

Right to Privacy on Abortion and National Problem of Female Foeticide

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I. The Issue

In recent celebrated judgment of the Supreme Court of India on right to privacy, according to Justice Dr. D.Y.Chandrachud¹ during the course of the last decade, the Supreme Court has had occasion to deal with the autonomy of a woman and, as an integral part, her control over the body. The ratio of the judgment more recently followed by the Bombay High Court where it has been held that a registered medical practitioner may medically terminate pregnancy which had exceeded 20 weeks, without permission from the High Court, only in good faith.² In *Sonali Kiran Gaikwad vs. Union of India*³ case medical termination of pregnancy was allowed as serious abnormalities of the fetus was indicated the Supreme Court held that continuing pregnancy would cause more mental anguish to the petitioners. In *Tapasya Umesh Pisal vs. Union of India*⁴ case, the Supreme Court in interests of justice, permitted the petitioner to undergo MTP, which was in its twenty fourth week noting that it would be difficult to refuse the permission to medically terminate pregnancy, as it was certain that the fetus if allowed to born, would have a limited life span with serious handicaps which could not be avoided. The *Suchita Srivastava vs. Chandigarh Administration*⁵ case arose in the context of the Medical Termination of Pregnancy Act (MTP) Act, 1971. A woman who was alleged to have been raped while residing in a welfare institution run by the government was pregnant. The district administration moved the High Court to seek termination of the pregnancy. The High Court directed that the pregnancy be terminated though medical experts had opined that the victim had expressed her willingness to bear the child. The High Court had issued this direction without the consent of the woman which was mandated under the statute where the woman is a major and does not suffer from a mental illness. The woman in this case was found to suffer from a case of mild to moderate mental retardation. The decision in *Suchita Srivastava*⁶ dwells on the statutory right of a woman

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¹Justice K S Puttaswamy (Retd.) vs. Union of India, Writ Petition (Civil) No 494 of 2012, Civil Original Jurisdiction, the Supreme Court of India, Judgment Dated AUGUST 24, 2017, Para 71

²XYZ vs. Union of India, Writ Petition No. 10835 of 2018, Civil Appellate Jurisdiction, in the High Court of Judicature at Bombay, Pronounced On 3rd April, 2019, Para 85

³Writ Petition (c) No. 928 of 2017 decided on 9th October 2017

⁴(2018)12 SCC 57

⁵(2009)9 SCC 1

⁶(2009)9 SCC 1

under the MTP Act to decide whether or not to consent to a termination of pregnancy and to have that right respected where she does not consent to termination. The statutory recognition of the right is relatable to the constitutional right to make reproductive choices which has been held to be an ingredient of personal liberty under Article 21. The Court deduced the existence of such a right from a woman's right to privacy, dignity and bodily integrity.⁷

Again the Supreme Court has held that the medical professionals do perform Sex Selective Abortion having full knowledge that the sole reason for abortion is because it is a female foetus.⁸ Foeticide is very old practice in India and this trend in declination of child sex ratio is the clear indication of female foeticide for long period. According to an activist, Five million girls were eliminated between 1986 and 2001 because of foetal sex determination done by unethical medical professionals. The rate of extermination continues to increase after Census 2001.⁹ Abortion of a female child in its conceptual eventuality leads to killing of a woman and law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it.¹⁰

While on the other hand, Liberalization of abortion rights for women has also made foeticide very common and International conferences have already included abortion as a part of human rights. The decision of English case in *R vs. Bourne*¹¹ influenced legal world where a famous gynecologist aborted a fourteen year girl who became pregnant due to rape by some soldiers. Later the Abortion Act, 1967 also realised termination of pregnancy on certain situations in England followed by the Human Fertilisation and Embryology Act, 1990. This law was adopted by dozen of American states and the legitimacy of therapeutic abortion is now recognized by legislation in most of the United States. Soviet Union recognized abortion after the revolution and up to 1936 it was limited for medical and eugenic reasons but at the end of 1955 abortion was almost without restriction. Sweden introduced abortion in 1938 for health grounds and Japan legalized abortion in 1948 for medical, eugenic and economic reasons. Maximum western countries recognized abortion on humanitarian grounds.¹²

