

FEMALE FOETICIDE AND INDIAN LAW

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INTRODUCTION

The social, cultural and religious fiber of India is pre-dominantly patriarchal contributing extensively to the secondary status of women. The patrilineal social structure based on the foundation that the family runs through a male which makes male a precious commodity that needs to be protected and given special status. Another important pillar of the patriarchal structure is marriage wherein women are given subordinate status having no say in the running of their life or any control over their body or bodily integrity. Marriage is also considered as a process whereby the burden of the father is passed on to the class structure that generations may have to toil to repay the debts incurred during marriage. All of this has contributed to a low status for women in the society to such an extent that even the birth of a girl child in a family is sought to be avoided. A deleterious fall out of the subjugated position of women is their vulnerability to violence, rape, sexual abuse dowry harassment, domestic violence, trafficking etc. with little or no mechanisms of combating the same either by way of effective laws and their implementation or civil society action. Various methods were found to eliminate the girl child after her birth like starving her, crushing her under bed or giving poison etc. Pertinently the responsibility for killing the child was fixed on the mother/women as she was considered responsible for bringing the girl child into existence. The causes for elimination of girl child indicate that the reasons are similar and different depending upon the geographical location in which female infanticide is practiced. An exorbitant dowry demand is one of the main reasons for female infanticide. Some of the other reasons are the belief that it is only the son who can perform the last rites, lineage and inheritance runs through the male line, sons will look after parents in old age, men are breadwinners etc. Strong male preference and the consequent elimination of the female have continued to increase rather than decline with the spread of education.¹

The recent technological developments in medical practice combined with a vigorous pursuit of growth of the private health sector have led to the mushrooming of a variety of sex-

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¹ Manjeet Rathe, *Eradicate Scourge of Female Foeticide*, People's Democracy, Vol XXV, No. 39, Sep 30

selective services. This has happened not only in urban areas but deep within rural countryside also. Female infanticide in most places has been replaced by female foeticide. Female foeticide or sex selective abortion is the elimination of the female foetus in the womb itself. The sex of the foetus is determined by methods like amniocentesis, chrion villus Biopsy and now by the most popular technique ultrasonography. Once the sex of the foetus is determined, if it is a female foetus, it is aborted. The increase in female foeticide has seen the proportionate decrease in female sex ratio, which has hit an all-time low especially in the 0-6 age group, and if this decline is not checked, the very delicate equilibrium of nature can be permanently destroyed.²

In ancient India, the birth of a girl child used to be praised as the arrival of Laxmi (Goddess of Wealth) into the family. In Hinduism, Abortion or killing of foetus has always been considered to be a sin and prohibited as such. The person who causes abortion is described as Bhrunaha and the killing of foetus is described as Bhrunahatih. References in Atharva Veda show that abortion was known in the Vedic age. Abortion was always considered to be a sin for which, however, expiation ceremonies were prescribed in Taittiriyanishad and also in Arunam. *Mannu* in his Dharmasastra said that a killer of a priest or destroyer of an embryo casts his guilt on the willing eater of his provisions (Chapter VIII, Verse 317).

Kautilya's Arthashastra provides for the highest punishment for causing abortion by physical assault. It refers to Yajnavalkya and Manu as well as Vishnupurana. Lesser punishments are also provided for inducing miscarriage by drugs.³

Muslim jurists also agree unanimously that after the foetus is completely formed and has been given a soul, aborting it is *harama*. While Islam permits preventing pregnancy for valid reasons, it does not allow doing violence to the pregnancy once it occurs.⁴

Foeticide was prohibited and classified as murder, equal to neglect of Vedas, incest and drinking of spirituous liquors. Man even considered a woman as murderer of her husband or of Brahmin or as an outcaste who had undergone abortion. The Buddhists who condemned the destruction of life, laid down that the bhiku “*who intentionally destroys a human being by way of abortion, is no Samana and no follower of Sakeyaputta.*” As per Gandhiji, “*abortion*

² Manmeet Kaur, *Female Foeticide: A Sociological Perspective*, The Journal of Family Welfare, Vol. 39 (i), March, 1993

³ Shaw S. P., *Encyclopedia of Laws of the Child In India*, First Edition, 2000, p. 99

⁴ *Id* at p. 201.

was more in violation of the principle of the ahimsa than the artificial birth control which was morally blameworthy. Holy Quran prohibits the killing of child", "Astray have gone those who stupidly kill their children without knowledge and deny to themselves of what Allah has blessed them with". The Didache, an authoritative source of Christian law, considered abortion, as a grievous sin and was included in the Ten Commandments which contain the forbidden acts. Every human being including the unborn child in the womb of its mother receives the right to life directly from the Almighty God but not from parents, society or any other authority.⁵

