

Right to Sex Selective Abortion vis-à-vis Dignity of a Women

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ABSTRACT

There has always been a predicament regarding the independent rights of women. May be the rights are related to her social status or regarding her own personal status. This uncertainty drags women behind in the walk of life in spite of long history of struggles for awakening the women empowerment. Erstwhile women would never be able to take independent decision, no matters it may be for her health or reproductive issues. It is tyrannical to say that she could not even decide to conceive so sex selective abortion is far away from the reach to provide her option of refusal consent to sex selective abortion. Now days ample of laws are available in various progressive countries regarding Legal Medical termination of Pregnancy, the physiological trauma and social isolation faced by a woman are still inattentive. Its mental trauma is the aftermath of Medical termination of Pregnancy of women which results in psychological disturbances in the form of major depression. Depletion in the ratio of women in India comes out with a huge picture of female foeticides. It is this negation of the self and low image of women which makes them unashamedly resort to female foeticide in order to achieve their desired family compositions and structures. Through this paper authors wants to grab the attention of legislation as well as society makers to secure women to undergo sex selective abortion and henceforth maintain the sex ratio in India.

Keywords

Women Rights, Sex Selective Abortion, Parenthood, Child Rights, New Legislations.

INTRODUCTION

"No woman can call herself free until she can choose consciously whether she will or will not be a mother".

Margaret Sanger [1]

Women have come a long way since the day of Margaret Sanger when abortion was illegal, secretive and socially unacceptable procedure, hidden from family members. Now a day the Medical termination of Pregnancy is legally

available in the progressive countries, the physiological trauma and social isolation faced by a woman are inattentive. Studies remark that the mental trauma is the aftermath of Medical termination of Pregnancy of women [2]. In majority of patients, we can see psychological disturbances in the form of major depression. The cultural devaluation of women has been so totally ingrained in minds of men and women that it has led to 'self deprecation' or 'negation of the self' by women [3]. In our patriarchal society this cultural devaluation has been transformed into feelings of worthlessness, inferiority and subordination of women. To be a woman in India, for the vast multitude of the population means to constantly embody and live as even more inferior than the "second sex" [4]. It is this negation of the self and low image of women which makes them unashamedly resort to female foeticide in order to achieve their desired family compositions and structures. India some of the neighbouring countries which witness an alarming rise of female foeticide are Pakistan, Bangladesh and China [5] while on other side it is a common observation, that couples in western societies prefer children of both the sexes. The idea behind such an egalitarian view is because the western society is well aware of the differential roles of both the sexes and henceforth the sex ratio is maintained throughout in western states. [6]

SEX PREFERENCES IN INDIA: HISTORICAL PERSPECTIVE

The preference for a son continues to be a prevalent norm in India as it is evident from the declining sex ratio in the past 70 years of the independence. The levels were alarming as indicated by the census of 2001, especially in the state of Punjab, Haryana, Madhya Pradesh, Rajasthan, Uttar Pradesh, Bihar etc. The proliferation and abuse of advanced technologies coupled with social factors such as dowry, concerns with family name and looking up for a son as a breadwinner etc. has made the evil practice of female foeticide common in every echelon of the society particularly in the above mentioned states despite various

provisions of the Constitution of India (Article 14, 15 and 21) and Indian Penal code, 1860.

Recently, PNDT Act and Rules have been amended keeping in view the emerging technologies for selection of sex before and after conception and problems faced in the working of implementation of the ACT and certain directions of Hon'ble Supreme Court after a PIL was filed in May, 2000 by CEHAT and Ors v. Union of India [7], an NGO on slow implementation of the Act. These amendments have come into operation with effect from 14th February, 2003. Due to depletion in sex ratios in the country to the disadvantage of women, this petition was filed seeking directions from the Supreme Court for the implementation of the Pre-Natal Diagnostic Techniques Act which regulates the provision of pre-natal diagnostic technology. In this case the Court took on the unique role of actually monitoring the implementation of the law and issuing several beneficial directives over the course of 3 years during which the case was proceeding in court. This petition put the issue of sex selection and sex selective abortion on the national agenda and as a consequence there have been heightened activities on this issue by government and non-governmental agencies alike.

