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Female Foeticide and Role of Judiciary in Elimination of Socio- Legal Practice in Present Era

Prof. (Dr.) Yogendra Singh¹ and Brajraj Singh²

“Every newborn baby is God’s opinion that the WORLD should go on”

– Carl Sandburg

ABSTRACT

Constitutional mandate provides equal protection and opportunities to every human being without any gender biasness. But due to the loopholes in the legislative approach some anti- social evils like female foeticide has become a social threat in Indian society since the advent of technological innovation. Feticide, often known as infanticide, is the killing of a foetus during pregnancy or after birth. The legislation permits foetal abortion if the particular circumstance is unavoidable, but sex-selective abortion is not acceptable. In societies where there is a strong preference for sons, the availability of these procedures has worsened the female sex ratio and is eradicating girls from social situations by improperly employing the technique, which is primarily intended to discover foetal anomalies. Although the role of judiciary is too vital to prevent the misuses of such practices and diagnose its main cause and reconsider to The Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 after the CEHAT landmark judgment. It is urgent imposed moral obligation against to medical community, the legal enforcement system, political system, NGO’s, women's organizations, the media, educators, and the communities as a whole make concrete and thorough efforts. The goal of this article is to analysis the role of judiciary in awaking and elimination of such heinous practice from the Indian society.

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KEYWORDS

Gender Selection, Sex ratio, Female foeticide & Infanticide, Sex selection techniques, Indian Supreme Court Role

INTRODUCTION

The Constitution of India is the basic law of the country, which includes the fundamental rights³ and directive principles⁴ for every citizen. The Indian Constitution guaranteed the various rights such as fundamental rights and directive principles of state policy (DPSP) for the welfare of the human life. It is significant to note that the Constitution mandates special protection of children through adoption of positive discrimination by making special provisions for them⁵. The fundamental rights in the Constitution of India impose on the State the primary responsibility of ensuring that all the needs of the children are met and that their basic human rights are fully protected.⁶

As far as Indian society is concerned, it is a representation of high cultures and an adherent to high moral standards. The social interactions in Indian society are structured according to certain patterns that date back to ancient times. Support their continuation from the immoral era on earth without any gender prejudice for any gender. Women have always been supported by Indian society's traditional values in all spheres of life. Women have traditionally enjoyed equal standing with males in all facets of life, dating back to the

³ The violation of Fundamental Rights can be brought before the Courts. A writ petition can be filed in the Supreme Court and High Courts.

⁴ The Directive Principles lay down the guidelines that the Governments have to follow. Although the violation of these Principles cannot be taken before the Courts, yet because of judicial interpretation, many of the Directive Principles relating to children have now become enforceable through legal actions brought before the Courts. Articles 39(e) and 39(f) direct that the State policies be directed towards securing children because of their tender age.

⁵ Constitution of India, Article 15(3).

⁶ Article 23 prohibits trafficking of human beings including children and Article 24 mandates that no child below the age of 14 years can work in any hazardous occupation or industry.

Vedic era. But because of the deterioration of Indian society's traditional values, sexism, poverty, and the dowry issue, among other things, women now live in an environment where they are treated less favourably than men.

Even though we view this century as evolved and modern, women continue to face significant dangers to their ability to maintain respect, equality, and dignity. One of the greatest types of violence against women may be female foeticide, in which a woman's "right to live," her most fundamental and basic right, is violated. The practise of deliberately eradicating female embryos or fetuses following prenatal redetermination, which results in the death of girl children even before they are born, is not a recent problem in India. The term "foeticide" refers to the killing of a foetus before birth. Instead of using the phrase "foeticide," the term "sex selective abortion" is preferable because it identifies both of the morally repugnant aspects of this procedure.

