



DEATH BEFORE BIRTH- A GROWING CONCERN FOR FEMALE FOETICIDE

By Shana Sara Varughese & Vandana Jain
From *School Of Excellence in Law,
TNDALU*

ABSTRACT:

“We aren't made to die in wombs
But live a life of honour
Not to embellish the tombs
Or be put down just as goners” -
AmbicaGovind

Having a child, especially a boy, is a dream come true for many families. Ours being a patriarchal society, a great deal of emphasis is laid upon extending a family's lineage. In India, this can be achieved only with a male child. Families wait for the announcement that the child conceived is a boy. If the child conceived is a girl, she is seen as a liability rather than an asset to the family. To escape from bearing such a liability, the family may resort to prenatal diagnostic tests to confirm the gender of the baby. If the result of this test is not in their favour, they may force the mother to abort the child or even kill the child inside the womb.

Since 1994, prenatal sex determination was banned in India under the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act. However, this act has not been implemented properly. Even in the 21st century, despite the progressive development that has taken place in our nation, the social evil of female foeticide is still prevalent.

This article aims to shed light upon the current scenario of female foeticide in India and how it compares in the international sphere. It also gives an insight into the current Acts and schemes enacted on female foeticide and provides suggestions for better implementation of their provisions. It also provides suggestions for a decrease in foeticide throughout India.

Keywords: Female, Foeticide, Prenatal, Child, Protection

INTRODUCTION:

Marriages are considered sacred in our country. A marriage is deemed to be successful only after its consummation. A woman is considered to be pure only if she is able to conceive and deliver a baby. If she is not able to, then she is disrespected by her conjugal family and society. It is a societal belief that it is the male heirs who run the family and therefore, it is important to have a male child to carry on further generations. Women are given secondary importance in the society. This preference for a male child over a female child led to the emergence of the concept of sex determination.

There is a huge disparity in the male – female ratio. The main reason behind this is the preference for a male child over a female child. New born female babies are killed because of their gender. This inhumane practice has been in existence for decades and even after the development that has taken place, it has not been curtailed. Instead, it has taken a new form. In the past, expectant parents had no means to test the gender of the foetus, so they had to wait till the baby was born. If the child was a girl, she was killed brutally and only the male



child would survive. Later in the 1990s, with the institution of ultrasounds and other reproductive technologies, the concept of infanticide changed into foeticide.¹ The practice of 'Female Foeticide' is the killing of a girl in the womb itself. Here, the girl is killed before she has the opportunity of being born. This practice had made things easy for the families who were keen to have a male child. This created a huge disparity in the male-female sex ratio which had a grave impact on the functioning of the society.

In spite of the widespread knowledge of a woman's right to equality, the patriarchal social structure continues to thrive. Women derive value and status only as mothers of sons; their happiness and social status in their conjugal homes is dependent on producing sons. Women have internalised these roles and values. Though they say that daughters take better care of parents or are more emotionally attached, the desire to have sons remain. In the pursuit of sons, they have become consumers of the new technology of ultrasound, which allows them to choose and bear sons.

It is quite evident that the sex ratio is a powerful indicator of the social health of the nation. Since the 1980s, India has witnessed a sharp decline in the number of females and the reason is the preference given to the boy child. An in depth analysis of the 2001 Census, shows that there are only 933 females for every 1000 males.² When we question ourselves whether this

decline is due to the unfortunate attitude towards having a female child, we come to a conclusion that even today, the birth of a son is considered to be a prestigious addition to a family.

It is legally valid to abort a child within 12 weeks of pregnancy due to medical complications.³ But it is unlawful to abort the child because of their gender. It is important that the Government and other institutions take an initiative towards this mind set of people so that we eradicate the practice of female foeticide.

