

HUMAN RIGHTS OF FOETUS: LAWS AND PROTECTION IN INDIA

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Abstract:

The fetus is a legal person and has rights globally. His or her legal status is contingent subject to his or her being born alive. S/he has right to life which begins from the point of conception. As a medical term, foeticide or feticide is destruction of a fetus, in legal context it refers to the deliberate or incidental killing of a fetus due to a criminal human act. Traditionally, in the absence of genetic testing, infanticide was the only inhumane option for discarding the female child. Abortion of female foetus is called female foeticide. This is a major social problem in India and has cultural connections with the dowry. This paper tries to focus on the rationale behind the foeticide, the effect of this phenomenon on the Indian society. Finally, this research will explore the various measures taken to combat this heinous crime for a balanced society.

Keywords: *Female foeticide, Abortion, Infanticide, Human Rights*

“O Soul of my soul, heart of my heart, hears my voice, my cry, my plea. A human being I am just like you, flesh and blood, acting with emotions, tortured by circumstances... please think once, just once, that I may turn out to be a bouquet of joy, a support a pillar, a friend ...A child who will hold your hand and walk with you right through the evening of your life-giving back all that you gave and so much more...Love me mother listen to me. Please do I the unborn, have no rights?”¹

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¹ Chakravarty, Ajanta E., *Diary of An Unborn*, U.B.S. Publishers, 1996

INTRODUCTION

The right to life, the most basic of all fundamental rights is so often denied to girl child even before they take their first birth. It is the beginning of the suffering of women from womb to the tomb. Paradoxically whereas the Indian culture and tradition considers woman hood as sacred and sacrosanct, there Indian girl child are killed in the mother's womb by pre-natal diagnoses. Killing the female foetus (unborn female) in the womb of the mother is not an uncommon phenomenon now in India which is known as female feticide. This is also called unlawful expulsion of foetus or criminal abortion.

It is significant to note that unwanted female babies were being eliminated even before the advent of prenatal diagnostic technology. The difference is that earlier they were killed or put to sleep soon after birth where as now it has become possible to be kind and eliminate female babies even before they are born. Medical science has invented gadgets and made researches for even pre-conception sex-selection, thus it has connived and facilitated disposal/elimination of unwanted female foetuses.² Now there is no need of touts or *tantriks* luring and blessing couples assuring birth of a male child.

In December 1789 Jonathan Duncan, the British resident at Benaras division first found female infanticide among *rajkumar rajputs* in Jaunpur District of Benaras division, when he was touring the district to collect the revenue.³ The colonial officers called female infanticide 'inhuman', obnoxious, barbaric and a crime. Duncan obtain written agreements signed by *Rajkumar rajputs* in 1789 and *Jadejas rajputs* in 1808 which stated that the signatories would therefore desist from killing their female children since such an act was a sin according to the Hindu *Shastras*.

Well entrenched social norms such as dowry, caste endogamy clan exogamy and so on, which made the marriage of daughters a very complicated affair. To stop the female infanticide the British tried most by promoting endogamous marriage circles. Wilkinson in 1836 and McLeod in 1853 tried to curb hyper gamy to stop female infanticide but could not found desired result. The Female Infanticide Act of 1870 also did not produce any significant result. There is evidence that deliberate neglect of girls was there even before the Female Infanticide Act was passed.⁴

After 1931, post independence period is a whole lot of region wise statistics that shows that female infanticide has changed to female foeticide whereas the sex determination facilities are available. It is certainly alarming to find that the practice

² "Oh mother Dear Do I Have No Right to be Born?" By Kusum, Lawyers Update, November, 2006

³ Vishwanath, LS., 'Female Infanticide the Colonial Experience' *Economic and Political Weekly*, May 29, 2004 at 2313-2317

⁴ WR Moore's Report of 1856 designated as Infanticide Commissioner

is spreading like wild fire. Now killing the female foetus (unborn female) in the womb of the mother is not an uncommon phenomenon in India which is known as female foeticide. This is also called unlawful expulsion of foetus or criminal abortion.

