

Sex-selective abortion and the theory of identity: The case of India

In this paper I shall inquire into the metaphysical underpinnings of the prohibition of prenatal femicide within the Indian cultural and legal milieu. Even though I choose *The Medical Termination of Pregnancy Act* and *The Pre-natal Diagnostic Techniques Act* (amended in 2004 as *The Pre-Conception and Pre-natal Diagnostic Techniques Act*) as the commencing points of my study, I will develop neither legal nor anthropological analysis of the sex-selective abortion in India. My purpose is to present politico-philosophical implications of the legal solutions in question.

The main thesis of my paper is the contention that metaphysical background theories that the prohibition of prenatal femicide is based on undermine the anti-discriminatory objectives of this prohibition; what follows, this anti-discriminatory legislation is then a contradiction in terms and for that reason ought to be abandoned. The method I deploy in my paper is the so-called method of reflexive equilibrium¹

¹ On the method of reflexive equilibrium see: N. Daniels, *Wide Reflexive Equilibrium and Theory Acceptance in Ethics*, „The Journal of Philosophy” 1979, Vol. 76, No. 5; D.W. Haslett, *What Is Wrong With Reflexive Equilibria?*, „Philosophical Quarterly” 1987, No. 37/148; J. Rawls, *Outline of a Decision Procedure for Ethics*, „The Philosophical Review” 1951, Vol. 60, No. 2; J.D. Arras, *The Way We Reason Now: Reflexive Equilibrium in Bioethics*, [in:] *The Oxford Handbook of Bioethics*, B. Steinbock (ed.), New York 2007; N. Daniels, *Reflexive Equilibrium*, [in:] *The Stanford Encyclopedia of Philosophy*, Spring 2011; J. Rawls, *A Theory of Justice*,

that examines the logical relations between particular political and legal solutions or considered judgements on the one hand and background theories that constitute *Bedingung der Möglichkeit* of these solutions on the other. Both, the subject-matter of this paper and methods employed demonstrate that the study I present here places itself unequivocally within the purview of political philosophy.

Indian law: MTP Act, PCPNDT Act

In India until 1971 *The Medical Termination of Pregnancy Act* abortion was illegal except in the case of saving a mother's life. The MTP Act changed the situation considerably making abortion available to women in many circumstances, especially "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 woman²". This created the situation where a married woman can terminate her pregnancy almost on demand and for any reason provided she is able to convince "a registered medical practitioner (specialised in gynaecology or obstetrics, not in psychiatry – LD), where the length of the pregnancy does not exceed twelve weeks,³" and "two registered medical practitioners, where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks,⁴"

Cambridge 1971; R. Dworkin, *Taking Rights Seriously*, London 2013; L. Dominiak, *Metoda równowagi refleksyjnej (reflexive equilibrium) w filozofii polityki* [The Method of Reflexive Equilibrium in Political Philosophy], „Athenaeum. Polskie Studia Politologiczne” 2012, No. 36, p. 143–156.

² *The Medical Termination of Pregnancy Act, 1971*, Act No. 34 of 1971, Explanation 2., section 3.

³ *Ibidem*, sub-section 2a, section 3.

⁴ *Ibidem*, sub-section 2b, section 3.

that the pregnancy ensued as the result of contraception failure and can be of a detrimental effect to the woman's mental health.

In about 1990 the rapid spread of diagnostic methods that could determine the sex of the future child prenatally or even before conception, together with the negative cultural attitude towards women and the availability of legal abortion created by the MTP Act, made it possible to selectively terminate pregnancies where the gender of a foetus was culturally undesired. To counteract this practice and the tendency of growing inequality in the child sex ratio, India enacted *The Pre-natal Diagnostic Techniques Act* (later amended as *The Pre-Conception and Pre-natal Diagnostic Techniques Act*) which was "An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto⁵". According to the PCPNDT Act "No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them⁶". These legislative changes created the situation in which it is legal to terminate pregnancy under manifold conditions but gender selection. Obviously, the purpose of the PCPNDT Act was to prevent and counteract the bias against females present in the Indian society and to do so within the context of liberal abortion legislation

⁵ *The Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994*, Act No. 57 of 1994.

⁶ *Ibidem*, section 3A, chapter II.

introduced by the MTP Act. Unfortunately, this kill-two-birds-with-one-stone kind of policy generated some severe philosophical complications that I will ponder on in what follows.

Background theories and prenatal femicide prohibition

I would like to start with a remark that everything I will say in the remainder of this paper pertains only to the positions that would like to protect women's right to abortion by and large on demand and at the same time prevent prenatal and preconception femicide on the grounds that it is an instance of gender discrimination or violation of women's rights; for the proponent of the belief that the foetus is a human person from the moment of conception and that abortion is more or less tantamount to murder, nothing of what follows creates problems.

