

In search of justice: Legal analysis of female foeticide

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ABSTRACT

The sex selective abortion continues as a burning social problem in India. The Government of India Census report, 2001 states that India had a sex ratio of 927:1000 girls to boy's ratio, against the world average of 1045:1000¹. The girl children become target of attack even before their birth. The science and technology directs to facilitate more comfortable human life. But the advanced technologies uses for sex determination of foetus and destruct the patriarchal mind set decide to detect and destruct the female foetus. The recent technologies, Ultra-Sonography and other enhanced technology being uses for sex determination of foetus. Pre-Natal Diagnosis Technique (PNDT) is a popular technology uses for abortion of female foetus in both rural and urban India. Technology thus becomes a hand made in patriarchal values that deny the right of girl child to live. However, the right to be born is being denied to the female child and denied the human rights, degradation of human value and illegal abortions pose threat to women's life. As per the Constitution of India this is the clear violation of 'the right to live' towards girl child. This paper is a socio-legal analysis of legal provisions in the Indian Constitutions and other social legislations to prevent abortions of female foetus. In-addition, the paper analyze the legal provisions under Medical Termination of Pregnancy Act, 1971, Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 etc.

Key Words : Female foeticide, Sex Determination, Patriarchy, Indian constitution, Indian penal code, PNDT, Son preference

INTRODUCTION

Sex-pre-selection is one of the most deliberate and heinous forms of violence against women and humanity. The girl children are devalued not only the economic considerations but also because of socio-cultural factors. Sex selective abortions have increased as a human rights violation in several parts of India. Female foeticide is the practice, the sex of the foetus determined with the help of ultrasound scans or in-vitro sex testing and the foetus is killed through abortion. The medical technology facilitates to detect and kill the female foetus. It is also called sex selective abortion.

The development of science and technology supports to determine the sex of the child in the womb itself. With the help of amniocentesis (after 15 weeks), Ultra-Sonography (after 12 weeks) and Chorion villous sampling (after 9 – 12 weeks) and levels of MSHCG (16 days after conception)

1. Government of India, Census Report, 2001

higher level indicates the presence of female foetus. Sex determination tests are widely extended in India even in less educated rural areas and the role of medical practitioners to misuse this technology is indescribable. Contraceptive methods enabled the determination of abnormalities as well as the detection of sex in advance or before birth. All these tests and investigations were developed to know the diseases and abnormalities of the foetuses. This study attempts to critically analysis the legal provisions of female foeticide.

Female foeticide: Through the ages :

Generally, religious texts encourages the belief that son extends the ancestry and enlarges the family tree which provides safety and security to the family members. Hindu belief highlights that birth of boy child show the path of salvation and son have the customary right to lighten the funeral pyre and perform other death related rituals. B.C. Chandrasekar discussed about the religious text *Brihadyogalarinigin's* thought to be written around the first century B.C mentioned about the incidence abortion and methods existed in ancient period. The text states that 'several contraceptive recipes are given including a method for the occlusion of the cervix' (1974:23). The ancient physicians, respectively by Susruta, Charaka and Vagbata, mentioned about how does they managed the issues of abortion and miscarriage amongst other reproductive issues. The controversial Hindu religious law maker, Manu has mentioned about the subject of abortion and they all expressed pity or contempt about birth of girl child.

Buddhism provided a positive stand to women and girls which do not endorse female foeticide by their religious philosophy. Gradually, son preference adored by patriarchal family and entire social system and the practice of female foeticide become an epidemic in most of the states. In 1789, Jonathan Duncan of the Bengal Civil Service notified the widespread practice of female infanticide in Bengal. The British government legislated against glaring social evils and had taken serious prevention strategies includes enforcement of legislation to abolish the inhuman practice like female infanticide through Bengal Regulation XXI of 1794 and Regulation VI of 1802. Female infanticide was practiced by different communities as Khattris, Bedis and Rajputs, Sikhs and Muslims engaged in this heinous form of crime against girl child.