Five Million girls were eliminated between 1986 and 2001 because of foetus sex determination done by unethical medical professionals. Sex determination and sex selective abortion was traced to an Amritsar clinic in 1979 and has now grown into a Rs. 1000 Crore country wide industry.⁵ The ground reality is that the clinicians unhesitatingly conduct the test for sex determination and women with their relatives' approach them with impunity. The States which are the worst sufferers of female foeticide are Punjab, Haryana, Himachal Pradesh, Delhi, Gujrat and other northern States. In other States though there are appropriate authorities to control the misuse of pre-natal diagnosis, but the determination of sex of the foetus is rampantly going on leading to female foeticide.⁶

RIGHTS OF FOETUS

The United Nations General Assembly Declaration on the Rights of the Child in its Preamble lays down that – where as the child, by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after its birth.

The fetus is a legal person and has rights globally. Under Transfer of Property Act, The property can be transfer to an unborn person by way of trust. His or her legal status is contingent subject to his or her being born alive. S/he has right to life which begins from the point of conception, However a balance have to be struck between mother's rights and rights to life of a fetus when the health of the mother is involved. The MTP Act attempts to bring a balance.

Female foeticide is prohibited by laws and ethics both. Various protective laws are enacted to protect the women. Apart from Constitutional⁷ provisions, **Indian Penal Code** and other laws particularly **Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994**⁸, **The Medical Treatment of Pregnancy Act, 1971** have been enacted to prevent the misuse of Pre-natal diagnosis and termination of Pregnancy. The National Commission of Women, National Human Right Commission and the Family Courts have established to save the women from atrocities. In spite of all that it is unfortunate that the female foeticide continues unabated in India.

⁵Sabu George, 'Hidden Genocide' in TOI, 8 March 2007

⁶Dr.Binayak Patnaik, 'Female Foeticide: A Socio Legal Analysis' Cr. L.J. 2006 (4) at 312-319

⁷ Article 14, 21

⁸ which is titled after amendment as Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1996, hereafter PNDDT Act

REASONS FOR FEMALE FOETICIDE:

Reports of female fetuses found in drains or dug from dry wells or floating in lakes or eaten by dogs are headline news very often. However despite all laws female foeticide continues with impunity. The crux of entire debate is whether the law alone can eradicate the crime and social evil of female foeticide? Why do couples/ mothers avoid a daughter? The factors are numerous socio-economic- cultural conditions, religious beliefs customs and traditions and so on. The reason is that our society mindlessly obsessed with a male child as the son keeps the continuity of the lineage. Gender bias and discrimination against girls is deep rooted in our culture, Birth of a son is an occasion for rejoicing and celebration whereas a daughter's birth is a disappointment. A mother with sons is glorified and respected in the family whereas one with daughters is treated with indifference. At times a husband and or his family even seek (unsuccessfully though) divorce from a wife who has not been able to give a son.

A girl child is a burden to the parents as she is vulnerable to exploitations particularly sexual exploitations. This problem is integrated in our society as it does not only arise due to a particular mind set or of male domination or hierarchy but also because of lack of girl child education, illiteracy about various rights conferred on women including the rights of foetus, ignorance about ill effects of abortion, lack of economic independence, lack of opinion/decision on social and political issues or due to dependency of women on men as a daughter, mother, or as a wife, that leads to a road of unwanted, neglected and oppressive life from womb to tomb.

EFFECTS OF FEMALE FOETICIDE:

There have been stories on the consequences like trafficking of women for marriages and emergence of polyandry as due to reduction in the number of female. According to the decennial Indian census, it is noted that while female and male ratio in 1991 census is 945: 1000, in 2001 census it is 927:1000 in 2011census it is 906:1000. It is also observed that 5 million women kill their unborn child every year. This will undoubtedly lead to imbalance in society, which is also a serious alarm to human races. Consequently there is increase of crime rate against women particularly sex related crimes: Breakdown of traditional family value; Prevalence of polyandry; an irreparable loss to the health of the mother. Due to female foeticide it is becoming difficult to find girls for marriage. According to news girls from Assam and West Bengal are kidnapped and sold as brides in Haryana for marriage, where the child sex ratio is least in the country. Due to diminution in the female's population our society is becoming male dominant, which is not a good indication. As the decrease in number of women, men consider themselves more superior and above law, which

in turn results in women's exploitation. Female foeticide has led to an increase in human trafficking.

