

Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994: A Critical Analysis

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ABSTRACT

Female infanticide/foeticide is a reflection of the social psyche in India. The paper seeks to study the constitution and legal perspective in relation to Pre-Natal Diagnostic Technique in India with special reference to various concepts related to Pre-Natal Diagnostic Technique in India and critical analysis of PNDT Act.

1. Introduction

Women constitute the backbone of the Nation and Prosperity of every Nation depends upon the prosperity of its women. Thus Women are central to the success of poverty alleviation efforts. This realization brings women at the center stage of development efforts. Men and women are the two wheels of the society. If one of the two falls defective the society cannot progress. With patriarchal values embedded deeply in the every aspect of life factors that have contributed to the prosperity of the people have only preference for the male child. Education, modernity and affluence have failed to favour the girl child. The assumption that upward economic mobility and education lead to less prejudice against the girl child has been undermined a bit by recent statistics on births in many cities of India. Fear of sexual abuse of the girl child is also a major for female infanticide. With the advent of these new techniques viz. Ultrasound, Genetic counseling etc., this social balance of male –female ratio is declining. There are different Acts and laws to check these machines, one of which is PC&PNDT Act. If this Act is implemented in a good effect, then it can stop this declining Child Sex Ratio in India.

2. Constitutional and legal perspective of pre-natal - diagnostic technique

The law recognizes legal personality to an unborn child. A child in a mother's womb (en ventre se mere) is by fiction treated as already born and regarded a person for many purposes. The Hindu law has equated 'person in womb' to a 'person in existence' for many purposes. Similar is the position under the Transfer of Property Act, 1882.

- (i) Under the Hindu law of partition, on partition a share has to be allotted to the child in the womb of the mother. If the child is a girl the share is reserved for her marriage and if it is a boy he takes the share is reserved for her marriage, and if it is a boy he takes the share. In some cases, where the male coparceners agree, the partition is postponed till the birth of the child. And, wherein they do not agree, a share equal to that of a son is reserved. If a share is not reserved for a son in womb,

he can demand re-opening of the partition after birth. However, if the child does not take birth alive. His share may be equally divided among the surviving heirs.

- (ii) A child in womb can inherit property. Under the Hindu Succession Act, 1956,¹ the property of a male Hindu dying intestate (without making a will) shall devolve firstly upon the Class I heirs, which includes Son/Daughter. 'Son' means inter alia a posthumous son (i.e. child in womb at the time of death of intestate, born alive later). The position of daughter is same as that of a son.
- (iii) A child in womb may be beneficiary of a trust. Sec. 9 of the Indian Trusts Act, 1882, says: "Every person capable of taking under a will may be a beneficiary."

Constitutional Legislations

The Constitution of India, the fundamental law of the country, provides a protective umbrella for the rights of women and children. The bracketing of women with children showed the patronizing attitude on the parts of makers of Constitution. Article 14 of the Constitution guarantees the right to equality before the law and equal protection of the law.² The Supreme Court of India has, however, held that differential treatment could be given to people or objects if such differential treatment was based on reasonable classification.³ The Constitution specifically bars any classification on the ground only of religion or caste or race or sex or place of birth.⁴ Therefore, no classification can take place on the ground of sex. Some of the other fundamental rights beneficial to women and are: Right to freedom of speech and expression [Art. 19 (1) (a)], personal liberty, right to due process of law (right to life) [Art. 21], right against exploitation [Art. 23], and religious, cultural and educational rights [Art. 23], and religious, cultural and educational rights [Art. 29]. Under the Constitution (Directives Principles) it is the duty of the State to secure that children of tender age are not abused and forced by economic

¹ Section 8-11, Hindu Succession Act, 1956.

² Chiranjit Lal v. Union of India, AIR 1951 SC 41

³ Art. 15 (1) & (2), Constitution of India, 1950, see also Art. 16 (2)

⁴ Art. 15 (3)

necessity to enter vocations unsuited to their age and strength [Art. 39 (e)] and to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity [Art. 39 (f)]. The Directive Principles provide for maternity relief [Art. 42]. Rights provided under Part IV of the Constitution can be read into the fundamental rights provided in Part III and hence enforceable in Courts. Because of Judicial interpretation, many of the Directive Principles have now become enforceable though legal actions brought before the Courts.⁵

Indian Penal Code Provisions

Section 312-318 of the Indian Penal Code, 1860 (hereinafter referred to as the Code/IPC)⁶ relate to miscarriage, injuries to unborn children, exposure of infants and concealment of births. Thus, there are provisions under the IPC for foeticide and infanticide. Sex-selective abortions though not expressly mentioned, is covered under the terms 'miscarriage' and 'injuries to unborn children.'

