



## Felony of female Foeticide – Role of judiciary in implementation of PCPNDT act in India

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### Abstract

The worst manifestation in our country is the gender discrimination. India is one of the several countries where higher sex ratio is observed and equally patriarchal in nature. Maharashtra was the first state to adopt law against the practice in the 1988. With the increasing availability of sex screening technology in India, the government of India passed Pre-natal Diagnostic Techniques Act (PNDT) in 1994. This law was further amended into the Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) PCPNDT Act in 2004, to deter and punish parental sex screening and female foeticide. However there are concerns that PCPNDT Act has been poorly enforced by authorities. God is the author of life and nobody should have right to take it. The unscrupulous murder of female foeticide has no ground for justification. More and more people are in urban as well as rural parts all over the community getting involved in this malpractice. The author of this article clearly explains the reasons for the heinous crime of female foeticide and role of judiciary in implementation of PCPNDT Act and explains analytically the lacunas and their remedies for controlling and restricting the female foeticide.

**Keywords:** Female foeticide, gender discrimination, sex determination, techniques, son preference, judiciary

### 1. Introduction

India is one of the several countries where higher sex ratio is observed and equally patriarchal in nature. A set of hierarchical systems prevails in all tiers of the social order. Right from the ancient scriptures, men are glowingly praised as the key to continue the family lineage. A girl is forced to undergo multiple pregnancies/abortions, until she fulfills her lifelong goal of being a breeding machine that produces male offspring as per the needs of the family.

According to the Tribuen, 66109 cases of female foeticide as a result of sex selective abortions were reported in the country in the year 2001, where as in 2000 the number was 69298. Fatehgarh Sahib (Punjab) has lowest female sex ration in the country <sup>[1]</sup>. According to UNISEF, India has less than 93 women for every 100 men against the world's average of 105 women for every 100 men. Due to which today there are 1.4 million missing girls in the age group of 0 – 6 years <sup>[2]</sup>. Infanticide and foeticide are like a part of life in both urban and rural India therefore, the provisions of a progressive law like the pre-natal Diagnostic Technique (Registration and Prevention of Misuse) Act 1994 remain a worthless scrap of paper. The deep seated bias in India against the girl child, with the availability of the most modern scientific technique to determine the sex of the fetus and abort thereby has resulted in large scale female foeticide in India. Foeticide is one of the most common causes of maternal mortality. The female infanticide in the past and foeticide in the present are two sides of the same coin.

The unscrupulous murder of female foeticide has no ground for justification. More and more people are in urban as well as rural parts all over the community getting involved in this malpractice. God is the author of life and nobody should have

right to take it. The author of this article clearly explains the reasons for the heinous crime of female foeticide and role of judiciary in implementation of PCPNDT Act and explains analytically the lacunas and their remedies for controlling and restricting the female foeticide.

#### 1.1 Factors responsible for female foeticide.

In the Vedic age 1500-1000 BC women in India were worshipped as goddesses. However, with the passage of time, the Muslim age 1026-1756 witnessed a sharp decline in their status and in the British regime they were looked upon as slaves of slaves <sup>[3]</sup> There are so many factors responsible for the decline of the girl child in Indian population.

1. It is a general perception that a woman is considered a financial obligation as money spent on bringing her up, educating her, marrying her will not be repaid back. As Justice YK Sabharwal, Chief Justice of India, rightly said <sup>[4]</sup> that investing in a daughter is like "watering your neighbor's lawn".
2. Dowry system is widely prevalent in all communities and castes and is illegal in India under the Dowry Prohibition Act. As a result the daughters are considered to be the economic liability.
3. Hinduism allows only a son or male relative to light the father's pyre. Believing that father gets salvation after his death. On the other hand, Hindu books and Rig Veda hold women in a much respected light. Many women, in these texts, were highly regarded and respected. This may be one of the main important factors to have the male child.

<sup>1</sup> The Tribune Feb.1<sup>st</sup> 2003.

<sup>2</sup> N.S.Bawa, *Female Foeticide: A Crime Let us fight it out*, 81 (Harijit Printing Press, Mohali, India 2002).

<sup>3</sup> B.R.Sharma and M.Guptha, *Gender based violence in India – a never-ending phenomenon*, 6(1) International women's studies, 114-123, (2004).

