

ROLE OF JUDICIARY TO CURB FEMALE FOETICIDE:AN ANALYSIS

Dr. Atul Jain¹

ABSTRACT

Female foeticide is a heinous act and an indicator of violence against women. There is abhorrent practice of sex determination and sex selection going on since long time. Immemorial patriarchal influence can be seen in all parts of India and in all spheres of life. In the 1991 census, there was a finding that ratio of girls was much less. The reason for declining sex ratio is the petrified social attitude and the lack of sensitivity. Pre-natal diagnostic techniques are used to detect a range of genetic abnormalities. The techniques have also been used to detect the sex of the foetus. The sex-determination tests have often been followed by abortion if the foetus has been detected to be female. Amongst the states, the northern state of Punjab tops the list in number of female foeticide cases

It is normally the function of the government to implement laws enacted by the legislature. To curb this practise The PNDT (Pre-conception and Pre-natal Diagnostic Techniques Prohibition of Sex Selection) Act was enacted by Parliament in 1994. The available legislation for prevention of sex determination needs strict implementation, alongside the launching of programmes aimed at altering attitudes.

But when the government fails to do so, resort is taken to judiciary. The primary credit for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 goes to the judiciary. However, it came into operation after 2 years, on 1-1-1996 and even after lapse of 5 years neither the Central nor the State Governments had taken any action for its implementation. Hence, the judiciary had to take upon itself the task of giving effect to the said Act.

Keywords: Female Foeticide, PNDT Act, Sex Selection, Abortion.

INTRODUCTION

For centuries, India's societal, cultural, religious, and financial pressures have dramatically favoured the birth of males over females and even after 65 years of Independence, gender equality is still a dream for India. Women are not regarded equal to men and also subjected to various kinds of harassments. The subjugated position of women makes them vulnerable to various forms of violence, both within and outside the family, domestic violence, rape, sexual abuse, dowry harassment, trafficking. Perhaps the most horrifying form of this gender-specific violence is female infanticide or female foeticide.²

The greatest threat to our contemporary civilization is the menace of skewed sex ratio. The increasing imbalance between men and women is leading to many crimes such as illegal trafficking of women, sexual assaults, polygamy and dehumanization of society. These acts have been increasing making this world unsafe for women. Female foeticide is one of the most nefarious crimes on this earth; perhaps what is detestable is that the people who commit crime belong to the educated class. To this menace our ancestral and biased view about male child, lack of education, ever increasing population and dowry have been good propellants.

The social, cultural and religious fibre of India is pre-dominantly patriarchal contributing extensively to the secondary status of women. 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

¹ Associate Professor, Amity Law School, AUH, Email: ajain@ggn.amity.edu, Contact No.8800264742

² Available at https://main.mohfw.gov.in/sites/default/files/Decentralisation_of_PNDT-NGO_Scheme_0.pdf visited on 23rd April,2022.

after parents in old age, men are bread winners etc. Strong male preference and the consequent elimination of the female has continued to increase rather than decline with the spread of education.³

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-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, chorion villus Biopsy and now by the most popular technique ultra sonography. 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.⁴

LEGAL FRAMEWORK IN INDIA TO CURB FEMALE FOETICIDE

In India the problem of female foeticide is prevalent since 1970 and measures have been taken by the government to combat the issue to improve the sex ratio but focus have been given except making laws but now it has been realized that the situation has to be handled as soon as possible as the whole country would suffer drastic changes in the society. The Indian Penal code has provisions that govern legal abortion. Abortion is allowed if done with good intent and to save the life of the mother.⁵ Abortion law is advocated as one of the mode of population control. Medical Termination of Pregnancy Act was enacted in the year 1971 which acts as a tool allowing the pregnant women to decide the number of child and frequency of the child. It also give right to the women to have a child or to have a child. The Act prohibited sex based abortion and determining the sex of the child before the birth of the child. In order to remove the setbacks in previous legislations the Pre-natal Diagnostic techniques (Regulation and Prevention of Misuse) Act was passed in the year 1994. This act prohibited the determination of the sex of the foetus before the child's birth and punished for the violation of the provision. The hospitals, clinics and medical centre have to be compulsorily registered as per this Act. These laws have been enacted to protect the interest of the women bearing child. In practise they are misused against women's interest. Unlike abortion female foeticide is done beyond the legal period and it is only done because of the reason that the foetus is a girl. Female foeticide is a punishable offence in our country and the offender is both imprisoned and punished with the fine.⁶

