

Working Efficacy of Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 through the Prism of Judiciary

Abstract

Female foeticide is an age old evil which refuses to die in our society. Female foeticide is the beginning of the suffering of a woman in the course of her long suffering from womb to tomb. The evil is a result of a number of social ills and the reasons for this practice are so intermingled that it is hard to determine a single factor for the prevalence of this menace. Even after so many years of independence female foeticide was prevalent in our country. This worsening situation pressurized the government to enact The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The situation continues to be grim despite the existence of PNDT Act on statute book. The judiciary has played a major part in the interpretation of the provisions of the Act and in many leading cases the Supreme Court has laid down guidelines for strictly implementing this law.

Keywords: Female Foeticide, Sex Selection, Sex Determination, Genetic Clinics, Genetic Counseling Centres, Genetic Laboratory

Introduction

India is the largest democracy in the world and is famous for its unity in diversity which is unparalleled anywhere else, its rich culture and traditions are praised throughout the world. Growth and balanced development of any society will be wholly illusory if equal opportunities are not made available to both men and women for their physical, moral, intellectual and cultural growth and well-being. As human development occupies centre stage in the global development debate, gender equality is emerging as major challenges. The patriarchal social structure accords secondary position to women. Social belief goes that the family runs through a male child and his presence is necessary to carry forward the family lineage. The preference for son gives rise to sex determination leading, in turn, to the abortion of female foetus.

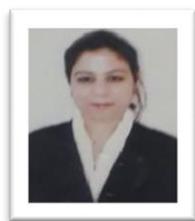
Female foeticide is a grave social evil practiced in our society. Though India has a history of low female sex ratio, what the country is witnessing today is the systematic extermination of the female child with the ultrasound machines serving as an instrument of annihilation. In India we face the problem of adverse male-female sex ratio which is unhealthy to any society. But the reckless practice of female foeticide continues without realizing its ill effects on the society. As per 1951 Census Report, the female-male sex-ratio was 946 to 1000 while in 2011 it decreased to 940 to 1000.

Objective of the Study

The main objective of the paper is to analyse how far judiciary has played a major part in the interpretation of the provisions of the PC and PNDT Act and the guidelines laid down by the Supreme Court for strictly implementing the PC and PNDT Act.

Review of Literature

Women and Law: From Impoverishment to Empowerment- A Critique, by Lalita Dhar Parihar, the book aims at evaluating the ideas and beliefs concerning the relationship of a man to a woman as reflected in law both in retrospective and prospect. In reference to social justice an attempt has been made to define the legal definition between a man and a woman. This book gives the details of causes of abhorrence against a female foetus and deals with Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994.



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Women, Birth Control and the Law, by B.P. Singh. Sehgal deals with problem of rapid growth of population which has affected the human life and the country's socio-economic development so adversely that the planning commission has been persuaded to study seriously. Law and certain socio-legal institutions are integral to the success of any population control and family planning programme. These two factors have not been receiving due importance in the matter of population control. This book is an attempt in the direction of examining the government's population policy and laws directly regulating the fertility of women. On the basis of the findings of this study some recommendations have been made for adoption of new laws or for amendment of the existing ones to cope with the present population problem in conformity with the democratic norm and ideas.

Law Relating to Women and Children, by Mamta Rao is a well-researched and systematically organised study of the law relating to women and children. Numerous laws and amendments essential for the effective enforcement of basic human rights relating to women and children have been discussed in this book. The author has in depth discussed the various crimes committed against women such as rape, dowry death, prostitution, female foeticide, sexual harassment at workplace, domestic violence, obscenity and indecent representation of women etc.

Disappearing Daughters the Tragedy of Female Foeticide, by Gita Aravamudan, the author systematically proceeds to uncover the truth behind the claims of female infanticide and foeticide, however, what she discovers in her quest is more unnerving than she had initially thought of. The longing for a son is not isolated to any pocket or region, caste or class but is found across the length and breadth of the country. The author traces the shift from female infanticide to foeticide with the advancement of technology, as killing a baby after it was born might generate a sense of guilt and invite punishment, but aborting a child in the womb was an unseen and comparatively safe act. Deflating the myth, it is the uneducated and illiterate who indulge in the gruesome practice of killing a girl child, the author shocks the reader with her finding that the sophisticated Delhi with its large urban educated population was the city where most girls were going missing.

