

**RIGHT TO ACCESS ABORTIONS AND SEX-
SELECTIVE PRACTICES: CHINA, INDIA AND
NEPAL**

By

Shambhawi Paudel

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Supervisor: Professor Judit M. Sandor

ABSTRACT

Sex-selective abortion is the practice of terminating a pregnancy, at any gestational stage, solely based on the sex of the fetus. While in many states sex-selective abortions can be seen to be a manifestation of the traditional preference for male children over female ones, there are different social, legal and biopolitical contexts linked with the issue. Alongside the broader human rights debate of whether there really exists a right to access to safe abortions for women, issues like this raise a question of how the reproductive autonomy and freedom of choice accorded to women from such access are further constrained when considering the gender of her offspring. The study aims to examine the practice of sex-selective abortions within the broader international human rights context, with special focus on the rights of the women. The study will compare the legal systems of Nepal, China and India and how the prevalence of this practice in their societies has been aided or addressed by their national legislation and state policies, and how it fits with their existing international human rights obligations. The trends of sex-selective abortions have been prevalent in these states especially considering the one child policy in China and a similar sociocultural setting of patriarchal families having strong desire for sons. Finally, the study will explore how the practice of sex-selective abortions could limit its scope of application.

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INTRODUCTION

Sex-selective abortion is the practice of terminating a pregnancy, at any gestational stage, solely based on the sex of the fetus¹. The general trend for selective abortions goes against the females; this can be empirically seen in the imbalance in the gender ratio of populations in state with its widespread practice². Currently, the number of ‘missing girls’ is estimated to be over 160 million³ – girls who never came to exist because they were aborted before they had a chance to. Practically, though, it is very difficult to prove its widespread practice. It is assumed to be an urban problem, prevalent in upper and middle-class families of means who have access to medical technology that allows them to make the determination⁴. Even so, it is usually done in a clandestine manner, in back alley hospitals, without official records, almost as if the decriminalization of and access to abortions were never realized.

Even so, there are a multitude of studies that have explored this issue and identified three major indicators to better examine the prevalence of sex selective abortions⁵. The first indicator is the natural expected sex ratio at birth. The natural sex ratio at birth is slightly greater than 1.0 males per female, owing to multiple factors and also fluctuates over time. The sex ratio at birth may be influenced by parental health, maternal anemia, the prevalence or severity of the causes of fetal mortality, Hepatitis B, hormones, race, or a variety of other factors that are not entirely understood⁶. Thus using the natural expected sex ratio at birth to gauge whether sex selective practices are prevalent in the society may not only be entirely inaccurate, there may also rise a

¹ Kate Greasley, *Arguments about Abortion: Personhood, Morality and Law* (OUP 2017), pp. 225-6.

² Christophe Guilmoto, *Sex Imbalances At Birth* (UNFPA Asia and the Pacific Regional Office 2012).

³ Ibid.

⁴ Ibid.

⁵ Jonathan Abbamonte, *Estimates on the Occurrence of Sex-Selective Abortion in India and Some Possible Solutions to Eliminate the Practice* (Population Research Institute, 2019), pp. 5-6.

⁶ Ibid.

question of what would be considered the natural expected sex ratio for a society in the first place. To estimate the actual natural expected sex ratio at birth is outside the limitations of this Masters' thesis. Figures for the expected sex ratio at birth and methods for estimating the expected sex ratio at birth as proposed by other authors, i.e. 1.05 male births per female will be used here to estimate whether sex selective practices are employed and whether there are "missing women"⁷. The second indicator in estimating the incidence of sex-selective abortion is the estimated number of births, specifically the number of female births⁸. There is some difficulty in doing so because the birth registrations are not always up to date. Furthermore, in cases of sex selective neonaticide or infanticide, the registered births may show a skewed ratio, not all of them imputable to sex selective abortions. The third indicator is observed sex ratio at birth⁹. This also suffers from the same problems of statistics being unreliable owing to widespread practice of female neonaticide or infanticide in the societies with high levels of son preference. There are also increasing cases of pre-conceptive sex selection where the parents genetically choose the gender of their child to avoid giving birth to a daughter. This is also a growing issue that affects the sex ratio at birth. While, one may argue, the root cause and the end result of both practices is the same, as this study deals with the issue of sex selection specifically within the purview of right to access abortions, a clear distinction is made between these cases.

Where the right to access to abortions is already controversial, the practice of sex selection complicates the debate. It is often used by critics in the pro-life camp as a justification for curtailing access to abortions, except in exceptional circumstances. There are increasing number of interpretations in regional and international forums arguing right to access to

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

abortions being a part of the recognized rights of the women; the Maputo Protocol¹⁰ from the African Commission of Human Rights is a landmark example that has explicitly recognized it as such. The study seeks to address the dichotomy in the understanding of right to access to abortions and the reproductive freedom accorded to women when it comes to the issue of sex-selective abortions. The study will focus on China, India and Nepal and how their laws and policies regarding abortions have affected the practice of sex-selective abortions. The trends of sex-selective abortions have been prevalent in these states under the different policy frameworks towards reproductive rights of women, despite a similar sociocultural setting of patriarchal families having strong desire for son. The first two states are the largest populations of the world, as well as have the largest ratio of gender disparity at birth¹¹. It is assumed that tens of millions of girls are aborted every year only in India and China. The case of China is especially interesting as it has undergone the largest state project in population control in the form of One Child Policy that was practiced until 2015, the disproportionate male to female population ratio being one of its many unintended consequences. The implications of the policy in the reproductive Though the numbers of “missing girls” in Nepal is not as large compared to India and China, the practice has led to adoption of stricter provisions regulating abortion in the new Criminal Code promulgated in 2018 with increasing political and religious voices demanding that right to abortions be curtailed entirely.

While the definition of sex-selective abortion may not only denote termination of only female fetuses as such, for the purposes of this study only the selective abortion of girls within the context of birth of binary sexes will be denoted as such. The study seeks to address the practice of sex-selective abortions from different dimensions to understand the reasons for its practice

¹⁰ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, art 15(2)(c), “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”

¹¹ Guilmo (n 2).

and how it can be understood in various social, political and legal perspectives. Arguments are being raised in India, UK, USA and many other states stating sex-selective abortions as a justification to regulate the access to abortion more strictly –in some cases even recriminalize it. While there have been studies in whether the practice sex-selective abortion is exacerbated by granting right to abortion as such, there is a need to place this debate within a broader human rights framework to analyze its interrelation with the state policy as well as the social contexts of the states where these laws are being implemented. The study will take a comparative approach to policy study of China, India and Nepal to explore the conditions, time limits, and access to abortions as well as reproductive rights accorded to women under national law. Following these examples, the study will answer whether limiting the scope of right to access to abortions can be justified through the practice of sex-selective abortions.

CHAPTER 1 - THE DIMENSIONS OF SEX SELECTION

The widespread practice of sex-selective abortions may be linked to a strong preference for sons; in reality, there are a multitude of factors influencing the trends. Historically, people had practices of eating certain foods, and having sexual relations only on certain days or in certain positions in order to influence the sex of their offspring¹². Predominantly patriarchal and patrilineal societal values influence people's reproductive choices at the macro level; at the micro level the strong son preference, increased access to prenatal sex determination technology and declining family sizes has led to increase in sex selective abortions¹³. It should be noted that the discovery of new reproductive technologies that make it possible to identify the gender of the child prenatally did not result in increase of sex-selective abortions everywhere¹⁴.

1.1 The Reasons for Sex Selection

The reasons for sex selection need to be analyzed in two aspects: the reason for son preference and the reasons for daughter avoidance. There may be religious, social, economic, cultural or even personal reasons for natal sex selection; this section will analyze how the practice of sex selection perpetuates, even exacerbates, the unequal gender norms in the societies where it is practiced. We will specifically focus in the societal situation of China, India and Nepal while also drawing comparable examples from other jurisdictions.

Many religions have created set roles and different rules for sons and daughters that gets reflected in the society. For example, in Hindu culture the funeral rites are performed by the

¹² Frank van Balen and Marcia C. Inhorn, 'Son Preference, Sex Selection, And The "New" New Reproductive Technologies' (2003) 33 International Journal of Health Services, p. 235.

¹³ Abbamonte (n 5), p. 3.

¹⁴ Balen and Inhorn (n 12), p. 236.

son. The son sets fire on the deceased's body, observes a 13-days long mourning rituals, donates the deceased's earthly belongings to lighten their burden so that they can ascend to heaven. In the absence of sons, the responsibility falls on the closest male relative, but it is believed the soul of the deceased is weighed down without their son(s) performing the rites for them. The daughter is considered a *paraaya*, or an outside guest, who is not entirely a member of the family as she is supposed to get married and leave some day. For a person who strongly believes this, having a son is of utmost importance not only for this life but also for their next life. The wellbeing of their soul and entire existence depends on it.

In patriarchal, patrilineal and patrilocal societies there is a lot of importance attached to sons. The sons are the ones who carry forward the family name. The need to have sons goes beyond personal preference when people attach their own identities and the identity of their families to the gender of their offspring. The value accorded to sons and daughters in such a society is fundamentally different – son is the bearer of the next generation of the family while the daughter is merely a guest to be married off to a different family. The family name and family identity is very important in Asian societies where people largely live with their families well past adulthood and sons have the responsibility to look after their elderly parents, inherit the family property and pass on the family traditions and family name to their sons; people without sons are in a lot of cases left without a support system in their old age and have no one to look after their daily needs. Many families are attached to their ancestral homes, living in the same village/town for centuries and ending the family line without a son would be comparable to erasing centuries of their history. Interestingly, this sentiment is prevalent across all economic classes and ethnic castes. Even though the modern urban settlements have mostly migrant nuclear families, the family name and the ancestral family house is still considered an important aspect of one's identity.