The main law for prosecuting persons who are engaging in sex selective abortion is the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The PNDT Act now stands renamed as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex selection) Act from 2003. It prohibits misuse and advertisement of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide. It permits and regulates the use of pre-natal diagnostic techniques for detection of specific genetic abnormalities or disorders and use of such techniques only under certain conditions and only by the registered institutions. It provides for punishment for violation of the provisions given in the act. The complaint made by any person should be first given to the appropriate authority with the notice of not less than thirty days for proper action and with the intention to make a complaint to the court.⁷

DECLINE IN CHILD SEX RATIO

As per the Census, 2011 the child sex ratio (0-6 years) has shown a decline from 927 females per thousand males in 2001 to 919 females per thousand males in 2011. State/UTs-wise details are given in table below:⁸

Child Sex Ratio in India (2001-2011)

³ Manjeet Rathe, Eradicate Scourge of Female Foeticide, People's Democracy, Vol XXV, No 39, September 30

⁴ Manmeet Kaur, Female Foeticide: A Sociological Perspective, The Journal of Family Welfare, Vol 39(1), March 1993

⁵ Section 312 of IPC.

⁶ Available at <https://fastforwardjustice.com/role-of-indian-legal-framework-in-addressing-and-eliminating-female-foeticide-in-india/> visited on 23rd April, 2022.

⁷ Ibid.

⁸ Available at <https://pib.gov.in/newsite/printrelease.aspx?relid=103437> visited on 23rd April 2022.

S. No.	State/UTs	Child Sex Ratio (0-6)	
		2001	2011
	INDIA	927	919
1	JAMMU & KASHMIR	941	862
2	HIMACHAL PRADESH	896	909
3	PUNJAB	798	846
4	CHANDIGARH	845	880
5	UTTARAKHAND	908	890
6	HARYANA	819	834
7	NCT OF DELHI	868	871
8	RAJASTHAN	909	888
9	UTTAR PRADESH	916	902
10	BIHAR	942	935
11	SIKKIM	963	957
12	ARUNACHAL PRADESH	964	972
13	NAGALAND	964	943
14	MANIPUR	957	936
15	MIZORAM	964	970
16	TRIPURA	966	957
17	MEGHALAYA	973	970
18	ASSAM	965	962
19	WEST BENGAL	960	956
20	JHARKHAND	965	948
21	ODISHA	953	941
22	CHHATTISGARH	975	969
23	MADHYA PRADESH	932	918
24	GUJARAT	883	890
25	DAMAN & DIU	926	904
26	DADRA & NAGAR HAVELI	979	926
27	MAHARASHTRA	913	894
28	ANDHRA PRADESH	961	939
29	KARNATAKA	946	948
30	GOA	938	942
31	LAKSHADWEEP	959	911
32	KERALA	960	964
33	TAMIL NADU	942	943
34	PUDUCHERRY	967	967
35	A & N ISLANDS	957	968

Source: Census of India 2011.

JUDICIAL APPROACH TO TACKLE THE PROBLEM OF FEMALE FOETICIDE

It is normally the function of the government to implement laws enacted by the legislature. But when the government fails to do so, resort is taken to judiciary. The primary credit for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 goes to the judiciary. The PNDT Act was enacted by Parliament in 1994. However, it came into operation after 2 years, on 1-1-1996 and even after lapse of 5 years neither the Central nor the State Governments had taken any action for its implementation. Hence, the judiciary had to take upon itself the task of giving effect to the said Act. There are series of petitions filed either suo moto or being moved by NGOs in which the Supreme Court and the High Courts, have issued various directions and pronounced orders to the Central and the State Governments for creating public awareness and for effective implementation of this Act.⁹

⁹ Available at https://india.unfpa.org/sites/default/files/pub-pdf/Compilation_and_Analysis_of_Case_Laws_on_Pre_Conception.pdf visited on 23rd April, 2022.

