

CHAPTER 5

ABORTION AND SEX SELECTION

Abortion has been one rallying point for feminists in the West. Western views on abortion and the position of the law there have had great impact in discussions in international fora as well as in countries like India.

The decision in Roe v. Wade is the foundation of abortion rights. It is critiqued as locating the right to abortion as being rooted in the right to privacy and not personal liberty and thus not such a strong right. Over time, this right has been whittled down to a shadow of its old self. Modern trends in the Western world, the strong anti-abortion position that George Bush takes and US funding and aid affect the position of abortion globally.

In India, there is an increasing tendency to link the abortion debate with that of sex selective abortion. The fear is that in view of the Preconception and Prenatal Diagnostic Techniques Act, the parameters of abortion itself are being more narrowly defined. Abortion must be rooted in stronger rights than the Medical Termination of Pregnancy Act, 1971 (MTP Act). The Indian Penal Code still treats it as a crime. The MTP Act creates exceptions to the crime. Thus, the right is still rooted in non-criminalization, than as a right.

In propaganda against sex selective abortion, increasingly the link is to the immorality of abortion itself, rather than that of sex selection. This has two effects:—

- 3. It justifies sex pre-selection because in this case there is no embryo/foetus to be got rid of*
- 4. It shifts the focus from sex determination which is crucial to the issue. It is sex determination which is punishable, not abortion.*

What is the stand that should be taken on abortion read with sex-selective abortion? How can the abortion 'right' be made stronger? How do we shift the focus from sex selective abortion to the idea of sex determination or sex selection itself?

One contemporary example used is that of Korea. Korea's position on abortion has followed a trajectory similar to that of India, yet different. This is looked at.

The research questions partially dealt with in this Chapter are—

- 3. How do the various laws and policies dealing with reproductive rights, technology, and crime impact—*
 - c. Sex selection trends*
 - d. The implementation of law relating to sex selection*
- 4. Assuming law to be one way of tackling this social problem, what can be done in order to ameliorate the current situation?*

The research questions in this Chapter are being dealt with in the context of abortion as a reproductive right as well as a crime and the interface with technology which makes sex selective abortion possible.

The Abortion Debate as a Feminist Focus

Catharine MacKinnon states that abortion is another way for men to control society and sexuality, cloaking that control in a woman's right to privacy. Abortion coerces women to handle crises that they did not create alone. Yet, the men, who are at least equally responsible for the crisis, are relieved of any concern, torment, anguish, or responsibility by a woman's choice of abortion. Indeed, the ultimate irony of abortion is that it inherently lets men off the hook²⁹¹.

²⁹¹ Lynne Marie Kohn, "Sex Selection Abortion, and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics," 4 *Wm. & Mary J. Women & L.* 91 at 123

Abortion was one of the earliest debates that Western feminism centred around and continues to do so. Although many societies had norms against abortion, many others were ambivalent about it. In the Western world as we know it today, the first legal condemnations of abortion appeared in religious law, notably the Code of Canon Law of the Catholic Church, beginning in the twelfth century. The basis of this earlier was the prevention of destruction of evidence of adultery. This was later changed to the basis of the 'ensoulment' of the foetus. The 1803 Irish Chalking Act was arguably the first legislation to ban abortion. With the stand of the Church against abortion, anti-abortion laws carrying penalties ranging from excommunication to life imprisonment were passed. Under the Napoleonic Code, it was treated as homicide²⁹².

After many centuries of draconian provisions on abortion, the early twentieth century saw some softening of the prevailing legal stance. In 1920, the Soviet Union, guided by Marxist principles of gender equality, became the first country in modern times to make abortion legal at a woman's request. China, too, followed. In the face of legislative inaction in Great Britain in 1938, the House of Lords decided *Rex v. Bourne*²⁹³ which exonerated a skilled surgeon of violating the Offences against the Person Act 1861 which rendered unlawful procuring the abortion of the girl. Although the basis was the surgeon's opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck, it was revolutionary and paved the way for legislative reform. Great Britain became the first country in Western Europe to liberalise abortion²⁹⁴.

However, it was still not looked at as a *right*. Women in the Western world did not have a right. The decision was still with the physician who had to be convinced that the continuation of the pregnancy would involve greater risk to the woman's physical or mental health than if the pregnancy were terminated. However, to be fair, it recognized social and economic grounds for abortion by providing for consideration of the woman's actual or reasonably foreseeable environment when

²⁹² Julia L. Ernst, *et. al.*, "The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic," 6 *U. Pa. J. Const. L.* 752 at 757

²⁹³ 3 *All E R* 615

²⁹⁴ In 1967, the Abortion Act came into effect

evaluating the potential threat to her mental health. The liberal interpretation of the law, however, rendered abortion available virtually on request²⁹⁵.

In the United States, however, though the courts did come up with progressive decisions, the legislature was lagging. Unlike the UK, the USA is more known for whittling away the guarantees established by the courts than accepting and recognizing the right.

