

Female Foetus Vis-A-Vis Human Rights

By

AJEET LAL

M.A., LL.M., Ph.D.,

Formerly Lecturer, Faculty of Law,
University of Jammu, Jammu

I. Introduction

Human rights are inherent in all individuals because of their being a human, irrespective of their caste, creed, religion, sex, language, ideology etc. The human rights originate with the very birth of the individuals which are essential for the adequate development of the human personality, happiness and progress. At the international level a major breakthrough was achieved by the adoption of the Universal Declaration of Human Rights by the United Nations on December 10, 1948. The Universal Declaration of Human rights imposed upon the new established organisation a fundamental obligations to promote human rights and fundamental freedom among all the people irrespective of their race, sex, language or country. The consensus against abortion and infanticide became so crystalised by the twentieth century and it has been embodied in the various United Nations Declarations. The preamble to the United Nations Declaration of Rights of the Child declares that the "Child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth."¹ Human rights declared by the Universal Declaration are given recognition in India by incorporating them into the Chapter of Fundamental Rights in the Constitution of India. India was a party to Universal Declaration of Human Rights and subsequently to the covenants on Civil, Political, Socio-economic and Cultural Rights. It inspired with aims and objectives of those Universal Declaration and covenants on Human Rights, the Indian Parliament enacted the Protection of Human Rights Act, 1993.

The sex of the foetus is determined by using various methods like Amniocentesis, Chorionic Villus Sampling, Fluorescence-activated Cell Sorting, Ultra-sound Scanning and Ultra-sonography . If sex of the foetus is determined as female it is

1 Year Book of the United Nations, 198(1959); Also see (Mrs) Boparai, "How Far Should Law and Morality be Differentiated, & the Question of Abortion", Journal of Indian Law Institute, Vol. 18, 1, 107 (1976).

aborted without delay, but retained happily male foetus. According to one report, after sex determination test 78,000 female foetus have been aborted during the period from 1978 to 1983.²

In the late 1970s when All India Institute of Medical Sciences, New Delhi introduced the amniocentesis tests pretended to see the genetic disorder in the foetus, seven out of eight women who had undergone the test were having the particular purpose to abort if the foetus were female.³ It is surprising that at Kallors of Usilampatti taluka in Tamil Nadu State 70 percent children below the age of 10 years are male which may be the result of sex determination test and female foeticide.⁴ The thrust of this paper is to explore the Medico-legal study relating to female foeticide and her human rights.

II. Sex Determination Test

The unisex society is indispensable for the survival of human being. India is the only country in the world in which during the last eighty years there as been a steep decline in the female population. In 1901 the male-female sex ratio was 972 females declined to 935 females per 1000 males in 1981.⁵ Further decline in the female sex has been witnessed in the census report of 1991, where 929 females per 1000 males are counted. ⁶However, the census report of 2001 has shown a slight increase in female sex ratio from 927 to 933 for per 1000 males which may be the result of PNDT (R&P of M) Act, 1994

Amniocentesis developed to detect the genetic abnormalities in the foetus but at the same time it reveals the sex of the foetus. Moreover, latest medical technology invented ultra-sonography which is a fast method to detect genetic abnormalities and

2 Kusum, "The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991: A Critique" 33 Journal of Indian Law Institute, 413 (1991).

3 Derek Morgan, "Foetal Sex Identification Abortion and the Law" Family Law Journal, Vol. 18, 358 (Sept. 1988); Also see Ajeet Lal "Sex Determination Test and Social Justice to Unborn Female Child – An Empirical Study" in K.L. Bhatia (ed.), Dr. B.R. Ambedkar Social Justice and the Indian Constitution, 236-287 (1994).

4 Dr. Jitendra Singh, "Female Feticide: A Medico-legal Abuse", The Kashmir Times, March 15, 1992 P.II; Also see Ajeet Lal, op. cit., p. 286.