3. The Medical Termination of Pregnancy Act, 1971

The Act gives a pregnant woman the right to have her pregnancy terminated only under a specified set of circumstances.

- A pregnancy less than 12 weeks old may be terminated by a registered medical practitioner if he believes in good faith that the continuation of pregnancy would involve.

(a) A risk to the life of the pregnant woman; (b) Grave injury to her physical or mental health [pregnancy alleged to have been caused by rape, and pregnancy on account of failure of contraception in the case of a married woman are presumed to constitute grave injury to the mental health of the woman], or (c) a substantial risk of the child being born abnormal or handicapped.

4. The Pre-Conception and Pre Natal Diagnostic Techniques (Prohibition of Sex selection) Act, 1994

The Pre Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 was enacted and brought into operation from 1st January, 1996 in order to check female foeticide. Rules have also been framed under the act. The Act prohibits determination and disclosure of the sex of foetus. It also prohibits advertisement relating to pre natal determination of sex and prescribes punishment for its contravention. The person who contravenes the provision of this act is punishable with imprisonment and fine. The object of this Act is to provide for the regulation of the use of pre natal diagnostic techniques for the purpose of detecting disorders or chromosomal abnormalities or certainly congenital sex linked disorders and for the prevention of the misuse of such Techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters

⁵ A. Bajpai, *Child Rights in India-Law, Policy and Practice*, OUP, New Delhi, p. 6-7 (2003)

⁶ 312. Causing miscarriage; 313. Causing miscarriage without woman's consent.; 314. Death caused by act done with intent to cause miscarriage.; 315. Act done with intent to prevent child being born alive or to cause it to die after birth.; 316. Causing death of quick unborn child by act amounting to culpable homicide.; 317. Exposure and abandonment of child under twelve years, by parent or person having care of it.; 318. Concealment of birth by secret disposal of dead body.

connected there with or incidental thereto Section 4(3) of the Act enumerates certain condition where only prenatal diagnostic techniques could be used and they are;

- (i) Age of the pregnant woman is above thirty five years.
- (ii) The pregnant woman has undergone of two or more spontaneous abortions or foetal loss.
- (iii) The pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation infection or chemicals.
- (iv) The pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease
- (v) Any other condition as may be specified by the Central Supervisory board.

The Act has three aspects;

- 1 Prohibitory –it prohibits sex selection completely either before or after conception
2. Regulatory- It regulates the use of prenatal diagnostic techniques for medical purposes and prevents its abuse.
- 3 Preventive- The Act provides for setting up of various bodies to look into implementation of the Act.

5. Salient Features of the Act

The following are the salient features of the Act:

- I. A woman may avail herself of the facility only if she is (a) above the age of 35, or (b) has had two or more 'spontaneous abortions', or (c) if she has a family history of genetic disease, or (d) has been exposed to agents that are potentially harmful to the unborn child.
- II. It can only be conducted to detect: genetic abnormalities; (b) genetic metabolic diseases; (c) haemoglobinopathies; (d) sex-linked genetic diseases; (e) congenital abnormalities.
- III. The test shall not be used for the purpose of sex determination.
- IV. The test can be conducted only at duly registered 'genetic counseling centres, laboratories and clinics'.
- V. The test cannot be performed without the written and 'informed consent' of the mother.
- VI. Advertising of the availability of facilities for sex-determination is banned. violation of this provision results in a maximum of 3 years, imprisonment and/or fine.
- VII. Pre-Conception Pre-natal Diagnostic Techniques Act (Prohibition of the Sex Selection) Act, 1994 provides for following instruction to stop the pre-selection of the sex..
 - It prohibits sex selection, before and after conception.
 - It regulates of Pre-natal Diagnostic Techniques (e.g. amniocentesis and ultrasonography) for detection of genetic abnormalities, by restricting their use to registered institutions. The Act allows the use of these techniques only at a registered place for a specified purpose and by a qualified person, registered for this purpose
 - It prohibited the sale of ultrasound machines to persons not registered under this Act⁷