THE HISTORY OF FEMALE FOETICIDE:

Discrimination between men and women has always been a part of society throughout history. Women have always been prone to unjust treatment. They were treated as commodities that were required to please male members of the family and bound by the duty to serve them. The men enjoyed a very dominant position as they were the ones earning the livelihood. This dominance of males over females paved the way for female infanticide being common in the society. Since boys were preferred over girls, girls were killed as soon as they were born. They were buried alive or were killed by rubbing poison on the mother's breast. They were made to drink milk of the Errukam flower which was dangerous for their health. They were even subject to inhumane practices such as being sold without their wish and severe injuries were

¹<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5441446/> Last accessed on 15/05/2018

²http://censusindia.gov.in/Census_And_You/gender_composition.aspx Last accessed on 15/05/2018

³Section 3(2)(b), Medical Termination of Pregnancy Act, 1971



marked on their body. They were even force fed sleeping tablets.⁴

The newest form of assault is the act of killing the foetus inside womb i.e., female foeticide. The development in the field of medicine and technology made it easy for medical practitioners to determine the sex of the foetus with various tests like amniocentesis, Chorion Villus biopsy and most popularly, ultrasonography.⁵

These sex-determination tests were designed to detect gender related hereditary abnormalities in the unborn child. It is unfortunate that it is abused largely in India and other Asian countries to abort the child if it is detected that the child to be born is female. With the introduction of the concept of family planning, the need to have a male child increased. With a limited number of children, they preferred boys more than girls and this led to an alarming increase in female foeticide rates.

PRE-NATAL SEX DETERMINATION TESTS:

- In early days, Amniocentesis was used as a means to determine the sex of the foetus. **Amniocentesis** (also referred to as Amniotic Fluid Test or AFT) is a medical procedure used in prenatal diagnosis of chromosomal abnormalities and foetal infections,⁶ and also for sex determination, in which a

small amount of amniotic fluid, which contains foetal tissues, is sampled from the amniotic sac surrounding a developing foetus, and then the foetal DNA is examined for genetic abnormalities. It is used during 14-18 weeks of pregnancy. If it is done before, it might harm the tissues of the foetus in the body. This result had a great impact on society, because these test were used to detect genetic disorders and kinship.⁷

- The second kind type of test is **Chorionic Villus Sampling (CVS)**. It determines chromosomal or genetic disorders in the foetus. It involves sampling of the chorionic villus (placental tissue) and testing it for chromosomal abnormalities, usually taking place at 10–12 weeks' gestation.⁸
- One of the newer methods employed to fulfil the desires of expectant parents to have a male child is the **Ericsson Method**. It is a device to separate the X and Y chromosomes from the sperm and then inject back only Y chromosomes into the womb to ensure a male foetus.⁹
- With the advancement in medical technology, now **ultrasonography** is used to determine the sex of the baby. During 12-40 weeks of pregnancy, this test is done to determine the gender of the baby. A gel is applied over the pelvic and abdominal area and then a transducer is

⁴ Swati Mehta & Jayna Kothari, — It's A Girl! Pre-Natal Sex Selection and the Law, Lawyers Collective, Nov. 2001.

⁵ Bahais View Point, PUCL Bulletin September 2001

⁶ "Diagnostic Tests – Amniocentesis". Harvard Medical School. Archived from the original on 2008-05-16. Retrieved on 12-05-2018

⁷ Rapp, R 1998, 'Refusing Prenatal Diagnosis: The Meanings of Bioscience in a Multicultural World', Science, Technology, & Human Values, vol. 23, no.1. pp. 45-70

⁸ <https://www.healthline.com/health/chorionic-villus-sampling> Last accessed on 15/05/2018

⁹ <http://www.ingender.com/Gender-Selection/Ericsson/Ericsson.aspx> Last accessed on 15/05/2018



used to scan the part. It is not illegal to conduct an ultrasound for pregnant women. But it is illegal to reveal the gender of the child in the process. The results of the test decide the fate of the foetus in the womb.¹⁰

These tests were introduced to have a healthy pregnancy and to check the complications during pregnancy so that the health of the mother and child are both safe and sound. But, this has taken a few form of business where the tests are used to satisfy the inhumane practices of the uncivilised part of the society. In India, these tests have been in practice ever since the 1980s. Now it has become more or less a business to satisfy the ego and patriarchal nature of the society.

