

RIGHTS OF UNBORN CHILD: ISSUES AND CHALLENGES

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Introduction

There have been several critical issues which underlie the problem of right of unborn child. These issues need to be addressed carefully so as to evolve a strategy to combat the problem. Further, there is a complexity embedded in the host of issues that constitute the terrain within which sex determination and sex-selective abortion takes place in India. Thus, there is a need for a multi-pronged policy and programmatic approach within which legal and other strategies have important roles to play. The holistic approach to adopt strictest measures is the critical and most radical call of the time.

Right to life is a well established right and is recognized by various national and international instruments; but a serious question is that does a foetus enjoy this right? And if so which are such rights we do not have definitive answer for. Globally, the various Constitutions recognize the sanctity of life; but they have failed adequately to protect the life of a foetus. Judicial pronouncements are also not conclusive, and vary in different jurisdictions.

In India, the right to life is guaranteed to every person under the Constitution. If we say that a foetus enjoys right to life, then will it affects the right of a pregnant woman to abort? Is a foetus to be recognized as a separate entity or a part of its mother? These questions are baffling the courts worldwide. There is a desperate need for the courts to arrive to a definite decision on these vital issues and recognize the right of a foetus.¹

Critical Issues

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¹ Prashanth, S.J., Right to Life of Foetus, *Criminal Law Journal*, AIR 2005.

I. Strict Laws and Political Will

It is easy but unrealistic to suggest that the Government must frame laws which have sharp nails and teeth, and then vigorously implement them to curb the problem. The reality seems to be that the Government, whatever its political complexion might be, relies on the prominent castes for votes and support.² Further, it is difficult to take action against doctors in India as they have a powerful lobby and have close links with politicians. The Government apathy is another major hurdle. Above all, the problem of giving birth to a foetus (unborn child) essentially is at prey of the doctor, the pregnant woman and/or her husband.

II. Role of Education

The impact of modernity and modern education is known to be complex. In States having a long history of female infanticide (now foeticide), the education may not enlighten the communities like *Khaps* in Haryana state, and the castes which have been getting rid of their female offspring for generations to generations. On the contrary, a college or university education may enhance the groom's market price. Degree and job-oriented education, which our educational system provides, may not create the awareness of discrimination against females and other social evils.

This of course at all costs does not mean that we should not have education. Literacy has surely very positive aspects and must be encouraged, at all costs. The point is that the potential of our formal educational system to remove gender bias and eradicate social evils is sometimes overstated. *E.g.*, high dowries are endemic among the Syrian Christians of Kerala though this State is often projected as a model which other States should try to emulate.³ It is absolutely necessary to bring about an attitudinal change among castes and communities which resort to female foeticide and infanticide, through a different kind of formal or informal education in rural areas. This is a tall order as it calls for a radical

² Vishwanath, L.S., Female Foeticide and Infanticide, *Economic and Political Weekly*, 1st Sept 2001. Available at: www.epw.org.in

³ *Ibid.*

restructuring of our educational system.⁴ It is also clear that unfortunately people don't understand that both the genders are essential to create stability as well harmony, and predetermination of sex has serious effects which prove disastrous to the overall growth and wellbeing of the society.

III. Reduction in Dependence on Agricultural Land

As noted earlier, dominant castes at rural areas have derived their socio-economic status from the extent of agricultural land they owned, and have tried to avoid high dowries and land alienation through female infanticide. Since India has embarked on the capitalist path, a significant reduction on agricultural land as a resource could be a distant possibility.⁵ Communities actively involved in female infanticide need to be persuaded towards trade and commerce as aid to agriculture, or as substitute of agriculture.

IV. Criminalization of Female Foeticide

Recently, the Chinese Government criminalized abortions and ultrasounds obtained for sex-selection purposes, in the hope that criminalization will prove more successful in curbing these practices. A new Chinese law calls for prison terms up to three years and fines for doctors and other health workers who assist in telling the gender of unborn babies, leading to abortions.⁶

To kill someone because of his or her sex (gender) is, in some sense, a heinous hate crime. It needs to be punished by the same 'deterrent logic' as in the case of an ordinary murder, whatever punishment to be given, it should be effective, coercive and terrifying one.

The problem with investigating a woman's reasons for abortion is, however, not that simple. Consider the enforcement of such a law. If police suspects a woman of having had a sex-selection abortion, they can subject her to the sort of interrogation that might ordinarily

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Anonymous, *Times of India*, New Delhi, 27th Dec 2005.

accompany a homicide investigation. Even if a woman accused of wrongful abortion is found 'innocent' after this investigation, the fact of her abortion would may become a public knowledge, and she would may suffer the stigma that attaches to this procedures (even when the procedures are done for medically sound reasons). Also, because it may often be difficult for a person to establish her reasons for terminating a pregnancy, the prospect of a criminal accusation could place a serious chill on the exercise of the right to choice, even for women who have no preference for male or female offspring.⁷

V. Ethics and Morals

Morally, the decision to terminate a pregnancy on the basis of a baby's sex shall by all means to be an ugly decision that deserves no protection. But the reality is that the reproductive rights of women who would never abort on the basis of sex depend on the Government's staying out of the decision altogether. Here we must hope, instead, that women will prove worthy of the trust and responsibility that is placed in their hands, even as we refrain from finding out whether that trust is warranted.⁸