FEMALE FOETICIDE AND LAW IN INDIA

India has always possessed the hateful legacy of killing the female child. Earlier, because scientific techniques were not advanced and it was impossible to determine the sex of the child, the killing of the female child took the form of adding opium to the infant's milk or by suffocating the infant under the mother after birth or else by plainly ill-treating daughters. Now it is given a sophisticated aura of education by the perverse use of scientific technology. The truth is disheartening but nonetheless the truth, that the technique used to diagnose the condition and sex of the foetus, medically termed as amniocentesis, is now primarily conducted for sex determination and the consequent extermination of a female foetus. And paradoxically, the practice is adopted by supposedly educated and reasonably well off families rather than by the poor who can neither afford doctors' costs nor have ever heard of such perversions. The blind killing of female foetuses has led to a precarious situation where the male-female ratio of the population is being affected.⁶

Indian society is patriarchal in nature with inborn desire for the birth of a male child in the family. This desire, along with the many prevailing superstitions, leads to indiscriminate abortion of female foetuses. Women carrying illegitimate children also have a high abortion rate. These factors have contributed to the prevalence, in Indian society, of the menace of quacks. These unregistered medical practitioners had become a health hazard for women who were carrying unwanted or illegitimate children because they performed abortions illegally and not knowing much about termination of pregnancies. In order to prevent such illegal acts

⁵ Sehgal B. P. Singh, *Human Right In India*, 2004, pp. 158-59

⁶ Rao Mamata , *Law Relating to Women and Children*, 2008, p. 143

Sections 312-318 of the Indian Penal Code deal with the causing of miscarriage with or without consent.⁷

In our country female foeticide has always been regarded as socially, morally and legally wrong. Under Penal Code, 1860 stringent penalties have been laid down for causing miscarriage whether it has been caused with or without the consent of the woman.⁸ A woman who causes her to miscarry may also be punished. The IPC even provides punishment for whosoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive⁹ but under certain situation the right to abortion has been recognized under the Medical Termination of Pregnancy Act, 1971. Section 3 of this Act provides for the termination of pregnancy by a registered medical practitioner only where its continuance would invoke 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 was born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Where the pregnancy is alleged to have been caused by rape or as result of failure of contraceptive used by a married woman or her husband, it would be presumed to constitute a grave injury to the mental health of the pregnant woman. But in practice this Act has provided a license to every registered medical practitioner to terminate pregnancy whether it is a fit case within the exception or not. There is no method to check whether the reasons specified for termination of pregnancy are true or not. D-regularization has resulted into a new type of criminal behaviour practiced by the medical practitioner. The government being concerned only with its family planning programme became a willing party to this so called legalized female foeticide. Amniocentesis technology added fuel to the fire when after detecting the sex of the foetus, selective abortions were caused. The problem of female foeticide became so acute that activists group, media persons and intellectuals demanded State intervention. In mid-eighties matter became a major campaign issue. A concerted campaign in Mumbai under the banner of 'Forum against sex-determination and sex pre-selection', supported by groups in other States, led to the formation of an investigation committee and later the formulation of Bill in 1988 which ultimately was passed in 1994 as the Pre-Natal Diagnostic Techniques Act. It came into force on January 1, 1996.

⁷ *Id at p. 178*

⁸ I.P.C. 1860, Section 312 & 313

⁹ *Id*, Section 315

**[PRE-CONCEPTION AND] PRE-NATAL DIAGNOSTIC TECHNIQUES
[(PROHIBITION OF SEX SELECTION)] ACT 1994**

The Act to provides for the prohibition of 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 chromosomal abnormalities or certain congenital malformations or sex –linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

It is proposed to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. Legislation is required to regulate the use of such techniques and provide deterrent punishment to stop such inhuman act.

Section 3 provides for the regulation of genetic counseling centers, genetic laboratories and genetic clinic.

Section 6 prohibits Genetic Centres, Laboratories and Genetic Clinics from conducting any prenatal diagnostic technique tests including ultrasonography for the purpose of determining the sex of a foetus. The same prohibitions apply to an individual also.

When otherwise for determining any abnormality, the prenatal diagnostic techniques are used and the sex of the foetus is known Section 5, specifically prohibits communication by words, signs, etc. is prohibited.¹⁰

Thus Section 5 and 6 prohibit the determination or communication of the sex of the foetus.