When societies have strongly defined gender norms and gender roles for males and females, one of whom given slightly more importance than the other, it automatically affects the functioning of the society at an integral level. The notion of filial piety resting on the son and him being someone to carry forward the family name while the daughter is a ‘burden’ to be married off to a different household persists in countries like China, India and Nepal. Economic factor also plays a huge role in the decision. Any investment into a daughter’s upbringing and education is seen as ‘watering the neighbor’s garden’. Traditional Hindu marriages put the burden of dowry on the bride’s family, sons are usually the ones who bring home a daughter-in-law and a small fortune with her. Such social, cultural and religious values have been interpreted into people’s everyday lives. Sons are the carriers of their lineage – in a way their legacy in form of genetic continuation, they are the earners in both agricultural and urban settings; sons are, thus, considered ‘primary’ and ‘unsubstitutable’ by daughters¹⁵. Son preference does not automatically translate to daughter discrimination. In many cases it can go beyond a simple prejudice against girls, if any; the social, cultural and economic consequences of not having a son in many patriarchal, patrilocal and patrilineal societies leads people to choose to abort their girl child¹⁶. It is rooted in value accorded in any society to sons and daughters, and the latter is usually found lacking. While the intricacies of and imbalance in gender norms will be addressed later in this chapter, the consequences of such status quo can be seen in cultures around the world.

Preference for male children has been prevalent in many societies historically and has manifested itself in practices preceding and beyond sex-selective abortions. Different cultures have different old wives’ tales on how to give birth to a son. According to Chinese culture, the mother’s date of birth and the date of conception in the lunar chart greatly influenced the sex

¹⁵ Balen and Inhorn (n 12), p. 238.

¹⁶ Greasly (n 1), p. 226.

of the baby and people used to consult the calendar to ensure they would have a son. The ancient literature Kamasutra on human sexuality even points out certain sex positions that are favorable to having sons over daughters and were practiced as a sex selection method. More often than not though, the best sex selection method is patience and there have been examples of families with multiple daughters, trying for a son until they got one after multiple tries, and usually later in life. In its most extreme form, there are examples of infanticide and neonaticide where female babies being abandoned, or worse killed, following birth merely because of their gender. In such cases, despite both being criminally punishable, the son preference supersedes the fear and possibility of sanction.

While femicide is seen as a more rural problem, sex-selective abortions are considered to be an urban occurrence. It is difficult to track the trends that exist because the practices are not recorded and are often done in a clandestine manner. Advancement in reproductive technologies has made it easier to access methods of terminating pregnancies. A 1996 study in Delhi shows how the idea of terminating the girl child was exhibited “through advertisements in newspapers, in trains, buses, on walls, hoardings, pamphlets, letters, etc” as they were introducing the medical technology for fetal sex testing¹⁷. Currently the policy approach to sex-selective abortions is stricter, but it is still difficult to track the practice where the doctors are complicit in marking the abortion as spontaneous or for other medical reasons. We can take the example of Montenegro; in an attempt to control sex-selective abortions that are prohibited by law, a woman seeking abortion must undergo the procedure in general hospitals in the capital that keep record of each case under an ethics committee¹⁸. This level of state regulation is not possible in countries with larger populations, higher number of populations, and fewer control

¹⁷ Dolly Arora ‘The Victimising Discourse: Sex-Determination Technologies and Policy’ (1996) 31(7) Economic and Political Weekly 420, pp. 420-421.

¹⁸ Johanna Kostenzer ‘Eliminating Prenatal Sex Selection?: The Global Agenda and National Action Plans’ (2016) 9(2) Global Studies Journal 41, p. 47.

mechanisms in place. The access question is integral when discussing any problem related to reproductive technology: to what extent is state control in reproductive choices necessary while still ensuring reproductive freedom. It is integral to understand the underlying reasons behind sex selective practices rather than making policy decisions that ban or curtail access to abortions; sex selective abortions should be studied not as a mere problem but also as an effect of widespread discrimination against women.

The identification of reasons leading to sex selection is further complicated when we consider that there still exist many societies which highly value males over females and yet this preference is not reflected in their gender ratio disparity at birth.

The idea of traditional and religious aspect driving sex selection in these societies gets more merit when considered in tandem with societies that have systemic gender discrimination and persistent cases of violence against women that have not led to disparate gender ratios. In most societies, the reproductive utility of a woman is not undermined by whatever difference persists in the social status of men and women. Women are irreplaceable in that sense. Even in societies where son preference is very strong, it usually manifests in multiple pregnancies until a son is finally born. The practice of abortion itself is highly controversial, and generally prohibited by religious beliefs, and not even considered as an alternative. In smaller numbers infanticide and abandoning newborn girls are practiced, but the whole belief behind sex selective abortions is not just that daughters are inferior than sons, they are inferior also to having nothing. Their utility value adds up to negative.

The situation in China, a traditionally patriarchal society, is very interesting as the practice of sex selective abortions is influenced not only by social factors but also political and legal ones. The details of what the One Child Policy entailed will be discussed in the next chapter, the policy led many couples to opt for sex selective abortions as they had only once chance to

procreate. It is estimated that the number of ‘missing girls’ in China due to this policy decision is upwards of a hundred million. A subsequent amendment to the policy in 1982 that allowed rural couples to have a second child if their first child was a girl further step back in terms of equalizing the gender norms. A number of social and economic contributed to the level of son preference to be higher in the rural areas, such as the lack of adequate general social security for the elderly rural residents and the laws and policies regarding the use of land against women¹⁹. The amendment still was a reaffirmation that son preference was a valid reproductive choice and the policy exception pushed the couples whose first child was a daughter to ensure that their second child would be a son by all means, including sex selective abortions.

The notion of inferiority of women is but one aspect behind sex-selective abortions. A branch of radical feminist discourse argues that ban on sex-selective abortions is a method of putting a cap on the reproductive freedom of women and limiting their choices²⁰. Unfortunately, such choices are rarely made in a vacuum. It is important to consider the reasons for sex selection in a micro level within a family for an individual couple as well. No one “chooses” to have an unwanted pregnancy, abortion itself is a practice that occurs as an exceptional circumstance. The only “choice” afforded to a woman seeking sex-selective abortion is whether to seek the procedure or give birth to a daughter. Every instance of a sex-selective abortion is an instance where the cost-benefit analysis between these two choices weighed against having a daughter. “[T]hey are operating within a certain set of social norms and realities and try to use their autonomy in order to make the best decision for themselves”²¹. There have been negative consequences for mothers who have failed to produce a son; cases of domestic violence,

¹⁹ Mandeep Dyal, 'Sex Selection And Sex-Selective Abortion: Lessons To Be Learnt From A Comparison Between The United Kingdom And The North Indian State Of Punjab' (2013) 13 *Medical Law International*, p. 115.

²⁰ Lynne Marie Kohm 'Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics' (1997) 4 *Wm. & Mary J. Women & L.* 91, pp. 95-98.

²¹ Dyal (n 19), p. 118

excommunication from family, and even killings seen in the news are only the ones reported to the media. The social status of the mother is dependent on her ability to produce a son²². Son preference in itself may not be a discriminatory statement, but more often than not it is a reflection of the unequal gender relations perpetuated by the society.

The question raised here is why despite unequal norms being present in all societies, not all patriarchal societies have widespread practice of sex selective abortions. For me, the difference is in not just the status but also the identity of woman in the society. In majority of western societies, women have independent identities – they may be patrilocal but in terms of citizenship attainment and/or their legal personality women do not derive their identities merely from their father or husband or from someone else. In this sense, the identities of women in China, India and Nepal is very much tied to their families. They are recognized as someone's daughter then as their husband's wives – it is difficult for someone to get citizenship, move within the state or own property independently. It is not impossible, but the administrative requirements are more difficult than what would be for a male in the same situation. This dependence of women towards their paternal family, then to their husband's family post-marriage has greatly stunted women's ability to make independent decisions – reproductive choices included. The internalized misogyny, the inability to make independent choices and understanding of a woman's role and reproductive responsibility to bear a son for her family has led for many women to 'choose' for sex selective abortions of their 'own volition'.

Sex-selective abortion is more than a simple effect of unequal gender norms – it is also a statement perpetuating it. As one of only two daughters, I grew up seeing my mother be repeatedly questioned on her reproductive choice of not trying for a third child, a possible son. I grew up seeing relatives who opted for abortion, instead of giving birth to a girl child. I grew

²² Ibid, p. 116.

up in a society where abortions were still criminalized. Dyal calls it a vicious cycle; disparate gender norms lead to increased sex-selective abortions which in turn contribute to upsetting the gender norms further²³. It reinforces the discriminatory message to all the daughters who were born that they were not particularly wanted. Some women even choose to opt for aborting a girl child, not merely out of son preference but, out of knowledge that her future daughter may be severely discriminated against if she chooses to give birth.

There is an optimistic expectation that midst the practice of sex selection, the girls who are born are wanted and there would be a decrease in abuse, neglect and early death; this notion is as problematic as it is misguided²⁴. Not only does it normalize the abuse faced by many women, it propagates the idea that women are always victims and any respite to the status, even under exceptional circumstances like here, is something to be grateful for. There is no evidence to support this claim though. On the contrary, change in population ratio may lead to further commodification of women, for example through trafficking or forced marriages²⁵. There is a village in India that has no recorded female births for the past 70 years²⁶. There is news of women being trafficked into China from countries like North Korea, Vietnam, the Philippines, among others to ‘replenish the women of marriageable age’ as the gender ratio gap has led to lack of female population²⁷. The long term human rights effects of disparate sex ratios at birth are manifesting in societies now, which shall be addressed later in this study.