The PCPNDT act could not succeed in the motto to save the girl child and consequently, there is dire need to strengthen the law and its enforcement since the number of convictions for this offence is a certain low. On the one hand the literate, educated and financially well off people are found to be more involved in suppressing the women at home by pressurizing them to abort the fetus after testing of its gender status. Not only it is a heinous crime but it's a curse suppressing the women's right and choice to give birth according to her own will. This practice has lead to disturb the social balance and it may lead to serious problems like greater insecurity to women, increase in sexual offences like rape etc, and even sharing of women within and outside the wedlock. [8]

The sex preferences in India can be historically attributed to the following major reasons, namely:

1. **Gender Discrimination:** The obsession for a son is a strongly structural and cultural affliction of Indian society. The preference for a male child is so predominant in the Indian society that people are willing to sacrifice their ethics and morals without any undue anxiety.

2. **Self lowered image of women:** Female foeticide is a reflection of the woman's negation of self. The decision to resort to sex determination tests and female foeticide thereafter is many times, taken by the women themselves due to the fickle mind created by the evil influence of the spouse and even the family. It clearly indicates that developing an awareness can only lead to the betterment of women's conditions in society to let her enjoy her sexual and reproductive rights. [9]

SEX SELECTION AND ABORTION: INDIAN AND INTERNATIONAL SCENARIO

High-tech methods of gender selection such as PGD/PGS are relatively new, at least six nations have already banned the use of gender selection technologies: Australia, Canada, China, India and the UK. However, the older methods of gender selection — ultrasound or amniocentesis plus abortion, and infanticide — continue to be practiced worldwide, particularly in some Asian and in India and neighbouring countries in general nations despite bans on these procedures. [10]

SEX SELECTIVE ABORTION- A GLOBAL DEBATE

It is worth to be noted that India is debating since last two decades on the legislation and non-medical use of reproductive technologies while America has already legalized the Sex selective abortions.

SEX SELECTIVE ABORTION METHODS

Through ultrasound scans, amniocentesis and chorionic villi sampling, the sex of the foetus can be determined during the pregnancy of the woman and the foetus is aborted if found to be female. [11]

Ultrasonography and Abortion (USG)

Ultrasonography of the gravid uterus is usually done to diagnose any foetal or placenta anomaly. Currently however, ultrasound imaging is the most commonly used technology for sex determination. USG helps in killing 2,000,000, female embryos in India every year. It is unfortunate that these advancements in medicine which aimed for a very noble cause for detecting the genetic

abnormalities in unborn child, being misused for the selective elimination of the female child.

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) (PNDT) Act, 2003

One of the many pre-natal diagnostic techniques is called 'aminocentesis', intended to test and analyze the amniotic fluids, blood or any tissue of a pregnant woman for the purpose of detecting any gender or metabolic disorders, chromosomal abnormalities, congenital anomalies and sex linked diseases. Unfortunately, some doctors, under the pressure of some sections of the society, have illegally made use of the above medical techniques to determine the sex of the child growing inside the mother's womb. [13]

PROHIBITIVE ASPECT

Under the PNDT Act, pre-natal diagnostic techniques for the purposes of sex determination are prohibited. [12] It is important to note that even a woman, who undergoes the test for finding out the sex of the child, is liable to punishment. There is however, a presumption that she had gone in for the test under pressure or compulsion by her husband or relations. This presumption is rebuttable. [14]

The PNDT Act, however, for all intents and purposes has proved to be a toothless piece of legislation. The problem with the Act is of two fold:

- (i) Interpretation of the Act, and
- (ii) Implementation of the Act.

The Act aims to penalize all the errant's involved either in sex determination or non-maintenance of records. The Act is deterrent for those indulging in sex determination. The unfortunate decline in the male-female sex ratio has brought in stringent measures like suspension of registration, filing of criminal cases and sealing of machines used for sex determination.

The Honourable Courts are also supportive of the strict implementation of the PCPNDT Act. However, the real aspect relating to women's reproductive and health right is escaped and not counted at all in most of the instances and cases decide by the courts. The appropriate authority under the Act is itself coming up with some or the other suggestions to curb the menace of female foeticide. But in the process the radiologists are at the receiving end and the best possible solution in today's scenario is to abide by the Regulations of the PCPNDT in its true letter and spirit.