5 Ibid.

6 K.K. Mishra, Uttar Pradesh News Letter, "Woman Endangered Species?", The Kashmir Times, May 31, 1992 p.5; Also see Ajeet Lal, op.cit., p 286.

depict the sex of the foetus. Sex determination has become a flourishing business of many doctors and clinics. It is believed that in some States there are courier services to carry samples of the amniotic fluid of pregnant women from rural health centres to big towns and cities. Even in Haryana there are said to be mobile vans which conduct sonography as the latest sex determination technique in villages.⁷

A determined campaign against the misuse of amniocentesis and other such tests was launched by a group of activists in Bombay. This organisation was known as “ Forum against sex determination and Pre-selection” ⁸It is assumed that destruction of one female foetus is the destruction of one generation, Now a days even newly wedded couples undergo sex determination tests to fulfill their desire of having male child. The sex determination test may got be done to have small family, preference for a son on the pretext to eradicate the sex linked disease, to avoid the handicapped child being born. Whatever, may be the reason for the test but human rights of the female foetus are violated once it is aborted after knowing the sex of the foetus.

Among all the methods of sex determination ultra-sonography is on its peak in India because it is now within the reach of low and middle class people also. It is a technique used to determine the sex of the child with high success rate. The sex of the foetus can be determined by the ultra-sonography between fourteen and sixteen weeks of pregnancy. The services of ultra-sonography are misused by the medical practitioners by disclosing the sex of the foetus for monetary benefits. The common man readily bears fee paid for the Ultra-sonography test and abortion so as to avoid expenditure likely to be incurred by the parents in bringing up the same female child and her marriage without giving due respect to the human rights of the female foetus.

III. Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

The State of Maharashtra took lead by passing Maharashtra Regulation of Pre-natal Diagnostic Act, 1988. This enactment could not provide the social justice to the female foetus, due to the Government’s lack of determination and political will. The Maharashtra Pre-natal Diagnostic Technique Act was applicable to the State of Maharashtra Only. The needy persons from Maharashtra were approaching to the neighbouring States for sex determination test and abortion of the female foetus. Hence,

⁷ Supra note 2.

⁸ Ibid.

a need for central legislation was felt to prevent the female foeticide in the whole country.⁹

Pre-natal Diagnostic Techniques (Regulation and prevention Of Misuse) Act, 1994 (Here-in-after referred as PNDT (R&P of M) Act) was enacted with two objectives, firstly, to regulate the use of pre-natal diagnostic techniques for legal or medical purposes, secondly to prevent its misuse for illegal purposes. The pre-natal diagnostic test is done to detect the abnormalities relating to chromosomal, genetic metabolic diseases, haemoglobinopathies, sex linked genetic diseases, congenital any other abnormalities or diseases as may be prescribed by the Central Supervisory Board.

In order to prevent the misuse of pre-natal diagnostic techniques, the Genetic Counselling Centre, Genetic Laboratory of Clinic Conducting the pre-natal diagnostic test may be registered under the PNDT (R&P of M) Act.¹⁰ The Medical Geneticist, Gynaecologist, Paediatrician, Registered Medical Practitioner or any person should conduct the pre-natal diagnostic test only at the place registered under the PNDT (R&P of M) Act¹¹

There are five conditions under which the pre-natal diagnostic test can be carried out to detect the abnormalities in the foetus. Firstly, when the age of the women is above 35 years. Secondly, when the pregnant women has undergone two or more spontaneous abortions or loss of foetal. Thirdly when the pregnant women had been exposed potentially teratogenic agents such as drugs, injunction, infection or chemicals. Fourthly, the pregnant women has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease. Fifthly, on any other condition which is mentioned by the Central Supervisory Board.¹²

The pregnant women is free to decide whether to go for pre-natal diagnostic test or not. The consent of the pregnant women for undergoing the pre-natal diagnostic test is to be taken in writing on the prescribed form in the language which she understands, and a copy of the same is to be given to her.¹³ In Practical husband dominate the wife and she cannot go against her husband's wishes. If she does not submit herself for pre-natal diagnostic test at the desire of her husband, then she has to face the tourchering

9 Supra, note 2, pp. 414-415.

10 PNDT (R & P of M) Act, Sec. 3(1).

11 Ibid, Sec. 4(3).

12 Ibid, Sec. 4(3) (i to v).

13 Ibid, Sec. 5(1) (a, b & c).

attitude of the husband. Due to which their matrimonial relations goes on deteriorating. In fact consent of the women is supported by the consent of the husband to submit for pre-natal diagnostic test. The medical practitioner for monetary benefits discloses the sex of the foetus resulting into female foeticide.