Section 5 lays down certain conditions which have to be fulfilled before carrying out a prenatal diagnostic technique on a pregnant woman. These are:

1. obtain her consent after giving her an explanation in the language she understands,
2. Give her a copy of her written consent.
3. Explain the side effects and consequences of using such technique. Unless these conditions are fulfilled no prenatal diagnostic test can be carried out.

¹⁰ PC-PNDT Act, 1994

No any person conducting pre- natal diagnostic procedure shall communicate to the pregnant women concerned or her relative or any other person the sex of the foetus by word, sign or any other manner.

Sections 7-16 deal with the Central Supervisory Board under Chapter IV. The sections give the details of constitution, term of members, meetings of the Board, Vacancies. Temporary Association of persons. Appointment of officers, authentication of orders and other instruments of the Board, Disqualifications, eligibility and functions of the Central Supervisory Board.

The act empowers and directs the Central Government to constitute an authority called the Central Supervisory Board consisting of a Minister and Secretary of Ministry of Family Welfare, two members representing the ministries of Women and Child and Law and Justice. Director General of Health Services, and ten members, two each from amongst eminent medical geneticists, gynecologists and obstetricians, pediatricians, social scientists and representatives from Women's Welfare Organizations. Apart from these, three women members of Parliament and four members are to be appointed by the Central Government (Sections 7).

Section 16 of the Act assigns the following functions to the Board:

- a) To advise the Government of policy matters relating to the use of prenatal diagnostic techniques, sex selection techniques, and against misuse.
- b) To review the implementation of the Act and the rules made there under and recommend changes in the said act and rules to the Central Government;
- c) To create public awareness against the practice of pre-conception sex selection and pre- natal determination of sex of foetus leading to female foeticide;
- d) To lay down Code of Conduct to be observed by persons working at Genetic Counseling Centres, Genetic Laboratories and Genetic Clinics.

The Central or State Government shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions.

The Advisory Committee, according to Section 17 (6), shall consist of:

- 1) Three medical experts who may be gynecologists, obstetricians, pediatricians and medical geneticists;
- 2) One legal expert;
- 3) One officer from the department of information and publicity of the State Government/Union Territory;
- 4) Three eminent social workers, of whom not less than one shall be from amongst representative of women's organizations.

Applications for registration or any complaint for suspension/cancellation of registration shall be considered by the Advisory Committee either on the request of the Appropriate Authority or on its own.

Under Section 18 of the Act, every Genetic Counseling Centre, Laboratory or Clinic must be registered under the Act before its commencement. No person shall open any centre unless such registration is made separately or jointly. The application for registration is made to the appropriate Authority, who, after holding an inquiry and satisfying itself regarding compliance with the requirements and also having regard to the advice given by the Advisory Committee, may grant a certificate of registration under Section 19. If after inquiry and affording opportunity of being heard and for reasons to be recorded, it is found that the requirements have not been complied with, the Appropriate Authority may reject the application for registration.

The certificate of registration has to be renewed as per the manner prescribed and has to be displayed by the Genetic Counseling Centre, Laboratory or Clinic.

The Appropriate Authority is vested with powers under Section 20 to cancel or suspend a registration if it is found that such a centre has misused diagnostic techniques.

The Appropriate Authority may issue a show cause notice to a centre as to why its registration should not be suspended or cancelled for reasons mentioned in the notice. The action against the centre may be on:

1. A complaint, or
2. Suo motu

If after the advice of the Advisory Committee and after giving the offender a reasonable opportunity of being heard, the Appropriate Authority is satisfied that there has been violation of the provisions of the Act, it may suspend or cancel the registration as it may deem fit. If it is required in public interest the Appropriate Authority may also suspend the registration without notice.

However, an appeal can be made against the order of suspension or cancellation under section 21, within thirty days to:

1. Central Government, or
2. State Government

Whichever is appropriate, Section 22 of the Act provides that, no person, organization or Genetic Centre should advertise in any form facilities available for prenatal determination of sex at such centres or laboratories. Therefore, no publicity can be given as to the existence or availability of the facility. Publicity includes publishing or distribution of notices, circulars, labels, wrappers or other documents and includes visible representations made by light, sound smoke or gas.

If an advertisement is given in contravention of the above provision, the same is punishable with imprisonment up to 3 years and with fine up to Rs. 10,000.

The seriousness of the offences committed under this Act is reflected by Section 27 which makes every offence under this Act cognizable, non-bailable and non-compoundable. Section 28 of the Act specifies that no court other than that of a metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act. These courts shall take cognizance of offences under the Act only on complaint made by:

1. The Appropriate Authority or any officer authorized by the Central or State Government, or
2. A person who has given not less than 15 days' notice of offence to the Appropriate Authority and of his intention to make a complaint.