Legislative Perspective

The crime against women is ever increasing and it is becoming a herculean task for parents to keep their daughter's dignity safe. This is regarded as one of the major causes for people not to have female child. They are responsibilities; their chastity is required to be protected always. Even a careerist woman decides to keep a male foetus, because she knows that in her absence from the home, it will be difficult to look after the girls and provide them with a secure environment. What happened in Delhi on 16 December 2012 is a reason enough for the parents to deem girl child to be a social burden. In Uttar Pradesh in the year 2014, a little infant girl of 6 months was raped by a migrant labourer and in Surat an old lady

of 85 years was made the sacrifice of the lust of a 25-year-old man. No female is safe in India irrespective of her age. According to the National Crime Records Bureau 2012, a total of 244270 incidents of crime against women, both under Indian Penal Code and Special and local laws, were reported in the country, out of which 8233 were dowry deaths, and 24923 rape cases.

The situation is that it is not only preference for son but also of daughters' non-preference which leads people to take extreme measures, like, elimination of unwanted female foetus. This evil is perpetuating because of the fact that it has socio-cultural and religious support. The son centric society has not accepted the law against sex determination tests. All the reasons like economic burdensomeness of daughter, social responsibilities of daughters and their future being unsafe have all contributed to the fact that the law has failed to check the growing evil of female foeticide.

In 1860, The Indian Penal Code was enacted. This Code in Sections 312 to 316 under Chapter 16 provides punishment for causing miscarriage with consent or without consent of the woman. As per Section 312, the offence of foeticide may be committed with or without the consent of woman. The said offence is non cognizable and non-compoundable. If the miscarriage is not caused in good faith, then the offender may be punished with imprisonment for a period of three years or fined or with both and if the miscarriage is caused without the consent of woman then the same may attract 10 years imprisonment and fine.

The need for liberalizing the law relating to induced abortions was felt in India. Therefore, the central Family Planning Board expressed anxiety on the reported increase in the number of induced abortions under unsanitary conditions affecting the health and life of the pregnant women. Accordingly, the Medical Termination of Pregnancy Act was passed in the year 1971. The main objective of the Act was to save the pregnant woman's health and strength. Abortion is an offence for which the mother as well as the abortionist is punished except where it is induced to save her life. The time of enactment of this coincided with the time when hard efforts were being made by the Government to control population. This was the time when targets were fixed for all government departments to bring family planning cases and abortion was an accepted family practice. The Act though was not designed for the purpose of limiting the family size, yet knowledgeable people including many in the medical profession and in the government took it as a measure for bringing down the population, particularly in view of Explanation (II) to sub-Section (2) of Section 3 of The Medical Termination of Pregnancy Act, 1971. The abortions under the Act can be justified in a few cases alone, e.g., when the continuance of the pregnancy would involve a risk to the life of the pregnant woman; when the child if born would suffer from severe abnormalities; where continuance of pregnancy would cause great mental injury to woman and where

pregnancy is the result of the failure of a contraceptive device.

The developments in medical science relating to pre-natal diagnostic techniques added a new dimension to the whole issue. It became possible to use pre-natal diagnostic techniques for finding out the sex of the foetus in mother's womb. This technique came as a boon for the Indian society. In this cultural milieu, pre-natal sex determination shops came up in every town, mohalla and street. It is noteworthy that the government departments, who were given family planning targets, persuaded and even in few cases pressurized the pregnant women to undergo abortions to achieve their family planning targets. The doctors of All India Institute of Medical Sciences (AIIMS), New Delhi started using these techniques to produce only sons. The poor Indians soon realized that it was possible to keep the family size small and at the same time to have sons. The gross misuse of technology enlightened a gynaecologist at the same Institute to step into and check this evil. She had discovered that in most of the cases, female foetuses were aborted even when there was no genetic disorder. At this the Indian Council of Medical Research came into action. It directed the AIIMS to use these tests only for research purposes and sought to put an end to this practice.¹ But by then it was too late. The people had come to know that there could be a supervening event which could prevent birth of unwanted daughters.

This worsening situation pressurized the government to enact The Pre Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. With the advancement of science and technology, certain techniques have been developed by which even before conception, the sex of the child can be selected. Therefore, certain amendments were made in the PNDT Act, 1994 and now it has been entitled as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. It prohibits sex selection completely either before or after conception. It regulates the use of pre-natal diagnostic techniques for legal or medical purposes and prevents its misuse for illegal purposes.