The female foetus is protected under PNDT (R&P of M) Act which provides that husband or any relative of the pregnant women shall not seek or encourage the conduct of any pre-natal diagnostic techniques test on her¹⁴. The medical practitioner is to explain the all known side and after effects of pre-natal diagnostic proceeding to the pregnant women before deducting the abnormalities.¹⁵

The provisions of PNDT (R&P of M) Act is the right step to protect the female foetus by imposing a duty on the person who carry out the pre-natal diagnostic test, shall not disclose the sex of the foetus to the pregnant women or her relatives by words, signs or in any other manner. ¹⁶One more safeguard is provided to the female foetus by putting a ban on the Genetic Counselling Centre, Genetic Clinic, Genetic Laboratory, person not to determine the sex of the foetus by pre-natal diagnostic techniques including ultra-sonography.¹⁷

The advertisement relating to place of facilities of pre-natal determination of sex shall not be given by any person, Organisation, Genetic Counselling Centre, Laboratory and Clinic.¹⁸ The PNDT (R&P of M) Act, also prevents person or organisation to publish or distribute any type of advertisement relating to the facilities of pre-natal determination of sex available at Genetic Counselling Centre, Laboratory and clinic. ¹⁹Any person or institution advertises for facilities of pre-natal determination of sex shall be punished with maximum imprisonment upto 3 years and with fine of Rupees ten thousand.²⁰ The PNDT (R & P of M) Act, protected the female foetus by prohibiting the advertisement relating to the facilities of determination of sex and by punishing the defaulter.

14 PNDT (R & P of M) Act, Sec. 4(4).

15 Ibid, Sec. 5(a).

16 Ibid, Sec. 5(2).

17 Ibid, Sec. 6(a & b).

18 Ibid, Sec. 22(1).

19 Ibid, Sec. 22(2).

20 Ibid, Sec. 22(3).

The enactment also protected the female foetus by providing that the court shall presume that the pregnant women has been compelled by her husband or the relative to undergo pre-natal diagnostic test unless it is proved that she has undergone said test on her own. The offence shall be of abetment²¹ and punished with imprisonment for a period of maximum upto 3 years and with fine maximum upto Rupees ten thousand. The punishment for the subsequent conviction is maximum imprisonment upto 5 years and maximum fine upto Rupees fifty thousand.²²

The sex determination test leading to female foeticide is done with conglomerated interest of parents of the foetus and registered medical practitioner. The PNDDT (R& P of M) Act, provides stern punishment for the registered medical practitioner and any person including the parents of the foetus who are responsible for the female foeticide. In a case when registered medical practitioner is convicted by the court for the offence of female foeticide shall be reported to the medical Council of the State for necessary action. The Medical Council of the State will take necessary action. The Medical Council of the State may remove the name of the convicted registered medical practitioner from the register of the Council for a period of 2 years for first conviction and permanently for subsequent conviction.²³

The PNDDT (R&P of M) Act, protect the female foetus by providing that any person including the parents of the foetus approaches the Genetic Counselling Centre, Genetic Laboratory, Clinic of a medical geneticist, gynaecologist, registered medical practitioners for conducting the pre-natal diagnostic test for determining the sex of the foetus shall be punished for maximum period of 3 years and fine maximum upto Rupees ten thousand and for the subsequent conviction punishment is enhanced as maximum imprisonment upto 5 years and fine upto Rupees fifty thousand.²⁴

It is evident from the provisions of the PNDDT (R&P of M) Act, and punishment in case of it violation that Parliament was having in mind the human rights of the female foetus.