The impact of the United States Supreme Court's decision in *Roe v. Wade*²⁹⁶ in recognizing a *right* to abortion has been immeasurable, both in the United States and around the world. It had its limitations being a negative right that only established the right to be free from government intervention for a specific period of time. It did not affirmatively ensure a constitutional right of access to abortion services. The right was rooted in privacy as opposed to personal liberty. Privacy for sexual matters is a double-edged sword and has been used against criminalizing marital rape, doing away with restitution of conjugal rights, and turning a blind eye to domestic violence. Increasingly viewed as a reproductive right, it is not without problems. Setting it up as a right can throw up other rights including the rights of fathers and may also open up the debate on the 'rights' of the unborn child.

The U.S. Supreme Court too has over time consistently upheld restrictions on funding for abortions. *Maher* upheld the cutback in the Medicaid programme²⁹⁷ and *Harris v. McRae* upheld the Hyde amendment²⁹⁸. This was followed in *Webster v. Reproductive Health Services*²⁹⁹, *Poelker v. Doe*³⁰⁰ and other cases. The domestic gag rule preventing pregnant patients from being counseled on abortion as an option

²⁹⁵ Julia L. Ernst, *et. al.*, "The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic," 6 *U. Pa. J. Const. L.* 752 at 758

²⁹⁶ 410 U.S. 113 (1973) establishing a fundamental constitutional right to abortion based on the constitutional guarantee of privacy.

²⁹⁷ *Maher v. Roe*, 432 U.S. 464 (1977).

²⁹⁸ *Harris v. McRae*, 448 U.S. 296 (1980).

²⁹⁹ 492 US 490 (1989)

³⁰⁰ 432 US 519 (1977)

was upheld in *Rust v. Sullivan*³⁰¹. Parental consent laws, which negated rights of an adolescent's privacy and freedom of choice, were upheld in *Bellotti v. Baird*³⁰². In *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁰³, the Court rejected the trimester framework developed by Roe and adopted the view that the state can take steps to ensure that the woman's choice to have an abortion is "thoughtful and informed" even during the first trimester, so long as such regulations do not impose an undue burden on women seeking abortion services³⁰⁴.

Nivedita Menon in her book summarises different feminists viewpoints of abortion. Some of those relevant to the present dissertation are listed below.

MacKinnon argues against abortion as a right of privacy for another reason—insisting that sex is a private matter implies that the violence that women face in what is designated as 'private' is not a matter of public concern³⁰⁵. Another influential feminist critique of abortion as a right to privacy is that of Robin West, who feels that privacy is a weak argument suggesting selfishness and freedom from accountability. Emphasis should be on accountability. She denies the foetus moral rights of its own, but does insist that it is a creature of moral consequence³⁰⁶.

Drucilla Cornell argues on the basis of self and bodily integrity as her womb is separated from the rest of her and placed in the control of others³⁰⁷.

Privacy also becomes a crucial issue in the context of sex selective abortion by cloaking such abortions in the protection granted to a woman's private choice to have or not to have a child. There are two arguments often raised to counter this—

³⁰¹ 500 US 173 (1991)

³⁰² 443 US 622 (1979)

³⁰³ 505 U.S. 833, 846 (1992)

³⁰⁴ Rachel E. Remaley, "The Original Sexist Sin: Regulating Preconception Sex Selection Technology," 10 *Health Matrix* 249 at 269

³⁰⁵ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 68.

³⁰⁶ Robin West, 'Taking Freedom Seriously', pp. 84-5. c.f. Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 69.

³⁰⁷ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 69.

one, controlling abortion, as women do not display agency when they act in such a manner and therefore need to be protected from the pressures acting upon them and, two, that discrimination must be avoided at all costs. However, controlling abortion in order to control sex selective abortion is no solution and will only serve to drive such abortions underground at considerable risk to the woman's health. Again, abortion may be done without the involvement of 'technology' in a major way and would thus be difficult to detect. Restrictions on abortion to control sex selective abortion, therefore, do not seem to be a choice at all.

The Medical Profession and Abortion

One of the ways in which sex selective abortion has sought to be controlled is by controlling the service providers. This is done by laying down the framework within which abortions can legally happen. Thus, many varieties of abortions may be criminalized and sometimes only a narrow selection is legal³⁰⁸.

Thus a law attempting to regulate abortion may lay down regulations regarding—

- Who may choose to abort— qualities of the mother
- What kind of foetuses can be aborted— qualities of the foetus
- Circumstances under which abortions can take place
- Persons who are eligible to perform abortions
- Procedural formalities to be completed by abortion service providers and the woman seeking the abortion
- Place where abortion is to be carried out
- Penalties for contravention of the law

A law seeking to regulate not just abortions but only sex selective abortion may have, among others, additional regulations like—

- Formalities to note the sex of the child

³⁰⁸ As is the case in India and Korea. The Indian position is discussed under the Medical Termination of Pregnancy Act and the Korean position is briefly discussed in international standards.

- Maintenance of records
- Licensing of abortion service providers
- Strong disincentives to mothers, abortion service providers, and others.