²³ Ibid, pp. 133-4.

²⁴ Kohm (n 20), p. 93.

²⁵ Farina Gul Abrejo, Babar Tasneem Shaikh and Narjis Rizvi, 'And They Kill Me, Only Because I Am A Girl'...A Review Of Sex-Selective Abortions In South Asia' (2009) 14 The European Journal of Contraception & Reproductive Health Care, p. 15.

²⁶ Maneka Gandhi, No daughters in 70 Haryana villages for years (Times of India) 23 January 2015, http://timesofindia.indiatimes.com/articleshow/45986143.cms?utm_source=contentofinterest&utm_medium=txt&utm_campaign=cppst <accessed 15 January 2020>

²⁷ Olufemi Terry, China's woman shortage creates an international problem (ShareAmerica) 24 July 2019, <https://share.america.gov/dire-effects-of-chinas-woman-shortage/> <accessed 15 January 2020>

1.2 The Ethical Dimension

This chapter will consider the ethical issues that arise when talking about sex selective abortions and delineate why it is different from other forms of abortion.

In its most simple form, the debate on abortion is the balancing test of the right of the fetus to be born against the reproductive autonomy of a woman. To this end, any discourse on sex selective abortion has an added gender dimension, which complicates the issue. Generally speaking, if the rationale for legalizing abortion is solely based on denial of the personality of a fetus, would bringing their gender into the discourse suddenly make sex selective abortions unacceptable²⁸. To better understand the ethical dimension of sex selective abortions, we need to delve into the limits of reproductive freedoms and reproductive autonomy.

The modern arguments for the right to abortion is developed from right to liberty and right to privacy. Robertson has argued that sex selection does not fall under the scope of procreative liberty; it is not entailed by any other basic right either, like right to privacy²⁹. The line drawn here is whether the choice being made by the couple is a mere preference or part of a necessary conditions for reproduction, whether this choice “serves the needs of couples who have strong preferences about the gender of their offspring and who would not reproduce unless they could realize those preferences.”³⁰ This lineation allows sex selection for medical reasons – for selection based on genetic sex-specific diseases but is less clear on sex selection for social reasons. If the son preference in a society is strong enough that they would rather be childless than have a daughter, is that not more problematic yet agreeable under the preference standard set above?

²⁸ Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly (Guttmacher Institute), 26 February 2019, <https://www.guttmacher.org/print/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly> <accessed 15 January 2020>

²⁹ Ibid.

³⁰ Nie Jing Bao, *Behind the Silence: Chinese Voices on Abortion* (Lanham 2005), pp. 23-26.

Nie Jing Bao has taken a balancing approach to justify banning sex selective abortions despite woman's reproductive liberty. He argues that an imbalanced sex ratio poses a greater threat to the society and justifies the restriction put on reproductive liberty of the woman. The social justification need is worrying, when we want to believe that reproductive rights are absolute and uncompromisable to uplift the women's status in society – Nie puts forth that limiting them is empowering for the woman³¹. The question, of course, is whether every reproductive choice can be made subject to the to social needs test and how do we ascertain the validity of these rights in such a situation.

We should consider that sex selective reproductions are unethical and impermissible in and of the act itself, without discourse to the possible repercussions of its widespread practice. We need to, therefore, clearly define the existence of the fetus as an individual while elaborating on its dependency on the mother, and the rights of the mother themselves.

Any ethical argument about sex selective abortions has to deal with the ethicality of abortion itself. Claiming that there exists a right to abortion is controversial, and there are literature on both sides of this moral quandary. But what one should consider is that right to abortion is not merely an hypothetical thought experiment that we merely discuss the pros and cons of, it is a policy question that affects millions of lives and has led to severe consequences to women across the globe. The ethical dilemma in being against sex selective abortions while still arguing for abortions is justifying that every act of sex selection is an act of gender discrimination if the fetus is not considered a person. The nonidentity problem occurs in cases of discussion of obligations persons who by our own acts/omissions are caused to have flawed

³¹ Ibid.

existence or not to exist at all³². Denying independent personhood of the fetus, theoretically precludes any discussion of the rights of the fetus against being discriminated.

The logical fallacy that plagues both sides of the abortion debates, whether pro-choice or pro-life, is the 'slippery slope' argument. While the state should not be able to dictate every reproductive decision of a woman, the state controlling the choice of the sex of the child further leads us down to a possible slippery slope where the state can control other reproductive choices, where the interests of the child are concerned.³³ In a state where abortions are legal, this may lead to the state slowly taking away the rights it has already provided to the women in an attempt to control 'undesirable' use of those rights. On the other hand, letting abortion be a choice also leads us down to the question of whether gender, as well as other attributes parents desire to see in their child can be a choice as well. This leads us down to another slippery slope of designer babies and new wave of eugenics where reproductive choice becomes the tool used to aggressively select against traits like inter alia sex, medical conditions, physical attributes, genetic characteristics of the child.

It is important to differentiate in how sex selection can occur at different stages, and how the ethical perspectives to considered are similar with slight variations. The first is pre-implantive sex determination, where the parents who are inducing pregnancy through artificial insemination or in-vitro fertilization choose the sex of the child before the procedure; they raise an ethical – albeit not a legal – wrong but this scenario is not covered by the scope of this study. Sex selective abortions occur during the pregnancy, at any stage, if the pregnancy is terminated for the sole reason to avoid having a female child. Neonaticide and infanticide where a child is

³² Roberts, M. A., "The Nonidentity Problem", *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/sum2019/entries/nonidentity-problem/> <accessed 15 January 2020>

³³ Ibid.

killed immediately after or within a year of their birth is also used as a sex selection method. Child abandonment is also a commonly practiced form of sex selection.

There are few ethical debated about the last three scenarios. Infanticide and neonaticide are a form of murder, usually an aggravated charge depending on the national laws of the nation and are universally acknowledged to be an unacceptable practice. It also goes against the right to life which is a basic human right. Abandoning a newborn baby who is unable to take care of themselves can lead to the child's death causing the arguments above to apply. Even when not, it leads to the question about the duty of the parents to their child and the rights of the child itself to proper nurturing care, family, safety and security. It is morally and legally unacceptable to kill or abandon your child under any circumstances, and sex selection is not considered an exception to this rule.

The situation is reversed in the first two scenarios. The reproductive choice and freedoms allow for parents to make certain choices regarding the birth of their child, and I strongly argue for there being a woman's right to access abortions. In these cases, the question of sex selective abortions come as an exception: these already ethically debatable reproductive rights exist but ought to be limited to not include sex selection. While the personhood of a fetus is a very important question in any aspect of abortion debate, I would like to make a case on sex selection independent of whether we can consider the fetus a person in their own right or not. It is not the sex of the fetus that any ban on sex selective abortion seeks to protect – it is the choice and interests of the women that any act of sex selective reproduction goes against. There is no reproductive autonomy in a choice a woman is forced to make in a society that devalues the life of a woman. The “choice” to have a son is not a choice but the culmination of societal pressure which makes it ethically and morally questionable. Furthermore, the demographic imbalance the skewed gender ratio at birth causes affects women adversely. While curtailing the right to sex selection may curtail the reproductive freedom of women, especially in societies

where it has been finally achieved after long fights for social change, it is a practice that gives continuum to the devaluation of the same women in the society. The areas where there is high prevalence of sex selection, there is also a very high prevalence of gender discrimination and gender based violence against women.³⁴

There is no unified feminist agenda in this issue. Furthermore, the opinions of feminist authors also seem to be highly influenced by their own societal and moral backgrounds and the groups of women that they represent³⁵. A number of feminists from India, and many other South Asian and South East Asian feminists have strongly opposed sex selection of any form. Moazam argues that an emphasis on reproductive choice, which is traditionally emphasized in Western abortion debates does not adequately address or reflect the issue of subjugation of women. She argues that the issue of reproductive autonomy of women in India, and I also extend this argument to other jurisdictions addressed by this study, are to be studied in their own unique cultural contexts where women are still powerless, highly dependent on and subjugated to men in their day to lives and have very limited choices. To view this from a perspective of a woman, practicing sex selection ultimately turns her into a ‘machine to generate the perfect child’³⁶, as a mere reproductive tool to her family. The choice of the sex of a child is a means to further take away the reproductive choices of the woman, it cannot be ethically acceptable under any modern school of thought, even more so under feminism.

³⁴ Guttenmacher (n 28).

³⁵ Toebe, Brigit (2008). Sex Selection under International Human Rights Law. *Medical Law International*. 9. 197-225, pp. 201-202

³⁶ Ibid. p. 201

CHAPTER 2 – SEX SELECTIVE ABORTIONS AND THE LAW

2.1. Abortion and Sex Selection in the International Legal Framework

There have been significant developments in the international and regional human rights legal framework in recognizing the human rights violations that can occur without safe access to abortion, even if not explicitly recognizing abortion as a human right itself. International and regional mechanisms have condemned restrictive abortion laws and held that denial of access to legal abortion services can amount to violations under right to health, non-discrimination, privacy, life, and freedom from cruel, inhuman and degrading treatment. The normative development has resulted in decriminalization of abortion by many states, including the three jurisdictions focused on by this study.

Abortion has developed as a divisive, yet integral, aspect of the right to sexual and reproductive health; the General Comment 22 on has underlined that safe abortion and adequate post abortion care are an integral aspect of health care and should be made accessible to everyone³⁷.

The reproductive self-determination of women covers several interrelated rights, inter alia their right to privacy, right to marriage and family life, right to health, right to life and right to liberty. It is imperative to protect these rights to protect a woman, to ensure that she can exercise her reproductive capacity under her own free will and to further her own best interests, in all issues including abortion and termination of pregnancy.

³⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4

Article 17 of the International Covenant on Civil and Political Rights (hereinafter the “ICCPR”), which all the jurisdictions covered in this study, i.e. India, Nepal and China, are parties to, guarantees the right to freedom from arbitrary or unlawful interference with private life.³⁸ The Human Rights Committee (hereinafter the “HRC”), the treaty monitoring body overseeing the implementation of ICCPR by the state parties, has elucidated on women’s right to equality in exercising their privacy rights, particularly in relation to their reproductive functions³⁹. The Committee has specifically recognized that women’s privacy rights may be undermined in the context of obtaining abortion services.⁴⁰

World Health Organization, as the leading authority in global health issues, has also urged all state actors to have abortion laws that include the women’s rights to privacy, autonomy, free and informed decision-making about their reproductive choices and access to quality reproductive health care are ensured⁴¹. Women’s right to reproductive health care further includes the rights to life and health, which are directly linked to issues of access to safe abortion and adequate reproductive health services⁴².

This right to health is also reiterated in International Covenant on Economic, Social and Cultural Rights (hereinafter the “ICESCR”) under Article 12 which guarantees that “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁴³ The Committee on Economic, Social and Cultural Rights, the treaty body for ICESCR, has interpreted this right to include the right to sexual and reproductive health as well, even if the treat itself does not explicitly mention it. This means that right to health is not

³⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 17.

³⁹ Concluding Observations of the Human Rights Committee: Bolivia, 01/04/97, U.N. Doc. CCPR/C/79/Add.74, para. 22.

⁴⁰ Concluding Observations of the Human Rights Committee: Colombia, 01/04/97, U.N. Doc. CCPR/C/79/Add.76, para. 24

⁴¹ World Health Organization: *Safe Abortion: Technical and Policy Guidance for Health Systems*, at 65 (2003).

⁴² *Ibid.*

⁴³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 12.

only about a person having the right to be healthy at all times, but instead having the right to control one's health and body – including in reproductive and sexual matters – and putting the duty on the state to ensure there remains an environment that promoted a minimum standard of health and that access to proper health facilities are available to all citizens. The Committee has further urged States parties to provide access to a full range of reproductive and sexual health care and remove all barriers interfering with access to related health services⁴⁴.

The right to health is interlinked to other human rights as well. Right to life is directly dependent on the realization of right to health and lack of access to proper health care may lead to the loss of right to life as well. In terms of abortion discourse, these rights need to be addressed towards the mother as well. Unsafe means of abortions in states where there are heavy restrictions on access to abortions and the only means to receive abortion services is through illegal and unsafe means, the women's right to life is seriously threatened. The Human Rights Committee has, thus, stated that such restrictions are potential violations of right to life under the ICCPR and has highlighted that high maternal mortality rates have direct link to illegal and unsafe abortion practices in states where abortion is still criminalized or not easily accessible.⁴⁵

Under its General Comment 28, which elaborates on the Article 17 of the International Covenant on Civil and Political Rights, Human Rights Committee has stated:

“[s]tates may fail to respect women's privacy [with respect to] their reproductive functions, for example ... where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion.”

⁴⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4

⁴⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982.

Another way to look into this issue is through a gender perspective; the abortion services are health care services needed exclusively by women and restrictions in access to these services affect only women. For men and women who do not require these services, the lifting of restrictions does not affect them at all, but for those who do the consequences of not having proper access and being required to seek recourse to illegal and unsafe abortions puts them in an increased risk of falling victim to severe human rights violations, as mentioned above. This can be seen to violate women's right to non-discrimination when restrictions on abortion laws affect women disproportionately when compared to men and as such it adversely affects their enjoyment of their other human rights as well⁴⁶. Article 12 of the Convention on the Elimination of Discrimination Against Women (hereinafter "CEDAW") guarantees the right to equality in access to health care, specifically requiring States to ensure access to services exclusively or disproportionately needed by women. States' failure to ensure services, which are exclusively used by women and address women's distinct biological needs, such as services related to family planning, health and other needs during her pregnancy or abortion services, is discriminatory against women⁴⁷. The CEDAW Committee, the treaty body monitoring the compliance of States parties' with CEDAW, has explicitly recognized that "[i]t is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."⁴⁸

The Committee has also explicitly given a statement on the issue of right to equality of women and how it is directly violated by restrictions put by a state on access to abortion services, noting that "laws that criminalize medical procedures only needed by women and that punish

⁴⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10.

⁴⁷ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

⁴⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I.

women who undergo those procedures constitute a barrier to appropriate health care for women, compromising the right to nondiscrimination in the area of health”.⁴⁹ Women disproportionately suffer from the consequences of unsafe abortion as well as physical as well as psychological effects if they are forced to move on with an unwanted pregnancy until term⁵⁰. Furthermore, Human Rights Committee has stated that women’s right to enjoy their human rights on an equal basis with men, including rights like freedom from torture or other cruel, inhuman or degrading treatment, right to privacy, and right to life, are undermined by national laws which criminalize abortions; thus, it gives weight to the notion that not only is access to safe and legal abortion services an integral aspect of ensuring women’s human rights but is a human right in and of itself.

More importantly, International and regional human rights standards do not support extending the right to life inherently enjoyed by every person to extend to fetuses. ICCPR guarantees the right to life in Article 6(1) as “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”; it gives no indication in the treaty text or the interpretations of the text done by the HRC that it applies to a fetus. On the other hand, the Human Rights Committee has routinely emphasized the threat to women’s lives posed by illegal and unsafe abortion falls under the purview of Article 6 of ICCPR, which can also be considered as an implicit understanding that protection guaranteed under this provision does not extend to fetuses. The Committee on the Rights of the Child, the treaty body for the Convention of the Rights of the Child has similarly interpreted its Article 6 which states that “every child has the inherent right to life” to not be used as a basis for denial of safe abortion services to adolescent girls under the age of 18 who seek to terminate their pregnancies. While it has made no direct references, we can implicitly understand from the text

⁴⁹ Ibid.

⁵⁰ Ibid.

of the Convention of the Rights of the Child and the General Recommendations from the committee the fetuses are not protected as a “child” under the definition of a child used by the CRC.

International human rights law, however, does discuss the issue of sex selection. The question of sex selection in international human rights law mainly focuses on whether the permissibility of choosing the sex of one’s child is inherent in the right of reproductive choice, which as described above is considered an important principle under the international human rights standards. International human rights norms and practices of treaty monitoring bodies have addressed that, even in an absence of adequate international human rights treaty texts that have mentioned the issue of sex selection directly, the international human rights perspective on the issue of sex selection is leaning towards the prohibition of sex selection, as opposed to making an exception towards some forms of the practice.⁵¹ The reproductive freedom enjoyed by women extends to them being able to choose experiences related to having children that are based merely on their preference, like the number of and spacing between their children, but not something that is inherently discriminatory, like the sex of the child⁵². Acts of sex selections constitute gender discrimination, and when it is done against a daughter with the aim of giving birth to a son, it can, in a way, also be characterized to constitute an act of violence against women⁵³.

As the treaty mechanism body for CEDAW, the CEDAW Committee has underlined the high prevalence of sex selection practices in China and India on the basis of the treaty reporting mechanisms which have consistently showed the alarmingly increasing sex ratio at birth in these countries. CEDAW Committee has also expressed its concerns over the “persistence of

⁵¹ Toebe (n 35), p. 217.

⁵² Ibid.

⁵³ Ibid.

deep-rooted stereotypes regarding the roles and responsibilities of women in the society”, which it has imputed to be the main reason for sex selective practices as they normalize the practice of extreme son preference in these societies.⁵⁴ It has recommended that countries to tackle the socio-economic and cultural factors that normalize extreme forms of son preference in the society. Particularly in the case of China, the negative consequences of the then practiced one-child policy (now two child policy) that has led to unprecedented amount of sex selection done against girls, especially in rural areas. The Human Rights Committee also refers to sex selection in its General Comment on Equality of rights between men and women, claiming that “the subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses”.⁵⁵

The national jurisdictions to be discussed in the next chapters are signatories to and have ratified the above mentioned international treaties.

⁵⁴ Concluding Comments on China’s Fifth and Sixth periodic reports, Thirty Sixth Session, 7–25 August 2006, UN Doc CEDAW/C/CHN/CO/6, 25 August 2006.

⁵⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10.

2.2 National Jurisdictions

2.2.1 India

One of the biggest populations of the world, India also has one of the biggest numbers of sex selective abortions, which has also led to the term “sex selective abortion epidemic” to be coined in reference to India. It is estimated that approximately 15.8 million have been ‘missing’ from birth registry in India since 1990 and the number is assumed to be approximately 550,000 annually since 2014; while some of those numbers are imputable to unreliable birth registration practices, a major cause of the discrepancy is due to the increasing practice of sex selective abortions, female infanticide, abandoned girls, and other forms of prenatal sex selection.⁵⁶

Historically, the adoption of abortion in laws can be traced back to its colonial legacy under the Great Britain. Abortions were prohibited in India under Section 312 of the Indian Penal Code (hereinafter the “IPC”) which criminalized the practice as “an induced act of miscarriage”. Reforms to these codes were made following the independence of India in the post-colonial era. India was also concerned over its rapidly expanding population and subsequently adopted a family planning program in 1952. This led to the Central Planning Commission to consider that there existed a need to explore the possibility of allowing purposeful termination of pregnancies and thus in 1964 a committee was formed to look into making any amendments to the IPC as well as develop other legislation as needed to allow abortions.⁵⁷ This led to the Section 312 of IPC being revoked and a specific law being promulgated to regulate abortion and termination of pregnancies. The Medical Termination of Pregnancy (hereinafter the “MTP Act”), which exclusively dealt with the issue of abortion as

⁵⁶ Abbamonte (n 5), p. 1.