In another judgment of the Hon'ble Mumbai High Court, the installation of Silent Observer (SIOB) in the Ultra Sound Machines was upheld. The Collector of Kolhapur came up with the novel idea of installing the Silent Observer (SIOB) under the delicate issue of 'Save the Baby Girl Child'. The device is a private external device for the purpose of filling the 'F-form' online and recording all images of the sonography whether obstetrics or non-obstetrics. The Hon'ble High Court dismissed the petition and the review petition filed by the IRIA. [15]

The IRIA also filed a petition before the Hon'ble High Court Delhi, whereby a few provisions of the PCPNDT Act were challenged, such as the registrations given to other faculty members and the mode of trainings to be imparted. The said petition is still pending.

Implementation has however had the following positive impacts:

1. Registrations of pre-natal diagnostic clinics saw have considerably risen.
2. There has been a definite check on advertisements for sex selection from print media, television and from walls around the country. The ruling of the Honourable Supreme Court has extended this check even to online advertisements hosted by Google, Yahoo etc.
3. An effort of public litigants has lead to effective implementation, eg: Maharashtra has seen a significant improvement in the sex-ratio over the years.
4. The 2003 amendment brought ultrasound in its ambit. This had led to a drastic reduction in its indiscriminate and unethical use.

The PCPNDT act can be criticized on following grounds:

1. The conviction rates have been abysmally low, especially considering the high density notorious clinics running sex- determination tests. Tracing those clinics is a big challenge for the implementation of the PCPNDT Act.
2. Registration has not been followed by actions, in most states, to prevent sex determination. Many unregistered machines are existing in the areas where surveillance is less and education is even low.

3. Medical associations have been making continuous efforts to undermine the law, for continuation of their profiteering practices. Growing misuse and access to reproductive technologies has lead the Poor illiterate people to consult with quacks leading to fatal results.
4. The main problem in implementation is that in most of the cases, both the service providers and the service seekers operate in agreement to defeat the provisions of the act and there is no complainant.
5. Monitoring of the implementation of the act in data base has lead to increased burden of health department, as no dedicated surveillance staff is deputed in the districts.
6. Medical Professional Ethics need to be promoted. Women need to be empowered regarding their choices for diagnostic of child. She should be counselled at every stage regarding her reproductive rights and to avoid the pressures of family. She should be rather educated to develop her own conscience regarding the diagnostic techniques to give birth to a male or female child.
7. Need of the hour is to promote medical prudence and accountability in private health sector, to cover for the hindrances to PCPNDT Act's implementation. Moreover, relevant landmark schemes like Beti Bachao Beti Padhao and their functioning can be interlinked with the Act's provisions for greater enforcement of both.
8. The absence of clear rules and guidelines regarding the qualification, training and experience required for operating a diagnostic clinic offering ultrasound tests, has resulted in unethical practices.
9. Lack of Institutional bottlenecks like lack of auditing staff, low conviction rate, slow judicial process.
10. Lack of awareness among the masses about demographic consequences for the nation and for the society.
11. The act should be strengthen by complementing it wielding with other powers to create deterrence among the masses perpetuating the practice and should be back by social sensitization programmes across the country especially in rural areas.
12. The Act does not provide very stringent punishment & fine. As a result people are dare to misuse of diagnostic techniques.
13. Only 30,000 cases are registered till now inspite of widespread violation
14. No proper checking and regulation of private hospitals who are illegally testing the foetus. Women being feared about the arrest of their own relatives and hence doesn't contribute to the effective implementation of her own rights as well as the Act.

Sex selection was introduced in India to control population growth but this method being against right to equality and right to personal liberty was banned by honourable Supreme Court and following which PC&PNDT Act was introduced. Sex selection being banned through PC&PNDT Act but illegally it is practiced.