The United States has a restrictive framework as far as abortions are concerned, and the control rests with the medical profession. On the issue of sex selective abortion, they are prohibited in Pennsylvania and Illinois. In Pennsylvania, an abortion can be performed only after a physician has determined it to be necessary. The statute specifically states that ‘no abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion.’ However, it also provides that the physician may consider all factors (physical, emotional, psychological, familial, and age-related) in determining whether the abortion is necessary. The Illinois law, in contrast, pivots on the knowledge of the physician. Whereas the physician need not determine the necessity of the abortion, the law prohibits abortions of viable fetuses and those performed ‘with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.’³⁰⁹

The Korea Criminal Code explicitly outlaws the actions of any individual who causes the miscarriage of pregnant woman through the use of drugs or other means. No individual has ever been charged or prosecuted under these explicit anti-abortion laws. In fact, it appears as though most people are not even aware of the anti-abortion provisions in the criminal code³¹⁰.

In India, physicians who do perform sex selective abortion often claim to be doing it in the interests of the woman. In one case with a trap witness in Bangalore, the doctor doing the test told the patient that it was illegal to do the test. According to one observer, the doctor was in fact sympathetic to the plight of the woman who was accompanied by relatives. However, such cases are few and far between.

³⁰⁹ Naryung Kim, “Breaking free from Patriarchy: A Comparative Study of Sex Selection Abortions in Korea and the United States,” 17 *UCLA Pac. Basin L.J.* 301 at 309

³¹⁰ *Ibid.* at 310-311

The rights of the woman, which are being balanced against the right of the foetus to potential life, are the anxiety and psychological distress of having an unwanted child, the pain and physical burdens of pregnancy, the stigma of unwed procreation, and the burdens of raising an unwanted child. The privacy right given to the mother is the right to decide privately, between herself and her physician, whether she wishes to assume the burdens of continuing the pregnancy or reject them and abort. Of course, the interests of the woman in the case of preconception sex selection are not the same and, therefore, weigh differently against the rights of the embryo to potential life³¹¹.

The medical profession has often used the argument of 'patient autonomy' in order to justify sex selective abortion. However, medical ethics is much vaster than patient autonomy. Sex selective abortion is definitely unethical on grounds of discrimination as well as eugenics. Controlling the profession, however, to be ethical is a tough task.

If it were to be done, all the records under Medical Termination of Pregnancy Act should be duly maintained including recording the sex of the foetus. Abortion service providers must be punished if it can be proved that they indulged in sex-selective abortion.

The fallout from thus tightening medical ethics would be to first and foremost drive many abortions underground. Most sex selective abortions are second trimester abortions and therefore would raise the risk, being underground. In any case, with technology growing, identification of the sex of the child can be done even in the

³¹¹ Rachel E. Remaley, "The Original Sexist Sin: Regulating Preconception Sex Selection Technology," 10 *Health Matrix* 249 at 7.

first trimester with a fair degree of accuracy³¹². Controlling sex selective abortions may be the slippery slope towards controlling access to abortion itself.

Again providing guidelines on how an appropriate person is to carry out an abortion procedure has ended up pushing many abortion service providers out of the ambit of recognized providers. Insufficient service providers are the norm especially in rural areas as the definition of service providers has narrowed. This makes access to abortion very difficult in practice.³¹³ One of the criticisms against the recent amendments to the Medical Termination of Pregnancy Act has been just this. Several so called 'unsafe' abortions now removed from the purview of the Medical Termination of Pregnancy Act would become criminal acts within the meaning of the Indian Penal Code, making both service provider as well as others, including the mother herself liable.

In terms of making abortions safe, although the purpose is laudable, it does open the door to criminalisation, which perhaps was an unforeseen, yet highly regrettable consequence. It reiterates the stand that the woman does not know what is good for her and leaves decision making in the hands of government officials and medical doctors.

While I am not of the view that quackery should be tolerated, I however wish to make the point that abortions fulfilling the criteria laid down in the Medical Termination of Pregnancy Act are just a pipe dream in the real world where most women do not have access to basic abortion services.

Amendments allowing abortions, if the service provider is convinced that the woman's socio-economic circumstances justify it, is another provision taking it out

³¹² Kirti and Sharad D.Iyengar, *et. al.*, "Proposed Changes to the MTP Act, Rules and Regulations in the Light of Concern About and Sex Selection" Coalition for Maternal-Neonatal Health & Safe Abortion at 1

³¹³ *Ibid.* at 2

of the hands of the woman and making it subject to interpretation by not just the service provider but also the morality of the times. Again, completely unnecessary.

On the other hand, we find the entry of drugs entering into the market, which make abortions very easy, and we may be coming to the stage where the physician's control would become redundant, except to meet prescription requirements. In India, even Schedule H drugs, which are not to be sold over the counter except on the prescription of a registered medical practitioner, are easily available over the counter³¹⁴. The law is honoured more in the breach in this case. Keeping this fact in mind, it is safe to assume that women will be able to access abortion-inducing drugs over the counter, and the physician's intervention may not make much of a difference³¹⁵. Such a development will make monitoring of abortions even more difficult than it already is.