⁵⁷ Ibid.

well as access of abortion services was adopted by India in 1971. MTP Act is still in force all over India, except for the disputed territories of Jammu and Kashmir.

Under Section 3 of the MTP Act⁵⁸, only registered medical practitioners can carry out termination of pregnancies, who have been defined to mean “a medical practitioner who possesses any recognized medical qualification as defined in Cl.(h) of Sec. 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act” in Section 2(d) of the MTP Act. During the first three months of the pregnancy, pregnancies can be terminated only after gaining approval of a single registered medical specialist while the approval of two medical specialists is needed for pregnancy termination between three to five months⁵⁹. If someone is seeking abortion beyond three but before five months, then the termination of pregnancy is allowed only under exceptional circumstances which have been detailed in Section 3 of the MTP Act⁶⁰. For pregnant women below 18 years of age and women with *impaired mental capabilities*⁶¹ seeking

⁵⁸ India, Medical Termination of Pregnancy Act 1971 (hereinafter MTP Act), sec 3(1), “Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.”

⁵⁹ Ibid., sec 3(2), “Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner- (a) where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are. Of opinion, formed in good faith, that- (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health ; or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 2.-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.”

⁶⁰ Ibid., sec 3(3), “In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.”

⁶¹ The MTP Act uses the term “lunatic” here, but it has been understood as and changed to “impaired mental capabilities”.

abortions, it is necessary to get express written permission from their legal guardians to provide services for induced termination of pregnancy.⁶²

The federal government of India also promulgated the MTP Regulations in 2003, which details the administrative and legal procedures required to be followed in all states of India as well as territories governed by the Union. Most importantly, it mandates the maintenance of the records all abortion procedures by the registered medical practitioners performing medical termination of pregnancies⁶³ and the regular reporting of the abortion cases to the Chief Medical Officer of the concerned State⁶⁴. The records were sealed and names of the women seeking these services redacted to protect their right to privacy. The central government also urged the state governments to have local laws and regulations to regulate safe abortion procedures.

India also introduced specific laws to combat the increasing sex selective abortions in 1994 as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection), 1994 (hereinafter the “PCPNDT Act”). While the laws above regulated abortion in general, this legislation was introduced to supplement them by regulating the problem of sex selective

⁶² India, MTP Act, sec “No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian. (b) Save as otherwise provided in C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman.”

⁶³ India, Medical Termination of Pregnancy Regulations 2003 (hereinafter MTP Regulations), rule 3, “(1) Where one registered medical practitioner forms or not less than two registered medical practitioners form such opinion as is referred to in sub section (2) of section 3 or 5, he or she shall certify such opinion in Form I. (2) Every registered medical practitioner who terminates any pregnancy shall, within three hours from the termination of the pregnancy certify such termination in Form I.”

⁶⁴ India MTP Regulations, rule 3, “[...] (5) Every head of the hospital or owner of the approved place shall send to the Chief Medical Officer of the State, IN form II a monthly statement of cases where medical termination of pregnancy has been done. (6) On every envelope referred to in sub-regulation (1), pertaining to the termination of pregnancy under section 5, there shall be noted the name and address of the registered medical practitioner by whom the pregnancy was terminated and the date on which the pregnancy was terminated and such envelope shall be marked “SECRET”.”; Ibid., rule 5, “(1) Every head of the hospital or owner of the approved place shall maintain a register in form III for recording there in the details of the admissions of women for the termination of their pregnancies and keep such register for a period of five years from the end of the calendar year it relates to. (2) The entries in the Admission Register shall be made serially and a fresh serial shall be started at the commencement of each calendar year and the serial number of the particular year shall be distinguished from the serial number of other years by mentioning the year against the serial number, for example, serial number 5 of 1972 and serial number 5 of 1973 shall be mentioned as 5/1972 and 5/1973. (3) Admission Register shall be a secret document and the information contained therein as to the name and other particulars of the pregnant woman shall not be disclosed to any person.”

abortion only through restrictions on medical technologies that allow this practice. It bans all screening tests that can be used in the early gestational stages of pregnancy to ascertain the gender of the fetus, unless a registered medical practitioner sees an acute need for them⁶⁵. Even so, it is criminal to disclose the gender of the child to the parents even if it is revealed to the medical practitioner through tests done for other medical purposes. It also criminalizes the act of advertising abortion services in any manner claiming to provide services for prenatal gender diagnostics⁶⁶. It criminalizes acts of sex selective abortions with loss of practitioner license for medical professionals performing sex selective abortions with up to three years of imprisonment and ten thousand rupees (approx. 130 USD) in fine for first offense, and up to five years of imprisonment and fine up to fifty thousand rupees (approx. 650 USD) for subsequent offences⁶⁷. In addition to criminalizing acts of sex selective abortions, it also criminalizes the act of seeking advice regarding the same. A special feature of this Act is that

⁶⁵ India, Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) 1994 (hereinafter the “PCPNDT Act”), sec 4 “On and from the commencement of this Act,-- (1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3); (2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:-- (i) chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) haemoglobinopathies; (iv) sex-linked genetic diseases; (v) congenital anomalies; (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board; (3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely:-- (i) age of the pregnant woman is above thirty-five years; (ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss; (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals; (iv) the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease; (v) any other condition as may be specified by the Central Supervisory Board; (4) no person, being a relative or the husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purpose specified in clause (2).”

⁶⁶ Ibid., sec 22.

⁶⁷ Ibid., sec 23, “(1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees. (2) The name of the registered medical practitioner who has been convicted by the court under subsection (1), shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence.”

the Act puts the onus on the husband/family of the woman to prove that she was not compelled to go through the procedure and if found guilty would face the same punishment as detailed above⁶⁸.

Despite the adoption of stringent laws banning sex selective abortion, the practice still persists in India. There have not been any major amendments to either MTP Act or PCPNDT Act in India even decades after their adoption. This can clearly be seen in the penal provisions of PCPNDT where the prescribed fines of ten thousand rupees to fifty thousand rupees are quite low in current standards due to inflation. Furthermore, the fear of sanction as mentioned in these acts has not translated to decreased discrepancies in sex ratio at birth. This has also led to other forms of sex selection gaining popularity in recent years, like pre-screening through IVF, and the legal approach taken by India is furthering the gap between urban and rural areas of India.

2.2.2 Nepal

The Constitution of Nepal 2015 recognizes the reproductive rights and reproductive autonomy as a fundamental right of a woman. The Safe Motherhood and Reproductive Rights Act 2018 has in no uncertain terms has provided the statutory basis for legal abortion. This is still a very recent phenomenon. The then Nepali general code *Muluki Ain* (which was in effect until August 2018) criminalized abortion under the chapter on homicide. All abortion was considered illegal and a form of homicide on part of the mother and the doctor until 2002 where it was amended to include situations where the termination of pregnancy was done with the permission of a medical practitioner and only under extenuating circumstances, i.e. rape, incest, the child being diagnosed with a lifelong medical condition, or there being a threat to the life of the mother. A

⁶⁸ Ibid., sec 24, “Notwithstanding anything in the Indian Evidence Act, 1872 (1 of 1872), the court shall presume unless the contrary is proved that the pregnant woman has been compelled by her husband or the relative to undergo prenatal diagnostic technique and such person shall be liable for abetment of offence under sub-section (3) of section 23 and shall be punishable for the offence specified under that section.”

woman's right to freely choose abortion and gain access to it was established under case law in 2009 with the landmark Supreme Court decision in *Lakshmi Dhikta v. Government of Nepal*. The Supreme Court of Nepal stated that obstruction to women seeking access to abortion is a violation of their right and it ordered the government to

“introduce a comprehensive law for abortion; expand the abortion services in a decentralized manner and ensure wider access to safe and legal abortions; establish a government fund to cover the costs of abortions for low-income marginalized women; and, launch advocacy programs to make the public aware about right to access abortion and address the stigma attached to the practice of abortion in Nepal”⁶⁹

While a woman's right to access abortion was established in Nepal under case law in 2009, this did not translate into statutory law until *Muluki Ain* was repealed and replaced by the National Penal Code in 2018. The new Penal Code also lists the abortion provisions under the Chapter on Homicide⁷⁰, thus not stating access to abortion as a right but rather as a criminal act that has been granted some exceptions. The exceptional circumstances listed in Section 189⁷¹ are the same as those in the *Muluki Ain*, with an additional provision that a woman can freely choose to end the pregnancy in the first 12 weeks. An act of inducing and coercing a woman to abort is also a punishable offense under Article 188(2) of the Penal Code. It is important to note that

⁶⁹ *Lakshmi Dhikta v. Nepal*, Writ No. 0757, 2067 B.S. (2009), summary para 1-4 [translated from Nepali].

⁷⁰ Nepal, National Penal Code 2017, Chapter on Homicide, art 188, “Prohibition of abortion: (1) No person shall, except in the case referred to in Section 189, commit abortion, or do any act with intent to cause, or with the knowledge that, or having reason to believe that, such act is likely to cause, abortion.”

