

# Infanticide and Diminished Responsibility-In Conflict with International Human Rights Law and Islamic Legal Norms

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## Introduction:

*Infanticide, killing of infants, has been prevalent in all cultures and civilizations throughout the history. The most recent legislations have considered it an offence of lesser degree than homicide specially when committed by parent (mostly by a mother). International human rights law through CRC (Convention on the Rights of the Child 1989) makes right to life an inherent right of a child and demands from States Parties to take all positive steps towards ensuring this right to children along with the right to survival and development. Islam has proclaimed that human life is sacred and cannot be taken away except for just cause. One of the Objectives of Shariah is preservation of life. This article is an attempt to explore whether the concept of diminished responsibility in infanticide cases is against the spirit of human rights law and Islamic legal norms?*

First it will be explored what infanticide means in different legislations (part 1). A brief history of infanticide will be given (part 2). Statistics and factors leading to infanticide with an over view of present trends in this regard (part 3). How the offence is dealt under different legislations and a brief account of abortion laws of different state around the world (part 4). How the concept of reduced/diminished liability may be contradictory to the International Human Rights Law and Islamic legal norms (part 5-6). Conclusion (part7).

## 1. Infanticide and Foeticide:

Infanticide is killing of the new born or an infant before or after birth (but foeticide is the appropriate word for killing before birth) in the most legislations in this regard infanticide is understood as ‘ infant killing’ (by either parent).The often quoted reasons are illegitimacy and economic reason. The countries where a child is taken into the institutions without question of paternity it is rare<sup>1</sup>( though this assumption may be contradicted on the basis of recently reported multiple infanticide cases in France from 2003-2010). In English Law it has been used for deprivation of right to life from conception to the age of two to three years. Under the Infant Life

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<sup>1</sup> Catholic Encyclopedia (<http://www.newadvent.org/cathen/08001/b.htm>)

Retrieved on; 22/5/2011.)

preservation Act 1929 it is an offence to cause the death of a child who is capable of being born alive except for the preservation of the life of mother,<sup>2</sup> Infanticide act of 1938 defines it as the killing of child under 12 months by its mother if she can prove that her mind was disturbed because of the effects of child birth and or lactation.<sup>3</sup> Same definition has been provided by Canadian Law. In French Law it is limited to murder of new born, In Slovakia and it is killing the child at or immediately after birth within 24 hours. In Sudanese Law it is understood as the killing of new born child by its mother .Until 1974 there was no provision in Sudan recognizing this offence by way of benevolence but the woman still faced charges of murder .The major cause in Sudan for this offence have been illegitimacy. An illegitimate child if born to an unmarried woman is considered a disgrace to the family<sup>4</sup>. Under the Penal Code 2003 Sudanese Law defines infanticide as the causing of death of a child by mother after the birth (within eight days).<sup>5</sup>

## **2. History of Infanticide:**

The infanticide was common to almost all ancient, well known cultures like china ,India, Greece,Rome and Arabia and this practice had different reasons e.g. sacrifice, limiting family size and disposing off deformed child or twin. The reasons of infanticide have been mainly poverty or population control or illegitimacy sometimes it has been for sacrifice or due to tribal traditions. But this has not been the case always for instance in Persia in the sixth century B.C. Cyrus the Great was an abandoned child, his grandfather on seeing in dream that ultimately his grandson will over through his throne ordered his steward to kill the infant. The steward thought him morally bound not to kill the infant and instead abandoned him on the hills. King Herode, the Roman appointed leader of JudeaKnown in the Bible for ordering the killing of children in Baithlehm shortly after the birth ofJesus. According to the Gospel of Mathew; Joseph, Mary and Jesus fled to Egypt to escape Herode's massacre of the innocents.<sup>6</sup>

In pre Islamic Arabia female infanticide was very common and the reason was that due to the tribal wars women were taken as slaves by the victorious and this was thought a disgrace to the tribe to avoid such situation female child was often buried alive.

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<sup>2</sup> Cornock et. al. Children's Rights in and outside the Womb. The International Journal of Children's Rights, Vol.19,No.1,2011,pp.3-19

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/Gen6/1-2/36/section/1> Retrieved on 28/5/2011

<sup>4</sup> Krishna Vasdev ,Law of Homicide in Sudan1978 .Butterworths

<sup>5</sup> The Penal Code 2003 of Sudan available at; <http://www.unsudaniq.org/docs/The%20Code%20Act%202003.pdf> (Sep.2007) Retrieved: 30/5/2011.