There are several possible justifications of the prohibition of prenatal femicide or, generally, prenatal or preconception sex selection in the context of the liberal abortion law. I believe that the most influential of them is the idea that prenatal femicide is an act of discrimination against women or an infringement on women's rights, supposedly, especially the right to equal treatment and recognition. So, ubiquitous moral intuition or common considered moral judgement says that aborting only female foetuses would be an act of gender discrimination. Let's for the sake of simplicity, call this considered moral judgement *the anti-discriminatory judgement* (and in its other rights-based version: *the equal rights judgement*). What the anti-discriminatory judgement tells us about the nature of the foetus? In other words, what kind of entity must the foetus be for the anti-discriminatory judgement to hold?

These questions are in fact inquiries about the background theory of the anti-discriminatory judgement, particularly about the theory of identity and theory of the person that is presupposed by

the anti-discriminatory judgement or that can be reconciled with this judgement. I think that one can distinguish between two general sets of background theories that are pertinent to the issues in question. 1) The first group consists of various theories of identity that in various capacities hold that there is a relation of identity between the foetus⁷ and the future child and so on. Let's elaborate on some of them. One of the most radical theories and partly apt in this case is *The Same Genotype Account*. According to this sort of theory of identity a person P1 at time t1 and a person P2 at time t2 are the same person if and only if they have the same genotype. This criterion can of course be enriched by different interpretations, for instance it can utilise discoveries of epigenetics. It is a no-brainer to notice that *The Same Genotype Account* equilibrates (is in a state of reflexive equilibrium) with the anti-discriminatory judgement as far as the prenatal sex selection is concerned. To put it simply, it is a foetus that has two chromosomes XX that is discriminated against by prenatal femicide.

Another theory of identity that fully equilibrates with the anti-discriminatory judgement is *The Same Soul Account*. According to this Cartesian theory of identity we are essentially immaterial souls. If one connects this belief with the statement that ensoulment occurs at the moment of conception, it works perfectly with the prenatal version of the anti-discriminatory judgement; but of course it is not necessary to limit one's imagination by stopping at the moment of conception. What is important about the Cartesian *Same Soul Account* is the fact that since the soul is an immaterial, spiritual entity, this account can be reconciled with an almost infinite number of moral judgements and fancy scenarios. There is nothing there in the Cartesian concept of the soul that could for instance impede soul's ability to occupy two

⁷ When in this paper I talk about the foetus I mean also the zygote and all subsequent developmental stages. From time to time, to underline some important differences between theories I use the term „early foetus”.

different bodies or a sperm and an ovum simultaneously; it makes room even for the concept of reincarnation⁸. For that reason *The Same Soul Account* can equilibrate well with the anti-discriminatory judgement even as far as it pertains to preconception sex-selection procedures. It of course does not mean that *The Same Soul Account* does not suffer from other maladies.

2) The second group of background theories comprises on the one hand theories of identity that deny early foetuses the status of a human being and theories that abstract from the question of identity or negate the very category of identity on the other. Amongst the first group there are theories of identity that work with the anti-discriminatory judgement only as far as late abortion is concerned. Amongst them one can mention *The Same Substance Account*. According to this hylomorphic theory represented by Aristotle and Aquinas we are essentially substances that consist of the soul (form) and the body (matter) and since our specifically human form ensues from some previous organic development taking place prenatally, we become human beings only at some time after conception⁹. Similar consequences for the anti-discriminatory judgement yields McMahan's *The Embodied Mind Account* which by and large assumes that for the relation of personal identity to hold there must be enough parts of the same brain to maintain the capacity for consciousness¹⁰; what unambiguously follows from this statement is the assertion that early foetus and the future child are not one and the same entity.

The second kind of theory within this group is the theory that negates the very category of identity. The most famous of them is the theory of Derek Parfit according to which identity is not what matters.

⁸ For a more detailed analysis of the Cartesian soul see: J. McMahan, *The Ethics of Killing. Problems at the Margins of Life*, New York 2002, p. 9–10, 14–19, passim.

⁹ St. Th. Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province, 1947, I, q. 76 a. 3 ad, a. 5; q. 118 a. 2 ad 2.

¹⁰ See J. McMahan, op.cit., p. 66–94.

