

## CRUSADE AGAINST FEMALE FOETICIDE

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“*Aglo Janam mohe bitiya na dijo, Narak dijo dar...*” is a chilling verse from a traditional song from the state of Uttar Pradesh whose translation connotes the desire of the singer to ‘seek hell instead of a daughter in her next birth’.<sup>236</sup> Such is the plight of females in this land of diverse cultural, social, regional and political discourse. These factors have not just favoured but promoted the birth of males over females for centuries.

Indian civilization has been patriarchal, patrilineal and patrilocal for centuries where birth of a girl child was considered a curse. Girls were presaged as either Goddesses or were highly objectified. Indian mythology also concreted this stance as Manu mentioned that for a person to attain salvation (Moksha) he must be reborn as a Man and not a Woman. This highlights male predominance in this diverse society.<sup>237</sup>

However, there are certain claims that India was historically a women friendly civilization with greater autonomy and freedom for women in all aspects of life.<sup>238</sup> It has been argued that India suffered this plague due to several socio-economical practices like dowry and objectification. Numerous historians note that the concept of Dowry is not recent and it existed since ancient times but it was a voluntary gesture by girls’ parents to give their daughters gifts for her pleasure, safety and security.

Dowry in contemporary times has become an involuntary forced exploitation of the bride and her family and a stigma gets attached to the family if a lesser amount is elevated, which leads to heinous cases of dowry deaths. This social evils, even when regulated by law and supervised by law enforcement agencies, still plagues Indian households, leading to increasing cases of Female foeticides especially in the Rural India.

Female foeticide can be defined as a practice of determining and aborting the foetus due to preferential gender bias towards male babies. The United Nations Children Fund suggested in its recent report that upto 50 million girls are lost from the Indian population as a result of Female Foeticide based on census report of 2001.<sup>239</sup>

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<sup>236</sup> MadhuGurung, Female Foeticide, at <http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/forums/foeticide/articles/foeticide.html>.

<sup>237</sup> Nehaluddin Ahmad, Female Feticide in India, 26 ISSUES IN LAW & MED.

<sup>238</sup> A. S. Altekar, “The Position of Women in Hindu Civilization: From The Prehistoric Times to The Present Day”, 336-39, (3d Ed. 1962).

<sup>239</sup> WHO Gender and Genetics, Available at: [www.who.int/genomics/gender/enlindex4.html](http://www.who.int/genomics/gender/enlindex4.html).

## **Factors responsible for female foeticide**

The deteriorating status of Indian women and omnipresent gender bias has resulted into a poor child-sex ratio. This resulted into grave consequences including a compromise with the girl child's education. The practice of aborting the female foetuses is not just present in the backward areas but it is also becoming a common phenomenon in the affluent classes as well.<sup>240</sup>

The dowry structure had worsened the situation as females were considered as an economic burden and this structure has resulted into far reaching consequences increasing social evils. This relativism has turned so extreme that having a child is measured considering the economic benefits that he may provide in the future. This clarifies the degrading status of females is an effect of increasing need of male children in Indian families. In a typical Indian family, preservation and carrying forward the 'Family Name' till ages is a great concern, the solution to which is preference of a male child as seldom families cannot afford more than 1 child.

Apart from the societal constructs, there are other factors as well which are promoting this evil practice. Technological advancements, specifically Ultra-sound sonographies are rampant and are conveniently available to seekers. Sex of the foetus can be determined within 13-16 weeks of pregnancy by these technologies.

Another technique known as the '**Ericson**' techniques ensures birth of a male child as through this technique X and Y chromosomes can be separated and taken out and then Y chromosome is artificially insinuated into the womb to ensure that a male child is born. To worsen this situation, people have seen business opportunities in this field as they have mobile vans which they take into remote parts to further the pre-determination techniques.

## **Legislative History vis-à-vis Female Foeticide in India**

The earliest attempts to eliminate female foeticide were taken during the British Raj as the IPC prohibited abortion or forced miscarriage except if done under Good Faith. However, major erratic movements saw their way protesting against Female Foeticide and demanding a rigorous legislation to curb the practice in the later 1970s. The major cause which triggered this movement was the abortion of a male foetus in 1982. A woman was advised to undergo a Pre-Natal sex determination test by her husband who was a high ranking governmental official.