<sup>6</sup> Washington Post.com(at Herode's site, New Hopes and Fears(Samuel Sockol)4/29/2007

Infanticide and Diminished Responsibility-In Conflict with International Human Rights Law and Islamic Legal Norms

In Greece and ancient Rome child was considered father's property .Roman Law gave father right to dispose of his offspring as he thought fit, sometime this decision was made by a public official. A practice described in Roman text was to smear the breast of baby with opium residue to cause its death. Apart from China, Rome, India, Arabia infanticide was also practiced in Europe until nineteenth century. In Europe infanticide was caused by smothering or overlaying on infant when shared bed with its parents. Death by overlaying (which could be accidental) was liable to mitigated penalty due to the lack of intent. It was the concern of church, a large number of references in the documents of church show that it was quite common. Sometimes it was caused by mother's refusing to nurse the infant or killing by her own hands.It was also caused by neglecting or abandoning the child. Infanticide was common in medieval English society and was taken cognizance of by the church as it was considered a public sin and the punishment was public humiliation or penance, however if the crime was committed by a person other than parents the Royal courts started taking cognizance in the twelfth century.<sup>7</sup>

### **3.Statistics and Factors:**

Statistically United States ranks high among the countries whose inhabitants kill their children and the infants under the age of one year are 3.2% of all the reported homicides in the United States .In 1966 USA had 10,920 murders and out of every twenty two one was a child killed by a parent .Estimates have indicated that 30.5 million, 22.8 million and 3.1 million females are missing from China, India and Pakistan respectively.<sup>8</sup>

According to most recent reported statistics of the Bureau of Justice (BJS) homicides of children in US increased in mid 90s but it has declined recently. It is also noteworthy that the perpetrator in most cases is male usually father and child also male. A study of the period 1976-2005 revealed that infanticide rate for all racial groups either remained stable or declined except for black children which has reached the lowest level recorded in 2004. It was also noted that the younger the child the higher the risk of infanticide. Of all the children murdered during 1976-

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<sup>7</sup> Catherine Damme, Infanticide:The Worth of an Infant Under Law. Medical History, 1978, 22:1-24 available at; <http://www.google.com.pk/url?sa=t&source=web&cd=8&ved=OCeSOFJAH&uri=http%3A%2F%2Fwww.ncbi.nlm.n>

<sup>8</sup> Dr. Larry S. Milner, A Brief History of Infanticide,1998.www.infanticide.org.history.htm

2005 under five years of age 31% were killed by their fathers, 29% by their mothers, 23% by male acquaintances, 7% by other male relatives and 3% by strangers.<sup>9</sup> The statistics show that the infanticide rate in Slovakia during 1981-1989 (66) was higher than in 1990-1997 (27) the reason is unknown perhaps the use of contraceptives.<sup>10</sup>

Most cultures have shown preferential female infanticide except for some where bridal wealth is received. According to an estimate by the United Nations almost 200 million women and girls are missing demographically, many fall prey of gender selective abortion and infanticide.<sup>11</sup>

Female infanticide was common in India and pre-communist China it has been mostly replaced by foeticide<sup>12</sup> due to the availability of cheap technology and illegal and immoral medical practices, the statistics of infanticide shown earlier might have been higher otherwise. According to another report of UNICEF 'up to fifty million girls and women are missing from India'. In most of the countries 105 female births as compare to 100 male whereas in India there are less than 93 women as compare to 100 men in the population. The most accepted reason for this is female infanticide (and foeticide) prompted by the poverty and dowry system.<sup>13</sup> Male children are valued for continuing the family line and providing economic security they are also to perform last rites. According to an estimate of Indian Medical Association nearly five million female fetuses are aborted each year. The sex ratio In some northern areas ,parts of Punjab and Haryana up till six years have been; 793:1000, 754:1000 and 600:1000 and young men are failing to find wives according to police reports in UP women are allegedly being shared and cases of fraternal polyandry are being reported. The people in villages may not have access to clean drinking water but they have access to cheap ultrasound technology flooded the country since early eighties which is being used by doctors unethically.<sup>14</sup> 2001 census revealed declining number

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<sup>9</sup> Homicide Trends in the US, Bureau of Justice Statistics.

<http://bjs.ojs.ojp.usdoj.gov/content/homicide/children.cfm> Last revised on May 29, 2011 and retrieved on the same date.

<sup>10</sup> Peter Sykora, Gender-biased infanticide in contemporary Slovakia (paper for the Ionian conference May 2000, Corfu, Greece)

<http://www.google.com.pk/url?sa=t&source=web&cd=1&ved=OCBwQFjAA&url=http%3A%2F%2Fwww.epic.ac.uk> retrieved: 29/5/2011.