WHY DOES FEMALE FOETICIDE OCCUR?

While the causes of female foeticide are many, it mainly attributes to the desire for a male heir who is seen as an asset when compared to a female, who is seen as a burden. The other causes of female foeticide are;

- **SOCIETAL AND CULTURAL PRESSURES:**

Whenever a woman is pregnant, there is a pressure upon her to conceive a male child rather than a female. This is because of the patriarchal society that we live in and its pressure. Further, girls are considered as a liability that must be constantly taken care of. The dowry system is one example where a girl child is considered as a

liability because when the girl gets married, she will have to provide a huge sum of money to her husband's family.

- **TECHNOLOGICAL ADVANCEMENTS:**

With advancements in technology, such as the conception of ultrasound, female foeticide has become more widespread and easily accessible. Expectant parents can simply approach a doctor and request an ultrasound to determine the gender of the child. While this practice has been prohibited, it is still carried out illegal in certain areas.

- **INEQUALITY OF GENDER:**

Despite the guarantee of equality as given under Article 14, women still do not have a status equal to men. Men are still seen as the superior gender compared to women. Therefore there is a preference for a male heir rather than a female. Males are considered to be the breadwinners of the family who will eventually repay the money spent on them. The status of women must be uplifted in order to prevent such an inequality.

- **SOCIAL SECURITY SYSTEM:**

As previously explained, men are seen as an economic benefit while daughters are seen as a mere loss to the parents. India does not have a regularized social security system and therefore the elderly rely upon their sons to look after them financially. Females are not considered as contributors to the family wealth. Therefore, expectant parents prefer a male heir.

¹⁰<http://www.sensiblesurrogacy.com/gender-determination-in-india/> Last accessed on 15/05/2018



• **PATRIARCHAL STRUCTURE OF FAMILY:**

It is always believed that boys are more beneficial as compared to girls. He heads the family and takes up all the responsibilities of the family. In Hinduism, birth of boy is essential as he has to perform the last rites of the father.

The causes stated above create pressure over society and parents are pressured to adopt female foeticide in some cases. The fact is that they lack courage to face the societal tantrums of not having a male child and having more than two children might disturb their family cycle.

IMPACT ON SOCIETY:

A society is a combination of both males and females. A proper balance between these two components is essential to have a smooth working in the society. But because of female foeticide, there is an imbalance in the structure of society and has a great impact over the society.

- **LOW FEMALE-SEX RATIO:** With a preference being given to male heirs, female foeticide takes place. This in turn reduces the number of females in society. This leads to a skewed sex ratio where there is an abundance of males and a drastic difference in the number of females. According to the 2011 Census, the male-female sex ratio is 940 females for every 1000 males.¹¹

- **WOMEN TRAFFICKING:** When there is a disparity between the male-female ratio, females are forced to enter the trafficking industry. When there are not enough women, they are trafficked and sold as goods with a price. Since there are less women compared to men, they are even treated as a commodity of marriage and there are high possibilities of re-trafficking. Thus female foeticide can lead to a direct increase in women involved in the trafficking industry.

- **INCREASE IN RAPE AND ASSAULT:** the loss in the number of women in society and a greater amount of testosterone, can indirectly lead to an increase in rape and assault of the few remaining women. Women are subjected to unnecessary harassment as an indirect result of female foeticide.

- **POPULATION DECLINE:** The most obvious effect of female foeticide is a huge decline in the level of population. The number of people in the country reduce as a whole when females are killed before they are even brought into existence.

