

## DEATH BEFORE BIRTH - A LEGAL PERSPECTIVE ON FEMALE FOETICIDE

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### Abstract

The practice of female foeticide and infanticide has been an age old phenomenon which has caused many deaths due to sex selection. Female foeticide and infanticide is not only responsible for the altered sex ratio but also reflects the status of women in our society. Though the concept of son preference is not a new one, the increase in the growth of scientific and diagnostic techniques has further accelerated this concept. The main objective of this article is to look into the legislative measures on the issue of female foeticide and analyse the provisions, lacunas and loopholes relating to the issue. The article also aims to identify the rights of the girl child and how they can be exercised. Though there exists much legislation and judicial policies that endorse and safeguard the rights of girl child and women the pragmatic implementation of these laws are difficult. Hence based on the research, recommendations are mentioned to further improve the existing legislations and to enhance the functioning of government schemes on this issue. The article centres on a strong disapproval of female foeticide and aims at promoting women empowerment and strengthening the rights of girl child.

Keywords: Abortion, Foeticide, Infanticide, Sex Ratio

## I. Introduction

Empowerment of women is an essential tool for the development of any nation however, female foeticide is the biggest obstacle in achieving this goal. Female foeticide over the few decades has imbalanced the sex ratios at birth in several Asian countries including China, India and Nepal.<sup>1</sup> In a 2011 study, British medical journal Lancet found out that up to 12 million Indian female foetuses had been aborted in the previous three decades.<sup>2</sup>

Female foeticide is the action or process of causing the death of a foetus and the killing of female foetus, without the legal qualms.<sup>3</sup> Desire and preference of a son over daughter in India has led to many misgivings like rape, assault, domestic violence, neglect, slavery, trafficking of women and many other evils. When crimes against girls and women are so extreme, it further creates reluctance in couples to have a girl child. In 2014, the United Nations said that “the dwindling number of Indian girls had reached emergency proportions and was contributing to crimes against women.”<sup>4</sup> Another instance was experienced during the 2014 Haryana Vidhanasabha elections. Bibipur, commonly referred to as the ‘Village of Brides’ hit the headlines when a local organisation called ‘Kunwara Union’ told candidates: "Give us brides and win our votes!" Villages in Haryana have been obsessed with young females who are sold for a meagre amount and are thus kept as sex slaves or a machine to bear sons.<sup>5</sup>

A son, according to Hinduism, has a manifest of responsibilities towards his family. Under the Hindu Religion he is considered as an asset to the family and is supposed to perform the final rites of his parents (Pinda Daan).<sup>6</sup> He is expected to take the responsibilities of his family and their social obligations. Such notions have been deep rooted in the patriarchal society of India

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<sup>1</sup> *Female foeticide*, The Times OF INDIA, (Oct. 20, 2017, 2:59 AM), <https://timesofindia.indiatimes.com/topic/Female-Foeticide>.

<sup>2</sup> Sanjay Pandey, *Female foeticide, India's 'ticking bomb'*, Al Jazeera, (Jul. 6, 2015), <http://www.aljazeera.com/indepth/features/2015/06/female-foeticide-india-ticking-bomb-150629090758927.html>.

<sup>3</sup> Merriam Webster 1828, <https://www.merriam-webster.com/dictionary/feticide>.

<sup>4</sup> *Id.* at Sanjay Pandey, *Female foeticide, India's 'ticking bomb'*, Al Jazeera, (Jul. 6, 2015), <http://www.aljazeera.com/indepth/features/2015/06/female-foeticide-india-ticking-bomb-150629090758927.html>.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Raman J., *The role and importance of a son in hindu family*, ISLAMIC RESERACH FOUNDATION INTERNATION INC. [http://irfi.org/articles3/articles\\_4601\\_4700/the%20role%20and%20importance%20of%20a%20son%20in%20a%20hindu%20familyhtml.htm](http://irfi.org/articles3/articles_4601_4700/the%20role%20and%20importance%20of%20a%20son%20in%20a%20hindu%20familyhtml.htm).

for many centuries and thus, a local ménage holds an inclination towards male children over female children.