There is a need to take account of the multiple dimensions by which technology is affecting women's lives.³¹⁶ This is especially so in case of physician assisted abortions in case of new technologies which are able to detect the sex of the foetus before the second trimester and also regarding over the counter drugs which may in the future make a physician's service regarding abortions fairly redundant.

So far, drugs are seldom used for second trimester pregnancies. Sex selective abortions currently account for roughly 11 per cent of late-term, unsafe abortions in India. Studies indicate that the risk of death is seven to ten times higher for women who wait until the second trimester to terminate their pregnancies. Sex selective abortions are all second trimester abortions³¹⁷.

³¹⁴ Sarasu Esther Thomas & Geetanjali Srikantan, "Pharmaceutical Drugs: Apathy of Law," 6 *Student Adv.* (1994) 109

³¹⁵ New non-invasive drugs like antiprogestogen-mifepristone derivatives, which studies have shown are 85-97% effective, are available over the counter.

³¹⁶ Radhika Balakrishnan, "The Social Context of Sex Selection and the Politics of Abortion in India," http://www.hsph.harvard.edu/rt21/medicalization/BALAKRISHNANSocial_Context.html as on 13 Jan 2005 at 8

³¹⁷ Lalitha Sridhar, "Female foeticide: The collusion of the medical establishment," *Info Change News & Features*, August 2004, <http://www.infochangeindia.org/features210print.isp> as on 16 September 2004 at 2

Where is the responsibility of the physician in terms of enforcement of the law? Of the many cases of abortion which arose where doctors were sought to be held responsible for causing the death of the woman, perhaps the one that stands out the most is that of *Dr. George Jacob v. State of Kerala*³¹⁸. This decision is important for two reasons—

1. It highlights the prolife approach which the higher courts of this land take
2. It shows that the focus is the unborn child and the woman is only of secondary importance

The judgment begins on a clear prolife note stating that life is said to be the most sublime creation of God. The judgment draws on religious arguments and points out that this belief is asserted strongly by religious denominations, who argue that human beings cannot take away life, as they cannot give life... sometimes to the extent of opposing birth control. Abortion and miscarriage would be opposed with greater force by these persons said the judge. Excerpts from the *Vedas*³¹⁹, *ahimsa* from Buddhism, and the strictures against the taking of any life in Jainism are used to support this argument, as is a quote from Mahatma Gandhi that 'God alone can take life because He alone gives it.'

The Court found the Medical Termination of Pregnancy Act to show concern for the unborn child and also the hazard to the life of the woman (in that order). This observation was based on the Statement of Objects and Reasons of the Medical Termination of Pregnancy Act which granted *permission* to abort on the grounds of

- health (danger to the life or risk to physical or mental health of the woman),
- humanitarian grounds, such as when pregnancy arises from a sex crime like rape or from intercourse with a lunatic woman,

³¹⁸ (1994) 3 SCC 430

³¹⁹ *Rig Veda II* "Grant us a hundred autumns that we may see the manifold world. May we attain the long lives which have been ordained as from yore."

Atharva Veda I "May we be enabled to see the sun for a long time" para 2 of the judgment

- eugenic, where there is substantial risk that the child, if born, would suffer from deformities and diseases.

On facts, the Court found that the homeopathic doctor in this case had been ‘daring, crude, and criminal’ and that an innocent life was sacrificed at the altar of a quack. The autopsy showed that the uterus had got perforated because of employing scientific gadgets by the doctor who had absolutely no training in this regard. Strong words by the Court.

Yet, in the sentencing policy, we find these strong words missing. Concern is shown to the young child whose mother has died as a result of the botched operation. The Rs 5000 fine imposed by the High Court is raised to one lakh. Yet, as punishment for negligently causing the woman’s death, the doctor’s punishment was reduced to two months of incarceration already undergone! If the special sections on abortion were absent, the punishment for negligently causing her death would have been much higher.

Was this done because ‘abortion’ is seen as a ‘bad’ act, though no longer classified as a crime? In earlier cases of abortion too, we find that the woman who died due to the abortion is often vilified. If she were unmarried and became pregnant, the man who got her pregnant often gets away on a charge of abetment. Although the woman’s character is irrelevant, it is still talked about³²⁰. If a woman dies at the hands of a quack, it is not only the doctor concerned who is punishable, but also the person abetting (usually the person who fathered the child) who is punishable. This would be a heightened punishment under Section 314 read with Section 34 of the Indian Penal Code, i.e., common intention to cause miscarriage which resulted in death³²¹. There have also, on the positive side, been cases where compensation has been provided to women who had become pregnant on the false promise of marriage or fake marriages and forced to undergo abortions by the men who had

³²⁰ *Madan Raj Bhandari v. State of Rajasthan* 1969(2) SCC 285 at para 7

³²¹ See *Surendra Chauhan v. State of MP* (2000) 4 SCC 110

deceived them³²². The principle used to award interim compensation has interestingly been on the basis of principles set out in *Delhi Domestic Working Women's Forum*³²³, which was in the context of rape³²⁴.

