

## **CHAPTER 9**

### **CONCLUSIONS**

*In this Chapter, attempts are made to generate solutions to the various issues discussed in preceding chapters. The focus is to tackle not just sex selection, but also some of the effects which have arisen because of sex selection or because of banning sex selection. While the focus is on remedies that law and policy can create, other remedies are also looked at. Some of the experiments in the form of law and policy which may work or have been proved to be successful in working are also examined. The impact of such remedies in terms of reproductive rights of women as well as constitutionally protected guarantees is also done in order to study not just the efficaciousness of the remedy, but also to see whether it satisfies the test of being an ethical remedy.*

*The dilemma has of course been the fact that a remedy would be useless if it is merely on paper. Unless a law is implemented, the problem it seeks to address will remain. In this context the efficaciousness of probable remedies are also evaluated. The limitations of such an evaluation are that it is impossible to predict how many of the remedies will work, simply because some have not been tried and most, though tried have not yielded many results. To be fair, it is probably too short a time period to evaluate the results of a law, but experts in the field have been able to give, though not a quantitative picture, at least a rough estimate of probable outcomes in a small way of certain remedies.*

*The next Census will be the litmus test of whether present remedies are successful in bringing about a decline in the social problem of sex selection. So far, population statistics coming in from the various States of the country, in the opinion of demographers, has not been optimistic.*

*In addition to bringing to a close preceding discussion, one of the research questions is also addressed. The research question sought to be dealt with in this Chapter is-*

*4. Assuming law to be one way of tackling this social problem, what can be done in order to ameliorate the current situation?*

*Remedies are discussed under six main heads-*

- 1. Law Reform in modern sex selection law*
- 2. Policy Changes*
- 3. Implementation of Constitutional guarantees*
- 4. Creation of implementation mechanisms*
- 5. Modification of criminal law and a relook at criminalizing policy*
- 6. Making medical ethics meaningful*

The Conclusion to this Dissertation brings mixed results. Conclusions to the field study, coupled with the fact that there is only one conviction so far for sex selection under this Act are clearly indicative that the law is still in its nascent form as far as implementation is concerned.

However, many other factors need to be kept in mind. The first and foremost is that it is a recent law. It took time for Appropriate Authorities to be set up and the mechanism to kick in. There are a number of cases being filed and though the process is consultative rather than aggressive, the number of registrations of machines and technology has gone up, advertisements have all but vanished and every professional is aware of the law as is a large section of the general populace. Law is thus an important measure in tackling this social problem.

It is also strongly felt that sex selection cannot be viewed in isolation. It must be looked at from the larger perspective of women's rights particularly reproductive rights. Many other laws and policies do have a direct bearing upon sex selection. It is not a law which works in isolation with other laws and other realities.

The approach to be used is a multi pronged one. Several areas must be examined by the law maker.

### **1, Law Reform in Modern Sex Selection Law**

While it is acknowledged that having a sex selection law is necessary because otherwise sex determination could be freely done without any legal restrictions on either the parents or on the medical professionals, the law does not adequately address the supply side. The demand side is addressed by attaching negative repercussions on those who approach service providers for tests. The medical profession is targeted too on the supply side. Punishing those who advertise on the Internet poses difficulties of tracing them even if they are based in India and of course jurisdictional difficulties if they are out of the country. Advertisements for

GenSelect fall into this category. Existing procedure must be streamlined in order to make sure that matters go to court quickly and that decisions are rendered soon.

The Appropriate Authorities under the Act must be vested with adequate power. As of now, they only have the authority to confiscate the machine and in many cases courts have been approached by delinquent doctors to seek its return. Authorities have to work along with the Public Prosecutors who are not trained in this area and also who keep periodically changing. Appointment of a single lawyer to handle matters in a State may be more useful. Appropriate Authorities may also work along with local NGOs if such NGOs are available.

As in other cases, the more a case gets delayed, the witnesses and others lose heart. Such cases must be fast tracked for this reason and also because it will send a strong signal to probable offenders. This is especially necessary in the case of this Act as it is a new legislation and there is a feeling that it is not being implemented. The only case so far which has been decided is in Delhi where a doctor has been convicted under this Act.