Sanjeev Kulkarni (1986) field study found that 84 per cent of the gynaecologists confessed as they performed the amniocentesis tests for sex determination in Mumbai. Of these 74 per cent gynaecologists had started performing the test since 1982 onwards and few cases of genetic defects were detected. Sex discrimination tests created wide and visible demographic impact on India's population especially over the decreased sex ratio. Similarly, a survey report of women's centre in Mumbai found that out of 8,000 foetuses aborted in six city hospitals 7,999 foetuses were of girls (Gangrade, 1988). In 1983, Bombay had only three sex clinics and within five years the number of sex clinics raised into 258 private clinics. Women's Centres survey revealed that out of 8000 abortions 7999 were female foetus.

It is reported that about 4,000 female babies are aborted in Tamil Nadu (southern India) every year. Even in the first census report by British India in 1872 brought huge disparity between girl and boy child sex ratio. Diaz (1988) states that in a well-known abortion Centre in Mumbai, after undertaking the sex determination tests, out of the 15,914 abortions performed 100 per cent were those of girl foetuses during 1984-85. In certain extend, the National Family Planning Programme introduced in 1963 under the direction of Ministry of Health and Family Planning, became a hidden reason for the decline girl child. Because this government health policy came up with different objectives like small family norm, maternal child health and nutrition service of entire family. Reema

Bhatia (2007:222) states that the parental choice to rear sons rather than daughters appears to be rooted in notions of gender difference and it derives from ancient texts and which established into the mind set of large number of people. As per the Census of India, juvenile sex ratios were 927, 945 and 927 for 1981, 1991 and 2001, respectively. In 2001, India had 158 million infants and children, in that 82 million were males and 76 million were females. Demographic asymmetry shows there was a deficit of six million female infants and girls. From this statistics we can realise that use of sex determination tests widely spreading in our country.

Conceptualization of abortion :

In Medical Science, the meaning of abortion is termination of pregnancy before the fetus has attained viability that is becomes independent extra-uterine life. The Hutchinsons's new 20th Century Encyclopedia defines abortion as "expulsion of the fetus before it has reached a state of development sufficient to permit it to live outside the uterus". Abortion can be classified into as natural and artificial. Natural abortion can happen due to mother's ill health, mental or physical shock, accidental falls excessive joy, extreme fear etc. Artificial abortion occurs through the premature evacuation of foetus by medical or surgical method. It is a criminal offence as well as which makes health impact among women. World Population Foundation (WFP) estimates that "19 million annual unsafe abortions, causing some 68,000 deaths and 99% of the 19 million unsafe abortions carried out each year, takes place in developing countries²".

Female foeticide is a practice of sex detection of the unborn baby in the womb of mother and if found the sex of the foetus is detected as a girl child. This could be done at the behest of the mother, or father, or both or under family pressure. The sex selective elimination of girl child even before her birth is a breach of her right to equality and existence. The practice causes imbalances in human population which may give rise to many sex related crimes against women. Sex detection methods are:

- 1) Amniocentesis
- 2) Chronic Villus Sampling
- 3) Ultrasonography

Sex ratio asymmetry in India :

Sex discrimination has long had visible demographic repercussions throughout India's population. The first censuses conducted by the British administration in colonial India had already highlighted the irregularity of sex ratio. The high masculine sex ratios of the Indian population had been a matter of concern for many decades. The Census evidence suggests a clear cultural preference for son in all over India. Amartya Sen has called it a 'technological revolution of a reactionary kind'.

The sex ratio imbalances are more severe in the north western region, which stretching from Uttaranchal in the north runs up to Maharastra in the west across Himachal Pradesh, Punjab, Chandigarh, Haryana, Delhi, Rajasthan and Gujarat. However the census reports estimates male-heavy character in Indian population. Table 1 authenticates the sex ratio of India from 1961 to 2011.