Penalties have been provided for the violation of the Act by Genetic Centers or Laboratories and the persons seeking aid of such centers and companies. Notwithstanding anything in the Indian Evidence Act it has been laid down in Section 24 that unless the contrary is proved,

the court shall presume that a pregnant woman was compelled by her husband or relative to undergo prenatal diagnostic test and such person shall be liable for abetment of the offence. Thus, special protection has been given to a pregnant woman taking into consideration the fact that for a mother her child is important and not its sex.

If the Appropriate Authority has reasons to believe that an offence is being committed under the Act, power to search and seize records at all reasonable times has been conferred. It has also got the power to examine any record, register, document, book, pamphlet, advertisement or any other material object found therein. Such acts have been protected by the Act under Section 31 if taken in good faith.

The Act confers power on the Central Government to make rules for carrying out the provisions of the Act. The rules may provide for, inter alia, the minimum qualifications of persons employed at Genetic Counseling Centres or Laboratories, facilities, equipments and other standards to be made available by these centres, the form in which consent of a pregnant woman has to be obtained under Section 5, the form and manner in which application has to be made for registration, manner in which seizure of documents shall be made and the manner in which the seizure list shall be prepared.

The Board has also been granted powers to make regulations with the previous sanction of the Central Government. The Rules and Regulations so made shall be laid before each House of Parliament while it is in session.

With this pious legislative backdrop we have the Union Family Welfare Secretary saying:

“In Vitro Fertilization (IVF) clinics have mushroomed all over. In the name of fertility techniques all such practices are being carried out.”

These centres encourage couples seeking a male child to go in for procedures such as separation of X-Y chromosomes of the sperm or embryo selection following IVF. These practices have led to increasing distortions in the sex ratio. Challenged again by IVF, the scope of the law for checking tests which determine the sex of a foetus is being expanded to cover pre-conception sex selection techniques.

FEMALE FOETICIDE AND JUDICIARY

Activists through intervention of the Supreme Court are compelling State governments to initiate action against ultrasound centers encouraging female foeticide under the (Pre-Conception and) Pre-Natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994. Therefore, it is for the first time since the enactment of this law about eight years ago that States have started registering ultrasound machines for a better supervision of their use.

The Indian Medical Association, too, has called for action against doctors helping in such sex- selection procedures. Activist Sabu George says.¹¹

“The problem with foeticide is that doctors are promoting and encouraging it. It is one organized crime against women encouraged by professionals.”

Not only is sex determination a crime against women but achieving is a balance in sex ratio also a crucial part of population stability. Expressing its concern, an NGO, CEHAT, filed a Public Interest Litigation highlighting this issue.

The challenge to the constitutionality of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 on ground of violation of Article 21 of the Constitution was rejected by the Supreme Court in *Vinod Soni v. Union of India*.¹²

Expressing concern over this issue the Supreme Court in *CEHAT v. Union of India*¹³ moved in to stop illegal sex determination and directed all States to confiscate ultrasound equipment from clinics that are being run without licenses. The Health Secretaries of Punjab, Haryana, Delhi, Bihar, Uttar Pradesh, Maharashtra, Gujarat, Andhara Pradesh, Kerla, Rajasthan and West Bengal were present to explain the steps taken to implement the Pre-Natal Diagnostic Techniques Act, 1994.

A bench comprising Arijit Pasayat, M.B. Shah and B.N. Agrawal, JJ. said:

“State Governments are directed to take immediate action if such machines were being used in clinics without licence. The machines are to be seized and sealed for the time being.”

¹¹ Rao Mamata – *Law Relating to Women and Children*, 2008, p. 148

¹² *Vinod Soni v. Union of India*, 2005 CrLJ 3408.

¹³ *CEHAT v. Union of India*, (2001) 5 SCC 577

When the petitioner's counsel Indira Jai Singh said that the State Governments were casually granting licences to ultrasound clinics the court said:

"The authorities should not grant certificate of registration if the application form is not complete."

The court also asked the manufactures of ultrasound machines-Philips, Symonds, Toshiba, Larsen and Toubro and Wipro Ge-to give the name and addresses of the clinics and persons in India to whom they sold these machines in the last five years "This," the court said, "would help the government find out whether these clinics or persons were registered."

Again in a resumed hearing the Supreme Court warned that health secretaries of States failing to implement its orders banning sex determination of foetus would be required to be present before the court in the next hearing.