LEGISLATIVE EFFORTS:

Indian Penal Code⁹ deals with the causing of miscarriage with or without consent, death caused by an act done with the intent to cause miscarriage without woman's consent, act done with intent to prevent child being born alive or to cause it to die after birth or causing death to quick unborn child by act amounting to culpable homicide. The exposure and abandonment of child less than twelve years by parent or person having care of it, concealment of birth by secret disposal of dead body are some of the problems also dealt with under the provisions of IPC.

Pre-natal Diagnostic Techniques Act came into operation in 1st January 1996 to restraint female foeticide. It was indented to regulate the use of Pre-natal diagnostic techniques for detecting genetic and metabolic disorders, chromosomal formations and or sex linked disorders. But this technology is misused in a large scale for the sex determination of the foetus and unfortunately if the foetus is pronounced as female this prompts termination of pregnancy. The Act seeks to tackle the issue of female foeticide and sex selection by banning even pre-conception tests or procedure for purpose of ensuring or increasing the probability that an embryo will be of a particular sex. Medical advancement in the field of assisted reproduction necessitated such provisions.

This Act also provides for strict regulations of genetic clinics, laboratories or centers with minimum standards prescribed in the terms of space, equipment and qualification of the staff; for monitoring proper records; for maintaining and also for setting up of various authorities to ensure effective implementations of the Act. Honable Supreme Court issued certain directions after a PIL was filed¹⁰ on slow implementation of the Act. PNDT Act and rules have been amended keeping in view the emerging technologies for selection of sex before and after conception. These amendments have come into force with effect from 14th February 2003. In this Act non registration, conduct of pre-natal diagnostic, communication of sex of foetus, determination of sex and 'any advertisement relating to Pre-natal determination of sex' is punishable up to three years and fine which may extend to Rs. 10,000.¹¹

⁹ *Indian Penal Code, 1860* also considers 'induced abortion' a criminal offence under Sections 312 to 318

¹⁰ *Centre for Inquiry into Health and Allied Themes (CEHAT) & Others V Union of India and others*. Writ Petition No. 301 of 2000, Supreme Court Shah, J. in *Journal of Indian Medical Association* Vol. 101, No. 12 December 2003 at 721 -726

¹¹ Section 3,4,5,6 and 22 of PNDT Act respectively

Section 23(1) prescribes punishment for erring medical geneticists, gynaecologists or other clinicians for contravening the provisions of this Act which may extend to three years and fine up to Rs. 10,000. For subsequent conviction the punishment may extend to Rs. 5000 and fine up to Rs. 50,000. Section 23(2) prescribes removal of the name of medical practitioner, from the register of the medical council for a period of .two years for the first offence and permanently for the subsequent offence, if he has convicted by the Court under Section 23(1). Sec. 23(3) prescribes punishment for those who seek the aid of such clinics, which is similar to sec 23(1).

Sec. 25 of PNMT Act penalise for contravening the provision of the Act or rules for which no specific punishments is provided, with imprisonment up to 3 months or with fine which may extend to Rs. 1000 or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for everyday during which such contravention continues after conviction for the first such contravention.

However under Sec. 24 of the Act a pregnant woman presenting for a test has been presumed to be compelled by her husband and or relative and has been saved from the rigorous of the law unless otherwise proved.