<sup>11</sup> Women in an insecure world, executive summary of DCAF (Geneva Centre for the Democratic Control of Armed Forces) 2005 available at:

[http://www.unicef.org/emerg/files/women\\_insecure\\_world.pdf](http://www.unicef.org/emerg/files/women_insecure_world.pdf)  
retrieved: 26/5/2011

<sup>12</sup> [www.hsph.harvard.edu/org](http://www.hsph.harvard.edu/org) 1998

<sup>13</sup> <http://www.indianchild.com/abortion-infanticide-foeticide-india.htm>

<sup>14</sup> <http://cronaca.com/archives/00257.html> (CRONACA past Imperfect , Present Subjunctive, Future Conditional June 22, 2004)

of girl children in India. Sex ratio in 1991 census in the children 0-5 age group was 945 girls and 1000 boys whereas in 2001 it was 927 girls. In a workshop organized by UNPFA ( United Nations Population Fund) and the Centre for Social Research it was revealed that around nearly 14 million girls were missing in 1981-1991 and that by the next census a large number of males (23million) would not find partners. The generally accepted reason for this sex ratio is believed to be the practice of female infanticide and misuse of technology resulting into the abortion of female fetus. Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act of 1994 amended in 2003 ( to curb the sex selection not only at the fetus stage but also at the early conception stage) bans the use of ultrasound machines to identify female fetuses and abort them. There were hardly any convictions reported whereas difference in sex ratio continues in Dehli it is 868:1000, Punjab 798:1000, Haryana 819:1000, Himachal Pradesh 896:1000.<sup>15</sup>

Similarly gender imbalance has been noticed in China due to the one child policy in urban and two in rural areas.” Twenty five million men in China cannot find brides because there is shortage of women. They emigrate overseas to find brides” said Steven Mosher, president of the Population Research Institute in Washington DC. Historically infanticide was practiced in poor parts of China but with the one child policy, which came into effect in 1979, it is practiced in wealthy areas as well. The reports show that gender ratio for newborns in China in 2005 was 118 boys for every 100 girls and in some southern regions it has reached 130 boys for every 100 girls.<sup>16</sup> What factors are responsible for infanticide is difficult to say with precision however some studies show connection between “high level stress and maladaptive parenting” other factor identified is post partum depression syndrome (PPD). Stress is considered to be a major risk factor in post partum depression and resulting into maternal abuse or neglect of infants.<sup>17</sup> In a report of WHO a “strong association between global inequality and child abuse” was found mostly in communities “with high level of unemployment and concentrated poverty”. “Extreme poverty amidst extreme wealth is conducive to stress-related violence”.<sup>18</sup> In some cultures where female child is considered less productive female infanticide has been prevalent. In

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<sup>15</sup> [http://articles.timesofindia.indiatimes.com/2005-11-12/india/27861605\\_1\\_girl-child-census-unesco](http://articles.timesofindia.indiatimes.com/2005-11-12/india/27861605_1_girl-child-census-unesco). retrieve on 25/5/2011.

<sup>16</sup> Infanticide, Abortion Responsible for Million Girls Missing in Asia, by Sherry Karabin, Wed. June 13, 2004

<http://foxnews.com/story/0,2933,281722,00.html>. Retrieved

<sup>17</sup> Eric Michael Johnson, A primatologist discovers the social factors responsible for maternal infanticide, Scientific American Magazine November 22, 2010 <http://www.scientificamerican.com/blog/post.cfm?id=a-primatologist-discovers-the-socio-2010>. Retrieved: 29/5/2011.

<sup>18</sup> Gauthier D. K.; Chadoir N.K.; Forsyth C.J. A Sociological Analysis of Maternal Infanticide in the United States 1984-1996 *Deviant Behavior*, Vol. 24 No. 4 July-August 2003 pp. 394-402 Routledge Part of the Taylor and Francis Group.

those cases gender- biased sex selection and abortion has facilitated the process. In past when contraceptives were not available and abortion was thought to be dangerous for the life or reproductive health of women it was a method of family planning. Infanticide has also been practiced to get rid of an illegitimate child. Recently French multiple infanticide cases have revealed “pregnancy denial” a “quasi-schizophrenic condition” in which a woman either does not realize or accept the pregnancy not even to consider an abortion.<sup>19</sup> According to British medical jurists Common Law presumption that “every new born child found dead is born dead until very clearly proved otherwise” has increased the infanticide (Time Magazine, July30,2010).It has been thought generally that infanticide is committed by women either to conceal her shame or to escape the burden of child support<sup>20</sup> but the statistics have revealed otherwise too( see the statistics of homicide of children in US supra.8)