- **DECLINE IN STATUS OF WOMEN:** when female foeticide takes place for a prolonged period of time, this changes the whole mindset of the society. They may come to think of female foeticide as an act that is acceptable in the sight of their society and this lowers their respect for women. This in turn leads to an overall decline in the status of women, where she is neither granted equality nor seen as a contributor to society. Women should be able to refuse risky interventions during pregnancy, such as those technological

¹¹<http://censusindia.gov.in/2011-Common/CensusData2011.html> Last accessed on 15/05/2018



medications which will put her health and her foetus into danger.¹²

ROLE OF LEGISLATURE IN CONTROLLING FEMALE FOETICIDE

Female foeticide possesses a great threat to humanity and mankind. It results in an imbalance in the society. It is important that the legislatures frame certain laws which might help in curtailing this evil practice. Article 21 of the Constitution of India guarantees the Right to life which is one of the important fundamental and human rights, violation of which would result in high scrutiny.¹³ Right to life is one of the basic human rights and not even the state can violate this right.¹⁴ It also provides for a declaration of deep faith and belief in human rights which ensures that there is no discrimination on the ground of caste, creed, race and gender. This implies that both male and female are to be treated equally and the concept of female foeticide is unconstitutional and has to be eradicated.

The punishment for the crime of female foeticide is clearly enshrined in Sections 312-316 of the Indian Penal Code, 1860. Section 315¹⁵ ensures protection to the

¹²In re Baby Boy Doe, 260 III.App.3d 392

¹³Bugdaycay v. Secretary of State, (1987) 1 AII ER 940

¹⁴State of A.P v. Challa Ramakrishnan Reddy AIR 2000 SC 208

¹⁵315. Act done with intent to prevent child being born alive or to cause it to die after birth.—Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the

life of the unborn child. It makes the perpetrator liable to punishment if he does any act which may prevent the child in the womb from being born.

Section 3-5 of the Medical Termination of Pregnancy Act, 1971, restricts a pregnant woman's right to abort. The Act lays down that the woman is not allowed to destroy the foetus in the womb unless it is done in good faith for saving the life of the mother. This makes female foeticide a crime. This act was not effective in its operation. Hence, the legislature enacted the Preconception and Pre Diagnostic Techniques (Prohibition of Sex Selective) Act, 1994 also prohibits the sex-selective abortion.¹⁶ This Act also restricts the determination of sex for any purpose before or after conception.¹⁷ This shows that the legislature has done a very good work on providing rights to unborn child and preventing of female foeticide.

JUDICIAL ACTIVISM AND RESPONSE :

The Indian Judiciary declared 2007 as the Year of Awareness for Female Foeticide and dealt with perpetrators in a strict manner. The former Chief Justice Y.K. Sabharwal, in his presidential address on 'Eradication of Female Foeticide', opined that law can play an important role in checking the menace of female foeticide. The judiciary has played a major role in checking upon this practice.

CEHAT v Union of India¹⁸

life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

¹⁶Section 3-A of the PNDT Act, 1994

¹⁷Section 6 of the PNDT Act, 1994

¹⁸2001 (8) SCALE 325, 2003 8 SCC 410



In this landmark case - in light of the alarming decline in sex ratios in the country to the disadvantage of women, this petition was filed seeking directions from the Supreme Court for the implementation of the Pre-Natal Diagnostic Techniques Act. The Court took on the unique role of actually monitoring the implementation of the law. The Supreme Court of India also 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. The Governments has to furnish quarterly returns to the central supervisory board giving a report on the implementation of PNDT Act, 1994.

In the case of **Kharak Singh Vs. State of U.P. and others**¹⁹, the Supreme Court has recognized that a person has complete rights of control over his body organs and his 'person' under Article 21. It can also said to be including the complete right of a woman over her reproductive organs.