As per Section 3 of the Act no medical geneticist, gynaecologist, paediatrician, registered medical practitioner (RMP) or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic technique at a place other than a place registered under this Act except for the purposes of detecting any chromosomal deformities. Advertising sex selection in any form is punishable under the Act and nobody by any means can disclose the sex of the foetus to the prospective parents or anybody else as per the Act. Further, the genetic clinics have to keep a record of the ultrasound tests conducted in their laboratories otherwise an adverse opinion may be formed that the test was conducted for the purpose of sex determination. It would be deemed that the female was forced to undergo the test unless there is evidence to the contrary. In case a RMP is convicted under this Act, the State Medical Council may remove that RMP's name from its register for a period of 5

years for the first conviction and if he/she is convicted again then his/her name may be permanently removed from the Register of State Medical Council. If any person seeks the help of any genetic clinic or imaging centre for the purpose of sex selection then he may be punished with an imprisonment of 3 years and fine upto Rs 50,000/- for the first such act and for the second such act the punishment may increase to 5 years imprisonment and fine up to Rs. 1 Lakh.

Since infanticide requires at least nine months, female foeticide up to three months, female embryocide potentially just a few weeks, and sperm separation a few days; it is becoming easier to produce only boys. Sex determination is done by methods, like, amniocentesis, chorion villus biopsy, etc. The discovery of cheaper ultrasound technique has proved to be a nemesis of the female foetus in India. In recent times, many new and sophisticated reproductive technologies have come up complicating the problem of female foeticide. The menu is an elaborate one: Karyotyping, which analyses chromosomal abnormalities and incidentally reveals the sex of the foetus, a procedure that takes around 11 days and costs around Rs.5000/-, Fluorescent in situ Hybridization, which has 95% accuracy, takes two days and costs Rs.10000/-, Comparative Genomic Hybridization requires two days; polymerase chain reaction, the results of which are available in a day with a cost of Rs.5000/-, and Pre-Implantation Genetic Diagnosis (PGD) where the results take about a week. There is so much advancement in the science and technology that a pregnant woman can easily get the sex determination test kit at home and conduct the test herself. No expertise is needed. The test kit is readily available online and one can get it at www.tellmepinkorblue.com. Thereafter, the role of doctor comes into play where if the sex determination test kit shows as is said "negative", abortion from qualified doctor is sought.

Section 24 of the PC and PNDT Act, 1994 and Section 106 of The Indian Evidence Act are in consonance with each other. Section 114 of The Indian Evidence Act provides unequivocally that the court may presume existence of certain facts. This rule seems to have been incorporated in the PC and PNDT Act as well. Section 24 of the PC and PNDT Act, 1994 says that unless the contrary is proved it would be deemed by the court that the woman was compelled by her husband or any other relative if it is shown that she underwent an ultrasound test but not for any of the purposes which are mentioned in Section 4 of the Act.

The PC and PNDT Act under Section 30 provides that if the Appropriate Authority, believes that illegal practice of sex determination test is being conducted in any genetic clinic or centre, then at all reasonable hours the Authority may enter and search the premises. The provisions of the Criminal Procedure Code, 1973 (Cr.P.C) are to be read with this Section. Correspondingly, if we have a look at the Criminal Procedure Code, it declares that the police may enter and seize any document or record as per Sections 94 to 106. Reading minutely, it comes to the fore that the Cr.P.C does not mention any time when

the search may be conducted. Section 100 further provides that in the absence of specific provisions of any other Act, the provisions of Section 100 would apply.² Even if we go through the provisions of PC and PNDT Act, Section 30 declares that provisions of the Cr.P.C shall be applicable to searches and seizures conducted under this Act.

In *A.P. Kuttan v. State of Kerala*,³ it was held that though there is no such provision but still it is not proper to make searches at night unless there are unavoidable circumstances. Thus, it can be seen that the wording of Section 30 of the PC and PNDT Act that the search can be carried out at reasonable hours in fact frustrates the very purpose of search as the illegal practices are usually carried out at not reasonable hours when there is least possibility of searches.