#### 4. Legislations:

From the beginning of human history child has not been considered full human being besides he has been considered property of parents. Under “Stubborn Child Law”<sup>21</sup> enacted in Massachusetts Bay in 1649,in Connecticut in 1650,in Rhode Island in1668 and New Hampshire in1679 as well as in Germany and Puritanical colonial America parents were given exclusive liberty to punish their children even to the point of death .In 1850’s in Antebellum Virginia, the mortality of children under the age of one year was 16-20% and the reason was believed to be SIDS (Sudden infant death syndrome).In cases where mother commits infanticide, it is believed that most of these cases are of neonaticide<sup>22</sup> or when the woman is suffering from postpartum depression which is recognized as a legal defense in at least 29 countries including Canada, Italy, Australia and Great Britain . This defence has been criticized as “ lay, rather than a psychiatric, theory”( Ward,1999) and that “the law following psychiatry, deems women inherently prone to mental instability as a result of the normal physiological functions associated with motherhood”.<sup>23</sup> In USA it is used as

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<sup>19</sup> Bruce Crumley, Why are French women killing their babies? TIME July 29, 2010  
<http://www.time.com/time/world/article/0,8599,2007359,00.html>

<sup>20</sup> 1902 Encyclopedia <http://www.1902encyclopedia.com/I/INF/infanticide.html>  
Retrieved:29/5/2011

<sup>21</sup> Stubborn Child Law was based on the injunctions of Old Testament in the book of Deuteronomy.Massachuset “Stubborn Child Law’ was repealed after three hundred years in 1973,Ann Kirson Swersky ,[www.h-net.org/~child/conference05/swersky.doc](http://www.h-net.org/~child/conference05/swersky.doc)

<sup>22</sup> Killing the newborn within twenty four hours after the birth.

12<http://archives.cnn.com/2001/law/06/28/postpartum.defense/>

13<http://www.canada.com/edmontonjournal/news/sundayreader/story.html?id=60527175-b3dc-4002-a27d-e9cf2f1ddd62>

<sup>23</sup> Kristine Kramar &William D Watson, Canadian Infanticide Legislation, 1948 and 1955; Reflection on the Medicalization/ Autopoiesis Debate Canadian Journal of Sociology 33(2) 2008 Available at;

Infanticide and Diminished Responsibility-In Conflict with International Human Rights Law and Islamic Legal Norms

part of an insanity defense.<sup>24</sup> Many legislations in this regard has considered infanticide a separate crime from murder thus the liability in these cases is diminished liability (responsibility).The punishment if awarded in these cases will be reduced one. In Slovakia killing of child after birth within twenty four hours is considered a separate crime from first order murder and is punished with imprisonment of 3-5 years (Articles 219, 220 Slovak Criminal Code) , in Austria it is punished with 1-5 years (Article 79 Austrian Criminal Code) and in Switzerland it is punished with 3days-5years (Article 111of Swiss Criminal Code).<sup>25</sup> Infanticide in Canadian Law is considered causing death of child within one year after birth.<sup>26</sup>Criminal Code of Canada S. 233 provides if a female causes the death of her newly-born child when she has not recovered from the effects of giving birth or lactation is said to commit infanticide ( R.S., c. C-34, s. 216) and under S. 237 the offence is indictable and the punishment awarded is a term not exceeding five years (R.S., c. C-34 s.220). Neglect in procuring reasonable assistance in child birth in order to conceal the birth and consequential death of infant is also an indictable offence under section 242(R.S., c. C-34, s.226).<sup>27</sup>In English Law the Act of Infanticide of 1922 the defence was available in case of the mother of newly born infant which was extended to the killing of child under one year in the Act of 1938.<sup>28</sup> The Kansas Newborn Infant Protection Act of 2007(Safe Heaven Law) provides for the parent or guardian of an infant to deliver the child to any employee of fire station, city or county health department or medical care. This law was enacted keeping in view the rise of infanticide cases in case of unwanted babies<sup>29</sup>. Similar Law introduced in Nebraska in 2008 allows abandoning a child in an hospital licensed by the State and the hospital is responsible to contact the appropriate authorities to take the custody of child.<sup>30</sup> Under the law of France, Luxembourg, Spain and Italy legal abandonment of infants is possible at birth where a woman may enter a hospital or a maternity clinic and give birth anonymously, in France this right is known as 'accouchement sous X'<sup>31</sup> which is apparently in contradiction with article 7 and 8 of CRC which state;

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[http://independent.academia.edu/KristenKramar/papers/432377/Canadian\\_Infanticide\\_Legislation\\_194](http://independent.academia.edu/KristenKramar/papers/432377/Canadian_Infanticide_Legislation_194) retrieved; 30/5/2011

<sup>24</sup><http://criminal.findlaw.com/criminal/more-criminal-topic/insanity-defense/status-of-the-insanity> retrieved:31/5/2011.

<sup>25</sup> Supra, 10.