The increased medicalisation of abortion is a phenomenon to be reckoned with.

International Standards on Abortion

Earlier on in this Chapter, it has been seen that *Roe* was a turning point as far as abortion rights were concerned. It sparked off a worldwide debate and was the catalyst in many other jurisdictions. *Roe*, in turn, as well as the movement for abortion law reform in the United States was influenced by attitudes in Europe toward abortion and birth control.

At the same time, since 1973, a vocal anti-choice movement within the United States has chipped away at the core of the principles espoused by *Roe*. This was reflected in laws restricting women's access to abortion as well as anti-choice U.S. foreign policy which has now reached its nadir promoted by George Bush³²⁵.

The Medical Termination of Pregnancy Act, 1971 in India has borrowed heavily from Britain's Abortion Act, 1967. However, it has also been influenced deeply by the trimester test in *Roe v. Wade*. Thus abortions are allowed, but within the first twelve weeks of pregnancy, in case of contraceptive failure, rape, fetal abnormalities, and mother's health. However, the final decision lay in the hands of the physician (a registered medical practitioner) who has to determine in good faith that it was so. Beyond the first trimester, two opinions were needed. The physicians had to be satisfied that such pregnancy posed a threat to a woman's physical or

³²² *Bodhisattwa Gautam v. Subhra Chakraborty* 1996 SCC (Cri) 133

³²³ (1995) 1 SCC 14

³²⁴ *Ibid.* at para 18

³²⁵ See Julia L. Ernst *et. al.*, "The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic," 6 *U. Pa. J. Const. L.* 752 at 756-757.

mental health or that the fetus was likely to suffer a serious physical or mental disability.

Of course, the Medical Termination of Pregnancy Act was not enacted out of concern for women's reproductive rights, but rather because of the reasoning that a lot of India's problems are because of population; that population increases poverty and therefore should be controlled. Population control was the avowed motive of the legislation. Indeed, it is noteworthy that hardly any objections were raised to the Bill on religious or moral grounds³²⁶.

Abortion law has been justified on the basis of women's health, positive state legislation, constitutional guarantees, and of late women's reproductive rights. In the context of sex selection, which has also opened to some extent the Pandora's box as far as abortion is concerned, the last is the most relevant. Health can be questioned, especially mental/emotional health; constitutional guarantees may be reinterpreted as is the attempt today in the United States³²⁷; legislation may be amended, as we are seeing all over the world where abortion once liberalized is now becoming restricted. It is therefore in reproductive rights that the right to abortion can be protected while also creating a strong anti-sex selection base. Unless, of course, it finds a mention in the Constitution as a fundamental right. Nowhere do we find evidence of this except in post-apartheid South Africa³²⁸.

³²⁶ The Act was passed in 1971 quite independently of the women's movement. The declared objectives of the Bill when it was introduced³²⁶ in Parliament were (a) humanitarian: to help the 'unfortunate women' who are the victims of forcible sexual acts'; (b) health: 'we should be sympathetic' to those who become pregnant because of failure of contraception; and (c) eugenic: to reduce the risk of 'crippled' children

³²⁷ Ironical, because the United States was the first country to bring the right to abortion within the right to privacy. However, as mentioned elsewhere in this dissertation, the US Supreme Court deliberately did not include it within the ambit of personal liberty. Where does privacy end and public interest begin, could be a moot question. After *Roe*, however, the rights are slowly being eroded. The erosion began in 1976 with the 'Hyde amendment' after which Medicaid was not available for abortions, except when such pregnancies were a threat to the life of the mother or were a result of rape.

³²⁸ The South African constitution, 1996, provides in Section 12 that "[e]veryone has the right to bodily and psychological integrity, which includes the right. . . to make decisions concerning reproduction."

³²⁸ South Africa's Choice on Termination of Pregnancy Act, enacted in 1996, is one that makes abortion legal at a woman's request during the first twelve weeks of pregnancy.

Today, over 60% of the world's population lives in the sixty-six countries that permit abortion without restriction as to reason or on broad grounds.

How has all this changed after the realization that sex selective abortion is happening? The three countries which are acutely facing the effects of sex selective abortion, viz., India, China, and Korea have dealt with it differently. In China as seen elsewhere, because of the one-child policy, abortions have been encouraged and sometimes even enforced as a family planning measure. India and Korea, on the other hand, continue to criminalize certain abortions. The Korea Criminal Code³²⁹ contains the 'anti-abortion law' of Korea. The anti-abortion laws were designed as a 'package deal' to address the problematic remnants of the war: the drastic decline in population and the social chaos created by sexual promiscuity. By emphasizing the sanctity of any (including fetal) life, these laws sought to promote population growth and moral, wholesome sexual practices³³⁰.