⁷Justice K S Puttaswamy (Retd.) vs. Union of India, Writ Petition (Civil) No 494 of 2012, Civil Original Jurisdiction, the Supreme Court of India, Judgment Dated AUGUST 24, 2017, Para 72

⁸ As per K. S. Radhakrishnan, J. in Voluntary Health Association of Punjab vs. Union of India, Writ Petition (Civil) No. 349 of 2006, Extraordinary Civil Writ Jurisdiction, Supreme Court of India, Order dated March 04, 2013.

⁹ Hidden Genocide, Sabu George, Times of India, 8th March 2007

¹⁰ As per Dipak Misra, J. in Voluntary Health Association of Punjab vs. Union of India, Writ Petition (Civil) No. 349 of 2006, Extraordinary Civil Writ Jurisdiction, Supreme Court of India, Order dated March 04, 2013.

¹¹ [1939] 1 KB 687

¹² Law in a Changing Society, W.Friedmann, 4th Indian reprint 2008, Universal Law Publishing, Delhi, Page 263-266

Three major techniques prevail relating to sex detection before birth like, Amniocentesis, Chronic Villus Sampling and most popular method is the Ultrasonography. In India Amniocentesis was tested in 1974, carried out by All India Institute of Medical Science (AIIMS), for detecting abnormality in fetus and later this test was changed into sex detection followed by abortion of female fetus. Ultimately the tests were stopped by the Indian Council of Medical Research (ICMR) in 1979 due heavy misuse by medical practitioners and clinics. In a meeting in New Delhi, it was decided that amniocentesis should be allowed only for educational research, Indian Medical Council should take stringent measures for members practicing tests and women organizations would be vigilant to prevent such practice.

Again heavy misuse of Medical Termination of Pregnancy Act, 1971 has caused the female foeticide and has become a weapon for sex discrimination in India. Presently, there are demands for relaxation of abortion laws for women in India. According to some medical experts, the time has come for us to review the law with restricting termination of pregnancy to within 20 weeks. If the mother feels that she is not mentally ready to take care of a child with incurable cardiac problems or Down syndrome, she should have the right to terminate the pregnancy at later stage i.e. after 20 weeks. However, many developed countries like Canada allow the termination of pregnancy even at an advanced stage, in case of foetal abnormalities.¹³ As per the Supreme Court, Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, egocentric traditions, perverted perception of societal norms and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of the future is crucified.¹⁴

There is a 'vicious cycle of crime against women' where crime against women will generate another crime against them. Scarcity of girls may generate many gruesome social problems also in future like late marriages among males, polyandry (collective marriage with the same girl), unnatural sexual offences or more sexual attacks to women.¹⁵ Some researchers have shown due to female foeticide, there is an increase in young, unmarried and poor men having high testosterone level who are causing violence against women.¹⁶ Legally foeticide amounts to homicide and subject to criminal prosecution in a civilized society. The unborn persons have

¹³ Give Women The Choice, Devi Shetty & Sneha Iype, the Times of India (Ranchi edition), March 31, 2017

¹⁴ Writ Petition (Civil) No. 575 of 2014 with 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India, Page 12

¹⁵ Child Sex Ratio, 2011: the Myth of Laws and the Reality of Policies, Dr. Partha Pratim Mitra, (2011) Cr.L.J.250J

¹⁶ At the receiving end, FRONTLINE, January 4, 2008, Page 12

several rights recognized by statute or judiciary like right to inherit or right to sue for damage caused in the womb. Article-21 of Indian Constitution is applicable to unborn children also. At the same time Article 14 is also applicable to the unborn girl child also. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it.¹⁷