<sup>27</sup>[http://www.canadacrc.com/Infanticide\\_Criminal\\_Code\\_Canada\\_Offence.aspx](http://www.canadacrc.com/Infanticide_Criminal_Code_Canada_Offence.aspx). Retrieved:30/5/2011

<sup>28</sup><http://www.legislation.gov.uk/ukpga/Gen6/1-2/36/section/1>

<sup>29</sup> [www.emporiagazette.com/news/2009/oct/08/safe\\_heaven\\_law/](http://www.emporiagazette.com/news/2009/oct/08/safe_heaven_law/)

<sup>30</sup> [http://www.hhs.state.ne.us/Child\\_Family\\_Services/SafeHaven/index.htm](http://www.hhs.state.ne.us/Child_Family_Services/SafeHaven/index.htm) retrieved 31/5/2011

<sup>31</sup> Deirdre Fottrell (ed), *Revisiting Children's Rights 2000*, Kluwer Law International.

1. "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless." ( Article 7 CRC)

1." States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity." (Article 8 CRC)

The government of Luxembourg believes that Article 7 of CRC does not present an obstacle to the legal process in case of secret or anonymous birth as it is deemed to be in the interest of child and is in accordance with Article 3(1) of the Convention, which states; "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The Committee on CRC (established under Art. 43 to examine the progress made by states in achieving the realization of obligations under CRC) expressed doubts about French Law in this regard and stated;

"Regarding the right of the child to know his or her origins, including in cases of a mother requesting that her identity remain secret during the birth and declaration of a birth, adoption and medically assisted procreation, the Committee is concerned that the legislative measures being taken by the State Party might not fully reflect the provisions of the Convention, particularly in its general principles." (France IRCO, Add.20, 14.)

The French Commentators answer this criticism on the basis of words "as far as possible" and it is also contended that the interpretation of International instruments take place within national legal culture, institutional ways of doing law and within a cultural understanding of the concepts of 'family' and 'best interest of child' etc. In French Law it is permitted for a woman giving birth to remain anonymous and the law protects her right to do so and there is a distinction between maternity and motherhood. Whereas in England giving birth makes a woman "the real mother" law reflects it and requires that the identity of mother must be recorded on the birth

certificate, the infant is considered part of the mother's family even if for a period between birth and legal adoption<sup>32</sup>

In France and other countries where the right of secret or anonymous giving birth is given to the women, an institutional method of abandonment of an infant has existed since the Middle Ages.

In France and Italy the 'tour' or 'ruota' consisted of a hole in a wall of convent with a wheel and a door where infant was placed in wheel, turned inward and a bell could be rung to alert the people inside and the infant could be collected without seeing the identity of the user and if the infant is accompanied by a note that could be later used for identification. The new millennium has seen the importation of 'tour' In the form of 'Letter Box Baby' in Germany and USA whereby a baby can be deposited in a letter box secretly and this system has been adopted to avoid infanticide through abandoning the infants. According to a report of US Department of Health and Human Services 108 infants were abandoned in public places in 1998 and the number was 65 in 1991(San Jose Mercury News, Jan. 16 2000).<sup>33</sup>

The Pakistan Penal Code of 1860 Ss. 328 & 329 make abandoning of a child under the age of twelve by a father, mother or any other person having the care of such child a punishable offence ( imprisonment of a term which may extend to seven years or fine or both) but if the child dies as a result of exposure then the punishment of murder intentional or otherwise as the case may be is awarded and secret disposal of the body of new born child whether died before, during or after the birth is punishable with maximum two years or fine or both. This is an attempt to prevent the foeticide or infanticide in case of illegitimate child. Short term of punishment suggests that it is not considered a very serious offence due to the stigma involved in case of such child. Under Female Infanticide Prevention Act VIII of 1870 the District Magistrate is given the powers to remove a female child from the custody of a person responsible legally for the maintenance of such child who endangers the child's health and life due to neglect and place the child under the supervision of an appropriate person and make liable the first person to provide monthly maintenance allowance for the child.

The Penal Code 2003 of Sudan defines infanticide under Section 253A as causing the death of child by mother after the birth within eight days due to the mental or psychological state caused by delivery or when the women causes the death of her illegitimate child after the birth during eight days to avoid shame she will be

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<sup>32</sup> Ibid, pp 79, 80& 81.(Under Article 341-1 of Civil Code the mother is entitled to give anonymous birth. <http://www.planning-familial.org/themes/theme13-famille/fiche02.php> retrieved: 31/05/2011.)

