

LINKAGE BETWEEN HUMAN RIGHTS AND PRE CONCEPTION AND PRE NATAL DIAGNOSTIC TECHNIQUES ACT, 1994

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CHAPTER 1

INTRODUCTION

The use of technology for pre-natal determination of sex, in the context of India, is wholly discriminatory to the female sex and has an impact on the status and dignity of women. Large-scale misuse of these technologies in future would precipitate a severe imbalance in the male female ratio. Therefore, it has become necessary to implement the Act uniformly in all the states and Union Territories so that it should achieve the purpose for which the Pre conception and Pre natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 has been enacted.

Scientific development and technological advancements are expected to be pursued by man for general human good, but unfortunately in present times, some specific technological knowledge is leading to greater abuse on humanity. One such case is the sex determination through scientific methods resulting in female foeticide. This is commonly known as sex-selection.

Such development in medical science have resulted in sex-determination and sex pre-selection techniques such as sonography, fetoscopy, chronic villi biopsy (CVB) and the most popular amniocentesis and ultrasound. A study of amniocentesis in a Bombay hospital found that 96% of female fetuses were aborted compared with only a small percentage of male fetuses. The preference of the male child leads to the female infanticide and sex selective abortion.

The right to life is a very broad concept and is the most fundamental of all. In India, right to life has been recognized under Article 21 of the Constitution which says that "No person shall be deprived of his life and personal liberty except according to procedure established by law". Person here includes both man and woman. Among various rights which are available to a woman, the right to abortion¹i.e. right to productive choice is also believed to be one of the most

¹Abortion is the termination of a pregnancy by the removal or expulsion from the uterus a fetus or embryo resulting in or causing in death. Abortion can be classified into two types which are the following:

essential and fundamental right. Right to abortion has been recognized under right to privacy which is a part of right to personal liberty and which emanates from right to life². But the question always, arises whether the mother has a right to abortion or the child has a right to life.

LITERATURE REVIEW

In their book titled, “*Law & Social Transformation in India*”, authors **Malik and Raval**, have very uniquely observed that, the use of technology for Pre Conception and Pre Natal determination of sex, in the context of India, is wholly discriminatory to the female sex and has an impact on the status and dignity of women. The authors have rightly observed that large scale misuses of these technologies in future would precipitate a severe imbalance in the male female ratio.

In his book titled, “*Reflections on Medical Law and Ethics in India*”, author **B. SandeepaBhat**, has interestingly provided an outstanding work on Legal Regulation of Abortion in India, which starts with the analysis of the background of legal regulation of abortion in India. The author finds that the Pre Conception and Pre Natal Diagnostic Techniques Act has tried to establish a balance between allowing abortion in certain and prohibiting sex selective abortion. This is due to the fact that India, on one hand has the problem of sex selective abortion. The author has concluded by highlighting concern over the timeframe for abortion, grounds of abortion and requirement of consent. This book is eminently readable and the contents are easily accessible because they are set forth in a jargon-free language.

In their book titled, “*Abortion in India- Ground Realities*”, author **LeelaVisaria&VimalaRamachandan**, have provided valuable insight into the Abortion need in India. Abortion remains a sensitive matter in most countries, receiving considerable international attention not only as a public concern but also as an ethical/moral/religious issue. India is a pioneer in legalizing induced abortion (through the Pre Conception and Pre Natal Diagnostic

1. Spontaneous Abortion- An abortion which results due to the complications during pregnancy and which occur unintentionally is called spontaneous abortion. It is also termed as miscarriages.

2. Induced abortion has also been divided into two types:

a. Therapeutic abortion- An abortion Which is induced to preserve the health of the mother when her life is in danger or when it is found that the Child if born will be a disabled one at time it is termed as therapeutic abortion.

b. Elective abortion- An abortion induced for any other reason in known as elective abortion.

Both embryo and fetus means unborn child.

²Roe v. Wade 410US 113 (1973)

Techniques Act of 1994) under which a woman can legally have an abortion if the pregnancy carries the risk of grave physical injury or endangers her mental health.

In the article titled, “*Important points in the PC&PNDT Act*” published by *National Center for Biotechnology Information*, authors **PrashantOnkar and KajalMitra** have highlighted a few points from the PCPNDT act, which need explanation whereas others are confusing or controversial. The act was formulated in 1994 specifically for pre-natal diagnostic techniques (invasive procedures) and centers were termed as genetic clinics. The Act would rather appear in consonance with Article 21 of the Constitution of India than in conflict with it, as the object of the act being to save the life of the female unborn child.