CONFLICT OF MOTHER AND CHILD RIGHTS

Abortion raises a variety of moral, legal, social and medical questions. If the pregnant women finds it necessary to terminate her pregnancy, does she have the right and upto what moment and on what conditions? Since such termination raises a conflict between the rights of the child and the mother (the child's right to survival and the mother's right to terminate the pregnancy), who is competent to adjudicate the claim? The law states, that killing a fetus is not permissible. If then qualifies, this opposition by specifying a series of exceptions. These exceptions purpose to be based on some specific consideration. One such consideration is concerned with the conflict between the rights of the mother and the rights of the child. The mothers right is allowed to prevail, in some situations. The women's supposed superiority in this matter is jurisprudentially explained in terms of the "necessity" of the situation coupled with her right to self-defense. To save the life or the health of the women, on a balance of probabilities, the lesser evil is looked upon as the limitation of the fetus to that of the mother [16].

Section 81 of Indian Penal Code says that an act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not be otherwise be awarded and which if they had allowed, would have inflicted upon him or upon others whom he was bound to

protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. Reliance on the doctrine of self-defense is nothing new to the law. All legal systems recognize the right of a living individual to protect himself from danger to his own life and, for that purpose, to use necessary force even to the extent of causing the death of the person creating the danger. [17]

PRE-CONCEPTION AND PRE-NATAL DIAGNOSIS

Ethical controversies always appear in pre natal screening and specific termination. A great dilemma exists in couples for making decision for termination of handicapping abnormalities. Things become worse where the pregnancy is much wanted one. It may be accepted by many couple, but may not be by some for religious and moral reasons. So, proper counseling must be done and every view of the couple must be respected. Women have no rights of her own to test the sex of the fetus whom she is going to give birth. In the absence of such right, she is forced to give birth to a child of her desire. [18]

SEX SELECTION OF CHILD

Sex selective termination is of grave social concern in India. According to PCPNDT Act, It is unethical and illegal too. Social and family pressures are such that inspite of legislation pregnant woman does opt for prenatal sex determination for selective female feticide. We must realize that selective feticide challenges the right to equality and status of women. Failure to recognize equality of sex is the sign of ageing and decaying society. Women should have the right to have a choice on termination and sex selection, but in India the social dilemmas and family pressures has lead the women to give up their choice. [19]

Other misguided measures taken by the government include putting the onus on pregnant women rather than focusing on medical practitioners, the major culprits. For instance, an news report titled "Pregnant women beware, Big Brother's watching", quotes Director (Health) Dr DPS Sandhu saying that all pregnant women in Punjab who already have two daughters will be placed under observation. If such a woman undergoes an abortion, she will have to satisfy the health authorities about the reasons for this. Women's health activists are up in arms about

this, terming it a violation of fundamental reproductive rights and access to abortion. [20]

That it is possible to stem the problem at the level of the medical practitioners, who provide the tests, has been amply demonstrated in Haryana, which also has a low child sex ratio of 820. The focus here has rightly been on unscrupulous and commercial-minded doctors and not on the women, who are themselves victims of family pressures [21].

COMPULSORY PARENTHOOD, UNWANTED CHILD AND RIGHT OF WOMEN

No discussion on the psychological aspect at MTP can be complete without emphasizing the major negative effects that can occur when a pregnancy is forced on a woman inspite of today's law. This can occur due to emotional pressure from the husband or from the senior member of the family. This can also occur due to misconceptions about safety of modern legalized abortions or enforced religious and moral; values. Several studies have emphasized the long-term harm that can occur to women mental health as a result of unwanted and mandatory motherhood. One should also not forget the fate of unwanted children who tend to be physically and mentally impaired. [22]

THE LEGISLATIVE DIMENSION

The problem was identified in the 90's, when the 1991 Census showed a marked decline in the CSR. Activists and concerned organizations decided to target sex determination rather than the primary cause, which was the legislation itself. This was possibly due to a misplaced apprehension that women's rights would be affected. Unfortunately, the PNDT (Pre-Natal Diagnostic Technique) Act which was enacted in 1994 and amended in 2003 and its later versions, meant to prevent pre natal sex determination proved to be ineffective pieces of legislation. [23]

