

CHAPTER 1

Introduction and Methodology

There is possibly no issue which disturbs feminists in India more deeply than the issue of the dwindling numbers of women. Sex selective abortions have been made possible by technological advances with disastrous consequences for women as evidenced by the last two Censuses. It is an issue which has challenged some of the basic concepts of feminism itself. It is patriarchy in a new form, discriminating against women before they are even born. It has eroded many of the gains that Indian women have made over time. It has resulted in drawing new parameters for violence; for how else can you describe a phenomenon which has seen the disappearance of over three hundred million women?

Where women's rights are concerned, feminists have been deeply critical of the law. Law is seen as maintaining the status quo of the many-headed hydra — patriarchy. Law, even when it is made ostensibly to protect women, is often either toothless or has a hidden agenda. Yet, the women's movement, in its multipronged attack against patriarchy, has used the law and campaigned for law reform; not seeing law as an end in itself, but rather as a means to an end, a tool for justice.

While much has been written about reproductive rights in India, feminist critiques of the bundle of laws which have a bearing upon the missing women phenomenon are few and far between. The researcher in this dissertation aims to look at this.

The phenomenon we are witnessing has itself undergone a change in nature. In the beginning, 'female foeticide' was the term used. Later, it was felt that foeticide itself was a loaded term, conveying the killing of an individual—the foetus. The foetus seemed to be a person bearing rights, including the right not to be killed. The next trend was to use the term 'sex selective abortions,' which seems more neutral.

Of late, gaining popularity is 'femicide' or 'femicide of fetuses.' Increasingly, with abortion itself slowly becoming outmoded, sex selection is the preferred term.

Myths and Social Reality

The phenomenon of sex selection has its parentage in mythology and social reality. Social reality creates the need for a son; mythology says that it is indeed possible to select a son. Between the two, they create a fertile ground and plant the seed for sex selection. Ancient Indian scriptures contain several stories of strange conceptions of sons, including that of Surya blessing Kunti with a son and of the Putrakameshti Yagnya performed by Dasharatha resulting in the birth of Rama and his brothers. Modern traditions see prayers and poojas for the birth of sons during ceremonies of marriage and during pregnancy. Myths have been multiplied by quacks who prescribe treatments of their own. Poojas and Yagnyas are still in high demand. A reenactment of the Putrakameshti Yagnya in Cochin, Kerala, found five thousand applications from childless couples¹.

Myths in the Western world were as fantastic as in the Eastern. Aristotle suggested vigorous copulation, and Anaxagoras suggested tying off the left testicle to conceive sons. Anaxagoras' 'theory' was still practiced among French noblemen more than 2200 years later!²

For those who pooh pooh mythology, there are modern 'scientific' myths neatly packaged and marketed. For instance, 'Select' capsules which the manufacturers claim results in the birth of a son. It even claims to change the sex of a female foetus on the grounds that the sex of the foetus is undecided for three months!³ Even in the West, suggestions to avoid the 'superfluous female' purporting to be

¹ Ravindra, R.P, "Dear God, Give Us Only Male Children," *The Weekend Observer*, April 25, 1992 at 1

² Owen D Jones, "Sex Selection: Regulating Technology Enabling the Predetermination of a Child's Gender", 6 *Harv. J. L & Tech.* 1

³ *Ibid* at 2

based on scientific research in the early twentieth century were nothing more than the propagation of the same old myths which were floating around⁴.

Mythology without social realities would have no role to play. It has been widely documented in many patriarchal societies that a woman would be subjected to social penalties if she did not produce sons for her husband. In India, not bearing sons is a very real cause for desertion of wives by husbands. Even in the West, women felt the weight of this burden. This is possibly best illustrated by the beheading of Anne Boleyn who failed to bear sons for Henry VIII. The role of sperm cells in sex determination was understood only in 1924. Yet, even now, there is a lag between science and popular belief. Women bear the brunt of this.

Today, we see mythology in the flesh with modern technology facilitating sex selection. The law on the one hand seeks to prevent it, and on the other hand, law and policies operate to intensify social pressures to use sex selection techniques. There is thus a dichotomy within the law itself.

Arguments For and Against Sex Selection Technology

Arguments set forth by both opponents and advocates of sex selection technology can be divided into four categories— consequentialist, moral/ethical, legal, and feminist⁵.

Consequentialist arguments analyze the demographic, social, and individual results of the practice of sex selection. Since there are more males, they would claim a greater privilege and would have a higher standing in family and society than lesser 'unchosen' daughters. A skewed sex ratio might lead to unforeseen social imbalances leading to repercussions for both sexes. There might be a greater rich-

⁴ Jodi Danis, "Sexism and the "Superfluous Female": Arguments for Regulating Pre-Implantation Sex Selection", 18 *Harv. Women's L. J* 219.