In *CEHAT v. Union of India*¹⁰ the Supreme Court of India observed that for controlling female foeticide Parliament in its wisdom enacted the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The Preamble provides that the object of the Act is to prevent the misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide and for matters connected therewith or incidental thereto, but the Act is not implemented by the Central Government or by the State Governments to fulfil the object. The court issued various directions for the same. It held that the Central and State Government should issue advertisements to create awareness in the public against discrimination between male and female children. It also directed that the appropriate authorities responsible for implementing the Act have to publish annual reports, which are to be available to the public. In order to streamline the effective functioning of the PNDT Act, the Court issued directions for the functioning of the supervisory boards and also directed that the national monitoring of the inspection committee shall continue to function until the Act is effectively implemented.

In the case of *Vinod Soni and Anr. Vs. Union of India*,¹¹ it was observed that the right to life is guaranteed is for all, and by stating personal liberty as choosing the sex of the offspring, the High court contended that “right to personal liberty cannot be expanded by any stretch of imagination to liberty to prohibit to coming into existence of a female or male foetus which shall be for the nature to decide”.¹² The High Court stated that even if the Article 21 includes the right to food, clothing, decent environment and even protection of cultural heritage, these rights even if we expand it to the extremes of the possibilities, cannot be stretched up to a right to choose the sex of the offspring.¹³ It also stated that this act was enacted for the development of the child after birth. It states that a child after birth has all right above mentioned irrespective of the sex of the offspring. The act does not intend to entirely prohibit use of such test to determine the sex at preconception or post conception stage but in no circumstances, the right of personal liberty can be expanded to determine the sex of the child. “Personal liberty” cannot mean to choose the sex of the offspring, and discriminate the male and female foetus.

In yet another case of *Dr. Mrs. Suhashini Umesh Karanjakar Vs. Kolhapur Municipal Corp*¹⁴ where the court ordered and empowered the Appropriate Authority to seize and seal the ultra sound machine and any such material object which can determine the sex of the offspring. If any medical practitioner is held to be involved in the sex determination works and is convicted shall be punished and his/her name will be removed from the register of medical council for a period of 5 years. This view was held in the case of *Dr. Pradeep Ohri Vs. State of Punjab*.¹⁵

In *Mr. Vijay Sharma and Mrs. Kirti Vs. Union of India*,¹⁶ stated that the Section 4(2) of the act shall not be conducted except for the reasons of detection of the following-

- Chromosomal abnormalities
- Genetic metabolic diseases
- Hemoglobinopathies
- Sex linked genetic diseases
- Congenital anomalies or any other abnormalities or diseases.

So, the tests can only be used to know about certain abnormalities and risk in the course of pregnancy, and not for sex determination. The CJI suggested that all sections of society must work together to ensure that each and every baby girl was given her due in society.¹⁷ In one of the speech, Justice Sabharwal said that female foeticide, is an unhealthy trend which if continued would disturb the demographic composition of the society, resulting in giving rise to many matrimonial issues. This son obsession syndrome should be removed. This is more of social evil than legal issue, so the society needs to be aware and commit and devote them for the removal of this social disease. Female foeticide is an ancient trend, not a new fashion so it is in the roots of the Indian society. So it needs large population standing against it, then only it can be eradicated.

¹⁰ AIR 2001 SC 2007.

¹¹ 2005 Cri.LJ 3408

¹² Felony of female Foeticide – Role of judiciary in implementation of PCPNDT act in India; Emandi Rangarao

¹³ Ibid.

¹⁴ 2011 (4) AIR Bom R 326 (F.B.)

¹⁵ AIR 2008 P & H 108

¹⁶ AIR 2008 Bom. 29

¹⁷ International Journal of Law, Emandi Rangarao; September 2016

In *Sabu Mathew George v. Union of India*¹⁸ spanning from 2008 till 2017 December, where by directions are given to search engines to block such advertisement which are meant for diagnostic help of female foetus, way back on 19-9-2016, the Supreme Court directed the respondents to develop techniques so that there would be auto-blocking of such private advertisement..