The above table explains, Indian sex ratio had noticeably shown a constant decline since the beginning of the twentieth century excepting some reverse trend of improvement during 1951, 1981

2. Maternal Mortality .http://www.wpf.org/reproductive_rights_article/facts

Table 1 : Female- male and child sex ratios from 1961 to 2011

| Year | Sex ratio | 0-6 years |
|------|-----------|-----------|
| 2011 | 940 | 914 |
| 2001 | 933 | 927 |
| 1991 | 927 | 945 |
| 1981 | 934 | 962 |
| 1971 | 930 | 964 |
| 1961 | 941 | 976 |

Source: Ravindra 1991: 4. Ministry of Planning Commission

and 2001. Along with rise in population size, there is evidence of masculinity in sex ratio in general as well as in child sex ratio in particular. The Indian census and two rounds of National Family Health Surveys (1992-93 and 1998-99) evidence proved that child sex ratio exclusively dominated by patriarchal thoughts that led to son preference which resulted sex ratio imbalance in the age group of 0-6 years. The female deficit of 0-6 years is much visible in Haryana (820/1000), Punjab (793/1000), Chandigarh (845), Himachal Pradesh (897) and Delhi (865). Child Sex Ratio for the last four decades (given on the table below) show that it has been declining continuously and the decline has been the sharpest from 1981 onwards.

Feminist intervention towards prevention of female foeticide :

Abortion became a gender concern among Indian feminists and much dynamic intervention has formed against it. From 1980's Amniocentesis has been used to determine the sex of fetuses in order to abort female foetus. Similar period onwards women's movement has taken female foeticide as a very serious issue in India. Feminists realized that they had lost their right to control over their own bodies because of the male dominated 'medicalisation of maternity' in India. It raises a new challenge for a feminist politics that seek to address the concealed anti-female bias into the socio-cultural and practice of sex-selective abortions in all over the world. Beijing Fourth World Conference on Women, known as the Platform for Action, 1995 took a stronger initiative against cultural, religious extremism through violence against women. It states that violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, workplace, community and society.

Miller states that (1981) the socio-cultural discrimination against girl child as the main reason for female mortality. Miller named this phenomenon as "extended infanticide" where life-sustaining inputs like food, nutrition, health care were denied to girl child. There is a great deal of evidence of girls being given less food and health care than boys, especially in north India. Girls are breast fed for shorter periods, they are taken to fewer medical consultations, and often very late, or not at all, to hospitals (Dreze and Sen, 1995). In 1984 some eminent feminists and human rights group formed a Forum against Sex Detection and Sex Pre-selection (FASDSP) and had a liaison with the legislation to ban the heinous crime. The Maharashtra Government passed an Act for banned the pre natal diagnostic practices. The parliament had enacted the Pre—Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act in 20th September, 1994. This Act came in to force from January 1996 onwards. In 14th February, 2003, the act was amended and renamed the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PNDT Act). Moreover,

the year 1990 was designated the “Year of the Girl Child” and 1991-2000 observed as “Decade of the Girl Child” in South Asia.

Legal prevention strategies against female foeticide :

The Universal Declaration of Human Rights (UDHR), adopted by United Nations General Assembly in 1948 proclaimed ‘all human beings are born free and everyone have equal right and dignity’. This egalitarian approach of legislations will strengthen the social justice and gender parity among all members of the society. India is a signatory of several international treaties and policies such as UN Convention on the Rights of the Child (CRC), with its two Optional Protocols, Millennium Declaration leading to the Millennium Development Goals (MDGs) (2000), and Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and so on. These International treaties assure the commitment to the balanced growth and development of women and children.

The Vienna Declaration and Programme of Action of the World Conference on Human Rights (1993) stated that the human rights of women and of the girl children are an “inalienable, integral and indivisible part of universal human rights³.” The Commission on the Status of Women in India (CSWI), integrated with the inter-governmental body in charge of monitoring and implementation of the Beijing Platform for Action. They made an agenda to make a theme as ‘girl child alive’ in the post-Beijing period. As a result, the World Summit, 2005 and Resolutions of the UN General Assembly have reinforced the importance of considering elimination of discrimination against girls and violence against girl children as a critical issue of concern⁴. The Government of India passed Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, (PNDT) 1994 enforced in 1996.

