act or omission causes the demise of her child, and her mind has not completely recuperated from the impact of childbirth, such action would have amounted to murder and be guilty of the offence of infanticide.

Similar to the English law, the Malaysian law recognizes the gendered nature of the offence as it merely applies to women (Hamin & Babat, 2017). Again, identical to the Infanticide Act 1938, section 309A seems to provide the rationale for such crime involving the fact that she has not fully recovered from the effect of giving birth, which resulted in the disturbance of the balance of her mind. However, unlike the English law, this section fell short of providing another defence that is provided in the English law, which is the effect of lactation (Hamin & Babat, 2017). Similar to the English law and despite such post-delivery condition, criminal liability will be attached to the female offender when at first sight, such offence is deemed to be murder but now it is to be regarded as infanticide (Razali, Kirkman, Ahmad, & Fisher, 2014; Hamin & Babat, 2017). However, unlike the English law, the Malaysian counter-part did not expressly state that the offence of infanticide is dealt with and punished as manslaughter (Razali,

Kirkman, Ahmad, & Fisher, 2014; Hamin & Babat, 2017). The punishment for infanticide is under section 309B of the same Act which provides for imprisonment up to twenty years and shall be liable to fine.

This provision seems to echo the spirit of 'post-partum disorders' the symptoms of which may include sadness, low energy changes in sleeping and eating patterns, anxiety, crying episodes, and irritability (Rahim, 2012). Commentators suggest that to understand the crime better is by analysing the allegations and sentencing of women accused of infanticide and by examining the charges brought against them (Loughnan, 2012b; Hamin & Babat, 2017). It is suggested that in infanticide cases, there is usually no premeditation involved; instead, the mother killers react with panic and impulsiveness (Friedman & Sorrentino, 2012; Weare, 2017). More severe charges are likely if the new-born was mutilated in any way. Preventing infanticide would require that society somehow reduces the vulnerability that is felt by women who commit such act of desperation (Malik, 2015).

PP v Zamihyah (1987) 2 MLJ 649 illustrates such a situation. In this case, the defendant who suffered an illness named puerperal psychosis, a disease associated with childbirth, threw her baby aged two months out of moving a car. Initially, the charge was framed for murder, but since the law in Malaysia at that time recognized such illness, the defendant was charged under section 309A and punishable under section 309B. She was sentenced to imprisonment for three years and two months. Zamihyah's case suggests that the offence is only applicable to mother killers. The phrase in section 309A only applies if she causes the death of her new own child. Sections 309A and 309B will not apply if the child is killed by someone other than his or her mother. If the murder is committed by anyone else, then the charge will be murder or culpable homicide depending on the intention of the offender.

Unlike the English law, section 309A of the Penal Code does not provide for the definition of a newly-born child, and hence, such term is open for debate (Razali, Kirkman, Ahmad, & Fisher, 2014; Hamin & Babat, 2017). Also, the law requires that the balance of the mother's mind is disturbed due to the effect of giving birth. Otherwise, the charge will be murder. In another recent case in 2014, an Indonesian maid pleaded guilty and was sentenced to eight years' jail by the Session Court for killing her new-born by stabbing her son using a pair of scissors until he died. She then wrapped the body in a garbage plastic bag and hid it under her bed. The judge described her action as brutal and inhuman. As the defendant pleaded guilty to the charge, the question as to whether she suffered mental illness or mental disturbance associated with childbirth remained uncertain (The Star, 2014).

6.4. Infanticide-related Law

In England and Wales and Northern Ireland, section 60 of the Offences against the Person Act 1861 creates the offence of concealing the birth of a child. In England and Wales, section 1(4) of the Infanticide Act 1938 extended section 60 to allow the jury to find an alternative verdict of this offence on a charge of child destruction or a charge of infanticide. Section 60 of the 1861 Act states that if any woman delivered a child and secretly disposed of the dead body or attempt to conceal the birth, she shall be imprisoned for a period not exceeding two years. Similarly, in Malaysia, the concealment of birth by secret disposal of the dead body may also amount to the act of abandonment or dumping a newly born baby (Razali, Kirkman, Ahmad, & Fisher, 2014; Hamin & Babat, 2017; Sharif, 2012). On the surface,

such wording may suggest that if the intention could be established, then the crime would be completed. Section 318 of the Penal Code provides that whoever by secretly burying or disposing of the dead body of a child or deliberately concealing the birth of a child, shall be punished with imprisonment up to two years, or fine, or both.

Another relevant provision that is closely related to infanticide is Section 317 of the Penal Code that provides for the exposure and abandonment of a child less than twelve years old by parent or person having the care of it. This section provides that whoever being the father or mother of a child under twelve years and having the care of such child, uncovered or leaves in any place with an intention to abandon the child, shall be punished with imprisonment which may extend to seven years, or fine, or both. The explanation to section 317 further provides that 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 (Razali, Kirkman, & Fisher, 2017; Hamin & Babat, 2017; Sharif, 2012). It is argued that if the baby was abandoned somewhere, the probability in all situation is that she will die. Therefore, the perpetrator may have committed culpable homicide under section 299 of the Penal Code, which states that whoever causes the death with the intention of causing bodily injury or with the knowledge to cause death confers culpable homicide under section 300 (Razali, Kirkman, & Fisher, 2017; Hamin & Babat, 2017; Sharif, 2012). Nevertheless, in cases where a baby is abandoned or dumped but does not die, the charge under section 304 of the Penal Code which provides for culpable homicide not amounting to murder would be unreasonable (Hamin & Babat, 2017; Sharif, 2012).

Another legal protection afforded to children are those under the Child Act 2001 (Act 611), including the neglect and abuse of children, especially those leading to death, need to be dealt with accordingly (Hamin & Babat, 2017). The act of baby dumping or abandonment is provided under section 3(1) of the Child Act 2001, which is an offence punishable by a fine not exceeding twenty thousand ringgit to imprisonment for a term not exceeding ten years, or both.

7. Conclusion

This paper has significantly identified some international scope on the right to life as it represents the universal recognition that fundamental rights and freedoms are inherent to all human beings, inalienable and equally applicable to everyone, including infants. The laws on infanticide in England and Wales, as well as Malaysia, have been examined. It is also noted that women who committed infanticide in England and Wales, received lesser and lenient sentences as compared to Malaysia. Psychological factors such as emotional reactions, psychiatric and medical report, the effect of giving childbirth and lactation are paramount considerations taken by English judges before sentencing the offenders. As such, the courts in Malaysia should make the same approach. The legal framework on infanticide needs to be reviewed to enable adequate protection and justice to the women offenders who kill their children due to their medical conditions after birth.

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