Vijay Sharma and Another Vs Union of India²⁰

In this case, the validity of the Pre Conception and Pre Natal Diagnostic Tests Act (PCPNDT) Act, 2001 which bans sex determination was challenged. The judges in their verdict, pronounced that sex selection would be as good as female foeticide. Thus, sex determination was banned

Qualified Private Medical Practitioners and Hospitals Association Vs State of Kerala

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 centres irrespective of the fact as to whether they are conducting ultrasonography, under the Act, 1994. A similar view was taken in the case of **Malpani Infertility Clinic Pvt. Ltd. and Others Vs Appropriate Authority, PNDT Act and Others.**²¹

Dr. Varsha Gautam W/O Dr. Rajesh Gautam vs State Of U.P²²

A pregnant woman wanted to abort as she was carrying a girl child in her womb. She approached the petitioner hospital, who agreed to perform the abortion although it was an offence to perform such an operation and even determination of the sex by doctors using ultrasound technique was illegal. The petitioner is said to have engaged in getting abortions done in her hospital in collusion with doctors, who determined the sex of the foetus by conducting ultrasound tests. Her clinic was not even registered under the Act and she was not entitled to conduct pre-natal diagnostic procedures therein.

VinodSoni and Another Vs Union of India²³

¹⁹1963 AIR 1295

²⁰ AIR 2008 Bom 29

²¹ AIR 2005 Bom 26, 2005

²² Writ Petition No. 192 of 2006,

²³ 2005 CriLJ 3408



The petitioners sought to challenge the constitutional validity of the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to as Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. It was held that the 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. Reliance is placed on a Supreme Court Judgment and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to food, clothing, decent environment, and even protection of cultural heritage. These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception thus, not unconstitutional.

FEMALE FOETICIDE- A GLOBAL VIEW:

Even in the international sphere, the foeticide rate in India is much higher when compared to other nations. Two of the most populated nations, China and India have the highest foeticide rates internationally.²⁴ This can be attributed to the strong desire for a male child and bias towards males in the society. The current scenario of female foeticide in certain nations has been explained below.

CHINA:

²⁴http://www.bbc.co.uk/ethics/abortion/medical/infanticide_1.shtml Last accessed on 15/05/2018

China established its 'One Child' policy in 1979 as a temporary measure to control its ever expanding population.²⁵ If the policy was complied with, it guaranteed financial incentives as well as preferential economic opportunities. However, if the conditions of the policy were violated, it led to economic sanctions, forced abortions and sterilization by the Government.²⁶ An unforeseen side effect of this policy was that it led to a number of abortions as they have a strong preference for a male heir. This also led to a huge increase in female foeticide rates and also brought a gender gap in China.²⁷ However the policy was scrapped in 2015 leading to a decrease in the number of female foeticides in China. China has also enforced laws for the protection of women and laws for prevention of determination of the gender of the foetus.²⁸

AFGHANISTAN:

Female foeticide is practiced in Afghanistan. Due to this reason, Afghanistan has been deemed the most dangerous country for a woman to live in.²⁹

EUROPE:

The occurrence of female foeticide is mainly in underdeveloped or developing countries. But this does not mean that the

²⁵<https://www.thoughtco.com/chinas-one-child-policy-1435466> Last accessed on 15/05/2018

²⁶<https://www.investopedia.com/terms/o/one-child-policy.asp> Last accessed on 15/05/2018

²⁷

http://shodhganga.inflibnet.ac.in/bitstream/10603/123356/9/09_chapter3.pdf

²⁸The Law on the Health Care for Mothers and Infants of the People's Republic of China, 1995

²⁹<https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8576474/Afghanistan-named-most-dangerous-country-for-women.html> Last accessed on 15/05/2018



practice is not present in developed nations such as European countries. The fact that female foeticide was happening in countries which previously had no history of such practices, such as Albania, Kosovo and Macedonia, indicated that gender discrimination was an epidemic.³⁰

The United Nations Population Fund (UNFPA) estimates that in countries such as Armenia, nearly 93,000 women will be missing by 2060 if the country's high pre-natal sex selection rate remains unchanged. Gender experts say the patriarchal structure is one of main reasons for the skewed sex ratio. An "abortion culture" inherited from the Soviet period and easy access to technology allowing parents to know the sex of their child before birth are other important factors for an increase in female foeticide.³¹