⁵ While a classification based on the first three have been given by Jodi Danis, I have added the fourth, which is indeed the most voluminous as well as the most researched set of arguments.

poor divide, with the rich having access to expensive technology and therefore sons and the poor having an excess of daughters; the list could go on.

Moral and ethical arguments are mainly based upon discrimination and eugenics. Choosing the sex of the child has been referred to as the original sexist sin⁶. The ethical argument would be that it would be a blatant act of sexism to choose the child of one sex, thus discriminating against the other sex as a whole. It also smacks of eugenics which has, since Nazi times, been a bad word.

Legal arguments generally examine the constitutionally protected liberty, privacy, and equality rights of groups either to engage in or to be free of sex selection practices. In the Indian context, this would include looking at the positive law on the point—the Preconception and Prenatal Diagnostic Techniques Act, and of course the Act would be violated by any act of sex selection.

Feminist arguments have probably dealt with this issue the most. The cultural underpinnings of son preferences have been addressed by many researchers. These preferences tend to be strongest in societies that are patrilineal, patrilocal, and patriarchal. Such social institutions took root in a fairly distant historical past, and a variety of factors help to perpetuate them today in contemporary forms⁷.

The period after the 1991 Census which first evidenced the contemporary display of son preference, perhaps, justifies looking at the issue from a feminist perspective. There is a variety of social, political, and legal factors at play. The net result has been a falling number of women. The 2001 Census, while it showed a better position for women as a whole, belied the fact that women's position had improved by not indicating that the juvenile sex ratio of women between 0-6 years of age had in fact fallen further.

⁶ See Jodi Danis, "Sexism and the "Superfluous Female": Arguments for Regulating Pre-Implantation Sex Selection," 18, *Harv. Women's L. J* 219.

⁷ Daniel Goodkind, "Should Prenatal Sex Selection be Restricted? Ethical Questions and Their Implications for Research and Policy," *Population Studies* Vol. 53, No. 1 (Mar 1999) 49-61 at 50.

For these reasons, while consequentialist, moral/ethical, and legal arguments are looked at, this dissertation has as its focus feminist arguments on the issue.

The Preconception and Prenatal Diagnostic Techniques Act

Concerned with the phenomenon of disappearing daughters, the State came out with the Prenatal Diagnostic Techniques Act, 1994 followed by amendments periodically to address the issue. As in the case of most social welfare legislations, there is considerable lag between the law and its implementation. Petitions were filed in the Supreme Court seeking implementation. The Court miraculously obliged. In a series of orders, it sought affidavits from State Governments to detail what had been done to implement the Act. Karnataka had the most number of cases on record and therefore makes an interesting case study. A number of other remedies seeking to inform, educate, and motivate people were also taken up. The law is being used as an additional tool— to punish wrongdoers, mainly doctors, who misuse technology for sex determination. So far, there has been one sole conviction in the entire country⁸.

Law and Policy Impacting Sex Selection

In addition to the Preconception and Prenatal Diagnostic Techniques Act, there are several areas dealing with reproductive rights which have a direct or indirect bearing on the implementation of the Preconception and Prenatal Diagnostic Techniques Act.

Population policies, especially the rigorous family planning policy and the two-child norm, impact sex selection by pushing sex ratio to new heights. If a small family norm is propagated with some pressure, the preference will be to have a son and end the family there, or to have a son and one spare son. A daughter is not

⁸ In Delhi. *The Hindu*, Sunday, April 02, 2006 (Bangalore edn)

preferred. The two-child norm has had other repercussions too which will be discussed in the course of this paper.

The law on infanticide is one with which many parallels can be drawn. Initially introduced by the British as a social welfare legislative measure, it has gloriously failed to tackle the problem. Infanticide is still prevalent but is increasingly being replaced by the new technology of sex selective abortions which are more sanitized and 'ethical'.

The unholy link between abortion and sex selection makes abortion law an area which has a bearing on the topic at hand. Often sex selection and the abortion of the identified, unwanted female foetus is done by the same service provider. Popular beliefs linking abortion and sex selection have a bearing on the effectiveness of the anti-sex selection campaign.

Policies which encourage or, at least, do not sufficiently regulate New Reproductive Technologies are of great concern. New Reproductive Technologies promoting greater control of women as baby-making machines and aimed at population control, while clandestinely encouraging sex selection, is perhaps one of the most controversial areas in medical ethics today. While, earlier, law dealt with prenatal diagnostic techniques, New Reproductive Technologies progressed so fast that, within ten short years, the Act had to be amended to provide for preconception techniques as well. Ethical issues raised by such technologies, particularly techniques which have potential for great use as well as misuse, must be looked at. Also, there is the matter of how to define reproductive rights in this context and of women's agency and choice in accessing new reproductive technologies.