Abortion in Korea continued to remain legally banned but widely practiced as a family planning measure and otherwise, although no legislation allowed it. As a social practice, it was allowed and even tacitly encouraged before law recognized it, as by then population was booming and a need to push smaller families was felt. This went on until the 1980s when concerns about skewed sex ratios brought abortion issues back into the centre of public debate³³¹.

In addition to national law reforms and policy changes in individual countries, there were a number of international instruments and conferences which impacted abortion through discussions and positions on reproductive rights. The ICPD Programme of Action describes reproductive rights as follows: Reproductive rights

C.f. Julia L. Ernst *et. al.*, "The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic," 6 *U. Pa. J. Const. L.* 752

³²⁹ Articles 269 & 270

³³⁰ Naryung Kim, "Breaking free from Patriarchy: A Comparatives Study of Sex Selection Abortions in Korea and the United States," 17 *UCLA Pac. Basin L.J.* 301 at 311-312

³³¹ *Ibid.* pp 313-314

embrace certain human rights that are already recognized in national laws, international human rights documents, and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children, and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.

The situation of abortion in the context of reproductive rights is unclear. Certainly, it is not considered a method of family planning, though a right. The Platform for Action of the Fourth World Conference on Women, held in Beijing, went further by urging governments to consider removing criminal penalties for women who have undergone illegal abortions and to take affirmative steps toward understanding and addressing the causes and consequences of illegal abortions.

The CEDAW is the basic instrument as far as women's rights are concerned. The Convention on the Elimination of All forms of Discrimination Against Women has time and again spoken of reproductive rights. However, it has been wrongly perceived as allowing unrestricted abortion. Which is why the United States has not yet ratified it³³². On the contrary, abortion as a family planning strategy adopted by the State, as opposed to the free choice of a woman, has never been pushed by women's fora.

Abortion and the Medical Termination of Pregnancy Act, 1971

Abortion was legalized in India in 1971, after a 1956 UN mission to India recommended this step to strengthen the population policy, and the report of the 1966 Shantilal Shah Committee also advocated it to reduce the numbers of illegal

³³² Julia L. Ernst *et. al.*, "The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic," 6 *U. Pa. J. Const. L.* 752 at 767-775.

and unsafe abortions. Although the stated reasons for passing the Medical Termination of Pregnancy (MTP) Act were humanitarian (to 'help' victims of sexual assault), health-related (to provide an alternative to those whose contraceptive measures failed), and eugenic (to reduce the numbers of 'abnormal' children born), there was a strong population control motivation underlying the passage of the Act³³³.

Femicide of fetuses has often been justified by doctors as an act done in order to protect the health of the mother. Since abortion is a very liberal law, the 'health of the mother' has been interpreted very broadly. Many doctors expressed the opinion that it would genuinely be in the interests of the mother's emotional health to abort a female foetus as she would otherwise be subject to utmost hardship.

It was for this reason that the FASDP wanted to include abortions within the purview of the Medical Termination of Pregnancy Act within the purview of the Prenatal Diagnostics Techniques Act, 1994. This would, if it had happened, have had serious repercussions on access to abortions for women.

Abortion in India was legalized before there was a demand for it from the nascent women's movement. It was more in order to bolster the family planning programme, than to give women rights. Indeed, it still continues to be part of the Indian Penal Code as a crime, and the State has not bothered to repeal the repugnant provisions. No Court has so far pronounced on the *right* to abortion. The only time it has seriously been dragged into a controversy is w.r.t sex selective abortion often referred to as femicide.

³³³ S Sudha and S Irudaya Rajan, "Female Demographic Disadvantage in India 1981-1991: Sex Selective Abortions and Female Infanticide," *Development and Change*, Vol 30 (1999), 585-618 at 596

In fact, even the words 'abortion', 'miscarriage,' and 'termination of pregnancy' have not been defined, either in the Act or in the relevant sections of the Penal Code, which leaves individual medical opinion on these matters sacrosanct³³⁴.

The Medical Termination of Pregnancy Act provides an exemption from criminal law for abortions that are done within the permitted limits of the Act. All other abortions continue to be punishable under Section 312 to 316 of the Indian Penal Code. This leaves no doubt about the 'decriminalising' of abortion or the 'right' to abortion myths. It is still a crime except as provided under the Medical Termination of Pregnancy Act.

Under the Act, termination of pregnancy requires the consent only of the woman if she is above eighteen and sane. However, while such a woman cannot be punished for the act of abortion itself, a Delhi High Court judgement in 1983 held that abortion without the consent of the husband constitutes 'cruelty' within the meaning of the Hindu Marriage Act. The husband was therefore granted divorce as, in the words of the judgement, the wife had refused to "satisfy a husband's natural and legitimate craving to have a child." The judgement goes on, "This more so . . . where the parties to the litigation are Hindus. In this sort of case, the court has to attach due weight to the general principle underlying the Hindu law of marriage and sonship and principles of spiritual benefit of having a son³³⁵." What are the implications of such a judgement for the selective abortion of female foetuses?³³⁶

In a case before the Madras High Court in 1993, the father of a sixteen-year-old girl petitioned that the pregnancy of his daughter be terminated on the grounds that she was legally and mentally too young to take the decision to bear a child. The Additional Public Prosecutor who presented the case of the girl, defended her right to bear the child on the grounds of the right to privacy. He argued that this right was

³³⁴ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 86.