The PC and PNDT Act is comparatively a new piece of legislation and at times the judicial officers themselves do not know the new legislations. The law has not been able to check this evil because of lack of proper implementation. The law has not been fruitful because of the fact that it is not in consonance with the needs of the society. The people seem to be quite perplexed as the government itself wants a small family norm to be practiced, yet it opposes the sex determination tests. They argue that since every family wants at least one son if not two, the best way to ensure a small family is to go for the test and act as per the results. Today even the parents aspire for a better life for themselves and for this the number of children has to be curtailed, which can now be fine-tuned more carefully with sonography.

It is crystal clear that no family is considered complete till at least one son is present in it even though two daughters are there. An ideal family should consist of two children but out of these two children both cannot be females, they can be males or 1 male and 1 female but never two females. Son's preference can be seen amongst all the classes, whether rich or poor, working non working, Hindus, Muslims, Christians, all want at least one son in the family.

Judicial Response

The Courts in India have expressed deep anguish against this horrific practice and have been trying on their part to stop it. The Judiciary has played a major part in the interpretation of the provisions of the PC and PNDT Act and in many leading cases the Supreme Court has laid down guidelines for strictly implementing this law. Time and again the Apex Court has issued orders to implement this law in letter and spirit. A number of cases came up before the Supreme Court seeking strict enforcement of the law against female foeticide.

A concern was raised through public interest litigation(PIL) filed by NGO's under the title *CEHAT v. Union of India*⁴ in the Supreme Court of India. The case was initiated by Centre for Enquiry into Health and Allied Themes (CEHAT), a research organization; Mahila Sarvangin Utkarsh Mandal (MAUSAM), a Non-governmental Organization and Dr.Sabu M. George, a civil society member. It many lacunae in the

implementation of this law. A total of six orders were passed by the Court in this case. It exhibits the deep concern and the anguish felt by the Apex Court towards the social evil of sex selection followed by elimination of foetus if found to be female. The Supreme court was equally concerned with the apathy on the part of the government in the implementation of law which aims at preventing such a social evil. The Supreme Court directed the centre and state Governments to monitor the functioning of diagnostic centres. The Court compulsory registration of all the diagnostic centres and empowered state appointed committees to seize the ultrasound Machines, if they were misused. Moreover, Central Government was directed to appoint Central Supervisory Board to look into the matter and submit the report quarterly to authorities. Further, the Central Government was directed to create public awareness against the practice of pre-natal sex determination and female foeticide through programmes on electronic media.

In *Hemant Rath v. Union of India*,⁵ it was said the Supreme Court though had issued various directions in CEHAT case but several States did not take effective steps to implement the law in an effective manner. Hundreds of bones of infants were found near nursing homes and genetic clinics which showed that pre-natal sex determination was still rampant. The High Court asked the State government to immediately appoint Appropriate Authority and Advisory Body as contemplated under Section 17 of the Act within 6 weeks and thereafter take requisite steps.

In *Qualified Private Medical Practitioner v. State of Kerala*,⁶ it was said by the Court that all the ultrasound centres should be registered whether they conduct pre-natal diagnostic techniques or not. In the case of *Vinod Rai v. Union of India*,⁷ The validity of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act was challenged on the ground that the provisions of the Act were violative of Article 21 of the Constitution of India. The High Court held that "these rights, even if, further expanded to the extreme of the possible elasticity of the provisions of Article 21, cannot include right to selection of sex, whether pre-conception or post-conception." It was observed by the High Court that "this Act is factually enacted to further the right of the child to full development as given under Article 21, which gives to every child right to full development. A child conceived is therefore entitled under Art 21, as held by Supreme Court, to full development whatever be the sex of the child." Accordingly, High Court dismissed the petition by holding that it does not even make a prima facie case for violation of Article 21 of the Constitution.

In the case of *Qualified Private Medical Practitioners and Hospitals Association v. State of Kerala*,⁸ various hospitals situated in different parts of Kerala had sought a declaration that laboratories and clinics which did not conduct pre-natal diagnostic tests using ultra sonography would not come within the purview of the Act and the Authorities under the Act should not insist for registration of all ultrasound scanning centres irrespective of the fact whether they

were conducting ultra sonography or not. Considering the provisions of Section 4(!) and Section 22 of the Act and keeping in mind the object of the Act to prevent misuse of any pre-natal diagnostic techniques, it was held that authorities would be free to conduct inquiries or inspection at any place where such device was available and to take action under the Act in case any person or institution was indulging in activities contrary to the provisions of the Act, irrespective of the fact that such an institute was registered or not under the Act. By this judgement, authorities under the Act were empowered to take action even against an unregistered institute and to ensure due compliance of the provisions of the Act.