The society should not want that a girl child take birth into the society and for the prevention of birth of girl different efforts are made by the society. The societies as according to the old mythology give preference to the son child with comparison to the girl child. Such type of practices violates the fundamental rights of women and it is against to the concept of women empowerment into the territory in India. It disregards the policy of Article 51 A (e), which states that it shall be the obligation of every citizen of India to abandon behaviour insulting to the dignity of women, and it violates Article 39 (c) of the constitution, which states that the health and strength of women is not to be mistreated. According to the constitution's design, women are an integral part of any community and should not be undervalued in the process of social advancement.

JUDICIAL APPROACH

The issue cannot be resolved satisfactorily without the involvement of the judiciary, and historical instances show that the primary credit for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 goes to the judiciary. 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.⁷

As according to the decision of the Bombay high court in **Vijay Sharma v. Union of India**⁸ that gender discrimination goes against the constitution's spirit. It degrades and denigrates womanhood. This is arguably the strongest case in favour of outright banning sex discrimination.

In addition, the rights to equality, protection of life and personal liberty, and the right against exploitation enshrined in Articles 14⁹, 15¹⁰, 16¹¹, 17¹², and 21¹³ of the Constitution of India are fundamental rights applicable to all Indian citizens including children. Constitutional Remedies to the Supreme Court and the High Courts can be resorted to in case of any violations of fundamental rights.¹⁴ Judicial activism has been displayed in several court decisions, in public interest litigations by civil society groups relating to children in institutions, adoption, child labour, child marriage, child prostitution, and the educational and

⁷ Available at https://india.unfpa.org/sites/default/files/pubpdf/Compilation_and_Analysis_of_Case_Laws_on_Pre_Conception.pdf visited on 12 March, 2023.

⁸ AIR 2008 Bom. 29.

⁹ Right to equality and equal protection of Laws.

¹⁰ Prohibition of discrimination on grounds of only religion, caste, sex, place of birth, or any of them.

¹¹ Promoting equality of opportunity for all citizens in matters of public employment.

¹² Untouchability has been abolished and its practice in any form is forbidden.

¹³ Right to life and due process of law.

¹⁴ Articles 32 and 226 of the Constitution of India.

health rights of children.¹⁵ It was after a long campaign and struggle that the 86th Constitutional Amendment to make the right to education a fundamental right was made in 2002. Article 21- A provides for free and compulsory education to all children in the age group of 6-14 years. The manner of education has to be determined by enacting a law.

In ***Bandhua Mukti Morcha v. Union of India***¹⁶ the Hon'ble Supreme Court held that "it is a fundamental right of everyone in this country assured under the interpretation of Article 21 to live with human dignity... it must include the tender age of children to develop in a healthy manner and in conditions of freedom and dignity.

Several cultural factors, strong affect gender preference in the society. In those cultures, for example, in which a daughter's parents are expected to pay her groom a dowry, which frequently constitute a year's salary, parents are often less enthusiastic about bearing a girl.¹⁷ This preference is particularly is present in cultures where a male has far greater earning opportunity and can substantially contribute to the family income and welfare, both as a young man and as the caretaker ultimately responsible for his parents.¹⁸

¹⁵ Some instances of judicial activism relating to children are: Bhagwan Singh and Ors v. State of M.P. AIR 2003 SC 1088, M.C. Mehta v. State of Tamil Nadu and Ors AIR 1997 SC 699, Sanjay Suri v. Delhi Administration AIR 1986 SC 414, Lakshmikant Pandey v. Union of India AIR 1984 SC 469; AIR 1986 SC 272; AIR 1992 SC 118, Gaurav Jain v. Union of India AIR 1990 SC 292, People's Union for Democratic Rights (PUDR) v. Union of India AIR 1982 SC 1473, Vishal Jeet v. Union of India AIR 1990 SC 1412, Dukhtar Jahan v. Mohammed Farroq AIR 1987 SC 1049, Sheela Barse v. the Secretary, Children's Aid Society and Ors AIR 1987 SC 656, Delhi Domestic Working Women's Forum v. Union of India and Ors (1995)1 SCC 14, Sarita Sharma v. Sunita Sharma (2000)3 SCC 14, Shantisar Builders v. Narayan Khimlall Totane AIR 1990 SC 630, Kishen Pattnayak v. State of Orissa AIR 1989 SC 677, Unnikrishnan J.P. and Ors v. State of Andhra Pradesh AIR 1993 SC 2178.