II. The Conflict

Recently the Supreme Court of India has delivered another judgment¹⁸ with sixteen directions¹⁹ for proper implementation of sex detection prohibition law to combat with rapid declination of child sex ratio of the country. This is not only example, the same petitioner already filed another writ²⁰ raising this serious concern which is related to the very core existence of a civilized society and pertain to the progress of the human race. The issue of these writs is the failure in the implementation of the stringent sex detection law which has generated enhancement in female foeticide and subsequently imbalance in sex ratio of the country. Even such type of direction on this issue is not first time, the apex court earlier had also delivered such type of directions in *Voluntary Health Association of Punjab vs. Union of India*²¹ and more earlier case *Centre for Enquiry into Health & Allied Themes (CEHAT) vs. Union of India*.²² Despite several directions issued by the Supreme Court, there was no proper implementation by the State governments or Union Territories and ultimately the Court has issued the present direction for effective implementation of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and the Rules of 1996 from executive to local authority and to other competent authority.

India has been struggling with this problem for a long period but failed to get rid of from the problem since independence. In spite of so many developments, needless to emphasise, the predicament with regard to female foeticide by misuse of modern science and technology has aggravated and enormously affected the sex ratio.²³ The last census of 2011 shows the child sex ratio has again declined which is lesser than previous census and presently there are 914 girls than 1000 boys from 0 to 6 years of age in India. There is a trend of descending order of magnitude in

¹⁷ Writ Petition (Civil) No. 575 of 2014 with 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India, Page 13

¹⁸ *Voluntary Health Association of Punjab vs. Union of India*, Writ Petition (Civil) No. 575 of 2014 with 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India

¹⁹ Paragraph 33

²⁰ Writ Petition (Civil) No. 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India

²¹ (2013) 4 SCC 1

²² (2001) 5 SCC 577 and (2003) 8 SCC 398

²³ Writ Petition (Civil) No. 575 of 2014 with 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India, Page 6

child sex ratios which were 976(in 1961), 964 (in 1971), 962(in 1981), 945 (in 1991), 927(in 2001) respectively.²⁴ This lower child sex ratio (0-6 years) clearly indicates that there are high ratio of female foeticide, female infanticide or female child mortality rate in the country. Decrease in the sex ratio is a sign of colossal calamity and according to the Supreme Court, it cannot be allowed to happen. Concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society. The present generation is expected to be responsible to the posterity and not to take such steps to sterilize the birth rate in violation of law.²⁵ In India, poverty and illiteracy are always taken as root causes of all social and criminal evils. But **Amartya Sen** in his famous article during 1990s mentioned, though an economic analysis does not explain very much, since many poor countries do not, in fact, have deficits of women, like poor and underdeveloped Sub-Saharan Africa has a substantial excess of women. Even within India, Punjab and Haryana – among richest and most economically advanced Indian states – have very low ratios of women to men, in contrast to the much poorer state of Kerala where ratio is greater. According to him, the cultural climate in different societies must have a clear relevance to differences between men and women – both in survival and in other ways as well – but it would be hopeless to see the divergences simply as a contrast between the sexist East and the unbiased West.²⁶

Again Family planning is an important state policy almost in every developing country and this Family planning system has also widened the choice of citizen indirectly to choose only the male child. In 1968, UN Conference on Human Rights, Tehran recognized the family planning as a basic human right. The Plan of Action in Bucharest Conference on World Population, 1974, again established basic human rights of the couples to decide freely number of children. Later World Conference of the International Women Year in 1975 has almost given the same right to the women.

On one side there is basic human rights relating to procreation and on other side State's economic policy on family planning have simplified the practice of foeticide. So private liberalization has widened the scope of abortion which has led towards female foeticide and has reduced the sex ratios.