According to the United Nations, rigorous efforts for striking strongly against female foeticide can be made only if collective strategies are adopted. Additionally, the Charter of United Nations, 1947, Universal Declaration of Human Rights, 1948, International Covenant On Civil And Political Rights, 1966, International Covenant on Economic, Social and Cultural Rights 1966, Convention on the Elimination of all Forms of Discrimination against Women, 1979, Convention on the Right of the Child, 1989 and its optional Protocol, 2000, provide for the protection of women, the right to be treated equally, the

protection of children and the right to live.³² Further, Article 2 of the European Convention on Human Rights says that 'everyone's life shall be protected'. In Paton's case³³, it was stated that life begins from the moment of conception. A similar view was taken by courts in the Abortion Reform case.³⁴ Additionally, it was also held that the state has a duty to protect 'developing life'. However all courts have not taken such a liberal view. The Austrian constitutional courts have refused to recognise the right to life of an unborn child.³⁵

In the United States of America, the Supreme Court upheld the right to privacy and ended the ban on birth control back in 1965, in the case of **Griswold v. Connecticut**.³⁶ Eight years later, the Supreme Court ruled the right to privacy included abortions in the landmark case of **Roe v. Wade**.³⁷ In 1976, Planned Parenthood of Central **Missouri v. Danforth**³⁸, ruled that requiring consent by the husband and the consent from a parent if a person was under 18 was unconstitutional. This case supported a woman's control over her own body and reproductive system. William Brennan, J. stated: "If the right to privacy means anything, it is the right of the individual, married or single,

³⁰ <http://news.trust.org//item/20141110202729-p565o>

³¹ <http://eeca.unfpa.org/en/news/93000-women-be-missing-armenia-2060-if-high-pre-natal-sex-selection-rate-remains-unchanged> Last accessed on 15/05/2018

³² Article 6, Convention on the Right of the Child (1989) & Article 3, Universal Declaration of Human Rights (1948)

³³ Paton v UK, (1980) 3 EHRR 408

³⁴ Abortion Reform Law Case, (1975) 39 B Verf GE 1

³⁵ Journal of Indian Law Institute, Volume 37, (1995), p.293

³⁶ **381 U.S.** 479 (1965)

³⁷ **410 U.S.** 113

³⁸ **428 U.S.** 52 (1976)



to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."

CONCLUSION:

Female foeticide is one of the worst forms of violence prevailing against women today. It has an impact not only upon the concerned family but also upon the society as a whole. If it is continued to be practiced again and again, it slowly becomes an evil which is acceptable in the eyes of society in the name of 'custom'. Thus the practice of female foeticide must be eradicated.

The government has provided schemes such as the National Plan action, Balika Samridhi Yojana, DhanLaxmi Scheme, Kanya Jagriti Jyoti Scheme and Beti Bachao, Beti Padhao Yojana. These schemes have discouraged foeticide by providing incentives to the members of the family of a girl child. These incentives include Cash transfers to family after meeting conditions of immunization and insurance, Cash transfers based on educational attainment etc. These schemes have been effective only to a certain extent.

Sex selective abortion is a huge crime and punishments must be awarded accordingly. The PNDT Act must provide for better implementation of its provisions by appointing proper authorities who are responsible and answerable to a higher authority.

Female foeticide is not just a crime. It is a social, medical and moral evil. Prevention of such a crime can only take place if there is proper awareness about it

and its consequences upon society. Female foeticide is a crime which affects not just the family in the short run but also the entire society in the long run as it skews the gender ratio. In order to transform such a social norm, change must begin with us. Even though the act of gender determination has been banned, it is still in practice. This is because, we, as a society prefer the male child to the female child. The patriarchal structure must be changed in a way that grants the same status to women as well. Most of all, women must be treated equally and given the same opportunities that a man takes for granted. However, it is an uphill task and every action and every group that can address this would contribute to improving the status of women in our society.