RESEARCH QUESTION

Weather the Pre Conception and Pre Natal Diagnostic Techniques Act violates mother’s right to liberty?

OBJECTIVE OF THE RESEARCH

- i. To understand the linkage between Human Rights and PC&PNDT Act
- ii. To know the law governing abortion in India
- iii. To find out what are the essential for an abortion to be legal
- iv. To study the Pre conception and Pre natal diagnostic Techniques Act, 1944.

RESEARCH METHODOLOGY

The researcher has undertaken the ‘Doctrinal Research’ study. It is library based research and elaborates the already existing facts. This study focuses upon understanding of operation of law. It includes book written by eminent authors, articles in magazines, journal, online articles, databases, newspaper’s editorials, etc. Books and other reference materials from the ILS library were also helpful for the completion of this research paper.

SCOPE OF THE PAPER

The scope of paper is limited to the pre conception and pre natal diagnostic techniques in India and its awareness among the women and the society. The research project is limited by constraints of time, space and financial resources. This project, while facing constraints, is further limited in its approach for obtaining the well-defined answer to the research question posed.

SIGNIFICANCE

The research topic, linkage between human rights and science & technology with special reference to Pre Conception and Pre Natal Diagnostic Techniques Act, 1994 is of great significance, irrespective of the marital status of women, access to safe abortion services and quality post-abortion care, including counseling, need to be legally guaranteed in certain defined cases provided under the Act.

CHAPTER 2

PRE CONCEPTION AND PRE NATAL DIAGNOSTIC TECHNIQUES ACT, 1994

PRE-NATAL SEX-SELECTIVE ABORTIONS

The most extreme expression of the preference for sons is female infanticide and sex-selective abortion. A study of amniocentesis in a Bombay hospital found that 96% of female foetuses were aborted compared with only a small percentage of male foetuses.

"Government officials even suspect that the disproportionate abortion of female foetuses may be a major underlying cause of the recent decline in the nation's sex ratio. In 1971 there were 930 females for every 1,000 males. In 1981, this figure had increased to 934, but by 1991, instead of continuing to rise, the ratio dropped to 927, lower than the 1971 figure. This sex ratio is one of the lowest in the world". There were posters in Bombay advertising sex determination tests that read, "It is better to pay Rs. 500 now, than Rs. 50,000 (in dowry) later".

Sex ratio in India (1901 to 2001)³

Census year	1901	1911	1921	1931	1941	1951	1961	1971	1981	1991	2001
Females for 1000 males in India	972	964	955	950	945	946	941	930	934	927	933

³India Census of India, 2001, paper-1 of 2001, Office of the Registrar General India (April 4, 2001)

If we look into this statistics, we find that in decades of 1971 and 1991, the ratio are lowest than others. Does this arise due to abortion of selective sex? No, it is not a sole reason, but one of the reasons. This facility was started from about 1980. The statistics shows that the ratio of female increased between 1991 to 2001, when such facility was on the peak. By survey it is found that the people who go for determination of sex in foetus, is the couple who is having one daughter. It is not so easy to remove the desire from the mind of person, to have male child. In Hindu mythology it is also suggested that “way of moksha is by the hand of son”. According to interviews of 10 radiologists and doctors in Gujarat, who refused to give data but agreed that more than 90% of the couples coming for sex determination are those having one female child and want to restrict themselves to only two children, but desire one male child.

SHOCKING FACTS AND FIGURE OF FEMALE FOETUS

It is not a revelation, but a confirmation, that female foetuses are disappearing faster than we would like to believe. Successive Census reports have highlighted our skewed sex ratio, but a survey published in the latest issue of the Lancet Magazine through up sacking statistics. According to this study on female foeticide by an Indio-Canadian team, about 500.000 unborn girls (one in twenty-five) are aborted in India every year. Even more disturbing is the fact that the 'girl deficit' is more prominent among educated families. The researchers attribute this to rampant misuse of ultrasound technology for pre-natal sex determination.⁴

REASONS FOR ABORTION OF FEMALE FOETUS

The preference of the male child is rooted in the centuries old belief that the son is the budde-ki-lathi (old age security) and the daughter is paraya-dhan (other's assets). This continues despite the fact that in a growing number of families, at least in urban India, daughters are taking on the responsibilities of looking after parents in their old age. A daughter is considered as economic burden because of the money which has to be spent on her dowry. Human greed and growing consumerism have made things worse. The argument that it is better to kill the girl in the womb than see her killed for dowry is outrageous.