⁷¹ *Ibid.*, art 189, “Conditions where abortions are allowed: Notwithstanding anything contained in Section 188 of this Chapter, if an abortion is carried out by a qualified and registered health worker upon fulfilling the procedures as prescribed by the Government of Nepal, it shall not be deemed to be the offence of abortion, in the following circumstances: A) If the abortion of a fetus of up to Twelve weeks is carried out with the consent of the pregnant woman; B) If the abortion is carried out with the consent of the pregnant woman and on the advice of an expert pursuant to the prevailing law that if abortion is not carried out, the life of such a woman may be in danger or the physical or mental health may be deteriorated, or a disabled child may be born. C) If the abortion of a fetus of up to Eighteen weeks caused by rape or incest is carried out with the consent of the pregnant woman. D) If the abortion of the fetus is done with the consent of the mother if she is diagnosed with HIV/AIDS or a lifelong illness of a similar nature.”

all acts of abortions as mentioned above are punishable under the Penal Code with up to five years of imprisonment and fifty thousand Nepali rupees in fine (approx. 500 USD) depending on the gestational stage in which the abortion is performed⁷², and the act clearly draws the line between ‘acts of abortion’ and ‘offences of abortion’ legally.

The Penal Code also specifically bans the act of sex selective abortion. Section 188(7) states:

“No person shall, with the intention of causing abortion, do, or cause to be done, any act by which the sex of the fetus is identified, and abort or cause abortion following such sex identification.”

The phrasing here indicates that not only does it prohibit the identification of the sex of the fetus but also prohibits abortion for other reasons (except those mentioned in Section 189) following the identification of a fetus. Unlike India, this law does not explicitly ban prenatal sex diagnostics but specifically bans it in the context of abortion and vice versa. The Code penalizes the individuals involved in prenatal sex diagnostics for the purpose of abortions with imprisonment of three to six months and for cases of sex selective abortions the punishment is up to one year of additional imprisonment added to the sentence for the offence of abortions as mentioned above.⁷³

The practice of sex selective abortions was one of the major impediments to legal reform to allow practice of abortions out of a woman’s own will. However, the declining sex ratio at

⁷² Ibid., sec 188(3), “A person who commits the offence referred to in subsection (1) or (2) shall be liable to: a. A sentence of imprisonment for a term not exceeding one year and a fine not exceeding ten thousand rupees in the case of pregnancy of up to twelve weeks; b. A sentence of imprisonment for a term not exceeding three years and a fine not exceeding thirty thousand rupees in the case of pregnancy of more than twelve weeks and up to twenty-five weeks; c. A sentence of imprisonment for a term not exceeding five years and a fine not exceeding fifty thousand rupees in the case of pregnancy of more than twenty-five weeks.”

⁷³ Ibid., sec 188(8), “A person who commits the offence referred to in subsection (7) shall be liable to: a. A sentence of imprisonment for a term of three months to six months, in the case of the offence of identifying, or causing identification of, the sex of the fetus with the intention of causing abortion, and b. A sentence of imprisonment for a term not exceeding one year, in addition to the sentence specified in subsection (3), in the case of the offence of aborting or causing abortion after identifying the sex.”

birth, increasing maternal mortality rate, increased unsafe abortions were a sign that the legal ban was only an impediment to safe abortions and not sex selective abortions and the health of all women was at risk. While the law itself addresses the issues of both abortion and sex selective abortions, the legal provisions do not seem to meet the standards set by the Supreme Court in the Laxmi Dhikta case as well as the international human rights standards Nepal has ratified. It is still difficult for women to easily access abortions while in terms of sex selective abortions, there is no mechanism to oversee compliance to the law. Unlike India, the recordkeeping is not mandated by the law and there have been news of non-compliant medical professionals providing sex selective abortion services to women in private clinics and hospitals without keeping their medical reports.

There is inadequate literature to review the initiatives undertaken by the Government of Nepal or other organizations known to be closely looking into the matter of how effective the national laws have been to reduce the sex ratio at birth or combat sex selective abortion. According to anecdotal information provided by concerned authorities, strict enforcement of the law was difficult due to the difficulty in identifying the cases of abortions that have proceeded after determining the sex of the fetus, and lack of filed complaints. It is even difficult to estimate the widespread prevalence and impact of sex selective abortion practices when cases of medical malpractice are recorded and the doctors themselves are found complicit⁷⁴. An alarming development comes in the form of conservative political and religious activists who ask for abortion to be criminalized again as they condemn the increasing practice of sex selective abortions and put the blame on raising the restrictions on abortion laws that have allowed the women and medical professionals to act with impunity. A few NGOs and the media have started awareness raising campaigns against sex selection among the general public

⁷⁴ Holly Watt, Abortion investigation: doctor caught falsifying sex selection paperwork (The Telegraph) 24 February 2012, <https://www.telegraph.co.uk/news/health/news/9102683/Abortion-investigation-doctor-caught-falsifying-sex-selection-paperwork.html> <accessed 15 January 2020>

highlighting the issue mentioned above and even exposing some medical facilities for enabling this practice. However, to my knowledge no criminal proceedings have yet been pursued on the charge of sex selective abortions.

2.2.3 China

The issue of abortion and sex selection in China is the most unique out of the three jurisdictions. With the adoption of the Family Planning Policy in China, colloquially referred to as the One Child Policy as it limited each family to only have one child, it was not the legality of abortion that has been historically under question but the legality of the pregnancy itself and whether the number of children an individual is allowed to have is under the sphere of control exercised by the state⁷⁵. The morality and validity of the steps taken by the Chinese government to combat the rapid population increase in China is not under the purview of this study, but what it is concerned is how this led to an unprecedented number of sex selective practices as people wanted the single child they were allowed to have to be a son. In a patriarchal society such as China, strictly enforcing the one child policy nationwide with severe penal sanctions to any violators eventually led to an estimate of hundreds of millions of missing girls since the policy was first introduced.

Chinese policy on abortion has thus not been restrictive since the introduction of one child policy; rather the Chinese government has actively encouraged the practice of abortion and even promoted advertisements about seeking abortion services⁷⁶. In addition to contraceptives, abortion was accepted as a family planning tool in China in the mid-80s to early 90s. Forced induced abortions has been one of the government's tools, and access to abortion of one's own volition was positively encouraged among the citizens.

⁷⁵ Elina Hemminki et al., 'Illegal Births And Legal Abortions – The Case Of China' (2005) 2 Reproductive Health, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1215519/>

⁷⁶ Ibid.

The subsequent consequence of this policy was felt in the 80s when the gender disparity in sex ratio at birth in China was being felt. Especially in rural China, where access to abortion services was available and son preference was very strongly felt the effects were enormously felt. The government seemed to have felt the unintended consequence of the population control mechanism manifest and thus in certain provinces of China the rule was amended to “two children if the first is girl”. This relaxation of the rule did not combat the entrenched notion of male supremacy and son preference but is still considered to have saved the lives of many girls in rural China. While there were still cases of people trying to ensure their second child is a son as well, the policy was still found to be comparatively successful. In the large scheme though, it was still not enough.

The Law of the People’s Republic of China on Maternal and Infant Health Care was adopted on 1994, which is still the prevalent law in China regulating abortions, and it prohibited the practice of sex selective abortions entirely. The Chinese government allows for a woman to have abortions at any gestational stage and of no cost to her at government medical institutions⁷⁷. The act also makes it mandatory for physicians to let the couple know about any medical situations concerning mother or child’s health as mentioned in the law and advise them for termination of pregnancy⁷⁸, which can almost be seen as the opposite of medical abortion allowed in the legal provisions of India and Nepal where abortion was the exception, not the preferred course of action.

⁷⁷ China, Law of the People’s Republic of China on Maternal and Infant Health Care 1994, art 19, “Termination of gestation or performance of ligation operations practiced in accordance with the provisions of this Law shall be subject to the consent and signing of the person per se. If the person per se has no capacity for civil conduct, it shall be subject to the consent and signing of the guardian of the person. Whoever is to terminate gestation or receive ligation operations under this Law shall receive such services free of charge.”

⁷⁸ Ibid., art 18, “If one of the following cases is detected in the pre-natal diagnosis, the physician shall explain the situations to the married couple and give them medical advice on a termination of gestation:

- (1) the fetus is suffering from a genetic disease of a serious nature,
- (2) the fetus is with a defect of a serious nature, or
- (3) continued gestation may jeopardize the safety of life of the pregnant woman or seriously impair her health, due to the serious disease she suffers from.”

Article 32 of the Law on Maternal and Infant Health Care forbids sex identification of fetus entirely, unless it is necessitated on medical grounds. It is the only provision related to sex selective abortions in the statute, and no specific penal measures are mentioned in therein if the medical professional doing the identification or the mother is found in violation of this provision. The phrasing of the act still allows for pregnant women to terminate the pregnancy even if they know about the sex of the fetus. It only bans sex identification and not sex selection, and does not take a strongly protective stance against fetal sex selection.

In 2015, the Family Planning Policy in China has been amended and the “one child policy” has been completely replaced by “two child policy” owing to declining fertility rates, the main issue to see in the legal study of China is not whether the current legal policies adequately allow access to abortion while controlling sex selection but rather ought to emphasize how to combat gap created by the millions of missing girls from when the one child policy was implemented. Even if it has been loosened, Chinese policy towards reproduction is still restrictive while the government stance on abortion is very permissive. While this allows for women to easily access free abortion in state medical institutions or have them at an affordable cost at private clinics, as long as the legal policy does not address the inherent discrimination against girls prevalent in the Chinese society, the widespread practice of sex selective abortions in China will continue to persist. In addition to abortion, abandoning girl children has also been a huge issue in China – which is also said to be one of the reasons the Chinese government decided to leave behind the one child policy and opt for two child policy. The Chinese example with both their nationwide family planning policies and abortion policies are an example of how legal policies can have both direct as well as indirect consequences, many of them unintended, effects of which are exacerbated decades down the road.