¹⁶ AIR 1984 SC 802.

¹⁷ See, Stephen R. Weirsmen, No more guarantees of Son's Birth, N.Y. Times, July 20, 1988, at A1, A9 (Dowries in India). Although Indian Legislation officially banned the dowry system, it is still customary in certain societies strata. Savings the daughters of India, Christian Sci. Monitor, July, 1988, at 13.

¹⁸ See, M. Ali Khan & Ismail Sirageldin, Son Preference and the demand of additional children in Pakistan, 14 Demography 481-95 (1977).

The preference of son and discrimination or exploitation against the girl child is unique and universal practice in Indian society. Position of the women in society is not too more strong as compared to the female because the women have traditionally been regarded as 'less' valuable than male.¹⁹ In India, the Hindu Succession (Amendment) Act, 2004 provides for the daughters to inherit family property almost as par with sons, and Maintenance and Welfare of Parents and Senior Citizens Act, 2007 requires both sons and daughters to be responsible for the care of parents in proportion to the share of property to be inherited. The government and non- government organization should advocate, sensitization and awareness programmes in the society and make efforts to change the mindset and attitudes towards the female child and reorganization the empowerment activities in the society.

Apex judiciary in India had observed 2007 as the Awareness Year of Female Foeticide and dealt in a strict manner with those responsible for this crime. The former Chief Justice Y.K. Sabharwal had declared while delivering his presidential address at a state-level seminar on 'Eradication of Female Foeticide', jointly organised by the Punjab Department of Health and Family Welfare and Punjab Legal Services Authority that law can play an important role in checking this menace of female foeticide.²⁰

In Federation of Obstetrics and Gynecological Societies of India

¹⁹ In many cultures such gender preference are unabashedly overtly. This translation of a song from Bulgaria, for examples, bespeaks not only gender preference but also violence towards women who are not accommodating:

If the tenth too, is a girlchild

I will cut both of your feet off,

To the kness I'll cut your feet off,

Both your arms up to the shoulders, both your eyes too, I will put out.....

Letty C. Pogrebin, Bias Before Birth, In Growing Up Free: Raising Your Child In the 80's 85 (1980). Note also, for example, the German Proverb that "a house full of daughters is like a cellar full of sour beer" and chinees proverb indicating that 18 goddess- like daughters do not equal one deformed son.

²⁰ Justice Y.K. Sabharwal, Chief Justice of India, Eradication of Female Foeticide, Delivered at Patiala on December 17, 2006.

(FOGSI), v. Union of India²¹

In this case a plea was filed by the Federation of Obstetrics and Gynaecological Societies of India (FOGSI), the apex body of obstetricians and gynecologists of the country, highlighting the issues and problems affecting the practice of obstetricians and gynecologists 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 decriminalizing 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.

A PIL petition was filed in the Supreme Court by **Centre for the Enquiry into Health and Allied Theme (CEHAT) v Union of India**²², **Mahila Savangeena Utkarsh Mandal (MASUM)** and **Dr. Sabu M. George** to indicate alarming position about decline in sex ratios in the country to the disadvantage of women and seeking directions from the Supreme Court for the urging effective implementation of the Pre-Natal Diagnostic Techniques Act which regulates the provision of pre-natal diagnostic technology. The Supreme Court passed an order to ensure the implementation of the law and monitoring the several beneficial directives during which the case was proceeding in court. The Supreme Court by such petition indicates the issue of sex selection and sex selective abortion as a national agenda in India and mentioned the legal consequence on this issue by government and non-governmental agencies alike.

The court observed that:

"It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of

²¹ 2019 SCC OnLine SC 650.