Female children are considered as social and economic burden to the family and their families wish to wash off their hands from such responsibilities. With the advancement of medical technologies including the pre-natal sex determination in the 1990s, female foeticide has become rampant in India. Families in rural areas of Haryana, Bihar, Rajasthan and other northern parts of India, who do not have enough money to offer dowry in order to get their daughters married, seek abortion as soon as they find out that it is a female foetus. Also it is no more a crime prevalent only in the rural areas. Affluent and well-off families also tend to have a 'Son-meta Preference' as stated in the Economic survey of 2017-18, conducted by the Indian Ministry of Finance.<sup>7</sup>

The archival sources and census data till the 1931 Census certainly indicated that Gujarat and other North-Indian states, had an alarmingly low ratio of female children. Certain castes like Lewa Patidars, Jats and the Rajputs in Gujarat, regularly practised female infanticide and ended up with a much lower proportion of female children compared to males.<sup>8</sup>

The Haryana Vigyan Manch (HVM) who have actively been indulging in promoting literacy among illiterate and poor families conducted certain tests between 1991-95 involving 1.15 lakh illiterates from the surrounding villages to know about the status of sex determination tests. According to the survey, families continued to have children till they had adequate number of surviving sons. Consequently small families had more sons while large families had more daughters. It appears that most women wished to have at least two sons. When two surviving sons are ensured, nearly 50 per cent of the women use sterilisation.<sup>9</sup>

Poverty and illiteracy have remained as two important reasons for non acceptance of female children. As girls were either not sent to schools at all or were withdrawn from schools at an early age they were never provided with a fair opportunity to indulge in self-development and bettering their family's economic status. Such a decision of withholding girls from being

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<sup>7</sup> IBEF, (Jan. 2018), <https://www.ibef.org/economy/economic-survey-2017-18>.

<sup>8</sup> L.S. Vishwanath, *Female foeticide and infanticide*, 36. EPW 3411 (2001).

<sup>9</sup> Sabu M. George & Ranbir S. Dahiya, *Foeticide in rural Haryana*, 32. EPW 2194-2195 (1998).

educated stems from lack financial resources available to parents and the illiteracy existing in the parents.

India has one of the highest female foeticide incidents in the world. The female child population in the age group of 0-6 years declined from 78.83 million in 2001 to 75.84 million in 2011. During the period 1991-2011, the child sex ratio (0-6 years) declined from 945 to 914. The Ministry of Health and Family Welfare has acknowledged that illegal abortions have outnumber legal abortions and thousands of women die every year due to complications resulting from unsafe abortions. According to the Population Research Institute, at least 12,771,043 sex-selective abortions had taken place in India between 2000 and 2014. It takes the daily average of sex-selective abortion to 2,332.<sup>10</sup>

## II. Analysis of the Legal Framework Dealing with Female Foeticide in India

### (A) The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

It was enacted in response to the severity of female foeticide and it enumerates sex determination as a non-compoundable, non-bailable and cognizable offence. Under the Act, “pre-natal diagnostic procedures” deals with gynaecological or obstetrical medical procedures like ultrasonography, foetoscopy, taking samples of body fluids or tissues, before or after conception, for conducting any type of analysis or pre-natal diagnostic tests for selection of sex.<sup>11</sup>

This Act prohibits the sex selection of the foetus before as well as after conception, and lays down the reasons for which the pre-natal diagnosis can be conducted. It should be conducted with the sole purpose of diagnosing any anomalies or diseases in the foetus.<sup>12</sup>

There exists a Central Supervisory Board and State Supervisory Board which looks after the implementation of the provisions set out in the Act. In addition to this, it also spreads awareness

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<sup>10</sup> Dte Staff, *India witnesses one of the highest female infanticide incidents in the world: study*, DOWN TO EARTH, (Jul. 08, 2016), <http://www.downtoearth.org.in/news/india-witnesses-one-of-the-highest-female-infanticide-incidents-in-the-world-54803>.

<sup>11</sup> The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, No. 57, Acts of Parliament, 1994 (India).

<sup>12</sup> The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, *supra* note 11.

amongst the masses on the social and legal implications of female foeticide and advises the government on policy matters pertaining to this Act.

The Act is stringent in the penalties laid down as it punishes the subsequent offences with imprisonment that can extend to five years and a fine up to fifty thousand rupees. In cases where a medical practitioner violates the provisions of the law then their license can be seized for five years for the first offence and can be terminated for a subsequent offence. The husband, relatives or any other person who obtains the aid of a medical practitioner to determine the sex of the foetus is to be punished with imprisonment and fine. Any person, organisation, medical geneticist, medical practitioner conducting ultrasound practices or any person who owns or is employed in a genetic counselling centre, laboratory or clinic advertises about pre-conception and pre-natal determination of sex or contravenes any other provisions of this Act is to be punished with imprisonment up to three years and a fine that can go up to ten thousand rupees.<sup>13</sup>

Though this Act competently addresses the issue of sex determination, it fails to account for instances wherein the husband is the medical practitioner who conducts the ultrasound of his wife. The Act prohibits the person conducting sonography from revealing the sex of the foetus to the father or any other relative of the foetus. However, this is violated when the husband, in capacity of being the expert conducting the ultrasound, finds out the sex of the foetus in his wife's womb. The Act is silent on such circumstances which opens room for sex determination.