³³⁵ *Satya v. Siri Ram*, AIR 1983 P&H 252 at 253

³³⁶ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 88.

a fundamental right included in the right to life and liberty and that the Constitution made no distinction between majors and minors when it came to fundamental rights³³⁷.

The Bench accepted the public prosecutor's arguments and said that this issue could be taken as one which involved the basic right of an individual. However, it made two additional pronouncements which are deeply disturbing from the feminist point of view. One, it rejected the petitioner's argument that delivery in the case of minors was medically dangerous. On the contrary, said the judges, "The younger the mother, the better the birth." Termination of the first pregnancy could lead to sterility, they added. Two, they quoted from Hindu, Muslim, and Christian scriptures that destruction of life even in the mother's womb had no moral sanction³³⁸

Given these explicit values underlying the judgement, it does not seem possible that the right to individual liberty would have been upheld had the situation been the reverse, that is, had the girl been a minor wanting to terminate her pregnancy in the face of opposition from her guardian³³⁹.

In 1966, in a case that came up before the Allahabad High Court, the judgement held that the child in the womb is a person. This judgement is interesting because such a conclusion does not appear to have been indispensable to holding the appellant guilty of assault resulting in miscarriage. The circumstances were that the appellant pushed down a woman and kicked her. Since she was seven months pregnant, this resulted in her prematurely delivering a baby which died. The trial court convicted the appellant under section 316 which applies if the death of a quick unborn child is caused by an action that can be classified as culpable homicide³⁴⁰.

³³⁷ *Ibid.* at 89.

³³⁸ *Id.*

³³⁹ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 89.

³⁴⁰ *Id.*

Safeguarding Abortion and Preventing Sex Selective Abortion in the future

By the late 1970s and 1980s, the women's movement in the West led to collaboration in United Nations conferences and other fora toward the development of international standards for the³⁴¹ protection of women's human rights, including their reproductive rights.

Abortion is not the only tack. Several developments, especially as a result of new medical research findings, open the discussion which was thought to be closed after *Roe*, viz., whether the unborn are 'persons' within the meaning of the law. Recent regulations giving rights to fetuses, embryos, and even fertilized eggs, making them eligible as beneficiaries for the State Children's Health Insurance Program ('SCHIP') may be the slippery slope towards a different end to this debate. There are also moves to recognize injury because of a crime to not just the foetus, but also a fertilized egg and treating such as independent legal entities³⁴².

Would such an approach be useful in the case of sex selective abortion? Looking at the unborn female child as an *individual person* vested with rights would make it easy to advocate arguments on sex discrimination and penalize doctors. However, the problem with such an approach would be that there would be no way of distinguishing punishment given for the abortion of a female or male foetus; if one is an individual person, so is the other. Also, from a feminist perspective, it would render the right to bodily integrity nugatory. Abortion would no longer be possible, not even on grounds of the health of the mother, for how does one balance the claims of one individual against another? The problem also with this approach would be that we would push reproductive rights back into its Dark Ages.

³⁴¹ Julia L. Ernst *et. al.*, "The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic," 6 *U. Pa. J. Const. L.* 752 at 756.

³⁴² Julia L. Ernst *et. al.*, "The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic," 6 *U. Pa. J. Const. L.* 752 at 767-773.

To add to the problem, the term 'abortion' has not been covered. The medical termination of pregnancy—the term used in the Indian statute—is also not very helpful. Certain common forms of contraception may work to actually preventing a fertilized egg from taking root. Can these be classified as abortion? If it means terminating a pregnancy, well, that is what it will do on the assumption that a pregnancy has indeed happened. If it hasn't, it is just a precaution. Usually, while discussing abortion, a surgical procedure comes into mind. In the West, extremists would consider such forms of contraception as leading to abortions.

Surprisingly, those who advocate rights of the 'unborn' by controlling women's bodies, do not display sufficient interest in providing for such unborns after birth. It is thus a hypocritical stand to take. Yet, with the 'viability' of the foetus becoming immaterial with the advance of medical technology which can continue the life and growth of a foetus outside the womb, rights of the unborn, from the feminist point of view, become even more dangerous.

Interestingly, although abortions are freely available at government health centres in India, the posters against sex selective abortion circulated by the Department for Women and Child Development in various States seem to view the foetus as having moral rights. This is not a happy trend. In fact, it conflicts with other departments, like that of Family Welfare which openly advocates abortion as a family planning/population control strategy.