According to some writers, criminalization of female foeticide works as a catalyst in the fire of social stagnation. What we need to realize is that female foeticide is not a result of criminal intent but that of compulsion caused by circumstances caused by rapid victimization of the females in the society. An evil practice can be curbed not by cutting the stems growing on the trunk above the ground, but by eliminating the roots standing beneath. Social awakening, vigorous campaigning against female foeticide, honest and full enforcement of dowry prohibition, and sexual harassment laws are the steps towards uprooting the practice of female foeticide.⁹

⁷ Colb, S.F., Criminalization of Sex Selective Abortion in China, *Find Law*. Available at: <http://www.indiafemalefoeticide.org>

⁸ *Ibid.*

⁹ Agrawal, M., *Female Foeticide: Law and Its Effectiveness*. Available at: <http://www.indiafemalefoeticide.org>

The above view is correct. However, not all crimes are committed with *mens rea i.e.*, a criminal intent. *E.g.*, the cases of violations of environmental and traffic regulations. The deterrent measures need to be used to 'discipline' the erring public and medical fraternity, along with social awakening measures.

"We may have to, for some time at least, revive the guilt of foetal murder. It would be calling a spade a spade"...an excerpt from the *Hippocratic Oath*, written 2,300 years ago, reads like an accurate prophecy of doom: "Our mistakes are not discovered by the patient (or their kin in case of the deceased)...and even if they are...they may whimper but rarely scream...and the worst penalty a doctor has to pay for his sins is disgrace...and it is surprising how little it (disgrace) bothers those who are used to it."¹⁰

Families that seek 'Female Foeticide Services', but more importantly doctors and medical practitioners (and all categories of employees in establishments with ultrasound sonography or other diagnostic, or fertility treatment facilities) who use these facilities to either commit or aid in the commission of female foeticide, or, to use Satish Agnihotri's phrase 'Female Foeticide Service Providers' will be liable for punishment for perpetrating crimes against humanity under the provisions of the Rome Statute (International Criminal Court)¹¹ in far more serious ways than contemplated by the current legislation, which imposes extremely mild punishment for the first offence and then steps it up gradually. Thus, the penalty structure itself defeats the purpose. Clearly, therefore the question of criminal responsibility and liability must be structured on the basis of an understanding of the gravity of the offence and not a response to a 'social evil'.

VI. Sex Determination: A Social or a Woman's Issue

Though sex determination has to be understood in the context of increasing violence against women, it has to

¹⁰ Sridhar, L., *Female Foeticide: The Collusion of the Medical Establishment*. Available at: <http://www.indiafemalefoeticide.org>

¹¹ Article 25 of the Rome Statute addresses the crucial question of individual criminal responsibility.

be viewed as a social issue. The term 'sex-selective abortion' is in use in recent years and various United Nations publications also use this expression. But if one's objective is to fight foeticide, one must know how best to convey the message of condemning foeticide to the masses.

Findings and Inferences

Laws cannot be enforced in the absence of a favorable consensus. In pluralistic society like India such consensus is a function of democratic constitutionalism and social development. A change in material conditions of life needs to be accompanied by a change in cultural preferences in favor of unborn child. The most vital important right of an unborn child is its right to take birth. Procuring abortion is condemned as an offence except for preserving the life of the mother. At what stage of pregnancy does the unborn child get a right to birth?

Indian Perspective

In India, since times immemorial, abortion has not been considered as an offence. The Hindus as well as Muslims considered it to be a forbidden act only and simply in the Indian Penal Code, 1860, in view of the religious, moral, social and criminal offence under sections 312-318, but where the abortion is on medical grounds in order to protect the life of the mother or child, it does not amount to an offence. These strict legal provisions on abortion have led to a large number of illegal abortions. In order to eliminate the high incidence of illegal abortions, the Medical Termination of Pregnancy Act, 1971, was enacted which permitted abortions on three grounds:

1. Health Ground: When there is danger to the life or risk to physical or mental health of the woman.
2. Humanitarian Ground: When pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman *etc.*, and
3. Eugenic Ground: When there is a substantial risk that the child, if born, would suffer from deformities and disease.

Thus right to birth is conferred on the unborn child who can be restricted in the interest of the mother or the child itself.¹²

Conclusion

In addition to the right to birth, again it is reiterated that simultaneously the unborn child has the right to healthy growth in unpolluted environment. Regarding the unborn child's rights in the realm of torts, the Congenital Disabilities (Civil Liability) Act, 1976, was passed by the British Parliament providing for action that may lie against a person or authority.

Moreover, we now have time at our disposal. Instead of blaming each other, we should take quick initiatives without loss of time. The change should start within each one of us. Let bygones be bygones. Mistakes committed by our forefathers should not be repeated by the present generation. Most of us and we are the future parents, and with us lies the responsibility of maintaining the balance in our society. At last, this research would like to be concluded with a saying which was aptly remarked by *Manusmriti*, the great sacred, the very first *Smriti* writer of Hindus¹³: *Yatra Naryaste Pujante, Ramante Tatra Devta*, which denotes that where ever women are worshipped and woman hood is honoured, respected and revered, *devta i.e.*, the God resides, settles and makes His abode perpetually; and where the women are insulted, dishonoured, degraded, battered and beaten cruelly, or harassed God does not come, and saintly moves away.



¹² Dr. Kameshwar, G., Basic Right of a Child – Born and Unborn, *Criminal Law Journal*, AIR 2002, p 144.

¹³ *Manusmriti*, VII 4-7.