Although Parfit starts with *The Psychological Account* which should be qualified as lying within the previous group (the early foetus and the future child are not the same entity since they are not psychologically continuous with each other; according to *The Psychological Account* a person P1 at time t1 and a person P2 at time t2 are the same person if and only if P2 is psychologically continuous with P1) he ends with the thesis of the unimportance of identity and with the support for impersonal ethics¹¹. Another example of this kind of theory is *The Interest View* represented by Bonnie Steinbock (I believe that on a deep level *The Interest View* is the theory of the above-mentioned type that implicitly employs the concept of identity; it basically denies early foetus the status of a human being). It says that what matters are the interests of particular persons (“without conscious awareness, beings cannot have interests”¹²) and that outside the realm of conscious awareness these interests are operative not on the basis of the theory of identity but on the basis of the concept of causality. To put it simply, an injury inflicted upon a preconscious foetus that does not have interests yet should be recognised as harm and should be recovered “assuming that causation could be established”¹³ between the injury and the future disability of the future child.

The anti-discriminatory judgement and the nature of the foetus

So, to come back to my main question: What the anti-discriminatory judgement tells us about the nature of the foetus? In other words, what kind of entity must the foetus be for anti-discriminato-

¹¹ See D. Parfit, *Reasons and Persons*, New York 1987.

¹² B. Steinbock, *Life Before Birth. The Moral and Legal Status of Embryos and Fetuses*, New York 2011, p. XIV.

¹³ *Ibidem*, p. 112.

ry judgement to hold? The most rudimentary metaphysical scrutiny informs us that for the prenatal and preconception femicide to be an act of discrimination and/or violation of rights there has to be somebody who is discriminated against and/or whose rights are violated. If particular sex-selective abortion is a discrimination against particular woman, there must be some being there that is identical with the woman that is discriminated against. Since you cannot violate the rights of somebody who does not exist the same as you cannot discriminate against somebody who does not exist, it must mean that if prenatal femicide is a discrimination against women and a violation of women's rights, a foetus who is killed in this procedure must be this woman who is discriminated against and whose rights are violated in an act of prenatal femicide; and if this foetus is this woman, it is as well and by definition a human being (since every woman is a human being), the same entity as you and me and the same entity as the future counterfactual woman who would have been existed if prenatal femicide had not been performed on this foetus.

To put it in a more analytical way consider the following line of argument:

1. For an act to be a discrimination/violation of rights there must be somebody who is discriminated against/whose rights are violated. *A contrario*, one cannot discriminate against nobody, non-existent entity/violate rights of nobody, non-existent entity.
2. Since prenatal femicide is both performed on a foetus and deemed an act of discrimination against women/violation of women's rights, the foetus that is killed in this procedure must be a woman.
3. Since every woman (and every man – but it was not the subject of my line of reasoning here, though it is a tacit premise of it) is a human being,
4. CONCLUSION: every foetus is a human being.

Is there any problem with this conclusion for the proponents of the anti-discriminatory judgement? Unfortunately, this conclusion yields undesirable consequences for the justification of women's rights to abortion. If the foetus is the same entity as you and me, killing it is far more difficult to justify than if it had some lower status, for instance, a status of the clump of cells or of the potential human being. The case for women's right to abortion is based on two main arguments that work together: 1) that woman has a right to decide about her own body and her family life; 2) that foetus at the early stages of pregnancy is not a human being yet, even though it has some potential to develop into a human being. Those arguments work together in most legislations and philosophical discussions in such a way that the stronger is the latter, the weaker is the former. The right to decide about one's own body loses strength with time for two reasons: 1) the postponement of the decision is difficult to make sense of; 2) the older the foetus, the less and less the decision is about one's own body and more and more about someone else's life and death. The right to decide about the shape of one's family life is not absolute and cannot be the reason to unprovoked or infringe on someone else's liberty and rights. Hence, weakening the claim that the foetus at the early stages of pregnancy is not a human being means weakening the impact of the claim that the woman has a right to decide about her own body and her family life (since the more a woman has this right, the lower the status of the foetus must be); in consequence it means weakening the whole case for a women's right to abortion. In the Indian context it of course means weakening the solutions introduced in 1971 by the MTP Act. So, it is glaringly inconsistent to grant women the right to abort the foetus for, amongst others, negligible reasons (for example, contraception failure) and yet to prevent abortions for reasons of sex selection as acts of discrimination against women. Since to constrain women's rights to abortion is commonly viewed as the discriminatory practice (men can decide about their own bodies whereas women cannot enjoy this right) and since bestowing the status of human

being on the foetus weakens the case for women's rights to abortion, then prohibition of prenatal femicide creates rather than limits gender discrimination (in the remainder I will analyse other reasons why prohibition of prenatal femicide creates gender discrimination).

If we look at the scope of the prohibition in question and realise that it pertains to both prenatal (from the moment of conception) and preconception procedures, we will understand that the theory of identity that makes sense of our conclusion from that point 4. that every foetus is a human being, must be either some variation on *The Same Genotype Account* or some version of *The Same Soul Account*, with the preference for the latter. But both of these theories provide quite strong defence of the foetus as a fully-fledged moral subject. If we essentially are souls then the developmental stage of our body is of no importance whatsoever for our status. If on the other hand we essentially are our genotypes then after conception there is no significant change in our status, only adventitious transitions in our bodies. Particularly *The Same Soul Account* can be apt in the Indian context since it makes room for the idea of reincarnation and the principle of non-injury/non-violence (*ahimsa*). But both of these theories of identity provide strong justification for the protection of foetal life and weaken the case for women's right to abortion.