Every offence under this Act shall be cognizable, non-bail able and non compoundable. Means in these cases the prosecution cannot be withdrawn or in simple terms where no settlements between the parties is possible to drop the proceedings.¹²

Procedure: A complaint can be registered with the appropriate authorities, the Chief Medical officer at district Level and the Director, Health Services at State Level or any other notified authority in whose jurisdiction the offence has been committed. If within 30 days of filling the complaint the appropriate authority does not act, the complainant can make a complaint directly to a court of law this is in the Court of Metropolitan Magistrate or Judicial Magistrate 1st Class in the District. On the receipt of complaint CMO or any other notified authority will make an independent inquiry, conduct an investigation in the matter and make a formal complaint in the court, Appropriate authorities can carry out searches and seizures under section 30(2) if he believes or has reasons to believe that an offence under the Act is being committed.

The Medical Termination of Pregnancy Act, 1971 came in to force on 10 of August 1971 to provide for the termination of certain pregnancies by registered medical practitioners only and other matters connected there with or incidental thereto. The Act contains eight sections dealing with various aspects like the time, place and

¹² *ibid*, Section 27

circumstances in which a pregnancy may be terminated by registered medical practitioners legally. Registered medical practitioner means a person possess any recognized qualifications as defined in the Indian Medical Council Act 1956 and whose name has been entered in the State Medical Register.¹³

A registered Medical Practitioner shall not be guilty of offences if any pregnancy is terminated by him, Where the length of the pregnancy does not exceed twelve weeks,¹⁴ or Where the length of the Pregnancy exceeds twelve weeks, but does not exceed twenty weeks,¹⁵ if not less then two registered medical practitioners are of opinion, formed in good faith, that- its continuance would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or where there is a substantial risk that if the child were born, it would suffer from such physical and mental abnormalities as to be seriously handicapped.

Where the pregnancy is alleged to have been caused by rape or as a result of failure of a contraceptive used by a married woman or her husband, the anguish caused by such unwanted pregnancy may be presumed to constitute grave injury to the mental health of the pregnant woman.

According to Section 3(4)(a) no pregnancy of a woman, who has not attained the age of 18 years and who having attained the age of 18 years is a lunatic, shall be terminated except with the consent in writing of her guardian. The consent of the pregnant woman for the termination of pregnancy has been made essential vide Section 3(4)(b).

Thus the Act does not allow termination of pregnancy to kill the female foetus. The Act aims to give protection to the physical and mental health of a pregnant woman and also to the child in the womb. But the problem is more of female foeticide and criminal abortion. These provisions apart from those of PNDT Act need to be more gender sensitive.

A petition¹⁶ was filed questioning the virus of the MTP ACT, 1971. The Court clearly stated that medical termination of pregnancy or abortion is necessary where continuance of pregnancy is likely to involve risk to life of pregnant woman or cause grave injury to her physical and mental health.

¹³ Section 2(d) of Medical Termination of Pregnancy Act,1971

¹⁴ Section 3 (2(a)) *ibid*

¹⁵ Section 3(2(b)) *ibid*

¹⁶ *Nand Kishore Sharma v. Union of India*, AIR 2006 Raj 166

JUDICIAL EFFORTS:

There are innumerable cases¹⁷ in which The Honable Supreme Court of India has responded positively to protect rights and dignity of a woman and thus provide justice.

The Supreme Court considered the Air India regulation as ultra virus of Article 14 and 16 (1) of the Constitution where pregnancy was considered as disqualification for the job.¹⁸

In *Tulsi Devi v. State of UP*, the accused woman kicked a pregnant woman in her abdomen resulting in miscarriage. Her conviction under section 313 IPC was sustained by the Court.¹⁹ Under Section 312 IPC such person as well as the woman who causes herself to miscarry are both punished.

In *Jacob George v. State of Kerala*²⁰, a homoeopath operated upon a pregnant woman to cause abortion but she died within a few hours of the operation because her uterus was perforated. The court found him guilty and discussed the purpose of punishment and emphasized the need for awarding compensation literally and but reasonably to meet the end of justice.

In *CEHAT case* The SC issued directions to Central Supervisory Board, all State Government and Union Territories for proper and effective implementation of the PNDT Act. The order in nutshell contained the following directions:

(i) There are appointment of appropriate authorities at State, District and sub-district levels and advisory committees to aid and advice the appropriate authorities to discharge its functions, by the State Governments and Union territories.