III. And the Resolution

In **Japan**, the censuses of 1899 and 1908 had a clear and substantial deficit of women, but 1940 the numbers of men and women were nearly equal, and in the post war decades, as Japan became a rich and highly industrialized country, it moved

²⁴ Census Report 2011, Chapter 5, Statement 16, Page 90 (www.censusindia.gov.in)

²⁵ Writ Petition (Civil) No. 575 of 2014 with 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India, Page 39 - 40

²⁶ More Than 100 Million women Are Missing, Amartya Sen, The New York Review of Books, December 20, 1990

firmly in the direction of a large surplus, rather than a deficit, of women.²⁷ So this is the high time for the departments of health ministries of central and State Governments to take massive actions in line of the Supreme Court guidelines. In spite of enforcement of legal mechanism, continuation in the decline of sex ratio is the clear indication that there is a vast gap in implementation of those laws. Unfortunately, facts reveal that perpetrators of the crime also belong to the educated middle class and often they do not perceive the gravity of the crime.²⁸ Despite the directions issued by the Court, there had not been proper implementation and that compelled the present petitioner, namely, Voluntary Health Association of Punjab to file the present Writ Petition seeking various directions. The Court on 08.01.2013 took note of the fact that the provisions had not been adequately implemented by the various States and Union Territories and accordingly directed for personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT of Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they had taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by this Court.²⁹ Sex determination and sex selective abortion was traced to an Amritsar clinic in 1979 and has now grown into a Rs. 1,000 crore countrywide industry. In recent years, the misuse of ultrasound has reached remote tribal areas of Rajasthan, inaccessible villages of Buldelkhand and emerged even in parts of India where women were better treated, such as Assam, Kerala and the Kashmir valley.³⁰ Mushrooming of various Sonography Centres, Genetic Clinics, Genetic Counselling Centres, Genetic Laboratories, Ultrasonic Clinics, Imaging Centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act.³¹ Multinational ultrasound equipment manufacturers took advantage of the economic liberalization of the early 90s and started production of ultrasound machines in India by the mid-nineties. The aggressive marketing of these machines coupled with easy availability of cheap credit for purchase made scanning accessible in many parts of the country. Machines were sold to anybody who wanted to purchase them.³²

²⁷ More Than 100 Million women Are Missing, Amartya Sen, The New York Review of Books, December 20, 1990

²⁸ Voluntary Health Association of Punjab vs. Union of India, Writ Petition (Civil) No. 349 of 2006, Extraordinary Civil Writ Jurisdiction, Supreme Court of India, Order dated March 04, 2013.

²⁹ Writ Petition (Civil) No. 575 of 2014 with 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India, Page 8 and 9

³⁰ Hidden Genocide, Sabu George, Times of India, 8th March 2007

³¹ Voluntary Health Association of Punjab vs. Union of India, Writ Petition (Civil) No. 349 of 2006, Extraordinary Civil Writ Jurisdiction, Supreme Court of India, Order dated March 04, 2013.

³² Hidden Genocide, Sabu George, Times of India, 8th March 2007

First time Pre-natal diagnostic techniques to indicate the sex of a fetus was banned by 'Maharashtra Regulation of Use of Pre-natal Diagnostic Techniques Act, 1988'. Maharashtra government forwarded a copy of the bill to the union law ministry to examine the constitutional validity of the legislation. The Central Government of India constituted an eight member committee with medical and legal professions in 1987 to go details of the Act and Central bill finally became an Act on 20th September, 1994. This enactment enabled the National Human Rights Commission to direct the Medical Council of India to take action against doctors found abusing prenatal diagnostic techniques. The law first came into force in 1996 as the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, in response to the falling sex ratio and fears that ultrasound technologies were being used to determine the sex of the foetus. The law was amended in 2003 to bring the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, not only to prohibit determination and disclosure of the sex of the foetus but also bans advertisements related to preconception and prenatal determination of sex. According to present law, ultrasound clinics, genetic counseling centres and genetic laboratories cannot be used for conducting prenatal diagnostic techniques except for detecting abnormalities such as chromosomal abnormalities, genetic metabolic diseases, sex-linked genetic diseases and congenital anomalies.