Now the NGOs are also coming forward to protest the female foetus. The Center for Enquiry into Health and Allied Themes (CEHAT) an NGO filed a petition alleging that large scale illegal sex determination was taking place in India leading to female

21 PNDDT (R & P of M) Act, Sec. 24.

22 Ibid, Sec. 23(3).

23 Ibid, Sec. 23(1 & 2).

24 Ibid, Sec. 24.

foeticide resulting in abnormal male-female sex ratio . The judiciary has also shown positive attitude to protest the female foetus in the case of *Cehat v. Union of India*²⁵ while issuing the directions to the Central and State Government, Union Territories, Central Supervisory Board and Appropriate authorities for proper implementation of the PNDT (R&P of M) Act. The State Government of Jammu and Kashmir had extended the provisions of PNDT (R&P of M) Act to its State on the directions issued by the Supreme Court. Subsequently, it enacted its own law titled as Jammu and Kashmir Pre-conception and Pre-natal Sex Selection or Determination (Prohibition and Regulation) Act, 2002 for the protection of female foetus. The Central Government also while acting on the directions of the Supreme Court introduced the PNDT (R&P of M) Amendment Bill, 2002 in the Cabinet with the proposal to change the title of PNDT (R&P of M) Act as the Pre-conception and pre-natal Diagnostic Techniques (Prohibition of sex selection) Act to bring within its purview pre conception sex selection technologies to check their misuse. The Bill also proposed stricter punishment and powers of search and seizure including sealing of premises and commissioning of witnesses.²⁶

On January 29, 2002, the Supreme Court summoned Health Secretaries of Punjab, Haryana, Delhi, Bihar, Uttar Pradesh, Gujarat, Maharashtra, Andhra Pradesh, Kerala, Rajasthan and West Bengal after finding that its orders for registration of ultra-sound clinics and prosecution of those resorting to illegal sex determination have not been complied with. The Supreme Court had also issued notice to five multi-national Companies namely Philips, Symonds, Toshiba, Larsen & Toubro and Wipro GE the manufacturers of ultra-sound machines to give the names and addresses of the Clinics and persons in India to whom they had sold machines in the last 5 years to help the Government to find out whether these clinics or persons were registered under the PNDT (R&P of M) Act.²⁷

The religious institutions have also now shown positive attitude to protect the human rights of the female foetus. On April 8, 2001, the Akal Takht Jathedar, Joginder Singh has created history of sorts by notifying the Sikh Community that acts of female foeticide are violative of Sikh principles and no member of the Sikh Community should go in for sex determination tests for the purpose of getting rid of a female foetus. If

25 AIR 2001, SC, p 2007.

26 "Govt. Bans Pre-natal Sex Determination Tests" Daily Excelsior, Jammu, Aug. 29, 2001, p. 3.

27 "Supreme Court Summons Health Secretaries of 11 Major States", Daily Excelsior, Jammu, Dec., 12, 2001, p7.

anyone from Sikh Community happen to be indulging in the unhealthy practice of female foeticide would be declared a Tankhiya or Excommunicated. His directive followed a meeting of the five Sikh Head Priests. The meeting was held to discuss the issue of female foeticide within the Sikh Community because Akal Takht has been flooded with complaints by a large number of women against their husbands or in-laws forcing them to go in for sex determination tests became evident with Jathedar, Joginder Singh Vedanti's warning that no member of the Sikh Community should violate the notification against all acts of female foeticide. Indeed the message from the Akal Takht was loud and clear that no member of the Sikh Community should go in for sex determination tests for the purpose of getting rid of a female foetus. Considering the facts that Sikhs alone were to blame, the Akal Takht Jathedar, Joginder Singh deemed it necessary to appeal to the entire society irrespective of religion not to indulge in foeticide as this is an inhuman act. Vedanti's message of course has covered albeit briefly the modus operandi for medical practitioners on the pretext of examining the position and health of the foetus, were indulging in the unethical practice of determining the sex of a foetus to satisfy their clients many of whom are illiterate.²⁸

IV. Female Foetus under Criminal Law

The right to life of the female foetus is protected because in case of mis-carriage is an punishable offence. Section 312 of the Indian Penal Code provides that a person who voluntarily causes a mis-carriage to a woman who is 'with child' or 'quick with child' shall be punished with lesser punishment for former and greater for later offence. As soon as woman conceive she is said to be woman 'with child' and she is 'quick with child' when the movement of the foetus has taken place or the embryo has a foetal form. Section 315 of Indian Penal Code punishes an act done with intention of preventing the child from being born alive or causing it die after its birth except when saving the life of the mother. The term preventing the child from being born alive is in tune with recognition human rights of the foetus. The person causes the death of quick unborn child shall be punished with 10 years imprisonment and fine under section 316 of the Indian Penal Code, is a protection to the unborn child, irrespective of the sex of the foetus.