The purpose of the regulation is to control the misuse of advanced scientific techniques for selective elimination of female fetuses through sex determination. Public Interest Litigation filed by an NGO named CEHAT and Others versus Union of India and Others. The Court had laid down the amendments to the PNDT Act and the amended Act came into force from February 14th, 2003 onwards. This particular act aimed to ban the use of sex-selection techniques before or after conception as well as the misuse of pre-natal diagnostic techniques for sex-selective abortions and regulate such techniques. There was a pressure created by the Forum against Sex determination and sex pre selection hence, unfortunately there was a gross violation of this central legislation. The Medical Termination of Pregnancy Act, 1971 came into force in 1972 all over the country and any woman can decide to have a pregnancy terminated under a specified set of circumstances. It includes ‘pregnancy should be less than 12 weeks old may be terminated by a Registered Medical Practitioner.

Dr. Sabu George, Centre for Inquiry into Health and Allied Themes, Mumbai and MASUM (Mahila Sarvagin Utkarsh Mandal) filed petition under Public Interest Litigation. Accordingly, the Supreme Court of India gave a direction on 4th May, 2001 to all state governments to make an effective and prompt implementation of the Pre-natal Diagnostics Techniques (Regulation and Prevention of Misuse) Act, 1994 and brought into operation from 1st January 1996. Now, it stands

3. J Mertus and others, Local Action, Global Change: Learning about the Human Rights of Women and Girls, UNIFEM and Centre for Women’s Global Leadership, Rutgers University, USA (1999), paras 18, 21, 48, 49; p vii.

4. E/CN.6/ 1998/12 p.31; A/ RES/S -23/3 para 3 as cited Aide Memoir for EGM Florence, 26/07/2006; 2005 World Summit Outcome, United Nations General Assembly , 60th Session, 20 Sept.2005, A/60/150.

renamed as The Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of sex Selection) Act, 2003.

Legal conditions of sex selective abortions :

⁵The Medical Termination of Pregnancy Act of 1971 had been enacted as a health measure for women and later it modified in 1975 to permit abortions under the following conditions:

a) The pregnant woman had a serious medical disease or her health condition that would endanger her life if the pregnancy were to continue.

b) Continuation of pregnancy would entail a substantial risk of physical and mental handicap to the newborn child.

c) The pregnancy resulted from rape.

d) The socio-economic circumstances of the mother would endanger the health of the newborn child.

e) The pregnancy occurred because of failure of a contraceptive method.

The above mentioned conditions are legally permits abortions. Hence, majority of the abortions have done as illegal and millions of female foetuses were aborted. Kulkarni (1986) reported that 64 per cent (42 respondents) of gynaecologists performs Amniocentesis solely for the sex determination purpose. Less than 10 per cent of the cases were conducted genuinely for detection of genetic defects. The failure of Medical Termination of Pregnancy Act, 1971 came up with the introduction of PNDT Act, which came into force from February, 2003 onwards.

Offences and penalties under PNDT Act, 1994 :

Section: 4 of the PNDT Act 1994, the pre-natal diagnostic techniques, may be conducted only for the purpose of detecting certain abnormalities like, chromosomal abnormalities, genetic metabolic diseases, hemoglobinopathies, sex-linked genetic diseases as may be prescribed by the Central Supervisory Board.

Section: 22 of the Act prohibit any advertisement relating to pre-conception and pre-natal determination of sex and punishment is applicable for contravention of the provision. Anybody who is found to be contravening the above provision will be punished with imprisonment for a term extending to three years and with a fine which may extend to ten thousand rupees.

Section: 23 of the Act debar practice of use of any sex determination techniques and if any registered medical practitioner or any health clinic conducts such tests are found contravene any of the provisions of the act are punishable with imprisonment for a term which may extend to three years and with fine up to ten thousand rupees and on any subsequent conviction imprisonment may extend up to fifty thousand rupees.

Any person who seeks the aid of any genetic centers or any clinics or any medical practitioner for sex selection or female foeticide shall be punishable with imprisonment for a term extending to three years and with fine extending up to one lakh rupees. Every offences in this act is cognizable, non-bailable and non-computable.