In a move to curb the dwindling sex ratio, the Gujarat government is planning to institute a cash prize for citizens who blow the whistle on doctors and parents who indulge in sex-determination tests aimed at eliminating foetuses in the womb<sup>468</sup>.

## **2. Policy Changes**

Sex selection is affected not just by the specific Act dealing with it, but also by a host of policy decisions. Standing out first and foremost is the population policy which has positive and negative aspects, the latter of which must go. The emphasis must be on choice and thus, the two child norm as a compulsory standard must be abandoned for the time being as it is seen that this combined with son preference

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<sup>468</sup> "Cash prize for whistleblowers to curb female foeticide in Gujarat," [http://infochangeindia.org/Population/top.jsp?section\\_idv=3](http://infochangeindia.org/Population/top.jsp?section_idv=3) as on 26 March 05 at 3.

will impact the sex ratio. Among already marginalized sections, the access to technology and its use is limited. The sex ratio is far healthier here. China's experience has shown an increase in gender violence due to the one child policy. This must be avoided in the Indian context. It is also unconstitutional for the State to regulate the number of children in a family as it tramples upon basic fundamental rights. A relook at *Javed* is therefore crucial.

Abortions must not be viewed as a family planning policy. Of course, access to free and safe abortions must be made available to all women, but the focus must be on contraception. Again, the modern misconception that the law forbids abortion must be clarified in the minds of those who implement the law. An amendment to the Indian Penal Code provisions on causing miscarriage is also desirable to avoid clashes with the Medical Termination of Pregnancy Act.

The Cradle Baby scheme brought in by some of the State Governments particularly Tamil Nadu, has been touted at preventing infanticides of girls and also preventing sex selective abortions. However, it does tend to underline the stereotype that since it might be difficult for families to bring up daughters, why not hand them over to the State which will do the needful. While there is no doubt that the Cradle Baby Scheme is needed for many reasons including avoiding the stigma of unwed mothers or an unwanted girl child, it must in no way be seen as an encouragement to abandon infant girls. A number of schemes are already being offered to encourage parents with girl children. These must continue and be strengthened.

### **3. Implementation of Constitutional Guarantees**

The Constitution is the primary and the most effective safeguard against discrimination. It has been used very often by those in the women's movement, disability rights movements etc to strengthen existing rights frameworks. The right to life in the Constitution in Article 21 has been read widely. When juxtaposed with abortion law in India, Article 21 does not cover the unborn child. Abortion law is in

India very liberal. However, Article 14 on discrimination is equally strong and must be used to ensure that there is no discrimination against women as a class. Liberty Rights covered in Article 19 will not cover the liberty to discriminate by sex selection. While there are no cases on the point yet, there are pending cases in Courts challenging the PCPNDT law as being unconstitutional as it deprives persons of their liberty or choice. These are test cases and hopefully the Court will send strong signals to support the implementation of sex selection bans.

In the United States, the Supreme Court has held that the rights to marry,<sup>469</sup> procreate,<sup>470</sup> use contraceptives,<sup>471</sup> and make choices about the education and upbringing of children<sup>472</sup> are fundamental. The liberty at stake in sex selection, however, cannot be equated with persons' interests in deciding whether or not to have a child, choosing to reproduce using technological means, or making parenting decisions<sup>473</sup>. Judges including Justice Shah who decided the *Cehat* petition have supported this view at seminars and conferences.

Equality of status and of opportunity in the context of gender must be strengthened by strengthening other areas of law which have a bearing on women's rights. Constitutional guarantees are slowly being invoked in cases of property rights etc. This is heartening as it will give women equal value within families. However, the recent amendments in the Hindu Succession Act which have given equal rights to women have reputedly increased sex selections as many will not want the property

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<sup>469</sup> Thomas E. Zablocki v. Roger C. Redhail, 434 U.S. 374, 384 (1978) (“[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”)

<sup>470</sup> See Skinner, 316 U.S. at 535.

<sup>471</sup> See Griswold, 381 U.S. at 479; Thomas S. Eisenstadt v. William R. Baird, 405 U.S. 438 (1972).

<sup>472</sup> See Walter M. Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Wisconsin v. Jonas Yoder, 406 U.S. 205 (1972).