Another emerging issue is reproductive tourism which has not been addressed by any law per se. *Reproductive tourism* is when a person travels from a country wherein certain medical procedures are not available to another country where such desired treatment is available for reproduction. The infertile individuals or couples who indulge in reproductive tourism for receiving medical advice, assisted reproductive technology (ART) treatments, donor gametes, embryos, or surrogacy services are termed as *reproductive tourists*.<sup>14</sup>

This is a loophole which is exploited by couples who desire sex selection before conception. Indian couples approach countries like United States of America where both, sex determination and commercial surrogacy are legal, to evade the punishments under the Indian laws for sex

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<sup>13</sup> The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, *supra* note 11.

<sup>14</sup> Marcia C. Inhorn, *Rethinking reproductive "tourism" as reproductive "exile"*, American Society for Reproductive Medicine, (Jan 29, 2018, 3:48 PM) [http://www.fertstert.org/article/S0015-0282\(09\)00046-6/fulltext](http://www.fertstert.org/article/S0015-0282(09)00046-6/fulltext).

determination. People, who can afford to travel abroad and spare enough financial resources, indulge in reproductive tourism to procure a male child. They get sex determination conducted in countries where it is legal and cheap to do so. In a 2011 article of Times of India, it was asserted, that Indians eye Dubai for sex determination because it is as cheap as Rs 4000 to travel to and the sex determination tests cost about Rs 1500. The article states that “such practices are reverse reproductive tourism, which means that even though India is a centre of reproductive tourism, Indians are at the same time seeking out similar services abroad.” A few doctors who were interviewed for this article said that their patients have often told them of such plans to travel to Dubai since it is illegal to undergo sex determination in India and they rarely return to the doctors.<sup>15</sup>

Conducting sex determination tests elsewhere also provides these patients with an opportunity to come back to India and legally abort the female foetus without contravening the provisions of the The Medical Termination of Pregnancy Act, 1971. As per this Act abortion is legal in India with the consent of the pregnant woman till the foetus is 20 weeks old<sup>16</sup> however the sex of the foetus can be detected before the lapse of 20 weeks, as per an article published in 2007.<sup>17</sup> So couples wishing to abort the female foetus can exploit this loophole.

#### (B) Indian Penal Code, 1860

Legal initiatives to curb gender discrimination and its manifestation in the form of infanticide and foeticide have been in force since the inception of the practise.

Section 315 and Section 316 discuss the offence of foeticide and infanticide.<sup>18</sup> If a person commits an act with the intention of preventing the child from being born alive or an act that results in the death of the child after birth, that person is committing foeticide/infanticide as long as they do not do it in the interest of the mother’s health or life. If a person does an act that amounts to culpable death which results in the quick death of an unborn child, he will be charged with culpable homicide. These sections of the Indian Penal Code explain that while the child remains in the mother’s womb it is a part of the mother’s life and not a distinct person. But as soon as any part of the child has been brought forth from the womb it becomes a separate

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<sup>15</sup> Malathy Iyer, *Indians eye Dubai for cheap baby sex tests*, TOI, Feb 9, 2011, at 1.

<sup>16</sup> The Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 (India).

<sup>17</sup> Tulsi Patel, *Informal Social Networks, Sonography and Female Foeticide in India*, 56 Social Bulletin 246, 246-247 (2007)

<sup>18</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India)

living person. Hence there is a fine line in the Indian Penal Code between foeticide and infanticide. Therefore female foeticide or injuries to unborn girl child would not amount to culpable homicide but will be considered as an offence against the pregnant woman.

Section 312 - 318 of the Indian penal code relate to miscarriage, injuries to unborn child, exposure of infants and concealments of births.<sup>19</sup> Though the term 'sex selective abortion' is not explicitly mentioned in the Indian Penal Code, the intention behind the terms of 'miscarriage' and 'injuries to unborn child' is to punish female foeticide.

In the case of *Rex V Bourne*<sup>20</sup> where a girl under the age of 15 who was criminally assaulted had become pregnant, it was held that the abortion had a bona fide objective and all therapeutic abortions are lawful.<sup>21</sup> The Madras high court in an early case, wherein a woman was charged of causing herself to miscarry, held that it was an absolute duty of the perspective mother to protect her infant child from the very moment of conception. Thus the high court used the provisions of the Indian Penal Code to protect embryonic life.

