CHAPTER 1

1.1 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 foetuses.’ Increasingly, with abortion itself slowly becoming outmoded, sex selection is the preferred term.
1.2 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 Yagnas are still in high demand. A reenactment of the Putrakameshti Yagnya in Cochin, Kerala found five thousand applications from childless couples.¹

Myths in 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 based on scientific research in the early twentieth century were nothing more than the propagation of the same old myths which were floating around.⁴

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 face-lifting 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.

1.3 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 feminist.\(^5\)

Consequentialist arguments analyze the demographics, 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 unchose daughter. A Skewed sex ration might lead to unforeseen social imbalances leading to repercussion for both sexes. There might be a greater rich-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.

1.3.1 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 sin.\(^6\) 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.

1.3.2 Legal arguments generally examine the constitutionally protected liberty, privacy and equality rights of group either to engage in or to be free of sex selection.

\(^5\) 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.

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.

1.3.3 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 the 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 forms.\(^7\)

The period after the 1991 census which first evidenced the contemporary display of son preference, perhaps, this 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 2011 Census, while is showed a better position for women as a whole, belied the fact that women’s position has improved by not indicating that the juvenile sex ratio of women between 0-6 years of age had in fact fallen further.

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

1.4 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 issues. As in the case of most social welfare legislature there is considerable lag between the law and its implementation. Petition was filed in the Supreme Court seeking implementations. The court mimicously obliged. In a series of orders, it sought affidavits from State Government to detail what had been done to implement the Act, Madhya Pradesh had the most number of cases on records and therefore makes an interesting case study. A number to 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 country.\(^8\)

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\(^7\) John Robertson, “Procreative Liberty and the Control of Conception, Pregnancy and Childbirth”, 69 Va. L. Rev. 405 (1983)

\(^8\) In Delhi. The Hindu, Sunday, April 02, 2006
1.5 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 preferences will be to have a son and end the family there, or to have a son and one spare son. A daughter is not preferred. The two child norm has had other repercussions too which will be discussed in the course of this study.

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 and sex selection have a bearing on the effectiveness of the anti-sex selection campaign.

Policies which encourages 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 those diagnostic techniques 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 contest and of women’s agency and choice is 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 victims of the violence need to be identified.

Procedural laws and criminal laws granting remedies, selling procedure 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, son 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 be evaluated.