<sup>4</sup> in his speech on "Eradication of Female Foeticide, delivered in Paritala on December 17<sup>th</sup>, 2006"

4. The people are well educated but the mindset and attitude of the people yet to be changed in order to curb the female feticide in Toto.
5. Advance in technology like ultra-sonography is now conveniently available at the clinic next door. The easy availability of mobile scanning machines and doctors are doing brisk business in rural areas. It has been estimated that there are 25,770 officially registered pre-natal units in India <sup>[5]</sup>.
6. Another reason for female feticide is parents much worried about the safety of the daughter rather than son.

The above said factors are one way or the other directly or indirectly are responsible for female feticide. Government passed laws from time to time to curb the heinous crime but the Government itself can't bring down the crime at once unless the mindset/attitude of the people changed it is sheer waste of time and money to further passing of the laws. Now let us understand the existing laws on female feticide and its importance.

In 1988, the State of Maharashtra became the first in the country to ban pre-natal sex determination through enacting the Maharashtra Regulation of Pre-natal Diagnostic Techniques Act. At the national level the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted on September 20, 1994. This act came into force in the year 1996. The Pre-conception & Pre-natal Diagnostics Techniques (PC & PNDT) Act, 1994 was enacted in response to the decline in Sex ratio in India, which deteriorated from 972 in 1901 to 927 in 1991. Female infanticide had been prohibited through legislation in pre-independence period and certain provisions were included in the Indian Penal code, 1860 for punishing causing miscarriages and other such offences, but with the advent of diagnostic technology to detect the sex of the fetus very early during pregnancy, a need was felt for a specific law to prevent the misuse of technology which could lead to female feticide.

The Act was amended in 2003 following a PIL filed in 2000 to improve regulation of technology capable of sex selection and to arrest the decline in the child sex ratio as revealed by the Census 2001. With effect from February 14, 2003, due to the amendments, the Act is known as the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The Hon'ble Supreme Court, taking a serious view of the onslaught of sex-selective discriminatory practices by medical fraternity, and connection it may have with the use of pre-natal sex determination, directed the Centre to implement the PC & PNDT Act in all its aspects <sup>[6]</sup>. The order came following a public interest petition filed by the centre for the Enquiry of Health and Allied Themes (CEHAT), the Mahila Sarvangeen Utkarsh Mandal (MASUM) and Dr. Sabu George, who had done extensive research in this area.

The basic purpose of the Act is three-fold, with a focus on averting further decline in sex ratio:

1. Regulation of Pre Natal Diagnostic Techniques only for legitimate uses as prescribed under the Act;

2. Complete ban on misuse of pre-conception diagnostic techniques' (PCDT) and pre-natal diagnostic techniques' (PNDT) for sex selection / determination;
3. Absolute prohibition of selection of sex of the fetus, both before and after conception, except for detecting sex linked diseases

### 1.2 Amendments to the Act mainly covered

- i) bringing the technique of pre-conception sex selection within the ambit of the Act,
- ii) Bringing the use of Ultrasound Machines within the purview of the Act more explicitly,
- iii) Further empower the Central Supervisory Board for monitoring the implementation of the Act,
- iv) Constitution of State level Supervisory Boards and a multi-member State Appropriate Authority for better implementation,
- v) More stringent punishments,
- vi) Empowering the Appropriate Authorities with the powers of the Civil Court for search, seizure and sealing the machines/equipments/records of the violators, including sealing the premises and commissioning of witnesses,
- vii) making mandatory the maintenance of proper records in respect of the use of ultrasound machines
- viii) Regulate the sale of ultrasound machines only to the registered bodies.

In order to stop female feticide and declining the sex ratio, the parliament passed the PCPNDT Act 1994 and amended from time to time to have effective implementation of the act and misuse of the parental diagnostic techniques for sex selection. However the act has not been properly and effectively implemented throughout the country. The judiciary plays very important role for effective implementation of the said act.

### 1.3 The role of judiciary

The judiciary has also taken serious note of the matter which is reflected in a number of judgments. Dr. Mrs. Suhashini Umesh Karanjakar V. Kolhapur Municipal Corp <sup>[7]</sup> Wherein the Hon'ble Bombay High Court held that words "any other material object" used in Section 30 of the Act and Explanation (2) to Rule 12 clearly provide that Appropriate Authority is empowered to seize and seal ultra – sound machine, other machines and equipments capable of aiding or assisting in sex selection. Considering declining sex ration in Maharashtra from 913 in 2001 to 883 in 2011, the directions were given for expedite disposal of the pending cases under the Act with utmost priority preferably within one year.