(ii) The Central Government is to ensure that the C.S.B. meets in every six months to review and monitors the implementation of this Act.

(iii) The C.S.B. shall issue direction to all State, Union territories, appropriate authority to furnish quarterly return to the C.S.B. giving a report on implementation and working of the Act.

(iv) The Central Government is directed to create public awareness against the practice of pre Natal determination of sex and female foeticide through programmes in the electronics media and implementation with all vigour and zeal the PNDT Act and rules.

¹⁷ *C. B. Muthamma v. Union of India AIR 1979 SC 1868, M.A. Khan V. Shahbano Begum AIR 1985 SC 945, Prathibha Rani v. Suraj Kumar, AIR 1987 SC 628; Shobharani v Madhukar AIR 1988 SC ; Bodhisatwa Gautam v. Shubhra Chakrabarty AIR 1996 SC 922; Vishkha v. State of Rajasthan AIR 1997 SC 3011; Tulsi Devi V. State of UP, 1996 Cri L J 940(All)*

¹⁸ In the case of *Air India v. Nargis Mirza AIR 1981*

¹⁹ 1996, Cr.L.J. 940 (All)

²⁰ 1994,3 SCC 430

SUGGESTION

Female foeticide cannot address in isolation. So a holistic approach is necessary to stop female foeticide. The related social malaises such as dowry, poverty, woman's unemployment and exploitation, lack of proper education to girl child and their drop outs, early marriage etc. are to be dealt with sternly by enacting proper laws and implementing them in true spirit.

The cases of female foeticide very rarely come to limelight because the parties in connivance with clinician do this sinful act. So it is viewed that awareness and consciousness help to solve the problem of female foeticide and save the humanity. Awareness program should be organized to make the woman literate about their rights and about the ill effects of abortion. Women should know their rights, regarding adoption, maintenance, succession marriage, property employment and education etc.

The PNDT Act 1994 and MTP Act 1971 should be read together as both the laws are interrelated and must be implemented strictly. The SC directed the government to implement the PNDT Act in May 2001. Later Parliament amended the law to make it more stringent. Now manufactures could sell ultrasound machines only to registered clinics. Consequently the registration of clinic has increased from 600 to 30000 since May 2001. However the regulation of ultrasound scanning is yet to be done. The law can be implemented and that the medical audit can restrain the misuse of ultrasound.

CONCLUSION

A family is incomplete without a girl child. A girl child is equally important as a male child. The Girl child is not only a daughter, but also a sister or future mother and wife. Female foeticide is a serious offence and an alarm to the human race. So far as the legislature is concerned, the duty is done. Now it comes to the executive and the judicial branches of the State to ensure compliance, which is always a tricky affair. Despite legal provisions, judicial decisions, conventions and commissions to combat female foeticide the same situation continues unabated in India. The National Plan of Action for the South Asian Association for Regional Cooperation (SAARC) Decade of the Girl Child (1991-2000) Seeks to ensure the equality of status for the girl child by laying down specific goals for her dignified survival and development without discrimination. The codified law world over considers human life as sacred and specific legal provisions have been devised to protect the life of the born and the un-born.

It is observed that the implementation of the laws is not made strictly so as to fulfil the objectives of the laws. The cases of female foeticide are rarely registered and

convictions are very rare under PNDT Act. The problem in this case is a little more complicated because female foeticide involves secretive family members, and the police and enforcement agencies need to be extra cautious to be able to detect the violation. The consequence of female foeticide is severe reduction of number of female. Ironically, female foeticide takes place in a country where people worship various forms of Goddesses, and where females are considered as Maa Laxmi's incarnation and where young girls are worshipped and people touch their feet for blessings. But even then, the intentional killing of the girl child continues. Right to education, health and empowerment are the fundamental rights of every Indian woman. The horrible illegal practice of female foeticide has to be stopped by harsh laws and change in the mind-set of the people. Save the girl child for a better tomorrow!