<sup>33</sup> Ibid Pp 81, 84.

punished with imprisonment of seven years or fine or both (Section 253 A; a, b) and Section 270 of the code provides punishment for secret disposal or burial of child whether died before, after or during the birth with five years imprisonment or fine or both.<sup>34</sup>

Abortion laws of different countries around the world provide a number of reasons for which abortion may be considered legal for instance to save the life and health; physical and mental of a mother, in case of rape, in case of birth defect of unborn child or a medical problem, in a few legislations for social and economic reasons even fewer on demand. In case it is allowed on demand it has restriction of first trimester of pregnancy.<sup>35</sup> The voices of pro-abortion groups are heard every now and then specially in Europe over the liberalization of abortion laws. One such example is of Luxembourg where in response to the demands of pro-abortion group, *Si je Veux* (if I want), made in February 2010 the Luxembourg council of state proposed the availability of abortion in case of women's "state of distress" earlier in 2009 an amendment to expand the availability of abortion for reasons of "social distress" was proposed in the legislative chamber of deputies and the government program in this regard stated "social situation as well as physical and mental state will be taken into account in demands for abortion"<sup>36</sup>. The discussion over the liberalization of the country's abortion law continued in 2010 until the government decided that "the penalties for unapproved abortion would remain in place."<sup>37</sup>

##### 5. Infanticide and International Human Right Law

Article 1 of the League of Nations Declaration of the Rights of the Child 1924 (commonly known as Geneva Declaration) Provides;<sup>38</sup>

"The child must be given the means requisite for its normal development, both materially and spiritually"  
Universal Declaration of Human Rights 1948 Article 25(2) provides;"Motherhood and Childhood are entitled to special care and assistance."  
This theme was further expanded and amplified in the UN Declaration of the Rights of the Child 1959.

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<sup>34</sup> Supra.5

<sup>35</sup> Summary of Abortion Laws Around the World.

<http://www.pregnantpause.org/lex/world02.jpg> retrieved:30/5/2011

<sup>36</sup> News 352, 12/08/2009 <http://hello.news352.lu/?p=edito&id=6407&a=print> retrieved: 28/5/2011.

<sup>37</sup> RefWorld <http://www.unhcr.org/refworld/country,,,Lux,,4dcbf5162f,0.html>. retrieved: 28/5/2011

<sup>38</sup> <http://www.un-documents.net/gdrc1924.html>

Article 1 of the Geneva Declaration 1924 was further elaborated in principle 2 of the UN Declaration of the Rights of the Child 1959;<sup>39</sup>

“The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”

In the draft Convention on the Rights of the Child submitted by Poland to the UN Commission on Human Rights in February 1978 the same text was repeated. On the request of the Commission the Secretary-General invited Member States, specialized agencies, inter-governmental and non-governmental organizations to express their views and suggestions on the draft proposal. Many governments and organizations observed that a binding Convention should have more concrete and specific wording than the Declaration. After a long discussion and different proposals forwarded by the members<sup>40</sup> the following text was adopted;

1. “The States Parties to the present Convention recognize that every child has the inherent right to life.
2. States Parties shall ensure, to the maximum extent possible, the survival and the development of the child.” (Article 6 of The Convention on the Rights of the Child 1989)

The Human Right Committee has characterized the right to life as the supreme human right without guarantee of which all other rights of human being would be meaningless.<sup>41</sup> The right to life is described as ‘inherent right’ in CRC. It is therefore duty of the States Parties to ensure this right through adequate positive measures. According to the CRC Committee the states laws on abortion and family planning are left by CRC within the discretion of individual states. China was encouraged by the Committee to withdraw its reservations in this regard and at the same time the

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<sup>39</sup>G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19,

U.N. Doc. A/4354. <http://www.cirp.org/library/ethics/UN-declaration/>

<sup>40</sup> See for these discussions and proposals Manfred Nowak, Article 6 The Right of Life, Survival and Development, A Commentary on the United Nations Convention on the Rights of the Child. 2005. (Leiden/Boston Martinus Nijhoff Publishers) pp.11,12,13.

<sup>41</sup> Ibid p. 14, (referring to Human Rights Committee, General Comment No. 6: the Right to Life (UN Doc. HRI/GEN/1/Rev.7, 1984), para, 1 in relation to Article 6 of the CCPR. On the significance and Interpretation of this provision see M. Nowak, UN Covenant on Civil and Political Rights-CCPR Commentary, 2<sup>nd</sup> ed. 2004 (Kehl/Strasbourg/Arlington, N.P. Engel Publishers), Pp. 121-122.

Committee adversely commented on the high rates of abortion and the use of abortion as a method of family planning. The Committee encouraged Russian Federation, Romania and Belarus to reduce the high number of abortions.<sup>42</sup> But the Committee expressed its concern over 'clandestine' abortion.<sup>43</sup> As the possibility of misusing the advance pre-natal diagnostic techniques for selective and discriminatory abortions have increased and that some states have introduced laws permitting termination of pregnancy even at later stage on account of the indication that the fetus has a disabling impairment, the CRC Committee in its general discussion on the rights of children with disabilities adopted a far-reaching position while urging such states to review and amend laws which deny disabled children an equal right "to life, survival and development". It is an ongoing debate whether the 'child' includes an unborn child and therefore the right to 'life, survival and development' extends to foetus under the convention. Article 1 of the Convention, which attempts to define childhood, this point was raised during the drafting of this Article and a number of proposals regarding the point of time when childhood begins were made either from the moment of birth or the moment of conception. It was also argued that if the abortions were allowed the children would be deprived of their right to development and survival. Although it appears from the case law and treaty law that international law protects beginning of childhood from the moment of birth but it certainly does not prohibit the States Parties to extend the definition of child to pre-birth as there are some international instruments which has extended protection of life by way of exception to the unborn child for instance International Covenant on Civil and Political Rights provides that sentence of death will not be imposed on pregnant woman [Article6(5)].<sup>44</sup>