In another case Dr. Pradeep Ohri V. State of Punjab and others <sup>[8]</sup> the ration laid down in this case is that removal of the name of medical practitioner from the register of the Medical Council for a period of 5 years (before the amendment of 2years) on his first conviction is in nature of penalty imposed on him due to his conviction under the Act.

In the case of Ajith savant Majagvai V State of Karnataka <sup>[9]</sup> The court held that "it is unfortunate that in an age where people are described as civilized, crime against female is

<sup>5</sup> Female feticide continues unabated in India, available at [www.dailymail.co.uk](http://www.dailymail.co.uk). 4<sup>th</sup> July, 2006.

<sup>6</sup> AIR 2003 SC 3309.

<sup>7</sup> 2011 (4) AIR Bom R 326 (F.B.)

<sup>8</sup> AIR 2008 P & H 108

<sup>9</sup> 1997, 7 SCC 110.

committed even when the child in the womb as the female foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable. To torment a wife can only be described as the most hated and derisive act of a human being.”

In *M.C. Mehatha V State of Tamil Nadu and others* <sup>[10]</sup> a three judge bench, while dealing with the magnitude of the problem in engagement of the child labour in various hazardous factories or mines, commenced the judgment thus, when the female foeticide takes place every woman who mothers the child must remember that she is killing her own child despite being a mother that is what abortion would mean in social terms. Abortion of female child in its conceptual eventuality leads to killing of women.”

In *Center for Enquiry into Health and Allied Themes (CEHAT) and others V Union of India and others* <sup>[11]</sup> The two judge bench commenced the judgment starting that the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has soothing effect on the parents. The court also commented on the immoral and unethical part of it as well as on the involvement of the qualified and unqualified doctors or compounders aborts the fetus of a girl child. In this case the court had noticed the misuse of the pre-conception and pre natal diagnostics techniques act and gave various directions for its proper implementation.

Keeping the ineffectiveness of the pre-conception and pre natal diagnostics techniques act and the non-compliance of the directions of the apex court given earlier decisions in view., an NGO in the name of voluntary health association of Punjab filed a writ petition before the Supreme Court in the name of voluntary Association of the Punjab V Union of India <sup>[12]</sup> and others. In the response to the writ petition Supreme Court on 4<sup>th</sup> March, 2013 has passed the following orders providing more teeth to the act for better affectivity.

1. All courts must dispose cases filed under the act within 6 months.
2. State governments must set up special cell to monitor the progress of the cases filled under the act.
3. State governments must map all registered and unregistered ultra-sonography centers within 3 months.
4. State and district and advisory boards must ensure that manufacturers and sellers of ultra-sonography machines do not sell the machines to any and unregistered centers.
5. All genetic clinics and laboratories must maintain statutory records and forms. Action will be taken against them if they fail to do so.
6. Central and State Supervisory boards must meet every six months to oversee the effective implementation of the act.
7. They must gather information on breach of the act and initiate legal proceedings.

<sup>10</sup> AIR 1997 SC 699,

<sup>11</sup> 2001 5 SCC 577,

<sup>12</sup> 2013 (3) SCALE 195; Decided on 4-3-2013 (SC) [K.S. Radhakrishnan and Dipak Misra, JJ.]

8. The state Advisory Committee and District Advisory must report details of the changes framed and the convictions given under the act of the state medical councils so that they may take appropriate action.

9. The authorities should take steps to seize the machines which have been used illegally and contrary to the provisions of the act and its rule. These seized machines can also be confiscated under the provisions of the code of criminal procedure and be sold in accordance with law.