Violence against women and laws dealing with violence raise peculiar jurisprudential issues of how to situate an unborn child in this framework without disturbing the reproductive rights of women. Also, the 'victim' of the violence needs to be identified.

Procedural laws and criminal laws granting remedies, setting procedures, etc., are also relevant. In their absence or their presence without teeth, no justice can be obtained. Especially relevant are the principles in criminal law, tort law, etc. Of course, there is the larger question to be addressed of how far law is a solution at all. The limitations of law in dealing with social problems are acknowledged, but how far could it be effective in dealing with this particular social problem needs to be evaluated.

Objectives

This study aims at the following objectives:

1. To look at the development of the problem and the law relating to sex selection in India
2. To study other laws and policies which impact sex selection
3. To examine the gaps in such laws and policies from the context of reproductive rights and women's human rights
4. To study a sample of cases filed in Karnataka to find gaps in the implementation process
5. To look at possible solutions to better implement the Preconception and Prenatal Diagnostic Techniques Act

Research Questions

1. Is sex selection a social problem which justifies legal intervention?
2. How far have the various law-related measures on sex selection been effective in controlling the social problem?
3. How do the various laws and policies dealing with reproductive rights, technology, and crime impact —
 - a. Sex selection trends;
 - b. 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?

Hypotheses

The hypotheses the study seeks to test are—

1. Implementation of the sex selection law has been dismal, and steps need to be taken to remedy this;
2. The Preconception and Prenatal Diagnostic Techniques Act by itself is insufficient to control sex selection; a wholistic look at law relating to reproductive rights is needed.

The Field Study

The field study consisted of an analysis of the cases dealing with the Preconception and Prenatal Diagnostic Techniques Act in Karnataka. The sample consisted of three districts— Bangalore Urban, Bangalore Rural, and Mandya. The reasons for selecting these three districts were because Bangalore Urban and Bangalore Rural had the maximum number of cases filed in courts and thus afforded a fair sample. Mandya was selected as it has been most in the news for being perhaps one of the biggest problem areas as far as its sex ratio is concerned as well as its cases filed.

A pilot study was done in Mandya and this was followed up by field studies in Bangalore Urban and Rural. Case files were viewed with the permission of the District Health Officers. Since most of the documents were in English, the Researcher did not face much difficulty. However, some of the documents were in Kannada, and translations were made by the DHO's office. No photocopies were permitted, though they were requested. Wherever possible, interviews were conducted with the District Health Officers and the Demographers in order to supplement the data collected.

In addition to this, data through informal interviews was collected from social activists, doctors, patients, witnesses, and academics.

Limitations faced

The field study took an inordinate length of time as permission to access the original case files was slow and required many visits. Very often DHOs were not available even if an appointment had been booked with them. Sometimes, the files have been obtained from case workers and others.

Literature too is scanty. There is no book dealing with the law and sex selective abortions in India, though Nivedita Menon's book⁹ devotes an entire chapter to it. Articles on sex selection abound, but most of them deal with its impact on society and, in a small part, medical ethics. There are legal analyses from the Western perspective of sex selection in general and also critiques of China. Wherever relevant, these have been used. The lack of decided cases on the point¹⁰ also adds to the difficulty. The CEHAT petition, which sparked off the debate on implementation, was examined in detail, along with the affidavits filed by Karnataka. Advocate Sanjay Parikh, one of the lawyers representing CEHAT in the Supreme Court allowed the researcher access to his office and to the case files.

Other than the National Law School Library, several public and private libraries were referred to including the United Theological College Library and the City Central Library. Materials were also collected from the Tata Institute of Social Sciences, Womens Rights Initiative of the Lawyers Collective, and others.

It is difficult to find another issue which could raise so many complex interrelated issues and yet touch human beings directly and intimately. Perhaps, in the Indian

⁹ Nivedita Menon, *Recovering Subversion – Feminist Politics Beyond the Law*, Permanent Black, New Delhi (2004)

¹⁰ The first case under the Pre Conception and Prenatal Diagnostic Techniques Act was decided only in April 2006. However, cases on other reproductive rights relevant to sex selective abortions are discussed where relevant.

context, it is the most appropriate example of the “Personal Is Political.’ However, it is difficult to refocus the nation’s attention on this issue.

We are running out of time. We do not have more than a decade to effectively curb (if not eliminate) this problem, which, even now, has acquired the status of ‘a social phenomenon.’ Thousands of clinics are already in operation, spanning the entire north, central, and west of India, and many of them in smaller towns and villages. The region most affected by this phenomenon coincides with the demographically sensitive region, where for economic, social, and cultural factors, female mortality is more pronounced. The sex determination phenomenon and with it the danger of a demographic catastrophe is rapidly spreading to newer geographical territories. The economic stakes in this growing business involve a few hundred crores of rupees today.