Whether the application of article 6 extends to the unborn child is a controversial issue but States Parties are definitely under a duty to protect children from infanticide. As mentioned earlier states penal laws have recognized infanticide a distinct crime from homicide and afford diminished responsibility and provide reduced punishment for infanticide<sup>45</sup> these laws can indirectly promote negative and discriminatory practices like infanticide of vulnerable children especially female

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<sup>42</sup> Ibid, p 28 (referring to UN Doc. CRC/C/2/Rev. 5. & R. Hodgkin, P. Newell, o.c. (note 28) pp.97-98)

<sup>43</sup> Ibid, p.28 (referring to CRC Committee, Concluding Observations Nicaragua(UN Doc. CRC/C/15/Add. 36)& R. Hodgkin, P. Newell, o.c. (note 28), p.98.

<sup>44</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child 1995*. Martinus Nihjoff Publishers. Pp.34,35,36.

<sup>45</sup> English Law recognizes 'infanticide' at the hands of mother suffering from post partum depression as a defense and in USA post partum depression is generally used as part of insanity defense and her mental condition can be a mitigating factor. It has been considered a legal defense in at least 29 countries. ([http://archives.cnn.com/2001/law/06/28/postpartum.defence/.](http://archives.cnn.com/2001/law/06/28/postpartum.defence/))

Infanticide and Diminished Responsibility-In Conflict with International Human Rights Law and Islamic Legal Norms

infanticide, honor killing, killing of illegitimate children etc<sup>46</sup> or those killed under rituals or harmful traditional practices.<sup>47</sup> Under CRC the States Parties are under a duty to take steps towards the abolition of such practices which put the life of children under threat. The issue of abortion remains controversial as the obligation of state to protect human life through Criminal law does not extend to abortion. It is therefore states responsibility to decide that to what extent they prohibit abortion keeping in view human rights of women. It is strange to note that advancement of medical technology has given rise to ethical dilemmas so much so that a conflict of right of the child and mother can be a possible result.<sup>48</sup> The states where sex-selected abortions are in practice the government should “undertake studies to determine the socio-cultural factors which lead to practices such as female infanticide and selective abortions, and to develop strategies to address them.”<sup>49</sup>

Abortion is neither mentioned in CRC (Convention on the Rights of the Child) nor in CEDAW (Convention on Elimination of all forms of Discrimination against Women), it seems that such an important issue faded away around the controversy of deciding actual beginning of life. China and UK interpreted that the Convention on the Rights of the Child is applicable only following a live birth whereas Argentina and Guatemala declared that the interpretation must be to the effect that the child is every human being from the date of conception to the age of eighteen. In UK the Society for the Protection of the Unborn Child (SPUC) has challenged the conceptual difference between a foetus and child thus demanding application of human rights for unborn children.<sup>50</sup>

On ratification of CRC some countries (China, France, Luxembourg and Tunisia) made reservations to ensure that the interpretation of Article 6 of CRC will not conflict with their national legislations on abortion and family planning. China’s concern was due to its ‘one child policy’ and according to Luxembourg’s declaration the Article 6 “presents no obstacle to implementation of the Luxembourg legislation

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<sup>46</sup> Manfred Nowak, Article 6 The Right to Life, Survival and Development- A Commentary on the United Nations Convention on the Rights of the Child- Martinus Nijhoff Publishers (Leiden/Boston) 2005 p.30.

<sup>47</sup> Benin (West Africa) where newborns are still killed as they are thought to be “bad luck babies” like premature weak babies, handicapped, born with extra limb or finger or Siamese twins etc.

<http://levenementprecis.com/index.php/2008/06/15/child-witches-and-ritual-infanticide-in-benin-when-the-birth-of-a-child-is-deemed-unfavorable/> (Retrieved on 18/2/2011)

<sup>48</sup> Supra 40.