⁴“Murder in the Womb”--Times of India, Ahmedabad Ed. 11th Jan, 2008.

THE PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994

The use of technology for pre-natal determination of sex, in the context of India, is wholly discriminatory to the female sex and has an impact on the status and dignity of women. Large-scale misuse of these technologies in future would precipitate a severe imbalance in the male female ratio. Therefore, it has become necessary to implement the Act uniformly in all the States/UT's so that it should achieve the purpose for which it has been enacted. Appropriate Authorities, assisted by Advisory Committees are the main instruments for implementation of the Act. There is a need to sensitize these Appropriate Authorities and Advisory Committees on the provisions of the Act and directions given by the Hon'ble Supreme Court for its implementation. Two regional workshops to sensitize the Appropriate Authorities at State and District levels were held in Bangalore and Chandigarh in the months of April and June, 2002, respectively. After detailed discussions in these workshops and queries raised in several before it was felt that there is an urgent need to issue clarifications on certain points including registration of clinics/centres, maintenance of records, procedure for prosecution. search and seizure, sealing of machines, etc.

PNDT Act and Rules have been amended w.e.f. 14th February. 2003, including the title of the Act, keeping in view the emerging technologies for selection of sex before and after conception and problems faced in the working of implementation of the Act and certain directions of Hon'ble Supreme Court after a PIL filed in May, 2000 by CEHAT and Ors, an NGO on slow implementation of the Act. By the Amendment, legislators have increased the punishment up to five years imprisonment and fine up to Rs. 100000.⁵

⁵Act with Amendment is discussed in detail under Chapter 6 of the same book.

CHAPTER 3

LINKAGE BETWEEN HUMAN RIGHTS AND PC&PNDT ACT, 1994

The Landmark judgments on Effective implementation of PCPNDT Act

Though the Act has been in place since the past six years the latest sex ratio figures of the 2001 Census reveal alarming trends. The Census figures of the 0-6 age group show a steep decline in the number of females especially in States like Haryana, Punjab, Himachal Pradesh, Maharashtra, Gujarat and Tamil Nadu. In February, 2000, Centre for Enquiry into Health and Allied Themes (CEHAT), and other activist filed a PIL in the SC in case *CEHAT v Union of India*⁶. The PIL seeks to accomplish the following objectives-

- (a) To activate the Central and State Governments for rigorous implementation of the Central Legislation, and
- (b) To interpret the legislation and/or to demand amendments to ensure that the techniques that use pre-conception or during- conception sex selection are also brought under the purview of the Act.

The first positive step forward was a favourable interim judgement by the Supreme Court of May 4, 2001. The order called for all the State Governments to take necessary steps towards the implementation of the Act. The Department of Family Welfare of Government too got energized and they issued an advertisement in national dailies saying that it is a crime to carry out sex selection and also activated the Central Supervisory Board by calling a meeting. The order also came heavily on the medical profession and their unethical practice. As a result, the Indian Medical Association (IMA) at the national level made a turn around and issued a warning to its members. The Federation of Obstetrician and Gynaecologist Societies of India (FOGSI) too showed some concern through its newsletter. The Governments were also asked to conduct a survey of the existing bodies conducting these tests. The hearings henceforth have been follow ups on the above directive. There has been very poor compliance by the State Governments.

⁶ CEHAT v. Union of India (2001) 5 SCC 577

In Orissa and in Haryana from near the place of nursing Home and Clinic hundreds of skeletons, skulls & body parts of the children were recovered leading to strong allegation of existence of sex selection and Sex determination.

In *HemantaRath v. Union of India*⁷ and *GauravGoyal v. State of Haryana*⁸, both the High Courts, after referring to the Act, its boarder perspective and Human Rights & Constitutional principles, stressed on Constitutional obligation of the State to implement the Act,

A married couple comes before the court and submits that the right to personal liberty of the person, guaranteed under Article 21 of the Constitution, includes the liberty of choosing the sex of the child. Hence, couple is entitled to undertake any such medicinal procedure for determination or selection of sex of the child.