The provisions under the Indian Penal Code are formulated under gender neutral terms and are not explicitly for injuries to unborn female child.<sup>22</sup> The provisions in the Indian Penal Code however have a limitation in the area of sex selective abortion. The Indian Penal Code also does not take into consideration the woman's experience during gestation, for example it does not consider the abandonment of pregnant or the neglect of medical care and attention toward a pregnant woman as an offence.

#### (C) The Constitution of India, 1950

The Constitution of India is the fundamental law of the country which provides a protective umbrella for the rights of women and children, provided under Article 15(3)<sup>23</sup>. Article 21<sup>24</sup> states that no citizen can be denied his life and liberty and Article 14<sup>25</sup> guarantees equal protection under the law. The underlying inequalities between men and women borne of

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<sup>19</sup>The Indian Penal Code, 1860, *supra* note 18

<sup>20</sup> *Rex v Bourne*(1938) 3 AII ER 615

<sup>21</sup> Bonda, "*The Impact Of Constitutional law on Protection of Unborn Human Life : Some Comparative Remarks*" in K.D Gaur, *The Indian Penal Code*, Universal Law Publishing co, Delhi. P502 (2004).

<sup>22</sup> V. Kumari , "*Gender Analysis of the Indian Penal Code*", Engendering Law EBC, P147. (1999).

<sup>23</sup> INDIA CONST. art. 15, cl.3.

<sup>24</sup> INDIA CONST. art. 2.

<sup>25</sup> INDIA CONST. art. 14.

culture, religious and social influences and the undying desire for a male provide for the basic reasons to enforce these rights. Unfortunately Article 21 of the constitution which gives a right to life to all citizens of India cannot be extended to female children who are killed before they are born because an unborn child is regarded as a legal fiction which cannot be granted rights laid down in the Constitution.

A very complex problem arises when a pro-abortion person argues that, under the constitution they a right to personal liberty which includes a right to bear or not bear a child , the right to be or not to be a parent, the right may accordingly be held to include stoppage of parenthood in transit that is the right to terminate pregnancy prematurely.<sup>26</sup> If the right to terminate pregnancy is thus comprised in and follows from the right to personal liberty guaranteed as a fundamental right under Article 21 of the Constitution , then under the mandate of that Article as held in the case of *Maneka Gandhi vs Union of India*<sup>27</sup> and later also in the case of *Francis Coralle Mullin*,<sup>28</sup> where it was said that a person can be deprived of such personal liberty except according to procedure established by law and this right must be reasonable just and fair. Thus a child in the womb not a natural but a legal person is not entitled to protection of life and liberty.

### III. Analysis of Government Schemes

‘Beti Bachao Beti padhao’(BBBP) was a project introduced by Prime Minister Narendra Modi in 2015 to empower and protect girl children. With workshops done by District collectors to create awareness about ‘beta beti ek saman’(no discrimination between girl and boy child) in 100 districts with low child sex ratio.<sup>29</sup> However, according to the Comptroller & Auditor General of India (CAG) state reports, the scheme has not been able to achieve its objectives. One of the BBBPS’s aims was improving the sex ratio at birth (SRB) in gender critical districts by ten points in a year. As per the CAG reports, in various districts of Haryana and Punjab, the sex ratio has worsened. For example, in Panipat, Haryana the ratio was 892 against the target of 902 but, it dropped further to 881. In Punjab, during 2015, six districts saw a decrease in SRB in comparison to the baseline values of 2014. In four of these districts, the SRB was not only declining but also less than Punjab’s overall SRB. Overall, out of a total amount of 43 crore rupees that was set

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<sup>26</sup> Justice A.M Bhattacharjee, *Liberty v life. Rights of The Child*. NLSIU. P59.

<sup>27</sup> *Maneka Gandhi v Union of India* (1978). ISCC 248.

<sup>28</sup> *Francis Coralle Mullin v Administrator Union Territory*, (1981) ISCC 608.

<sup>29</sup> Ankita, *Beti Bachao beti padhao*, BETIBACHAOBETIPADHAO, (Feb. 14, 2015, 5:01 AM), <http://www.betibachaobetipadhao.co.in/>



aside for BBBP in the fiscal year 2016-2017, only 5 crore rupees has been properly utilised, according to the report of the Parliamentary Standing Committee on Human Resource Development. Audits in various districts revealed that the births of all baby girls had been registered while those of some baby boys had been concealed to present improved figures of the gender ratio in some districts.