A married couple challenged the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 as it violates Article 14 of the Constitution and Article 21 of the Constitution of India. But the Bombay High Court³³ rejected the petition stating that the Sex Selection Act of 1994 is factually enacted to further this right under Article 21 which gives to every child the right to full development and the legislation is confined only to prohibit selection of sex of the child before or after conception. This enactment does not bring about total prohibition of any such tests and no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities, (2) genetic metabolic diseases, (3) hemoglobinopathies, (4) sex-linked genetic diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. It prohibits user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage. **Again the Clinical Establishments (Registration and Regulation) Act, 2010** was also enacted by the Central Government to

³³ Vinod Soni vs. Union of India, Criminal Writ Petition No. 945 of 2005 and Criminal Application No. 3647 of 2005, the jurisdiction of the Bombay High Court, dated 13.06.2005

provide for registration and regulation of all clinical establishments in the country and the Ministry has notified the National Council for Clinical Establishments and the Clinical Establishments (Central Government) Rules, 2012 under this Act. It is applicable to all of Clinical Establishments including both therapeutic and diagnostic, from the public and private sectors, belonging to all recognized systems of medicine, including single doctor clinics.

Recently the Supreme Court of India also asked internet companies to take appropriate steps to withdraw advertisements and information which violated the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003. The Bench comprising Justices Dipak Mishra and R.Banumathi, directed to respondents that search engines like Google India Pvt. Ltd, Yahoo India and Microsoft Corporation (I) Pvt. Ltd shall appoint an in-house expert body which shall take steps if any words that is shown on internet and which has the potential to go counter to section 22 of the Act.³⁴ Later while hearing a PIL filed by activist **Sabu George** who sought its direction for search engines to block advertisements and texts on sex determination as per Section 22 of PCPNDT Act. The Supreme Court said that it could not direct online search engines to block all texts pertaining to pre-natal sex determination tests as it would deprive researchers, academicians and students valuable information on the issue.³⁵

The United Nations Declaration on the Rights of Child, 1959 convenes child needs special safeguards and care, including appropriate legal protection, before as well as after birth and Article 6 of the Convention of the Rights of the Child, 1990 says that every child has the inherent right to life and States Parties shall ensure to the maximum extent possible the survival and development of the child. The Supreme Court of India directed the government to implement the PNDT Act in May 2001. Later, Parliament amended the law to make it more stringent. Manufacturers could sell ultrasound machines only to registered clinics. There was a decline in sales of machines in 2002 and the subsequent increase was less than the anticipated volumes. The registration of clinics has increased from 600 to 30,000 since May 2001. However, the regulation of ultrasound scanning is yet to be done.³⁶ As per the Supreme Court the mushrooming of various sonography centres, genetic clinics, genetic counseling centres, genetic laboratories, ultrasonic clinics, imaging centers in almost all parts of the country called for more vigil and attention by the authorities under the Act.³⁷ Such type of activities can be restricted only with strict implementation of existing laws. The government of India should set a target date

³⁴ SC to search engines: Block pre-natal sex test content, the Times of India (Ranchi edition), dated 2nd February 2017

³⁵ Apex court rules out blanket ban on online content on sex determination, the Times of India (Ranchi edition), dated April 12, 2017

³⁶ Hidden Genocide, Sabu George, Times of India, 8th March 2007

³⁷ Writ Petition (Civil) No. 575 of 2014 with 349 of 2006, Civil Original Jurisdiction, the Supreme Court of India, Page 9

by which the country will have balanced sex ratios at birth. Over the last four decades, our five-year plans have had targets for population control. The coming plan needs to give a fair deal to women by abandoning fertility targets and replacing it with solid commitments to restore sex ratio at birth³⁸ and it was also held that there can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the *status quo ante* cannot be restored as resurrection is beyond the capacity of man.³⁹

³⁸ Hidden Genocide, Sabu George, Times of India, 8th March 2007

³⁹Parmanand Katara vs. Union of India (1989) 4 SCC 286