In *VinodSoni v Union of India*⁹, Constitutional validity of the PCPNDT Act was challenged on the ground that it violates Article 21 of the Constitution. But it was held that Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself be a right. Right to life under Article 21 cannot include right to selection of sex – whether pre conception or post conception.

A couple is having two daughters and desires of having a son so that they could enjoy the love and affection of both son and daughters and their daughters can enjoy the company of their own brother while growing up. Hence, the said couple wants to go for sex selection and sex determination. It is argued that why they should not be allowed to make use of the pre natal diagnostic techniques at pre conception stage to have a male child. It is further argued that couple which is already having son or sons should be allowed to make use of the pre natal diagnostic techniques and pre conception stage to have daughters and vice a versa. Hence, there should not be blanket ban on sex selection and sex determination.

It is further argued that till today the conditions in our society are not yet conducive for the birth of a female child. A female child is subjected to all sorts of abuse and harassment, from sexual

⁷AIR 2008 Ori. 71

⁸ AIR 2009 Haryana, decided on 7th July, 2009

⁹2005 Cri.L.J.Bom. 3408

assault to domestic violence. Hence till the conditions are improved, we should not have the girls to be borne and till then sex selection and sex determination should not be prohibited.

In *Vijay Sharma v Union of India*¹⁰ Constitutional validity was challenged on the ground that it violates Article 14 of the Constitution. High Court rejected the challenge holding that-

- Sex selection is against the spirit of Law & Constitution.
- It affects the dignity of women and undermines their importance.
- It insults and humiliates womanhood
- It violates woman's right to life.

In *SatyaTrilokKesari @ Satyanarayn s/o. TrilokchandLohia v State of Maharashtra and Anr.*¹¹ An Article in legal newspaper on how to conceive a male child through naturopathy was published. Case filed under section 22 of PCPNDT Act against the applicant. Application filed under High Court for quashing proceedings, arguing that it was a research paper. The Argument was rejected holding that intention of the Applicant has to be read between the lines. Some paragraphs are very explicit and held it amount to violation of Section 22(1) of the PCPNDT Act.

Another major landmark in the course of the PIL was the hearing held on 11th Dec, 2001. The Supreme Court called upon the Chief Health Secretaries of Punjab, Delhi, Bihar, Rajasthan, Gujarat, Haryana, Uttar Pradesh, Maharashtra and West Bengal, to remain present before the Court on the 29th of January, 2002 for non-compliance of orders passed by the same. The Supreme Court also directed companies manufacturing ultrasound machines to provide information about the individuals or groups to whom ultrasound machines have been sold during a period of last 5 years. The Centre was asked to frame rules for ensuring action. Till the time such rules are framed companies supplying such machines are directed to supply information to the Government.

The Supreme Court issued the directions to CSB commissions' studies of sex ratios at birth every 3 years at State level. This information should be collected independent of the routine Health Department sources and birth registration data. The analysis of sex ratios at birth is an

¹⁰ AIR 2008 BOM 29

¹¹ 2012 (6) LJSOFT 389

unbiased indicator of the effectiveness of the implementation of the PNDT Law and related efforts. CSB place a detailed report to the Supreme Court once every three years beginning from 1stOctober, 2004 (Thus, we will have 3 time series data before the Census 2011 surviving child sex ratios are available). State and National consultations should be held to plan appropriate follow up actions.

FIRST CONVICTION HELD AFTER DECADE UNDER THIS ACT

This enactment was passed in 1994 called "The Pre-conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994", to curb the misuse of amniocentesis for sex selection and abortion of female foetuses. Women activists criticise this Act, because it provides that the woman who seeks the procedure also shall be punished. These women may be under pressure to bear a male child. It is sordid to say that, this Act was only on paper for a decade. The median conviction under this Act was held by Magistrate of Palwal Court (Haryana). Learned Magistrate has shown the real object of the Act, by convicting a doctor and his assistant to two years' imprisonment to each, as an exemplary punishment. This is a type of crime where victim is only sufferer and has to pay more foes than the other ultrasounds. Don't forget that unless there is affection for girls, respect for women, only then can India be heaven.¹²