²² AIR 2002 SC 3689.

a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately developed medical science is misused to get rid of a girl child before birth. Knowing fully well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected the overall sex ratio in various states where female foeticide is prevailing without any hindrance. For controlling the situation, the Parliament in its wisdom enacted the PNDT Act, 1994. It is apparent that to a large extent, this Act is not implemented by the Central Government or by the State Governments.”

The Supreme Court of India directed all the State Governments/Union Territory administrations to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisements in the print and electronic media by hoardings and other appropriate means.

Considering the amendment in the Act, it is the duty of the Union Government as well as of the State Government / UTs to implement the same as early as possible. Hence, the State Government / UTs are directed to the necessary affidavits within a period of ten weeks from today.

Again, in 2003, in **Centre for Enquiry into Health v. Union of India**

and others²³ , the Supreme Court while expressing concern in the matter held that for effective implementation of the Act, information in this regard should be published by way of advertisements as well as on electronic media and suggested many other steps for continuing monitoring. Consequent to the concern expressed by the Supreme Court, the Parliament took the necessary step by amending the law. The said Act has since been amended with effect from 14.2.2003 to make it more comprehensive and renamed as “Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) at the same time certain amendments have also been brought about in the Rules of 1996 to ensure effective implementation of the Act and in view of the observations of the Supreme Court. The amended Rules have come into effect from 14th of February, 2003. The Act defines the terms used therein, lays down when the use of Pre-Natal Diagnostic Techniques is prohibited and where it is regulated, it has provisions for bodies which are responsible for policy making under the Act, and those which are responsible for the implementation of the Act. The penalties for various offences, how and by whom cognizance of complaints is to be taken are also elaborated. Now, it would be expedient to refer here few relevant provisions of the Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.

*In the case of **Uma Shankarrao Rachewad v. Appropriate Authority, Nanded and Sub Divisional Officer, Nanded***²⁴ court observed that under the PNDT Act the competent authority should considered each case on its merits, examine it meticulously, preferably with the help of a legal Advisor and then file complaint in the court. The court has issued the direction to the different authorities to implement the Act with main object and monitoring the activities relating to the sex selection and also banned all the advertising for the facilities providing pre- natal sex

²³ A.I.R. 2003 S.C. 3309 (India).

²⁴ 2002 Cri JL 2634 (Bom).

determination.

In the case of ***Kharak Singh v. State of U.P. and others***²⁵, the Supreme Court has rightly observed that a person has complete rights of control over his body organs and his body is protected under Article 21 of the Indian Constitution. It also further observed by the Supreme Court that right to body also including the complete right of a woman over her reproductive organs.

As per the interpretation of the above decisions of the various courts, right to life means that the life of the foetuss and pregnant women should not be subject matter of any discrimination before or after the birth of child. The government should ensure about the implication of such policy of the PNDT Act and should strict restriction upon the medical labs and clinical. It is not only a legal obligation but also a social responsibility to mandate the decisions of the apex court.

In the development of the country and no person should be allowed to curtail the life of the unborn Foetus in any condition, and the USA Supreme Court recognized the right of privacy of every foetus and ended the ban on birth control system in 1965. As per the policy of the USA, the Supreme Court in the case of ***Griswold v. Connecticut***²⁶. William Brennan, J. stated:

"If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."

In ***Vijay Sharma and another v. Union of India***²⁷ the petitioner challenged the validity of the Pre-Conception and Pre- Natal Diagnostic Tests Act (PCPNDT) on the ground of prohibition of the sex

²⁵ AIR 1963 SC 1295, pg. 345.

²⁶ 381 U.S. 479 (1965).

²⁷ AIR 2008 Bom. 29.

determination under such legislation. In the Pre-Conception and Pre-Natal Diagnostic Tests Act prohibits of sex determination on any grounds. After investigation of the all facts and evidences the judges pronounced a verdict and said that sex selection is not good for the female and it violates the spirit of the constitution under article 21.