The pre-conception and pre-natal Diagnostic Techniques (Prohibition of sex selection) Act 2003, prohibits the sex-selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or sex-linked

5. UNFPA. *Declining Child Sex Ratio (0-6 Years) in India: A Review of Literature and Annotated Bibliography*. Thiruvananthapuram: Centre for Development Studies

disorders. The person who tried to recognize the sex selection of fetus is punishable at first conviction, imprisonment for a three year period and the person required to pay fine of Rs. 50,000/-. If the Medical practitioner involved in this case, the State Medical Council can suspend the registration of the Medical Doctor, at the stage of conviction. In-addition, the medical practitioner's name can remove from the register of Medical Council.

Any person who seeks the aid of any Genetic Clinic or a medical geneticist, gynecologist, sinologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant women shall be punishable with imprisonment for a term which may extend to 3 years and with fine which may extend to 3 years and with fine which may extend to Rs. 50,000/- for the first offence and for any subsequent offence with imprisonment which may extend to 5 years and with fine which may extend to Rs. 1, 00,000/-.

Female foeticide under IPC Section – 312-316) :

Sex selective abortion is a criminal offence punishable under Sections 312-316 of the Indian Penal Code. IPC Section 312 deals with causing miscarriage, sec. 313: causing miscarriage without woman's consent, Sec.314: death caused by act done with intent to cause miscarriage, Sec. 315: Act done with intent to prevent child being born or alive or to cause it to die after birth and Sec.316: Causing death of quick unborn child by act amounting to culpable homicide.

Sec. 312 Causing miscarriage :

This section states that whoever voluntarily causes a woman with a child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the women, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. As a result of this Act, all bodies under this PNDT Act, namely Genetic Counseling Centre, Genetic Laboratories or Genetic Clinic cannot function without registration of the Government of India.

Limitations of the PNDT Act :

Every law has its own loopholes and misuse of the law comes only after the implementation. The limitations of the PNDT Act, 2003 lie down in the provision to set for establishing a genetic counselling centre, genetic laboratory and genetic clinic/ ultra sound clinic/ imaging centre and person qualified to perform the tests.

Under the PNDT Act 2003, "a person who have the degree or diploma or certificate in medical genetics in the field of PNDT or has a minimum of two years experience after obtaining any medical qualification under the MCI Act 1956 or a Post Graduate in Biological Science. But the expert medical geneticist's opinion is that a degree or diploma or two years experience cannot make efficiency in medical genetic field to do the PNDT. Therefore, the

Several malpractices happen from the medical field :

There is a necessary to register all genetic laboratories and clinics and monitored the functions of such reproductive health clinics. The Act prohibits sex selection before/after conception. It does not deny the use of prenatal diagnostic techniques, such as or other sex linked disorders in the fetus. A person who helps for sex selection can face, at first conviction, imprisonment for a period

of three years and can be required to pay a fine of Rs. 50,000/-.

Conclusion :

Female foeticide is one of the heinous forms of violence against girl child as well as humanity. It is a blatant violation of human rights and human values. Over twenty three years women's rights activists are campaigning against female foeticide. It gives an alarming sign to every patriarchal society that how does the misuse of technology can leads to make homicide of entire womanhood. There are constant efforts to enhance the legislations on abortions and change the stand of judiciary from a gender sensitive perspective. Similarly, social changes need to be assured to remove the social stigma or 'girl child aversion' that challenges to create a gender sensitive approach towards the life of girl child. Even though, the law is a powerful instrument for change; law alone cannot root out this social problem. Female foeticide strengthen the patriarchal value system and devalue the female status. The problem has deep roots in social behaviour, cultural notions, gender blindness and prejudices. Therefore, mere legislation alone is not a solution to prevent female foeticide.

The women's existence question raised by Annirudha Malpani, the most articulate proponent of sex-pre-selection tests, that 'Can we allow Indian women to become an endangered species? Shall we be bothered only about endangered wild life, tigers, lions, so on and so forth? Massive resources are invested in OPERATION TIGER. When shall we start OPERATION GIRL CHILD'? We the people, our government, NGO's and media should have a great task to change the attitude of society to prevent the female foeticide. It brings solution to halt the process of the declining sex ratio of girl child. The nation need a gender conscious judiciary mechanism, a civil society which protects democratic values, dedicated social activists to act as an agent of social change. It requires a whole lot of social and cultural change beyond regulations and legal restrictions.

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