GENDER NO BAR FOR HEARING CASES RELATING TO SEX

The Supreme Court has rejected the plea for transferring a sexual offence case being heard by a woman judge to a male judge as she would find it 'embarrassing' to hear it. Court said that judges hear and decide the cases of any type irrespective of their gender, as that is their duty. The judgment is fall out of a criminal case registered or procuring young men and women for preparing pornography videos and CDs and selling them to pornographic websites. When the question of examination of the CDs came up before the Chennai Trial Court being presided by woman judge, the accused moved the High Court saying the examination of CDs would embarrass her. They sought transfer of the case to a court presided over by a male judge. The Chennai High Court transferred the case to the court presided by male judge. High Court

¹²DD NEWS, May, 2006.

observed that transfer of the case to a 'mahila' court would embarrass everybody. But, a woman, who was a victim of the pornographic expose, challenged the High Court order and argued that women witnesses would be more at home to dispose against the accused in a court, presided over by a woman judge.¹³

STATE MUST INTERVENE TO STOP SEX-SELECTIVE ABORTION

Since the bias against the girl child is based on economic considerations, the solution too will be economic. Turning the girl child from an economic liability into an economic asset is the most effective way of tackling the problem. The Government should give incentives for having a girl child through free education, extra PDS ration, perhaps even tax concession for parents of girl children. This is more likely to have the desired result than sting operation against sex determination clinics that the Government has just announced. At a social level, religious and social organisations must mobilise their energy against this inhuman practice. Community leaders must take the lead. Anyone involved in the killing of a girl child should be ostracized by society. We have to do everything it takes to stop this barbaric practice.

In this regard a big step has been taken by "Jat and GujjarMahapanchayat" on 7th October, 2006 at Village Shouro (Muzafarnagar, U.P.), they decided to boycott families which opt for pre-natal sex determination tests for selective abortions, and doctors/nursing home owners, where the tests are carried out, will be ostracized.¹⁴ We hope that such decision will set guidelines for other communities to come forward, to protect their future generation.

In the State of Gujarat, tuition fees of the girls are free at all levels in government institutions. Similarly, the UP Government has passed a scheme called Kanyadan Scheme, under which every girl passing the intermediate exam (10+2) in the year 2006, would be awarded with donation of Rs. 20,000, and issued the cheques in the month of September, 2006.

¹³Times of India. Ahmedabad Ed., 12th Jan. 2005.

¹⁴"Jats, Gujjars wake up to ills of sex tests" -TOI. Ahmedabad Ed. 8th Oct, 2006.

CONCLUSION

The Preconception and Prenatal Diagnostics Techniques (Prohibition of Sex Determination) Act 2003, with Rules made thereunder is an act to safeguard the girl child. The Courts have at all material times and in all possible manners delivered judgments indicating therefore that the PC-PNDT Act is actually a whip to penalize those indulging in sex determination and to serve as a deterrent to others.

The Act is legislated in a manner that it should be a deterrent for those indulging in sex determination. The unfortunate decline in the male-female sex ratio has brought in stringent measures, there is suspension of registration, filing of criminal cases and sealing of machines. Besides, criminal prosecution will also bring in suspension and cancellation of registration granted by the State Medical Council.

Remedies are also provided—like filing an appeal before the appellate authority and getting the machine released from the court of law, but all these remedial measures are time-consuming and bring the career of an individual to a standstill.

It would not be out of place to therefore state that the most effective precautionary measures are to maintain records scrupulously, fill the Form-F as provided in the Act, accurately and correctly, submit the records to the appropriate authority within the stipulated time; then there will be nothing to worry.

There is no doubt that there are a few shortcomings in the Act but that does not give any reason for non-compliance of or contravention of any of the provisions of the Act.

The major contribution by radiologists/ sonologists/ gynecologists towards prevention of female feticide can be achieved by thus fulfilling the mandatory requisitions of the PC-PNDT Act.

So last but not the least BEWARE.

SUGGESTIONS

- Abortion of pregnancy should be allowed in any stage, when fetus is suffering from any severe health issue.
- PC&PNDT Act should be lenient in cases of such medical emergency.
- Awareness program is necessary to educate people regarding prevention sex-selective abortion.
- Pregnant women with history of diabetics or thyroid should conduct the entire prescribed test on time including pre conception and pre natal test.
- The doctors or physicians must not disclose the gender of the fetus, even after conducting Pre natal test during emergency.
- Media can play a vital role for spreading awareness in public relating to prevention of those tests which leads to sex determination.
- Awareness camp required to be promoted regarding gender equality especially in rural areas.
- Every woman should have the right of abortion, if her life or the life of unborn is in danger but not merely on the basis of sex of the unborn.