<sup>473</sup> John Attanasio, analyzing the possible constitutional arguments for protecting genetic engineering in general, suggests that genetic manipulation such as sex selection is so closely related to other traditionally protected procreative rights that it can be protected without substantially expanding constitutional safeguards. See John b. Attanasio, *The Constitutionality of regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide*, 53 U. CHI. L. REV. 1274, 1285-87 (1986). Attanasio also suggests that there could be a social interest in evolution through genetic selection. *Id.* at 1287.

to go to outsiders and to daughters. This has not been substantiated by research yet but is a point which has come up at seminars.

#### **4. Creation of Implementation Mechanisms**

As they say, the proof of the pudding is in the eating. Implementation of a law is the only way that a mischief can be addressed. Implementation has been the biggest drawback as far as sex selection is concerned. Under the 1994 Act, it was found that the Police was not effectively doing its job. It was also felt that States had not taken the law seriously to even constitute Appropriate Authorities. The matter went to Court in the *Cehat* petition referred to elsewhere in this dissertation. A series of orders from the Supreme Court finally got governments moving.

While Appropriate Authorities have been established, very often their hands are tied as they have very limited powers under the Act. They are forced to rely on the public prosecutors and on the support of women's organizations. Considering the fact that there are very few or no women's organizations in most districts who work on this issue, the Appropriate Authority is often stuck with trying to implement an unpopular law. Most actions are against doctors and many have alleged that pressure is brought upon Authorities which they cannot always resist.

Implementation mechanisms to prevent abandonment of girls of any age must be strengthened by strengthening incentives and also effectively following procedures in the Juvenile Justice Act relating to children in need of care and protection.

Laws relating to trafficking of women and children also needs to be strengthened. As of now, trafficking for immoral purposes is the focus due to the special law on it (The Immoral Traffic Prevention Act, 1956), but trafficking for marriage which has been happening for some time has not often come within the ambit of trafficking prevention systems. There are already cases of brides being taken from south India or Bangladesh or Kerala or tribal belts where the sex ratio is better. Many of these

women come from poorer families and have no say in the marriage. Sometimes, the marriage is a sham one and is entered into only for the sake of gaining control of the woman concerned. This woman may then be forced into prostitution or sold in marriage to someone else once she has borne a son for the family. Provisions relating to fake marriages, trafficking for marriage and for commercial sexual exploitation may be used to combat this.<sup>474</sup>

## **5. Modification of Criminal Law and a Relook at Criminalizing Policy**

One of the major stumbling blocks that public prosecutors face is proof. Unless a decoy witness is used or technology such as recording conversations or videotaping is used, it is very difficult to prove that a service provider has been engaging in sex selection. There is also an unwillingness on the part of persons who have utilized the services to complain- for obvious reasons. Some state governments are actively promoting the use of dummy patients to catch doctors involved in the misuse of sonographies.<sup>475</sup>

It has often been suggested that the crime because of its very nature is difficult to produce evidence for and that therefore the burden of proof should be shifted. There is also a need to introduce innovative measures like protecting whistle blowers from prosecution and also in some cases by protecting their identity from the media etc. Concerned authorities at the Health and Family Welfare Department in Gujarat for instance, are working on the cash-for-information plan and the amount of money that will be offered to people who come up with information. "Saving the girl-child is top priority with us. Instituting a cash prize will inspire people to come forward and give information about doctors and parents who indulge in sex-determination of the foetus," says Health and Family Welfare Commissioner Dr Amarjeet Singh<sup>476</sup>.

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<sup>474</sup> For Details Refer to Annexure V

<sup>475</sup> "Cash prize for whistleblowers to curb female foeticide in Gujarat,"

[http://infochangeindia.org/Population/Top.jsp?section\\_idv=3](http://infochangeindia.org/Population/Top.jsp?section_idv=3) as on 26 March 05 at 4.

<sup>476</sup> *Id.*

Criminalising of activities which have so far not been brought into the net is also crucial to step up implementation processes. This must be done at various points such as manufacturing, retailing etc. a system to trace movement and changing hands of equipment must be there to avoid unregistered equipment which is probably a huge concern today.

At the same time, there is a need to decriminalize acts done by those who do not have agency. This has already been done by amending the Act to a large extent. Women who are forced to undergo a sex selection test cannot be penalized.