The Medical Termination of Pregnancy Act, 1971 (herein after referred as MTP Act) was enacted to liberalise the abortion and to maintain the health of the mother. The MTP Act, provides four grounds under which pregnancy can be terminated. Firstly,

²⁸ "Female Foeticide" Daily Excelsior, Jammu, Apr 24, 2001, p.6.

when the continuance of pregnancy would involve a risk to the life of the woman or grave injury to her physical or mental health.²⁹ Secondly, there is a substantial risk that if the child were born it would suffer from such abnormalities as to be seriously handicapped.³⁰ Thirdly, when a pregnancy is caused by rape, the doctor shall presume that the pregnancy constitutes a grave injury to the mental health of the pregnant woman.³¹ Fourthly, when pregnancy is caused due to the failure of any device or method used by either of the spouse for the purpose of limiting the number of children and such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.³² The MTP Act, liberalise the abortion irrespective of the sex of the foetus.

The sex of the foetus can be determined during the period of pregnancy between six to sixteen weeks with the help of Amniocentesis, Chorionic Villus Sampling, Fluorescence - Activated Cell Sorting, Ultra-Sound Scanning and Ultra sonography on the pretext of to know the abnormalities in the foetus. The provisions of MTP Act for the length of pregnancy which can be terminated safely is 20 weeks, when opined by two Registered Medical Practitioners. The provisions of PNDT (R&P of M) Act and MTP Act are misused to determine the sex of the foetus on the pretext to detect genetic or metabolic disorders of chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex linked disease and to terminate the pregnancy upto twenty weeks safely if the foetus is female respectively. The human rights of the female foetus are denied not by anybody else but by her own parents with the convenience of Registered Medical Practitioners for their self interest.

V. Status of Unborn Foetus

The human rights originate with the birth of the child but female foetus is eliminated before taking birth. Now question arises that what status unborn foetus does enjoy? The Constitution of India guarantees fundamental right to life and personal liberty to all the persons. But the unborn foetus may be denied this right for the simple reason that it is not a person under the Constitution of India. The major problem is for the female foetus who is eliminated in the selective abortion because law does not recognise it as a person. Article 15 of the Indian Constitution provides that no

29 M.T.P, Act 1971, Sec. 3(2)(a)(i).

30 M.T.P, Act 1971, Sec. 3(2)(a)(i).

31 Ibid, Sec. 3 Explanation I.

32 Ibid, Sec. 3 Explanation II.

discrimination shall be made on the ground of sex but it is clear discrimination against the female foetus when it is eliminated before taking birth in the selective abortion. The female foetus is not treated equal to male foetus whereas Article 14 of the Indian Constitution is very clear about the equality before law and equal protection of law to all the persons.

The presumption under Hindu Law is that a child comes into existence at the time of its conception. ³³Moreover, Indian Penal Code defines man as a male human being of any age and woman as female human being of any age.³⁴ The unborn foetus is not included in the definition of person under Indian Penal Code as well as Constitution of India ³⁵but a coparcener conceived at the date of partition and subsequently, has a right to get the partition reopened,³⁶ recognises an unborn child as person. The scientists say that life starts from the zygote formation. In case of selective abortion of a female foetus after sex determination test is a violation of human rights of female foetus on the ground of sex discrimination.

The judiciary has shown mixed attitude in recognising the rights of unborn foetus. In the case of Tagore v. Tagore ³⁷the Privy Council observed by the general rule adopted in jurisprudence, this class would include children in embryo who subsequently came into separate existence. The judiciary has shown positive attitude to preserve the rights of foetus while it is in the womb of mother in the case of Shivaji v. Vasant Rao ³⁸by holding that where partition takes place while a coparcener is in the womb of the mother on his birth he becomes entitled to share which may claim on reopening the partition. In the case of Jabbar v. State of U.P.³⁹ it was held that a child in the womb of the mother is considered to be living entity of its own. The judiciary has in mind to recognise the human rights of the foetus while in the womb of the mother, which may be violated when female foetus is eliminated after the sex determination test.