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<sup>240</sup>Sharma BR, Barish D, Sharma V and Vij K. Kitchen Accidents Vis-a-vis Dowry Deaths. Burns 2002; 28 (3): 250-253.

The test projected that it was a girl foetus however the diagnosis erred and it was a boy foetus. This raised controversies and came as a shock to the conscious of the society as a high ranked governmental officer was indulged in such heinous activities.

After numerous revolts and protests the Pre Natal Diagnostic Techniques Act was drafted by the Central legislature in 1994, however the act could only pass till late 1996. Although, the enforcement of the Act took place in 1996, it was in 2001 that Supreme Court had to step in on a petition<sup>241</sup> by Centre for Enquiry into Health and Allied Themes to impose proper governmental implementation of the Act. This judgment paved the way of a robust PNDT Act regime which was regulated by Supreme Court directives.

The Medical Termination of Pregnancy Act was enacted in 1971 and is widely considered as a tool to allow women to decide upon the number and frequency of giving birth to her children. This is considered as a tool to advance the woman with rights to choose about the condition of pregnancy with certain restrictions and regulations. In essence a mother is allowed to abort her foetus if-

- There is a danger to the life of the mother if the pregnancy persists, or
- There exists a danger to the life or limb of the child when born, or
- The pregnancy is a result of rape on the woman.

Abortion is allowed within a particular span of time, before it is possible to determine the sex of the foetus. However female foeticide is usually practiced much later during pregnancy, i.e. after the determination of the sex of the foetus is possible.

To meet these challenges PNDT Act prohibits sex determination of children apart from making registration of genetic counselling centres, counselling centres, hospitals, nursing homes etc. mandatory before getting operational. The PNDT act is a regulation mechanism and does not legalize abortion i.e. the Act is not confined with the selective abortion allowed to women but prohibits female foeticide in its entirety subject to the provisions of the Act.<sup>242</sup>

### **Highlights of the PNDT Act**

The act of Female Foeticide is a punishable offence in India. The Act imposes penal liabilities on both, the parents and the doctor who may be imprisoned or fined under the Act. The PNDT

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<sup>241</sup> Centre for Enquiry into Health and Allied Themes v. Union of India, AIR 2001 SC 2007. Available at : <http://www.supremecourtonline.com/cases/4179.html>.

<sup>242</sup> ASHISH BOSE ET AL., DARKNESS AT NOON: FEMALE FOETICIDE IN INDIA 28 (2003).

Act was later renamed as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act.

***There are certain regulations under the Act:***

- The PCPNDT Act prohibits advertisement of prenatal diagnostic techniques for sex determination of the foetus which may lead to female foeticide.
- The Act prohibits misuse of the provisions of the act.
- The Act regulates and permits usage of pre-natal diagnostic techniques to diagnose certain genetic disorders and such usage can only be undertaken by registered institutions only under certain specific conditions.
- The Act provides for penal punishments for violations of certain provisions under the Act.
- The Act also imposes liability up to \$ 320 and three years' imprisonment for violation of a few provisions of the Act.<sup>243</sup>

**Shortcomings in the PNDT Act**

The Act does not impose a blanket restriction on usage of Pre-Natal Diagnostic techniques but it just imposes restriction on usage of this technique for sex determination of the foetus. For instance, if there were genetic problems in the foetus, these tests can be done to remedy these altercations. These ambiguities and loopholes in the Act makes it impossible to ensure a strict implementation and enforcement of the PNDT Act.

Not just the enforcement provisions are ambiguous, but the provisions concerning penalties are also unclear. A Central Supervisory Board is constituted to review the implementation of the Act and to suggest any changes in the functioning of this Act. However, the powers of the CSB are also ambiguous, i.e. whether this board has powers to impose penalties or not isn't clear. Minimum penalties are also not specified either under the Act or by the enforcement machineries thus making it unclear as to the minimum penalty that has to be imposed on those who violate the provisions of this act.<sup>244</sup>

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<sup>243</sup> L. Visaria, Deficit of Women in India: Magnitude, Trends, Regional Variations and Determinants, 15 NAT'L MED. J. INDIA 19 (2002).