Abortion, like domestic violence is seen by society to be a private matter and to be free from State influence, though the right to privacy has not been recognized in concrete form. Women's control over their wombs has been a debated point from the point of view of contraception, choice, etc. In the context of sex selective abortion, it assumes a new form. The earlier Pre-Natal Diagnostic Techniques Act made the mother punishable for sex determination tests, and the later Pre-Conception and Prenatal Diagnostic Techniques Act recognized the control that others have over the womb and the mother and remedied the situation.

In the context of sex selective abortion, Nivedita Menon in her book deals with some important issues concerning abortion—

She points out that arguments deployed to support a ban on sex determination tests can also be used to support a ban on abortion³⁴³. And, further, that there is a profound philosophical incoherence involved in arguing for abortion in terms of the right of women to control their bodies and, at the same time, demanding that women be restricted by law from choosing specifically to abort female fetuses.

None of the major religions had a position on abortion, although among several Hindu, Muslim, and Christian traditions (though not all of them), abortion was viewed as a sin. However, on sex selective abortion, several religious leaders have taken up a strong stand. Now, religionwise population has become an issue and losing potential childbearers to sex selective abortion would adversely impact the concerned community in the numbers game.

Even if it were possible to pressurise the government into enacting a foolproof law against the abortion of female foetuses, there remains an important dilemma for feminists. We have to examine the political implications of pushing for legislation that could entail restricting a woman's right to abortion. In fact, two of the legal initiatives against sex determination tests were based on premises that questioned the unrestricted right to abortion. A women's group in Bombay filed a petition in the High Court in 1986 arguing against sex determination tests on the grounds that such tests violated Article 21 of the Constitution, that is, the right to life. This argument could well be extended to the right to abortion itself. The second instance is a Private Member's Bill introduced in Parliament to amend the MTP Act. The amendment sought to empower the medical practitioner to refuse termination of pregnancy 'if he or they have reason to believe that such termination is sought with

³⁴³ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 72

the intention to commit female foeticide³⁴⁴. Both initiatives were opposed by the FASDSP as potentially restricting the right to abortion. Nevertheless, it must be recognised that, in many ways, arguments against selective abortion of female fetuses occupy the same terrain as those against abortion. Reflecting on the campaign against sex determination tests, an activist writes, “Today . . . some of us feel that the poster and other visuals used in the campaign might have been misinterpreted as being anti-abortion.”³⁴⁵

The greater importance assigned to the unborn child over the mother is illustrated also in a case before the Madhya Pradesh High Court in 1992. A doctor administered an injection to a woman to determine pregnancy. She was twenty-four weeks pregnant and died the next day. The doctor’s conviction under Section 312 was upheld, that is, voluntarily causing miscarriage. It is significant that though the woman died as a result of the injection, the doctor was not convicted for her death but, in essence, for the death of the foetus^{346 347}.

The issues of sex selection versus safe abortion are increasingly intertwined. The MTP Act giving women in India the right to safe abortion has recently come under increasing scrutiny by some as the debate on sex determination and sex selective abortion heats up. During the parliamentary discussion on the bill to amend the MTP Act, for example, a number of members questioned the usefulness of the amendments in curbing female feticide. The tendency to conflate access to safe abortion with the need to curb sex selection abortion also became evident when one Member of Parliament asked whether “abortion is tantamount to feticide. What is the difference between the two?”³⁴⁸

³⁴⁴ Flavia Agnes, ‘A Critical Review,’ p. 147.

³⁴⁵ R.P. Ravindra, ‘Campaign Against Sex Determination Tests,’ *Lokayan Bulletin*, no. 8, 1990, p. 31.

³⁴⁶ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004) at 90.

³⁴⁷ 1992 Cri L.J. 1680.

³⁴⁸ Rupsa Mallik, “India – Recent Developments Affecting Women’s Reproductive Rights,” Centre for Health and Gender Equity, December 2002 at 2.

It is important to mention that the Pre-Natal Diagnostic Techniques Act has an important link with the Medical Termination of Pregnancy Act, 1971 and Rules 2003.

Some feminists referring to the issue in terms of reproductive right and choice ironically justify sex selective abortion. This argument goes that people have no use for abstract concepts as sex ratios. The lives of Indian women were so terrible that this technology offered them an element of choice, indeed of empowerment. Over time a decline in the supply of girls and thus their status. What this argument misses out is extremely important: women are not in fact exercising agency when they exercise this “right” to sex selective abortion³⁴⁹.

The argument that pre-conception sex selection is an expression of a woman’s choice is also suspect³⁵⁰.

It is noteworthy that no Indian women’s organization, reformer, or nongovernmental organization has ever demanded such a right³⁵¹.

³⁴⁹ Mohan Rao, Female Sex Selection Abortions: Some Issues”, IDPAD Newsletter Vol II, No. 1 January–June 2004 at 23

³⁵⁰ Vineet Chander, “It’s (Still) A Boy. . . .: Making the Pre-Natal Diagnostic Techniques Act an Effective Weapon in India’s Struggle to Stamp out Female Foeticide,” 36 *Geo. Wash. Int’l L. Rev.* 453 at 7.

³⁵¹ *Id.*