### **6. Making Medical Ethics Meaningful**

The medical profession is at the heart of implementing this law. It is a profession which is based on self regulation within the framework of a growing body of ethical rules. It is slowly becoming obvious to everyone that unless the profession is convinced, it will be very difficult to monitor and bring to book individual doctors.

Many Seminars and Conferences are today in fact being spearheaded by ethical practitioners who feel that sex selection is giving the profession a bad name and that it is completely unethical and violates the code of ethics that doctors live by. They have suggested new punishments including barring from practice during the pendency of the case which are sometimes more harsh than what the women's movement itself pushes for. Incorporating trainings for doctors including components on medical ethics in curricula at undergraduate and postgraduate levels and consequently in medical text books is often suggested.

### **7. Miscellaneous**

While creating social awareness is necessary, it is not something that happens automatically. States spend a lot of resources on pamphlets, awareness meetings and local paper publications to publicise the fact that sex selection is illegal. This is

a positive step in all States. However, action taken against service providers or encouragements to people to step up and report cases is not done with the same enthusiasm. If done, it will generate a greater feeling of a law that is actually working.

Social awareness is also important as often culture is used to justify sex selection. Although classified as a non interventionist approach, it has an important role to play in itself and also complements interventions. Cultural relativism is not sufficient justification to do so. Attitudes towards gender are established within the family and community. Creating an environment where sons and daughters, girls and boys are respected and cared for equally is therefore important. Child rights is women's rights incomplete without the protection of the rights of the girl child. So too women's rights would be incomplete if the girl child had no rights.

Other than voluntary organizations and women's groups, a number of religious organizations are now being brought into the campaign. Many religious leaders especially among Sikhs and Jains have been worried about the demographic imbalances within their communities. The Sikh community has labeled sex selection sinful and is trying to curb it within the community. This is to be applauded, but caution must be taken to ensure that an anti sex selection law does not become an anti abortion one.

The obvious problem with mere social awareness similar to the primary problem with the medical field regulating itself, is that there is no actual regulation. This approach merely provides incentives to providers not to practice sex-selection services. Yet, if the market presses down more strongly on the backs of those providers than do the squeaky wheels of social exhortationists, the technology will be used, and the harms will be experienced by society. Therefore, while this

approach is good when used in combination with other truly regulatory efforts, it is inadequate on its own<sup>477</sup>.

In an effort to keep tabs on the rapidly declining number of girl-children in India, as revealed in Census 2001, the government plans to monitor child sex ratios across the country on a monthly basis. The Registrar General of India has already asked its state offices to prepare monthly reports of births with a view to monitoring sex ratios<sup>478</sup>. This strategy has worked with mixed results to keep tabs on girl children to ensure they are not trafficked from trafficking prone areas. It is hoped that this would work in cases of sex selection as well. In some cases, pregnancies are being monitored. However, this may really affect the privacy of the woman should she choose to abort for any reason.

Although India is the second most populous country, it is the largest democracy in the world. There may be certain disadvantages in the democratic system that might be responsible for our backwardness, but Indians still enjoy a greater deal of freedom than many<sup>479</sup>. It is no point in just talking about women's equality. The many kinds of inequalities must be done away with, socially, politically and economically. We are making small steps here through our policy of reserved seats, representation and inheritance rights.

In conclusion, to go back to the hypothesis advanced, implementation of anti sex selection law has indeed been dismal and steps as mentioned above, among others need to be urgently taken to remedy this. A wholistic look at law, policy and social realities is a must. The challenge is to create a sense of public outrage against sex selection, how to empower those who wish to implement the law and how best to reform law and policy in order to do justice to the next generation of Indian women.

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<sup>477</sup> Rachel E. Remaley, "The Original Sexist Sin: Regulating Preconception Sex Selection Technology," 10 *Health Matrix* 249 at 16.

<sup>478</sup> "India's child sex ratio to be monitored every month"

[http://infochangeindia.org/Population/top.jsp?section\\_idv=3](http://infochangeindia.org/Population/top.jsp?section_idv=3) as on 26 march 05 at 6.

<sup>479</sup> Ajay K Tripathy, "Unpleasant endorsement of population control"

<http://www.expresshealthcaremgmt.com/20041115/viewpoint01.shtml> as on 26 March 2005 at 1.