In Federation of Obstetrics and Gynecological Societies of India (FOGSI), v. Union of India¹⁹

In this case a plea was filed by the Federation of Obstetrics and Gynaecological Societies of India (FOGSI), the apex body of obstetricians and gynaecologists of the country, highlighting the issues and problems affecting the practice of obstetricians and gynaecologists across the country under the PCPNDT Act and challenging the constitutional validity of Sections 23(1) and 23(2) of the Act and seeking direction in the nature of certiorari/mandamus for decriminalising anomalies in paperwork/record keeping/clerical errors in regard of the provisions of the Act for violating Articles 14, 19(1)(g) and 21 of the Constitution of India.

It was contended by the Society that the Appropriate Authority appointed under the Act conducts inspections and raids in various districts and cities and even if there are mere anomalies in the paperwork, it seals the sonography machine and files a criminal case under the Act. As a result, doctors who do not conduct sex determination and gender selection are being targeted on the basis of aforesaid anomalies.

Rejecting the contentions of the Society, the Court held that non maintenance of record is spring board for commission of offence of foeticide, not just a clerical error.

The Court held that dilution of the provisions of the Act or the Rules would only defeat the purpose of the Act to prevent female foeticide and relegate the right to life of the girl child under Article 21 of the Constitution, to a mere formality.

In Radiological and Imaging Association Vs. Union of India (UOI)²⁰

In a series of landmark decisions delivered by the Bombay High Court towards effective and meaningful implementation of the provisions of the Act, one must say this Judgment constitutes a major milestone. It once again proves that Judiciary is one step ahead of legislature and executive in acting as catalyst for social change. (Right to Privacy was the issue in this case. The court held that the right of the unborn child to be born would also be the fundamental right, and therefore, when there is a conflict of fundamental rights of two parties, that right which advances public morality will prevail.

By analysing the above cases it can be said that judiciary has played its best role in curbing and tackling the issue of female foeticide. It has interpreted its views through various judgement that female foeticide is a great menace faced by the country and in order to get rid of this the precedents of the above case can be referred. Concerning the gender ratio issues, the court had upheld the constitutional validity of the prenatal sex determination prevention, by infusing its legality in the literary interpretation of the statute.

CONCLUSION

As long as there is fascination for male child and phobia for female child and girl child is irrationally perceived as a burden, people will resort to any means for eliminating the female foetus while systematically selecting the male foetus. Social malaise of such a staggering magnitude cannot be remedied only through legislation and court cases. It is true that technology is aiding systematic elimination of girl child; still technology does not exist in a vacuum. Social evil inevitably influences its use. The PNDT Act and its strict implementation undoubtedly is a step in the right direction for preventing the killing of unborn girls. The grave crime of female foetus being done away also needs to be noticed in holistic perspective of gender injustice. Rapidly followed unequal treatment meted out to women, perpetration of violence, lack of education and denial of economic opportunities, total stifling of their voice even in such intimate and integral matter as raising their own family, displays firmly imbedded patriarchal mindset. Howsoever, multi-faceted evil though it is still having to be met by a sustained campaign on all fronts. There may be possible road-blocks and dead-ends. They have to be acknowledged and identified and addressed. Professional bodies like the Indian Medical Association (IMA) also must not remain a passive spectator to the brutality and greed of the members of medical profession in such acts and derogatory practices. Even in matters where doctors are not directly involved, in case if they have definite information, their

¹⁸ (2018) 3 SCC 229

¹⁹ 2019 SCC OnLine SC 650.

²⁰ (2011) 5 AIR Bom R 731

vigilance in reporting such acts to competent authority certainly can help; for non-reporting would mean joining in the conspiracy of silence, if the PNDT Act has to be a transformative force, emphasis also has to be laid on sufficient education, lobbying, publicity and commitment to saving female foetuses; unborn daughters so that their Right to Life is recognised and asserted. What is ultimately needed is the development of innovative strategy of engaging with law as means of mobilization and resistance.