It is also stated that the Section 4(2) of the act shall not be conducted except for the reasons of detection of the following-

1. Chromosomal abnormalities
2. Genetic metabolic diseases
3. Haemoglobinopathies
4. Sex linked genetic diseases
5. Congenital anomalies or any other abnormalities or diseases.

In ***Qualified Private Medical Practitioners and Hospitals Association V. State of Kerala***²⁸ It was declared that laboratories and clinics which do not conduct pre-natal diagnostic, test using ultrasonography will not come within the purview of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and a direction to the respondents not to insist for registration of all ultrasound scanning centers irrespective of the fact as to whether they are conducting ultrasonography, under the Act, 1994 and similar view was taken in the case of ***Malpani Infertility Clinic Pvt. Ltd. and Others v. Appropriate Authority, PNDT Act and Others.***

After that in the case of ***Vinod Soni and another v. Union of India***²⁹ by this petition, the petitioners who are married couple seek to challenge the constitutional validity of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment-

²⁸ Supra 114, pp 61.

²⁹ 2005 Cr.L.J 3408.

- i. First, it violates Article 14 of the Constitution and,
- ii. Second, that it violates Article 21 of the Constitution of India.

It was held 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”.³⁰ 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.³¹ 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 completely forbid the use of such tests to detect a child's sex before or after conception, but under no circumstances may the right to personal liberty be enlarged to do so. Personal liberty cannot include the right to decide the sex of one's children or to treat male and female foetuses differently.

In another case of ***Dr. Mrs. Suhashini Umesh Karanjakar v. Kolhapur Municipal Corp***³² 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 V. State of***

³⁰ Felony of female Foeticide – Role of judiciary in implementation of PCPNDT act in India; Emandi Rangarao.

³¹ Ibid.

³² 2011 (4) AIR Bom R 326 (F.B.).

Punjab.³³

In Radiological and Imaging Association v. Union of India (UOI)³⁴

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.³⁵

CONCLUSION

Implement the Indian Government's policy regarding the outlawing of sex determination in India in order to strengthen and monitor the practise of female foeticide and sex determination. All Chief Registrars of Births and Deaths in India are required by the Registrar General of India to compile data on sex determination and closely track the sex ratio at birth each month.

The Committee on the Status of Women in India correctly draws the following conclusion: "The entire exercise of our committees has indicated that in certain important areas and for certain sections of the female population, there has been repression from the normative attitudes developed during the freedom movement. Even with the implementation of laws and other legal safeguards, the protection against injustice and exploitation that the vast majority of people receive is insignificant. Despite the fact that women are not a minority

³³ AIR 2008 P & H 108.

³⁴ (2011) 5 AIR Bom R 731.

³⁵ Dr. Atul Jain, Role Of Judiciary To Curb Female Foeticide: An Analysis, *IJARIIIE-ISSN(O)-2395-4396, Vol-8 Issue-3 2022.*

in terms of numbers, they are starting to resemble one due to the acknowledged elements of class, economic standing, social position, and political power disparity. The chasm between the values of a new social order proclaimed by the constitution and the realities of contemporary Indian society as far as women's rights are concerned remains as great as at the time of independence.³⁶

By considering the seriousness of problem of 'Female Foeticide' and child labour prevalent in state of Punjab, the Chief Justice of Punjab and Haryana High Court declared year 2007 as a child year and also stated that the state legal services authority should create maximum awareness amongst the people of Punjab regarding equal status of woman as well as to arrange a legal aid camp to combat with the peril of 'Female Foeticide' and Infanticide. One lakh female foetus aborted every year in state of Punjab as per report of Government.³⁷

³⁶ S.K. Ghosh, *Indian Women Through the Ages* 19 (1989).

³⁷ Research Report on Evidence based Causes of Female Foeticide Among Economically Well-Off Communities in Punjab: Strategies to Change the Mindset Submitted by, International Union for Health Promotion and Education, Punjab Chapter, Ludhiana.