⁷ The PNNT (Prohibition of Sex Selection) Rules, 1996; Section 3 A

- It provides punishment for violation of provisions of the Act.
- It further provides that the name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed off and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.
- It provides that any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees. It provides that the Court shall presume unless the contrary is provided that the pregnant women have been compelled by her husband or relative to undergo the test. It provides that there shall be an Appropriate Authority consisting of an appointed officer, who shall be advised by an Advisory Committee, consisting of, three medical experts, one legal expert, three eminent social workers and one government officer. The function of the Appropriate Authority is namely to grant, suspend, cancel registration; to enforce standards, to investigate complaints of breach, to search and seize records etc.

It provides that all records etc. are required to be maintained and preserved by the concerned institution/person. It provides that the Court shall take cognizance of a complaint only if it is made by the Appropriate Authority or by a person who has given more than 30 day notice the Appropriate Authority.

6. Critical Analysis

The PNDT Act, in its amended form, is quite clear and there are no major loopholes in the law. The law has come into existence but what is missing is its enforcement. The census of 2001 is a pointer to the fact that the laws governing foeticide like the PNDT Act have been totally ineffective. The Supreme Court of India in its order on May 4, 2001 on the writ petition filed by an NGO called Centre for Enquiry into Health and Allied Themes (CEHAT) against the Union of India said:⁸

⁸ Centre for Enquiry into Health and Allied Themes v. Union of India, (2001) 5 SCC 579, mentioned in Jyoti Dogra Sood & Dr. K.N. Chandrasekharan Pillai, "Female Foeticide in India", NUALS Law Journal, Vol. 2, 2008

"Prime facie, it appears that despite the PNDT Act being enacted by the Parliament, five years back, neither the State Government nor the Central Government has taken appropriate actions for its implementation."

Framing a social problem in the formal and specific language of law has first clearly defined all the key players and their roles in promoting the practice and second put in place institutional mechanisms that will regulate the practice. Legislation and regulation provide a framework within which the role of multiple actors and institutions can be correctly measured and evaluated. For instance, regulation has a critical impact on the larger medical and pharmaceutical industry that has sprung around reproduction in general and sex – determination in particular of which doctors are only a part.⁹The irony of the whole Situation is that in the 10 years since India enacted the pre-Natal Diagnostic Technologies (PNDT) Act, not a single person was convicted till very recently and in the beginning of April 2006 only two people were convicted fined and pronounced five years of rigorous imprisonment. Fetal sex determination techniques such as amniocentesis, originally intended for the detection of fetal abnormalities, were first introduced in 1975 (Luthra 1994). The rampant misuse of amniocentesis and other techniques, such as chorionic villas sampling and ultrasound, for aborting female fetuses rapidly became a major concern, and it remains so till this day. The astonishing pace at which the network of private clinics providing sex determination and abortion services grew was marked by two features:- the tests were cheap (Wertz and Fletcher 1992) and they were widely available, even in remote rural areas bereft of basic amenities and health facilities (possibly because of the widespread use of portable ultrasound equipment's and amniocentesis kits (Menon 1996, Ganatra et al. 2001))¹⁰. Anti-sex determination campaigns during the mid-1980s focused attention on the vast scale of the problem, especially in the urban areas of northern and western India (Retherford and Roy 2003). Prenatal sex determination was banned in public healthcare facilities nationwide as early as 1978. However, largely due to public awareness campaigns¹¹, the state government of Maharashtra was the first to impose a complete ban on all (public and private) prenatal sex determination in 1988. The rest of the country followed suit with a similar ban by the Indian central government, known as the Pre- Conception and Pre-Natal Diagnostics Techniques (Prohibition of Sex Selection) Act of 1994 (PNDT Act, effective from 1996). Despite the ban on sex-selective abortion, the CSR declined from 945 in 1991 to 927 in 2001. In the wake of these findings the large public outcry that ensued, the Indian government amended the PNDT Act in 2003 and doubled down on the campaign against sex selective abortion. The Pre- Conception and Pre-Natal Diagnostics Techniques (Prohibition of Sex Selection) Act of 1994 (PNDT Act, effective from 1996). Despite the ban on sex-selective abortion, the CSR declined from 945 in 1991 to 927 in 2001. In the wake of these findings the large public outcry that ensued, the Indian government amended the PNDT Act in 2003 and