This discretion was not exercised, as the statistics have quite amply revealed. How can a healthy pregnancy cause grave mental injury to a healthy married woman who is conceiving for the first time or is the mother of one child unless there are exceptional circumstances? Clearly, there is need for introspection by the medical fraternity

regarding sex determination as well as termination within the meaning and intent of the Act. [25]

JUDICIAL DIMENSIONS

Concerned and alarmed with the sex selective abortion (female foeticide), consequent by the constant decrease in the sex ratio despite the PNDT Act being in force, in February 2003 a public interest litigation was filed in the Supreme Court under Article 32 of the constitution against the Central Government and all the States and Union Territories. [25]

The Supreme Court further noticed and showed its concern on the constant decrease in the sex ratio of 0-6 years, which fell from 945 females per 1000 males in 1991 to 927 per 1000 males in 2001. [26] The new figure gives India one of the world's lowest ratios for women to men. The above-mentioned Supreme Court order largely concerns only the implementation of the Act and putting the required infrastructure in place. However, the order entrusts the responsibility of examining the necessity to amend the Act to the Central Supervisory Boards, keeping in mind emerging technologies and the difficulties encountered in the implementation of the Act and to make recommendation to the Central Government. [27]

In case of *Voluntary Health Association of Punjab Vs. Union of India & Others* [28], the Voluntary Health association of Punjab [VHAP], an NGO filed a writ petition in the Honorable Supreme Court of India in 2006 against Union of India and Others, for effective implementation of Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. This was because, for one reason or the other, the practice of female infanticide still prevails, thus affecting overall sex ratio in various States where female infanticide is prevailing without any hindrance. The Parliament enacted the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. This Act was however not completely implemented. In particular, thousands of clinics were operating without registration. There was virtually no case of prosecution. On 31.3.03 the Act was amended and titled as Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act. This Act too came into improper implementation in some of the states as well as no prosecution has taken place against the violators of the act and violating the sex selection and reproductive health rights of women.

CONCLUSION

Various steps are required to adopt for proper handling of Prenatal discrimination and rid the society free of the menace of female foeticide are outlined as suggestion:

1. PCPNDT act should give only the sole right to women in selecting the sex of child and to give birth.
2. Commissions should play an active role in educating the people in general; especially the women should be made aware about their reproductive health rights. National Human Rights Commission, State Human Rights Commission, National Commission for women and NGO's fighting for the rights of the women should play an active role in developing new women's era by educating them for future endeavors.
3. Law alone can tackle the problem may be right, but society plays a vital role in accepting the laws. Hence the social action plan should be prepared at International and National level specially concerning the Reproductive health rights of women.
4. Relative and Neighbours can play an important role in eradication of female foeticide which is done under the family pressure and not as per the women's choice.
5. Special courts should be set up only to protect the reproductive health rights of women, which shall be presided by women Judges who have the knowledge of social problems and rights of the women and that too should have speedy trial.
6. Women welfare organization should play a vital role in developing the awareness among the women about their dignity and rights.
7. Role of Doctors in counseling the family members should be vital specially regarding the sex induced abortions. Doctors only can counsel the family members not to praise them for sex selection but to respect the choice of the women to give the birth to a child.
8. Publicity about the rights of women and awareness campaign should be promoted by the government and NGO's.

9. It is also evident that elite class is more frequently violating this act, some stringent punishment along with naming and shaming in public if found guilty can be used as effective deterrent.
10. *Beti Bachao and Beti Padhao, Sabla*, etc to be implemented nation-wide empowerment of women through reservation in seats in education institution and administration.
11. Famous female leaders and celebs to be presented as role models.

Author is of the view that a cosmopolitan society can only exist if the women will be made empowered about her own rights specially related to use of sex selective techniques which are boon in identifying the disparities of a womb and choice of a women about gender of a child, rather to use the technology for female child abortions which are under family pressures. The author would conclude with the words of an inspirational leader in women's health.

'It is the women's right to decide. It's her body. She is the one taking the risks,' [29]

Wandy Savage

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[29] Said by Wandy Savage an inspirational leader in women's health. As an obstetrician and gynaecologist, a campaigner, and an academic, she has a lifetime of contributions and achievements in women centred care and continues to be a champion of women's rights in childbirth and fertility. Currently honorary visiting professor at Middlesex University.