In the number of cases an issue was raised relating to the status of an unborn child before the Supreme Court of United States. It was argued in the cases of Roe v.

33 Dr. Hari Singh Gaur, The Hindu Code, 5th ed. Vol. III (1976) p. 228.

34 Indian Penal Code, 1860, Sec. 10.

35 Ibid, Sec. 11, Also see Constitution of India, Art. 21.

36 Supra, Sec. 11, Sec. 115(1) of Partition.

37 9, B.L.R. 377 p. 397 (P.C.).

38 I.L.R. 33, Bom. 267.

39 AIR, 1966, All. p. 590.

Wade,⁴⁰ and Doe v. Bolton⁴¹ that an unborn child is a person as per the fourteenth Amendment of the Constitution of United States, so it cannot be deprived of its life without the due process of law. The Supreme Court observed that unborn child is not a person under the fourteenth Amendment of the Constitution of United States. The judiciary has shown negative attitude to recognize unborn child as person but in the long run if these arguments are accepted by the judiciary, in alike cases then it will be a step to recognise the human rights of female foetus. The High Court of Ontario has held in the case of Medhurst v. Medhurst,⁴² that unborn child was not a person but rights conferred on the foetus are preserved till he is born alive.

In the case of C v. S.⁴³ the High Court held that foetus did not have any right to action through its a father as next friend to prevent its mother from terminating her pregnancy. The English Law have several well established areas in which the rights of the unborn child 'en ventre sa mere' have been recognised. Account may be taken of persons who are unborn and not even conceived at the time of the application.⁴⁴ In the law of succession a child 'en ventre sa mere' has been recognised as a person is being who entitled to acquire property provided it is in fact subsequently born alive.⁴⁵

VI. Conclusion and Suggestions

The female foetus was safe under Indian Penal Code because abortion was allowed on a narrow ground only to save the life of the mother. After liberalisation of abortion under MTP Act female foetus is safe since it does not allow the selective abortion. The PNDT (R&P of M) Act is a welcome step to put an end the practice of female foeticide and to provide the human rights to her. In spite of the statutory protection provided to the female foetus, still the practice of sex determination test leading to female foeticide is carried on by misusing the provisions of PNDT (R&P of M) Act and MTP, Act. The female foeticide is done with the conglomerated interest of the parents of the female foetus and medical practitioners. The judiciary has also shown positive attitude to end the practice of female foeticide. Now even religious institutions have also taken initiative to end the practice of female foeticide.

40 41, L.W. 4213, 410 U.S. 113 (1973).

41 41, L.W. 4233, 410 U.S. 179 (1973).

42 (1934) 46, O.R. 2d, 263.

43 S.P.de Cruz, "Abortion C. v. S. and Law" Family Law, Vol. 17, 321-22 (1987) : Also see The Times, February 24 & 25, (1937) Family Law, 987.

44 Variation of Trust, Act, 1958, Sec. 1.

45 Supra note 43.

Inspite of all these protections unborn female foetus is denied the human rights for the simple reason that it does not enjoy the status of person under Indian Penal Code as well as Constitution of India. The judiciary in India and in U.S.A. is reluctant to recognise the status of person of the unborn foetus but ready to reserve its rights in the womb of the mother till it takes birth. Even though Hindu Law presume that child comes into existence at the time of its conception. The scientists are also of the view that the life of the foetus starts from the zygote formation.

It is suggested that unborn foetus must be included within the definition of term person for the purpose of Article 21 of the Constitution of India and Section 10 of the Indian Penal Code. The negative attitude of the public towards the female foetus need to be changed to positive for the protection of female foetus by educating them about the serious affects of female foeticide. The print and electronic media may be used for motivating the attitude of the public in favour of female foetus. Like CEHAT other NGOs must also come forward to protect the female foetus, and to provide her human rights by motivating the public to end the practice of female foeticide.