Shocked at the slackness of the Union and the State governments, the Supreme court in *CEHAT v. Union of India*¹⁴ again asked the authorities to file within six weeks status reports regarding implementation of (Pre-Conception and) Pre-natal Diagnostic Techniques (prohibition of sex selection) Act, 1994. A Bench comprising M.B. Shah and R.P. Sethi, JJ., said:

"We make it clear that there is total slackness on the part of administration in implementing the Act."

It asked the authorities to implement the Act and prosecute clinics, centres and laboratories which aid and abet identification of the sex of the foetus illegally.

When consul for certain States said that the authorities have issue warnings to several such unregistered centres having ultrasound facilities, an anguished Bench expressed surprise and wondered "whether the implementing authorities are aware of law?" "The Act provides for prosecution and not warning. Authorities under the provision of the Act are not empowered to issue warnings and allow these centers to continue their illegal activities."

It also castigated the Union Government for not setting up an Appropriate Authority to implement the Act. It should have set up the authority five years ago, the court added.

¹⁴ *Ibid.*

Such, then, is the attitude of the government towards a crime which hits at dignity even before conception. There has to be a concerted effort by all to stop this inhuman treatment of the female foetus. By the intervention of the Apex Court, prosecutions have been launched against the offenders but, in all cases, it is the will to protect the dignity of women which will ultimately succeed.

In *CEHAT v. Union of India*,¹⁵ further directions were issued by the Supreme court. The Centre and State Governments were directed to issue advertisements to create awareness in the public that there should not be any discrimination between male and female child, and to publish annually the reports of appropriate authorities for the information of the public. National Monitoring and Inspection Committee is to continue to function for the effective implementation of the Act. Certain State were directed to appoint State Supervisory Board and multi-membered appropriate authorities.

In *Malpani Infertility Clinic (P.) Ltd. v. Appropriate Authority PNDT Act*,¹⁶ the petitioner sought to challenge the order, under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT) suspending the registration of the petitioners Diagnostic Centre. A writ petition was also filed by an NGO in 2001, Center for Enquiry into Health and Allied Themes CEHAT, against the activities being carried out which are banned by the PNDT Act. The petitioners have then in their affidavit defended sex determination on the ground of family balancing'. Later they tendered apology through another affidavit.

The petitioners Diagnostic Centre was allegedly carrying out prohibited activities involving pre-natal sex determination leading to female foeticide. Prima facie there was some material before authority, a prosecution lodged on the basis of which the authority had adequate power under the Act to suspend the licence pending prosecution. It cannot be said that there was no sufficient mention of reasons for authority to take action.

In *Chitra Agarawal (Dr.) v. State of Uttaranchal*,¹⁷ the petitioner, a practicing doctor having an Ultrasound Centre was registered under the PNDT Act, 1994. The registration of the petitioner was first suspended and then cancelled. There was also criminal proceeding

¹⁵ *CEHAT v. Union of India*, (2003) 8 SCC 398

¹⁶ *Malpani Infertility Clinic (P.) Ltd. v. Appropriate Authority PNDT Act*, AIR 2005 Bom. 26.

¹⁷ *Chitra Agarawal (Dr.) v. State of Uttaranchal*, AIR 2006 Utt. 78.

pending against the Ultrasound Centre. Appeal was filed against decision of District Level Appropriate Authority of canceling the registration. The petitioner was informed that his appeal cannot be entertained in view of pending criminal proceeding. This refusal was challenged in the present writ petition.

The Court while giving its decision lay that the initiation of criminal proceedings against the Ultrasound Centre of pendency of such criminal proceedings before Court is no bar for deciding the appeal against cancellation of its registration. It cannot be a ground for refusing to entertain and decide the appeal filed by violation of the provisions of the PNDT Act and the rules. The action is directed against registration of Ultrasound Centre and not against owner of the Center. Both actions are independent and can be preceded simultaneously. The pendency of criminal proceeding should not deter the appellate authority from deciding the appeal filed against the cancellation of registration.

In *Vijay Sharma v. Union of India*,¹⁸ the High Court held that the provisions of the Pre-conception and pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 as amended by the Amendment Act, 2002 are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition. Therefore it is not necessary for the Central Government to issue any order regarding removal of difficulties in the official gazette.

The above discussion is pertinent in today's scenario because even after various states attaining high literacy rates, the cases of illegal foeticide have not reduced significantly. It is a worthy move by the present day Uttar Pradesh and other state governments to make identity proof mandatory for getting ultrasound or any other Pre Conception and Pre Natal diagnostic tests and procedures. This is going a long way in curbing this dreadful practice.

¹⁸ *Vijay Sharma v. Union of India*, AIR 2008 Bom. 31