⁹ R. Malik, "Negative Choice", Seminar 532, p.34, December
¹⁰ Arindam Nandi and Anil B. Deolalikar, "Does a Legal Ban on Sex-Selective Abortions Improve Child Sex Ratios?" Evidence from a Policy Change in India, April 2011, p.4

¹¹ The 'Forum against Sex Determination and Sex Pre-selection' in Maharashtra is a prominent example of such campaigns (Gangoli 1998)

doubled down on the campaign against sex selective abortion. At present, ultrasonography is used most commonly in India as it is most widely available, inexpensive, non-invasive and easy-to-use: it is also a technology supported by medical practitioners to detect foetal defects, and thus is a legitimate technology used by pregnant women. However, rapid advances in technology may make the identification of the sex of the foetus possible through a blood test early in pregnancy or even at conception stage. While these methods are not currently available for the most part in India, they offer an almost undetectable way of experiencing a sex-selective pregnancy, and are likely already undertaken by wealthy Indians who travel abroad to take advantage of the availability of such techniques. Indeed, in south Indian states prenatal diagnostic techniques are widely available and used, but not misused: as a result, although the use of these techniques is greater in the southern than in the north Indian states, imbalances in the sex-ratio at birth have not been as pronounced (Bhat and Xavier, 2007).¹²

An important modern diagnostic tool, used for monitoring pregnancy and genetic defects: the ultrasound machine, has also become a selective killer of the female child. The male child preference in India was responsible for female infanticides in the past. With easy availability and accessibility of USG, a shift has occurred from infanticide to feticide, although female infanticides still continue. In the process doctors are blamed as “merchants of death”. Doctors are considered men of noble profession. However, in recent times, they have also often been projected as “Merchants of Death”. This has happened in spite of the fact that there are evolutionary transformation of the health scenario in our country, mainly related to the fact that doctors often have been caught indulging in wrongful acts and these have been splashed in the media.¹³

7. Conclusion

Equality and respect for human dignity must permeate all stages of the socialization process. Divine justice demands that the rights of both sexes should be equally respected since neither is superior to the other in the eyes of God. Seminars and workshops on female foeticide should be organized on a regular basis to be addressed by eminent sociologists, demographers, feminists, medical experts and lawyers etc. Complete ban should be imposed on advertisements relating to all sex-selection techniques before or during pregnancy.

All the medical practitioners, especially the sonographers and gynaecologists, members of the Indian Medical Association and other specialist groups should come forward and make a common public declaration before reputed public figures, journalists or other authorities and sign an oath that they will not themselves indulge in or abet the nefarious activity of female foeticide. Ultrasound and other Genetic Centers should undergo surprise and regular checks for which

¹² Shireen Jejeebhoy, Sharmistha Basu, Rajib Acharya, A J Francis Xavier, “Gender Biased sex selection in India: A review of situation and interventions to counter the practice”, Population Council Ideas. Evidence. Impact. New Delhi, March 2015, p.4

¹³ Murali Mohan Paitnaik and Gouri Sankar Kejriwal, *A Perspective On The PCPNDT Act*, Indian Journal of Radiology and Imaging / May 2012 / Vol 22 / Issue 2, p. 137

a team should be constituted comprising members from different sections of society. Medical Council of India should amend its Code of Ethics to make it more effective against erring doctors. Members of the general public must be empowered to bring in an action under the PNDT Act so that the culprits may be brought in the light within time. In the PNDT Act, the Appropriate Authority and the defaulter’s (doctor, radiologist etc) belong to the same class; therefore, the Appropriate Authority should consist of different professionals who could act in an unbiased manner. The critical issue of female foeticide needs to be addressed carefully and urgently so as to evolve a strategy to combat the problem. There is a need for a multi-pronged policy and programmatic approach within which legal and other strategies have important roles to play.