Petitions challenging constitutional validity of the Act: -

In the case of *Vinod Soni and Anr. -Vs- Union of India* <sup>[13]</sup> a very interesting argument was advanced in this case by the Petitioner that the right to life guaranteed under Article 21 of the Constitution includes right to personal liberty which in turns includes the liberty of choosing the sex of the offspring and to determine the nature of the family. Therefore, it was contended that the couple is entitled to undertake any such medical procedure which provides for determination or selection of sex. The High Court however exposed the fallacy of this argument by observing 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.” After making reference to the decisions of the Supreme Court, which explain that Article 21 includes the right to food, clothing, decent environment and even protection of cultural heritage, the High Court held that “these rights, even if, further expanded to the extremes 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. A child conceived is, therefore, entitled under Article 21 to full development, whatever be the sex of that 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 *Vinod Soni and Ans. Vs. Union of India*, <sup>[14]</sup> The petitioners, who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994. The Hon'ble Apex Court held that, “cases are permitted as mentioned in sub clause 3 of section 4, where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at pre-conception stage or post conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomenon. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child which is come into

<sup>13</sup> 2005 Cri.LJ 3408.

<sup>14</sup> 2005 Cril. L.J. 3408.

existence as a right to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination, to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right.”

Mr. Vijay Sharma and Mrs. Kirti Vs. Union of India <sup>[15]</sup> while upholding the constitutional validity, the Hon'ble Bombay High Court has held that the section 4 cannot be called that it violates Art 14 of constitution of India. Section 4 regulates use of the said techniques. Section 4(2) states that the said techniques shall not be conducted except for the purpose of detection of (i) chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) hemoglobinopathies; (iv) sex linked genetic diseases; (v) congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board that too on fulfillment of any of the conditions laid down in subsection 3. Thus the said techniques are to be used only to detect abnormalities in the foetus and not for sex selection or sex selective abortions to couples who are desirous to have a male child even after birth of daughter.

The Judiciary in India observed 2007 as 'Awareness year of female foeticide' and will deal in a strict manner against those responsible for this crime, Chief Justice of India Y K Sabharwal while delivering his presidential address at the state level seminar on 'Eradication of Female Foeticide', jointly organized by the Punjab Department of Health and Family Welfare and Punjab Legal Services Authority, he called upon the people to get rid of themselves of the son-obsession "as our lives will be just as fulfilling, if not more, if our children were to be girls". The law can play an important role in checking this menace of female foeticide, he added. 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. Warning the medical fraternity, there ought to be stricter control over clinics that offer to identify the sex of a foetus and stronger check on abortions to ensure that these are not performed for the wrong reasons. Doctors must also be sensitized and strong punitive measures must be taken against those who violate the law, Justice Sabharwal said further that if this unhealthy trend continued for some more time, then probably it would disturb the demographic composition of the society, giving rise to many matrimonial problems. "It requires the commitment, devotion and sensitivity of all to eradicate this deep rooted social problem," he noted. The "son syndrome and obsession" must be wiped out from the minds and we must give equal importance to the girl child, otherwise this trend would lead us nowhere. "I would just like to say that this is not so much a legal problem but it is a social disease", he added.

Evil of female feticide is not creation of tomorrow but lies in root of Indian Society and worsening day by day due to which Indian Judiciary should come forward with new laws/amendments to the existing laws to control the practice.

#### 1.4 Conclusion and Suggestions

The legislations enacted in this behalf are not sufficient to curb the heinous crime. Orthodox views regarding women need to be changed. The PCPNDT Act is to penalize and punish the violators of this crime strictly. There is necessity of mobilizing the political will to ensure proper and better implementation of the provisions of the Act. The pernicious acts of female feticide and coercive abortions have to end before women becomes endangered species.

The prenatal diagnostic Technique (Prevention and Misuse) 1994 is a master piece of legislation which prohibits female feticide in India. The object behind this act is to maintain the balance the sex ratio. There is a need to take protective measures by the legislature, administrator, non-governmental organization and society. The provisions of PCPNDT Act 1994 should be strictly implemented. Legal measures will not bring about revolutionary change in existing women's conditions but it acts as supplement. Media both print and electronic plays a very significant role in removing gender bias and developing a positive image of the girl child in the society. It is not easy to change overnight the attitude of women towards female feticide. It takes time to change the mindset of the public. The government has initiated many programs like Beti Bachao, Beti Padhao and Sukanya Samridhi Account to encourage the birth rate and education of girl child and also end gender discrimination practices Government should see these schemes should be properly implemented and finally the directions of the courts regarding the prevention of female feticide should be strictly followed by the Central Advisory Board and Appropriate Authority.

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<sup>15</sup> AIR 2008 Bom. 29.