#### IV. Recommendations

The analysis of statutes and other provisions of law has brought certain lacuna in limelight which should be addressed for an effective functioning of law.

- (a) No law monitors ultrasounds or any other pre-natal diagnostic tests being carried out by a licensed person who is a spouse of the woman on whom such tests are conducted or when the pregnant woman conducts pre-natal diagnostic procedures on herself. Hence, it is proposed that the The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 should have an express clause which shall prohibit a spouse from carrying out any pre-natal diagnostic tests or procedures on his wife which may reveal the sex of the foetus to the father-to-be. It shall also prohibit a pregnant woman from carrying out any pre-natal diagnostic tests or procedures on herself which may reveal the sex of the foetus to the mother-to-be.
- (b) The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 also constitutes a Central Supervisory Board and State Supervisory Board whose functions are clearly listed in Section 16 of this Act.<sup>30</sup> However another function should be introduced for the Board to curb the problem of reproductive tourism and to stop people from indulging in sex determination techniques abroad. Any couple who wishes to travel abroad for getting sex determination done or indulging in reproductive tourism should have a prior consent of the State or the Central Supervisory Board without which such an activity shall be considered as a contravention of the said Act.
- (c) Under Article 21A of Constitution of India, children between the age of 6-14 years have a fundamental right to free and compulsory education which should be provided by the State.<sup>31</sup> The government should introduce two essential subjects namely - ethics and

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<sup>30</sup> *Id* at 11

<sup>31</sup> INDIA CONST. art. 21A.

sex education, during the elementary schooling of children. Sex education and ethics imparted by teachers while exercising gender sensitization can create the firm foundation of a child's future. Gender sensitization refers to the way in which teachers and parents behave with children that encourages gender equality. Gender sensitization will reduce the gap that is felt at schools between a male student and a female student. Sex education will prevent unnecessary or unwanted pregnancies and will also educate the children on basic hygiene. Ethics will edify the children as to ill effects of practices like female foeticide, infanticide, domestic violence, etc which can in turn help in reducing these crimes.

- (d) Under the 'Beti Bachao Beti Padhao Scheme', the Indian government provides financial assistance to state governments to encourage gender sensitization and empowerment of girl child. Out of the 43 Crore Rupees allotted for the implementation of the scheme during the fiscal year 2016-17, only 5 Crore Rupees has been utilized. On one hand the funds have not been availed by some districts while on the other hand the funds are yet to be released to some districts.<sup>32</sup> Due to the poor appropriation of funds, this scheme has contributed little to solve the problems of female foeticide. Thus, it is suggested that the state governments should avail the funds released to them while the central government should immediately release sufficient funds to other districts which are yet to receive it.
- (e) An anonymous complaint portal was to be made functional by September 2014 in Haryana. However, none of the gender critical districts in Haryana have constituted the same.<sup>33</sup> It is recommended to implement such an anonymous portal in the Haryana as well as in all other states and union territories in order to protect the identity of those who are willing to report the mishappening of female foeticide.

## V. Conclusion

With the increase in pace of scientific advancement it became difficult to protect women and children from social evils hence a need for legislations arose. Thus various legislations were enacted and referred such as The Constitution of India 1950, which guarantees the protection of person under gender discrimination and also guarantees certain rights and privileges for women and child development; The Indian penal Code 1860 which penalizes miscarriage and

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<sup>32</sup>*Id.* at 7.

<sup>33</sup>Wamika Kapur, *Why the beti bachao beti padhao scheme has failed on several counts*, THE WIRE, (May 04, 2017), <https://thewire.in/131743/beti-bachao-beti-padhao-scheme-failed/>

other crimes committed against pregnant women; The Medical Termination of Pregnancy Act 1971 which regulates abortion and permits abortion only in certain cases excluding abortion based on Gender; The Pre-Conception and Pre-Natal Diagnostic Techniques Act 1994 which penalizes the misuse of prenatal diagnostics procedure for sex detection and also includes preconception sex selection. India has also ratified the United Nations Convention on Rights of child, 1989 and the convention on the Elimination of All Forms of Discriminating Against women 1989. India also endorses the twenty-seven survival and development goals laid down by the World Summit for Children. Despite all this, the reason why female foeticide still exists is the difficulty arising in the pragmatic implementation of these laws. It may be impractical to say that female foeticide can be completely eradicated but proper implementation of laws can facilitate creation of a safe environment for the girl child and women. Bringing out the changes in the mentality of the calloused Indian minds in order to eradicate female foeticide is indeed a challenge but it can be tackled through imparting education, bringing reforms in the legislations and through effective appropriation of government funds and resources.