In *Suo Moto v. State of Gujarat*,⁹ the full bench of the Gujarat High Court was deciding on several important legal issues, namely,

1. Whether, the onus lies on the Authorities to prove that there was contravention of the provisions of Section 5 or 6 of the Act?
2. Whether any deficiency or inaccuracy in filling Form-F as required under the Statutory provisions is merely a procedural lapse?
3. Whether the provisions of the proviso to sub-section (3) of Section 4 of the PNMT Act required that the complaint should contain specific allegations regarding the contravention of the provisions of Section 5 or 6 of the act?

While answering these legal issues, it was held by the Full Bench that the Rules were made and the Forms were prescribed for implementation of the Act to plug the possible loop holes in strict compliance of the Act and, hence, they were very important for implementation of the act and for the prosecution of the offenders that any improper maintenance of such records was itself made by the Act equivalent to violation of the proviso of Sections 5 and 6 by virtue of the proviso to sub-section (3) of Section 4. It was further held that improper maintenance of records also had consequences other than prosecution for the deemed violation of Section 5 or 6 because Section 20 provided for cancellation or suspension of registration of genetic counselling centre, genetic laboratory or genetic clinic in case of breach of the deeming provisions of proviso to subsection (3) of Section 4, contravention of the provisions of Section 5 or 6 of the Act was legally to be presumed. Hence, proviso to sub-section (3) of Section 4 of the act did not require that the complaint alleging the inaccuracy or deficiency in maintaining records in the prescribed manner should also contain allegations of contravention of the provision of Section 5 or 6 of the Act. It was further held that the burden to prove that there was contravention of these provisions did not lie upon the prosecution. It was accordingly held that deficiency or inaccuracy in filling Form-F prescribed under Rule 9 of the Rules made under the PNT Act, being a deficiency or inaccuracy in keeping record in the prescribed manner, was not a procedural lapse but an independent offence amounting to contravention of the provisions of Section 5 or 6 of the PNMT Act had to be treated and tried accordingly.

The case of *Dr. (Mrs.) Suhasini Umesh Karanjkar v. Koihapur Municipal Corporation and*

Ors,¹⁰ is a reference made to larger Bench by the Division Bench reconsidering the anomalous position of the decision delivered by the Two Judge Aurangabad Bench in *Dr. Dadasheb Popatrao Tarte v. State of Maharashtra*. In that writ petition, seizure of ultra sonography machine was challenged on the ground that Section 30 of the Act did not empower Appropriate Authority to seize the sonography machine used in the Genetic Clinic. The High Court had accepted the said contention holding that reading of Section 30 and rule 12 of the Act did not empower the Appropriate Authority to seize the ultra-sonography machine and directed its return to the petitioner. The matter was considered in detail by the Full Bench, which held that the analysis of the provisions of the act was sufficient to hold that the expression "Material Object" in respect of which the power to seize and seal was conferred upon the Appropriate Authority/Authorized Officer, included ultrasound machines, other machines and equipment which were used for pre-natal diagnostic techniques or sex-selection techniques and, hence, it could be held as settled law that Appropriate Authority had power to seize the ultra sound machine used in Genetic Clinics. The High Court also made reference to the disturbing figures of the declining National Sex ratio over the last five decades reflecting that in the census of 2011, the National female sex ratio has fallen to 914. The High Court also felt distressed with the fact that a number of cases for trial of offences registered under the Act were pending in the courts for a long time. The High Court, therefore, directed that all cases under the Act should be taken up on priority basis.

Conclusion

The female foeticide continues to be practiced in our country because of a variety of reasons ranging from economic worthlessness of the female child to the evil custom of dowry. The causes of female foeticide lie buried deep in the social structure of our society. The evil is a result of a number of social ills and the reasons for this practice are so inter-mingled that it is hard to determine a single factor for the prevalence of this menace. The situation continues to be grim despite the existence of PC and PNMT Act on statute book. 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 Judiciary had to take upon itself the task of giving effect to the said Act. The Courts have pronounced the PC and PNMT Act as a significant piece of legislation which has to be applied with full force and dedication.

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