CHAPTER 3 - ANALYSIS

3.1 Impact and Shortcomings

3.1.1 India

Studies have shown that the issue of sex selection in India is prevalent within urban, middle-class and educated women as opposed to rural, poor and illiterate ones⁷⁹. It is highly likely that it is an issue of access, as urban women have better access to medical facilities, doctors and safe abortion services. Studies done in the Indian context have shown that sex selective abortion is more likely practiced by women with higher levels of education as they are seen to be more likely to give birth to a boy, statistically⁸⁰. This difference is even more stark if analyzed based on the order of birth of the children. Based on a study done by the Population Research Institute in India, women with 10 or more years of education were likelier than illiterate women to have a male child if they already had a female child⁸¹. There was a direct proportionality to the rate of giving birth to a male child following a ultrasound test, with women of higher education being more likely to do so; the trend was specially significantly noticed in women with 9-10 years of education.⁸² Although individuals from the upper socioeconomic classes are less likely to express their son preference, they are statistically more likely to seek sex selective abortion services when compared to individuals in the lower socioeconomic classes. In the three states with the highest discrepancy in sex ratio at birth in India, Punjab, Haryana, and Gujarat, the probability of having more sons is demonstrably higher in high income families.

The studies further show that the sex ratio at birth in India is significantly higher in the top 20 percent of wealth and much lower in the households that fall in the bottom 20 percent. The

⁷⁹ Abbamonte (n 5), pp. 15-16

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

caste system in India, which has listed Scheduled Castes and Scheduled tribes, which contain the poorest and the most marginalized populations, did not show significantly high probability of giving birth to a son even they demonstrably had access to medical services and screening facilities for pregnancies. One of the reasons for this, is assumed that urban women tend to have limited number of children and thus their son preference manifests through sex selective abortions, while rural women tend to have a number of children until they finally give birth to a son. This, in rural areas, further complicates the analysis of sex ratio of birth to ascertain whether sex selective abortion has been practiced because some families skew the data with an unusually high number of girl births in the family. Recent health survey data in India underscores this point as urban sex ratio at birth is much higher than rural sex ratio at birth in majority of Indian states.⁸³ This shows that access and ability to procure abortion services is more important than our general understanding of son preference as higher in rural areas, because urban populations are more capable as well as more willing to act on their preferences in seeking sex selective abortions.

Studies have also found a religious aspect to higher son preference. There was high prevalence of son preference in Hindus and Sikhs, with significantly higher likelihood to give birth to a male child at third birth. When compared, Muslims were less likely to have sons than both Hindus and Sikhs, whereas Christians tended to have less children overall and displayed significantly lower son preference in general⁸⁴. This may be tied to the religious beliefs of Hindus and Sikhs which gave high value to sons as carriers of the family line, and funeral rites being performed by sons believed to wash the deceased of all their mortal sins. Islamic and Christian beliefs consider all children to be gifts of god and abortion to be a sin, which may have led to less discrepancies in the sex ratio at birth in these religious groups.

⁸³ Ibid, pp. 22-27

⁸⁴ Ibid.

Interestingly, the geographic distribution of sex selective abortion in India greatly varies by the location as well with the eastern, north-eastern and southern states not showing major son preference or significant high sex ratio at birth. The sex ratio at birth, on the other hand, for central, western, and northern India, which includes states like Punjab, Maharashtra, New Delhi, etc., surpassed the expected sex ratio at birth of 1.05 males per females by significant numbers, with the ratio going up to 1.35 for Haryana, northwestern state bordering Punjab. One of the highest sex ratios at birth, according to the National Family Health Survey of India in 2015/2016, is in Sikkim, an independently governed state which has a close cultural connection with Nepal.⁸⁵

The government regulations discussed in Chapter 2 to regulate the rise of sex selective abortions in India throughout the 1990s showed some impact. There was some impact seen after the promulgation of the PCPNDT Act as the sex ratio at birth which was in rise in India plateaued before slowly declining. It was however insufficient to control the problem. The enforcement of law all across the country was slow and proper monitoring of the mechanisms thus kept in place was deemed to be insufficient. Furthermore, this actually created a market for illegal abortions and medical malpractice where practitioners charged exorbitant fees to have back alley abortions of girl children, creating a similar situation to when there was no legal abortion at all, leading to greater risks for the mothers and increased maternal mortality rates. Thus, since the PCPNDT Act has been enacted, the incidence of sex-selective abortion has not been in rise but it has not declined as expected either.

Currently, the Prime Minister of India, Narendra Modi, has launched a nationwide program *Beti Bachao, Beti Padhao* (“Save the daughter, educate the daughter”) (BBBP) in 2014. The campaign aims to address the inherent inequality faced by girls overall, focusing on uplifting

⁸⁵ Ibid.

their value and dignity. Combating sex selective practices is also an important part of this campaign. The government has plans to strengthen the enforcement of the PCPNDT Act using various advocacy tools. The national fund has allocated 1 billion rupees (approx. 14.3 million USD) for the implementation of this program. The program is focused not only on making people aware about risks of unsafe abortion and the provisions of PCPNDT, but it also focuses on advocating for girls' education, combating malnutrition and undernourishment in girls below five years of age, promoting institutional deliveries at the closest health post or hospital or with a licensed midwife and encouraging timely registration of birth. The project seeks to utilize mass media and social media as its main advocacy tools. While it is currently launched across India across all sectors of the government, it is yet to show a direct impact on the sex ratio at birth or sex selective practices in India⁸⁶.

The legal and policy responses in India regarding the issue of sex selective abortions seem to have failed to address the root cause of the issue, and some of the methods used to combat sex selective abortions have brought new problems that further victimize the women. While the BBBP is a step in the right direction, the son preference inherent in the society needs a focused approach in order to diminish the existing prejudices. The one solution fits all approach taken by the Indian government obviously have lesser impact in solving the issue without an intersectional understanding of how social, economic, cultural, religious and geographic factors have contributed to son preference and has manifested as increased practice of sex selective abortions.

⁸⁶ Ibid.

3.1.2 Nepal

The biggest impetus to address the issue of sex selective abortions in Nepal is that it has not been adequately addressed before, which also presents a biggest challenge. Unlike India, there have not been focused studies to underline the sex ratio at birth to chart the imbalance in sex ratios across the country. While the national average sex ratio at birth is significantly higher than the expected 1.05 male births per female births, the distribution of this data across different indicators has not been done. It is widely believed that similar to India, sex selection is the problem of the educated urban rich in Nepal who have access to better health facilities, but there is no statistics to prove or disprove this claim. A qualitative study done with health workers who provide abortion services, however, claim that women are more likely to seek sex selective abortions if they are educated.⁸⁷

Even at the governmental level, as of date, there have been no focused policy or programs to address imbalance in sex ratios in Nepal. Unlike India and China, the increase in sex ratio at birth in Nepal is relatively new as this phenomenon has only been seen in the population data since the late 2000s. While some groups claim this is largely said to be a result of increased access to medical abortion in the country and the loosening of laws prohibiting abortion, different social and political factors are in play. Nepal was undergoing a decade long civil war between 1996 and 2006 and there was civil unrest and political turmoil even in regions where active hostilities were not taking place. Access to abortion was significantly difficult for even those who were allowed to legally terminate the pregnancy under the *Muluki Ain* with tremendous administrative requirements, only a few could afford to pay out of their own pocket for an abortion which was not widely available to the general population. Many internal refugees fleeing the conflict were more concerned with survival and overall the birth rate in the

⁸⁷ Lamichhane, Prabhat, et al. "Sex-selective abortion in Nepal: a qualitative study of health workers' perspectives." *Women's Health Issues* 21.3 (2011), pp. 37-41.

country was decreasing, let alone the sex ratio at birth. Thus, how the Nepali demography will be affected by the increasing trend in sex selective abortions and how it will pan out in the population levels of Nepal have not been observed yet. But there are some government as well as non-government advocacy initiatives that have been introduced to improve gender equality in all spheres of life but their impact have not been assessed yet.

While there have not been any large scale studies in Nepal to fully understand the trends of sex selective abortions in Nepal, few independent studies carried out by NGOs connect the emergence of sex selective abortions in Nepal to the increased accessibility to medical technology that allows for prenatal sex determination like the ultrasound, the persistent religious and social belief that the sons have higher cultural and economic value than the daughters, the prevalence of dowry system – especially in the southern parts of the country, pressure on women to give birth to sons, stating these as the main causes of higher sex selective abortions in the country⁸⁸. Higher sex ratios at birth were seen in the urban areas of Nepal, and the southern Tarai belt bordering India, with some studies suggesting the rich urbanite women were more likely to seek sex selective abortion⁸⁹. The studies in the issue are as yet insufficient and more research is necessary into these issues to validate this claim.

The current policy framework, as discussed in Chapter 2, does not have adequate programs and mechanisms in place to monitor and take concrete actions against violators seeking sex selective abortion. The law does not hold enough deterrent force for its enforcement to prevent people from practicing sex selective abortions. Recent political discourses in this issue are usually initiated by religious groups who want to curtail the right to freely access abortions, which was only recently legalized in the country. The long standing practice of gender based

⁸⁸ Adhikari et al., 2008, N. Adhikari, A. Ghimire, I. Ansari, Sex preference in urban Nepal, *Journal of Institute of Medicine*, 30 (2008), pp. 19-23.

⁸⁹ Ibid.

discrimination and deep rooted patriarchal systems ensure that taking away the right to access abortion is indeed a slippery slope to women losing their basic rights and reproductive freedoms. Comparing to the way the practice has evolved in the neighboring country of India which has similar sociocultural norms, it can be predicted that the practice is currently in rise in Nepal as it was in India in the 1990s. As smaller family sizes get more popular, there is a chance that people will turn to sex selective practices to have a desired son. The focus should be shifted to uplifting the situation of women in the country generally, but also specifically regulations should be made to closely monitor the medical professionals in the country. While the practice of sex selective abortions may not be completely eradicated, through strong compliance mechanism for medical professionals it would be easier to ensure that women who really require abortion services have full access to it while these rights are not misused to further sex selection practices. The apathy of the general population towards this issue is also hindering progress in combating it, as studies on this issue are not prioritized. Thus, there is need to conduct studies on sex selection in Nepal, how prevalent it is across different demographics and the state should proactively ensure the implementation of existing laws as well as introduce more policies to further this aim.