<sup>49</sup> Manfred Nowak( Supra, 40) P.29. [ CRC Committee, Concluding Observations: India ( UN Doc. CRC/C/15/Add. 115, 2000), para.49 ]

<sup>50</sup> Cornock et. al.2011(.Supra 2.)

concerning sex information, the prevention of backstreet abortion and the regulation of pregnancy termination”.<sup>51</sup>

The World Conference on Human Rights (Vienna, 14-25 June 1993) urged universal ratification of CRC by 1995. It urged the States Parties to address the children’s problem facing difficult situations and living in hardship with special attention on abused and exploited children, female infanticide, harmful child labor, sale of children and their organs, child pornography and prostitution and all forms of sexual abuse. The Conference recommended the review of children human right situation and monitoring it by relevant organs of the United Nations.<sup>52</sup>

#### 6. Infanticide and Islam

Islam has declared human life as a sacred trust which cannot be taken away without just cause. Quran regards murder of one human being as the murder of whole humanity;

“Because of that We ordained for the children of Israel that if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land-It would be as if he killed all mankind, and if one saved a life it would be as if he saved the life of all mankind...”<sup>53</sup>

Islam has generally prohibited infanticide and more specifically female infanticide. Quran has mentioned this practice with strong condemnation;

“Kill not your children on a plea of want. We provide sustenance for you and for them. Come not near shameful deeds, whether open or secret. Take not life which Allah has made sacred.”<sup>54</sup> And; “Kill not your children for fear of poverty. We shall provide sustenance for them as well for you. Surely killing of them is a great sin.”<sup>55</sup>

The foregoing verses indicate that infanticide and foeticide is not only prohibited for economic reasons but killing for honor is also prohibited. As mentioned earlier that in pre- Islamic Arabia infanticide was common and the reason was tribal honor. Quran has condemned this practice and gave tidings of severe accountability on the Day of Judgment for this heinous crime;

“When a female infant (buried alive) will be questioned for what sin was she killed?”<sup>56</sup>

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<sup>51</sup> Trevor Buck, *International Child Law*. 2007. Routledge.Cavendish (Tylor and Francis Group) p.60.

<sup>52</sup> Janusz Symonides (ed), *Human Rights: Concept and Standards 2002* (Ashgate / Dartmouth and UNESCO Publishing) p. 273.

<sup>53</sup> Al-Quran (5:32)

<sup>54</sup> Al-Quran (6:151)

<sup>55</sup> Al-Quran (17:31)

<sup>56</sup> Al-Quran (81:8-9)

Not only that Quran prohibited this practice and declared it a great sin but it eliminates the discrimination on the basis of gender and condemns those who do not rejoice at the birth of their daughters like they do when sons are born to them; “When news is brought to one of them of (the birth of) a female (child) his face darkens, and he is filled with inward grief. With shame does he hide himself from his people, because of the bad news he has had! Shall he retain her with dishonor or bury her in the earth? Certainly evil is their decision.”<sup>57</sup>

## **7. Conclusion:**

Article 6(right to life, survival and development) is one of the fundamental principles<sup>58</sup> of CRC 1989. “States parties recognize that every child has the inherent right to life,” Article 6(1) of the United Nations Convention on the Rights of the Child has recognized the right to life as inherent and most fundamental right. It further states that it is the duty of states parties to ensure survival and development of child, “States Parties shall ensure to the maximum extent possible the survival and development of the child.” Therefore the right of life, survival and development are the primary duty of the State Parties to the Convention towards children all other rights are subject to these fundamental rights. Without taking measures to ensure and guarantee these rights, efforts to provide other rights like education, recreation become meaningless and fruitless. On ratification of CRC some states made reservations to ensure that the interpretation of this article will not conflict with national legislations regarding abortion and family planning legislation.<sup>59</sup>

A close analysis of national legislations permitting abortions and or having the concept of diminished responsibility or reduced liability in the cases of infanticide may give rise to a situation which, in many cases, is in contrast with the ‘Right to life’ of a child whether born or yet to be born thus rendering children especially vulnerable children or those belong to marginalized groups at risk. Not only so but in most cases it can result into a conflict between the right of mother and her child for instance when there is violation of human rights peculiar to women like pregnancy as a result of rape or forced pregnancy and she seeks abortion as a right in that matter. Therefore, it is the need of day that the States Parties should carefully review their legislations to make these in conformity with the International human right law. Further, Islam has condemned in strong terms not only infanticide and foeticide generally but it has taken a step forward in condemning the practice in more strong words when it is gender based ( female infanticide) whether the reason of infanticide or foeticide is poverty or honor therefore it is the duty of States Parties holding Islamic legal tradition to review their laws in the light of International Human Rights

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<sup>57</sup> Al-Quran(16:58-59)

<sup>58</sup> Other principles are Article2(non-discrimination), Article3( best interest of child) and Article12(Right of expression or participation according to the age and maturity of child)

<sup>59</sup> Trevor Buck.2007. Supra. 51.

Law as well as Islamic legal norms for more effectiveness as the concept of diminished liability poses contradiction to the primary and foremost objective of Shariah- Preservation of life.