<sup>244</sup> Alka Gupta, Female Foeticide in India, UNICEF INDIA (2007).

One of the major weaknesses of this act is that it punishes the females who indulge in sex-determination activities. The jurisprudence working behind this reasoning is that it will deter those women who are going to get themselves diagnosed for sex determination. This flaw fails to appreciate the reality that in India majority women are forced by the husbands or their families to undergo such tests and they themselves may be reluctant to take these tests. This threat does not deter her from undergoing the diagnosis but will surely deter her from reporting such diagnosis.

Arguably the weakest point in the Act is its inability to bring newer technologies under its scanner. The act takes into consideration only the existing technologies and prohibits sex determination through them only, it fails to foresee the new developments through which sex determination may become easy thus defeating the whole purpose of the act.

### **Suggestions to improve implementation**

One of the reasons of failure of PNDT Act is the connivance of medical practitioners who have made sex determination as their business. Thus its time that the Medical Council of India and other institutions which regulate the Medical profession, take a firm stand against such practices to uphold the values and motive of PNDT Act into the spirit of the profession.

It's time that organizations like the Medical Council of India and Indian Medical Association create deterrent examples to deter the practices and involve following of PNDT Act within the ethics of the profession, not just into practice but into spirit.<sup>245</sup>

An effective way to deter such practices is to completely ban the usage of these techniques by private institutions or private medical clinics, i.e. only government hospitals and clinics can use these techniques and that too only to detect genetic abnormalities in the foetus. This in essence means a complete ban on commercial utilization of these techniques by the private sector. This solves the problem of unregistered users of these technologies.

Women who undergo such diagnosis must not be penalized under the act, but penalties must be imposed on the husband or any of the persons forcing the woman to undergo such tests to abort the foetus. This is essential because the current penal provision for women is in a nature of double penalty for them as they are already under stress to throw away their baby who she dearly wants to conceive.

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<sup>245</sup> Dolly Arora, The Victimized Discourse: Sex-Determination Technologies and Policy, 31 ECON. & POL. WEEKLY 420 (1996),

## **Judicial Responses**

Numerous spirited activists have filed Public Interest Litigations to ensure systematic implementation of the Act. The most prominent of those is Centre for Enquiry into Health and Allied Themes v. Union of India<sup>246</sup>, where the Hon'ble Supreme Court of India issued notices to concerned authorities who were directed to forward quarterly reports to the Central Supervisory Board to spread awareness against Pre-Natal sex determination practices.

Supreme Court further asked 9 companies to furnish the information about machines sold to clinics in the previous 5 years and the specific details therein. The Hon'ble Court further went stringent as it issued directives to state governments to issue prosecution against the unregistered practitioners by the help of Ultra Sound machines.

Even after such crucial steps taken by the Apex Court, clinics have now been registered but they are still not regulated as required.

## **Conclusion**

India has been fighting the battle to eradicate Female infanticide and Female foeticide for long now and its enforcement regime is not equipped well enough to end this battle anytime soon. No measures suggested above can help solve the problem until an ideological change is brought about and to ensure that, our societal values must be given a reality check. The PCPNDT Act, as it today stands, is hollow armour which cannot repel or deter the consequences of this societal evil. Female Foeticide is an example of how technology is used for worse social evils. India is experiencing a massive female genocide situation and the permissive level of abortion maintains that we do not view Sex selective abortion as a great human rights violation.

The Act must be comprehensively amended to meet it in consonance with the present need and to meet the changes suggested above. The act is noble in its intent but its mettle is toothless and there is nothing worse than having a toothless king.

The act as it stands today is a paradox for what it stands. It is the nation's hope to eradicate the problem of annihilation of its unborn daughters. It must be structured in a fashion to include new reproductive techniques also other orientations of society to ensure that our daughters are born and grow without facing social discrimination.

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<sup>246</sup>Supra Note 5.