3.1.3 China

It was considered that in the Chinese context, son preference is a serious rural problem highly prevalent in countryside where people are illiterate, as opposed to urban areas with higher living standard and education levels. However, there are no significant differences in the sex ratio at birth in rural and urban areas of China.

While there have been many references to the one child policy and its implications, the actual practice has not been adequately understood outside China. A crucial element in this policy has been that a woman should have an "official permission to be pregnant", as in a *de jure* permit from the country to procreate. In most other countries permission to have birth are *de facto* and

socially constructed and outside government regulations, usually assumed through the act of marriage in most societies, and not an explicit permission required from the state. Hemminki et al. state that “[t]he central concept applied at the individual level is that of “illegal pregnancy” (in Chinese “ji hua wai ren shen”, “unauthorized” pregnancy)”⁹⁰. Different provinces across China have different rules to allow pregnancy beyond one child. The rule of “two children if the first is a girl” was the most commonly practiced but some provinces had also adopted “two children with a four-year interval”. This rule was also differently applied in the case of minority groups protected by the state, more children were allowed⁹¹.

The biggest visible impact of the problem of sex selection in China is the ‘missing girls’ who are projected to be in millions. There have been multiple reasons that led to the practice of sex selection to be so widespread that it has led to millions of girls being missing from China. Nie Jing Bao has classified these into three categories:

“‘proximal causes’, which include female infanticide, under-reporting of female infants, discrimination against girls in nutritional and medical care and sex-selective abortion of female fetuses; ‘conditional causes’, which include a major drop in fertility brought about through China's population control policies and ‘fundamental causes’, which include entrenched patriarchy in the private and public spheres, as well as the strong socio-cultural tradition of son preference.”⁹²

The major cause for the imbalanced sex ratio at birth in China is attributed to sex selective pregnancies. Even though the prenatal gender diagnosis is illegal in China, it is still widely used and allegedly not reported. As discussed in Chapter 2, doctors in china are not allowed to disclose the gender of the fetus to the parents as the law prohibited prenatal sex determination

⁹⁰ Hemminki (n 75).

⁹¹ Ibid.

⁹² Jing-Bao Nie, Non-medical sex-selective abortion in China: ethical and public policy issues in the context of 40 million missing females, *British Medical Bulletin*, Volume 98, Issue 1, June 2011, pp. 7–20.

for prospective parents in an effort to curtail sex selective abortions. But in absence of proper monitoring mechanisms, the practice still prevails in China till date. People in China still consider females to be inferior to males, and especially in rural provinces the traditional notions of son preference is still very deeply rooted in the populace. Nie Jing Bao mentions a survey done in 2000 in central rural China, where over 36 per cent of women admitted that they had opted for sex selective abortions. Such abortions were significantly prevalent for second births compared to the first birth, which can be seen as a vestige of the “two children if the first is a girl” policy implemented in rural China. The study said that among the 753 pregnancies covered in the study, with 427 male fetuses and 279 female fetuses, 25 per cent female fetuses were aborted while only two per cent of male fetuses were aborted. Male fetuses were found to be more likely to be aborted if they were the second birth than when they were the first birth, according to the findings⁹³.

The way the high sex ratio at birth has been an unintended consequence of the population control policies, the aggressive sex selection in China has led to the over-supply of males, particularly marriageable-age men that are unable to find themselves a wife because of lower female birth rates. A Chinese term describes these men as: 'bare branches' (guanggun)⁹⁴. Studies have indicated that a generation later, this high discrepancy in the population ratio in China may ultimately lead to unimaginable social unrest that affects not only the Chinese society but even internationally. Current estimates put the number of these bare branches in China to be upwards of 34 million. Chinese scholars have thus highlighted that traditional Chinese societies may soon have various new problems caused by the deficit of females, impact of which is already seen with increase in “borrowing” wives – through legal means like

⁹³ Hesketh, Therese, Li Lu, and Zhu Wei Xing. "The consequences of son preference and sex-selective abortion in China and other Asian countries." *CMAJ* 183.12 (2011): pp. 1374-1377.

⁹⁴ Ibid.

immigration, gray means like mail order brides, or illegal means like trafficking – from the neighboring countries of South East Asia, Nepal, Bhutan, and North Korea.

The main priority in China to combat the rising cases of sex selective abortions should be to address the deeply entrenched son preference in China. It is a huge challenge because in both rural and urban settings, and the development of Chinese culture and social norms may have empowered women to pursue independent lives economically but their sociocultural value is still considered inferior to that of a son. While the amendment in the family planning policy may show quantitative difference in the sex ratio at birth, it still does not address the underlying causes that led to this problem in the first place. Highlighting the value of girls and creating equal recognition for sons and daughters requires a multifaceted approach that seeks to amend the deeply entrenched centuries-long social practices to a significant level. One of the success stories from China in its effort to combat sex selective practices comes in form of Care for Girls Campaign⁹⁵. It was implemented in 2003 by China's National Population and Family Planning Commission and it aimed to advocate about the value of girls in the society. It specifically focused on how young men would face problems finding brides and girls were valuable as these sons would not be able to carry on the family line without them. It emphasized on how the future of men depended on there being enough women, which may not be as progressive as one would like but it went a long way in painting a picture of what future implications the unprecedented number of sex selective abortions would have in terms that they valued. The program also introduced a provision where parents of daughters were provided with guaranteed pension as an added incentive to give birth to girls. A 2007 study in Shanxi province, where the campaign had taken place, showed the campaign did have some positive impact and the perception towards the value of women seemed to have increased. While the

⁹⁵ Ibid.

son preference still persisted and the sex ratio at birth was still significantly higher at 118 in 2006, it had gone down from the 135 in 2003 showing that there was some major influence⁹⁶. The program has since been discontinued but it shows the role the Chinese government can play to impact people's decisions, especially now that China is not implementing one child policy. There is need to observe how the fertility rates in China change over the coming years and whether sex ratio at birth is significantly impacted.

⁹⁶ Ibid.

CONCLUSION

Sex selective abortions are the practice of terminating pregnancies solely due to the gender of the child. The socioeconomic and cultural factors prevalent in the jurisdictions discussed in this study: India, Nepal and China, have increased the prevalence of this practice in that region leading to millions of ‘missing girls’ and the sex ratio at birth to skew highly towards males. Legally, people are not allowed to use prenatal diagnostics to determine the sex of their child in the above countries nor are they allowed to seek (or perform, for medical personnel) solely based on the sex of the fetus. And yet, despite the national policies, these practices remain.

The question of son preference is a multifaceted question – when choosing sex selective abortions people do not choose sons over having daughter, they choose having no child, and the possibility of legal sanction if caught doing so, over having a daughter. Thus interventions are needed not only at a legal level, but at a societal level where uplifting the status of the women in the society should be the primary focus. Other factors that are contributing to gender discrimination in the society may also directly or indirectly promoting the practice of sex selective abortions, and study into these matters is integral for problem identification by the state before taking policy actions with regards to existing abortion laws. There is also need for interventions beyond national level to address this issue.

The question of whether access to abortion is a human right may still be debatable in the international forums, there is need for the human rights framework to explicitly include the issue of sex selective abortions and address the prevalence of the problem in Asia, parts of Europe, parts of Latin America, among others. While it is universally considered to be an unacceptable practice, there is no recourse under international human rights law to address

the shortcomings of the state in implementing their national laws prohibiting sex selection nor are there any international binding treaty laws that address the problem of sex selective abortion in detail and highlight the obligations of nation states towards this issue.

My recommendations are:

- Have an international human rights agreement that specifically focuses on the issue of sex selective abortions. While there are allusions to this problem in existing treaty law, having a separate document would greatly strengthen as well as pressure the states to address the inherent gender inequality in their societies to tackle this issue. Formation of a UN Special Procedure body to specifically address this issue in state parties where it is prevalent is also suggested.
- There are data gaps on the causes of high sex ratio imbalances in certain states while states where there is rampant gender based violence and inequalities may not have this practice as prevalent. There is glaring lack of empirical evidence on variations of son preferences by geography, place of residence, religion, education, socio-economic status on son preference and reasons for such variation across the globe as well as within a state. Further quantitative and qualitative research is needed to understand what motivates people to prefer sons so strongly and how it manifests as sex selective abortion. This data should guide the policymaking in national and international level to better tackle the problem of sex selective abortions.
- Further compliance is required for medical professionals who can perform abortion. It is necessary to ensure continued access to abortion, while also ensuring that the medical professionals are not misrepresenting sex selective abortions as other medical reasons. There should be a monitoring body overseeing all medical cases of abortion performed in a hospital. Providing widespread access to abortions should also be

prioritized, so that back-alley abortion clinics do not provide unsafe illegal abortions to women seeking sex selective abortions by making them less inaccessible.

- Though few, advocacy efforts are being implemented by NGOs and the media to raising awareness on sex selective abortions. There is need for international human rights networks and organizations to prioritize this issue and support the local organizations that are working on it. Furthermore, there is not enough evidence on changing attitudes, practices of the general population, and/or health care provider attitudes towards the issues. Therefore, a systematic evaluation of such initiatives is highly necessary to monitor impact and introduce programs that uplift the situation of the girls from within the society and dissuade the people from seeking sex selection.

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