

ARTICLE

Discrepancies in the laws on identifying foetal sex and terminating a pregnancy in India

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Abstract

Laws that regulate the identification of a foetus and the termination of a pregnancy in India are shaped by their social context. The Medical Termination of Pregnancy Act, 1971, discriminates against unmarried women by not recognising that unwanted pregnancies in unmarried women could result in at least as much anguish and suffering as that experienced by married women. While the MTP Act permits the abortion of fetuses with disabilities, the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act's ban on identifying the foetus's sex prevents the use of sex-detection to identify fetuses at high risk of sex-linked diseases.

Two laws in India regulate the determination of the sex of the foetus and abortion. The Medical Termination of Pregnancy (MTP) Act, 1971, primarily aimed to make it possible to use abortion as a mechanism of family planning (1). This law stipulates that if certain conditions are fulfilled, an abortion can lawfully be done. Before this law came into existence, the Indian Penal Code (Act No 45 of 1860) permitted abortion only when it was necessary for saving the life of the woman.

When technologies were developed that made it possible to detect the sex of the foetus, and in the absence of any regulation of the use of such technologies, they began to be used for sex-selective abortions that discriminated against the girl child. In 1994 the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted; subsequent amendments resulting in the Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) (PCPNDT) Act, 2003, plugged certain loopholes (2).

The mere enactment of a law does not imply that the law is ethical and just, fair and reasonable. We argue in this article that it is unethical and unjust to allow only married women to get an abortion under the MTP Act. We also argue that one provision of the MTP Act is negated by the PCPNDT Act. The ethical issues related to abortion as well as disability-related abortion, which continue to be debated, will take a backseat for the purposes of this article.

Inequities in the MTP Act

The initiative to enact the MTP Act came from groups that looked at it as a law for family planning. However, the government and the then ruling Congress party consistently

defended the law by saying that it was not for family planning and that it was social legislation aimed at empowering women (3).

The MTP Act of 1971 did not provide abortion as a right to women. It expanded the permitted reasons for abortion in India, legalising abortion subject to the fulfilment of the following conditions: (a) risk of death or grave mental or physical injury to the health of the pregnant woman; (b) risk that the child, if born, would suffer from serious physical or mental abnormalities; (c) where the pregnancy is caused by rape and (d) where a married woman is pregnant as a result of the failure of a contraceptive device. The number of medical practitioners required to give their assent for termination of the pregnancy is contingent upon the duration of the pregnancy. Abortion on any grounds other than those specified in the law is an offence punishable under the Indian Penal Code.

These conditions may appear to be inflexible, but each condition can be interpreted according to the ethics of the practitioner. For example, the definition of "serious physical and mental abnormalities" is subjective and this permits practitioners to devise different standards to judge specific situations. Similarly "failure of contraception" has been read as "non-use of contraceptives." It is pertinent to note that this condition comes from the context of family planning in which the law emerged.

While context is important, it is not the only factor that determines the justness of legislation. A lot of progress has been made in theories of law, especially laws that relate to the rights and roles of women. The MTP Act makes abortion due to a failure of contraceptives available only to married women: "Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

The Supreme Court has ruled that classification of daughters as "married" and "unmarried" violates the equality clause enshrined in Article 14 of the Constitution of India (4). It would be ignoring reality if the law ignores the anguish of an unmarried mother in the Indian social context.

The MTP Act brings into focus the moral undertones of a law

that discriminates against unmarried pregnant women. Laws related to abortion must also benefit persons whose sexual relationships are beyond the legitimacy conferred by law, especially when some courts have taken the view that live-in relationships are not illegal (5). It is unethical for a law to punish such choices by not recognising the "anguish caused by unwarranted pregnancy" to unmarried women.

The MTP Act and disability

The MTP Act also allows abortion if the medical practitioner is of the opinion that "there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped." In the absence of any definition of what constitutes such abnormality - and what a "substantial risk" is - this open-ended condition can be applied according to an individual's understanding of ethics.

The ban against sex selection

As it became progressively easier to identify the sex of the foetus at an early stage, pre-natal diagnostic techniques began to be deployed for sex-selective abortions. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted to curb the malpractice of identifying and terminating the foetus (6). To plug the loopholes in the PNDT Act of 1994, following the implementation of interim orders in *CEHAT v Union of India* (7) the new PCPNDT Act was enacted in 2003. The stated purpose of the legislation is to prohibit the use of prenatal diagnostic techniques for the determination of the sex of a foetus, which results in "female foeticide". This is described as "discriminatory against the female sex" and "affecting the dignity and status of women." The PCPNDT Act regulates all pre-natal diagnostic techniques and prohibits sex selection per se.

Technologies of sex selection can potentially be used for elimination of sex-linked diseases or to select the child of the desired sex. In India it has been used primarily for sex-selection for sons.

Pre-natal diagnostic techniques performed by registered and qualified agencies may be used to detect genetic disorders, metabolic disorders, chromosomal abnormalities, congenital anomalies, haemoglobinopathies, and sex-linked diseases. Pre-natal diagnostic techniques include both non-invasive (ultrasonography and foetoscopy) tests and invasive tests or analysis of the amniotic fluid, chorionic villi, blood, any tissue

and fluid of a pregnant woman or conceptus.

However, the Act prohibits all technologies of sex selection, which would also include the new chromosome separation techniques.

Is a total ban on foetal sex identification necessary?

With the blanket prohibition of sex selection under the PCPNDT Act, it is not possible in India to use pre-natal diagnostic techniques to abort foetuses whose sex (and the family history) indicate a high risk of certain sex-linked diseases -- or to choose a foetus whose sex is less susceptible to certain sex-linked diseases. This contradicts the MTP Act which permits abortion of a foetus that is at a risk of being born with serious physical or mental disabilities. While it is legally permissible to abort a foetus at risk of serious physical or mental disabilities, it is not permissible to select foetus of a sex which is less likely to suffer from a sex-linked disease. Legal and ethical questions involved in sex selection for elimination of sex-linked diseases are open for debate.

Conclusion

The two laws related to abortion create ethical dilemmas for doctors as well as pregnant women. The MTP Act contains general provisions but also restricts abortion due to contraceptive failure to married women alone. This effectively gives doctors the power to provide or refuse abortions depending on their personal views. While the MTP Act permits abortion of a foetus with serious abnormalities, the PCPNDT Act does not permit the identification of the sex of the foetus for the purpose of eliminating sex-linked disorders.

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