It is possible however to try to explain the anti-discriminatory judgement in another way, by the reference to the second group of background theories according to which either early foetus is not a human being or identity is not what matters. Let's start with the first option. Since, as I have already noticed, for an act to be an instance of discrimination there must be some being that is discriminated against, these background theories must somehow explain how it is possible that it is not the foetus that is discriminated against but some other entity. The most straightforward attempt to do it was made by *The Interest View* (which although is classified by me as an instance of the theory for which identity is not what matters, on a deep level is an instance of the theory which basically denies early foetus the status

of a human being) within the context of prenatal and preconception harm¹⁴. According to *The Interest View* a recognition of the right of a child to recover from injuries inflicted prenatally and before conception can generate apparent inconsistency with the abortion law and the status of the foetus within the abortion law. At first glance, prenatal and preconception lawsuits assume that the foetus is the same being as the future child whereas abortion law is based on the assumption that early foetus is not a human being. But it does not have to be so. There is another possible interpretation that avoids this inconsistency. As Bonnie Steinbock wrote: “The interest view denies moral and legal status to the early-gestation foetus, providing part of the justification for legal abortion. However, acceptance of the interest view does not preclude prenatal torts, that is, civil suits brought against physicians whose negligence causes children to be born with serious injuries. Although the harm is inflicted prenatally, when the child is a foetus, it is not the foetus, but surviving child, who is affected and wronged by the negligence. Allowing surviving children to recover for injuries inflicted prior to birth in no way implies that preconscious fetuses have interests, rights, or moral or legal status. There is no contradiction in the legal system that both allows for abortion and allows recovery for prenatal torts”¹⁵. So, following this logic one could say that it is not the foetus who is discriminated against and whose rights are violated by the act of prenatal and preconception femicide but a woman who cannot be born and cannot live because of the sex-selective abortion. Unfortunately, this strategy would not work. The difference between the concept of prenatal/preconception harm and prenatal/preconception sex selection is that in the first case there is a surviving child whereas in the second

¹⁴ Ł. Dominiak, *Prenatal Harm and Theory of Identity*, „Political Dialogues. Journal of Biopolitics and Contemporary Political Theories” 2013, No. 1(15), p. 46–52.

¹⁵ *Ibidem*, p. 109.

case there is nobody; and nobody cannot have rights and cannot be discriminated against. The analogy that holds in the case of prenatal femicide is not with the prenatal harm but with the wrongful death lawsuits where parents recover from the death of their child, not the non-existent child itself. So, perhaps there is some other strategy that is able to explain how it is possible that it is not the foetus that is discriminated against but some other entity? I believe that this kind of explanation is impossible because both the concept of rights and the concept of discrimination are based on the assumption that there is somebody who is the addressee of rights or discriminatory actions¹⁶.

There is finally the last option to consider, namely theories that negate the importance of the category of personal identity. According to these theories it might be possible to show that even though sex selection does not violate anybody's rights understood as they are in our society, it is feasible either to re-define concepts of right and discrimination in such a way as to prove that preconception and prenatal sex selection violates rights and discriminates on a gender basis or to explain the evil of preconception and prenatal sex selection in impersonal terms, for instance by modifying Derek Parfit's *The Same Number Quality Claim*¹⁷ in such a way (Let's call it *The Equal Sex Ratio Claim*): "If in either of two possible outcomes the same number of people would ever live, it would be worse of if those who live are of a more unequal sex ratio, than those who would have lived". Since this paper is not about the drawbacks of impersonal ethics that, I believe, are manifold and gargantuan (I believe that

¹⁶ There is some interesting consequence of the analysis presented so far. If preconception and prenatal sex selection cannot be an act of gender discrimination and rights violation because early foetus is not a human being, and since in Indian society women are commonly discriminated against, these procedures, namely preconception and prenatal sex selection, can be viewed not as discriminatory practices but as preventive measures against gender discrimination.

¹⁷ D. Parfit, op.cit., p. 360.

any possible solution within the remit of impersonal ethics would necessarily violate individual liberty and property rights), and since to discuss them even superficially would take another few papers, I will constrain myself only to one argument directed against *The Equal Sex Ratio Claim*.

Let's analyse what *The Equal Sex Ratio Claim* tells us about the acceptability of sex-selective methods. There are two logically possible and equally justified answers to this question. The first of them is that since it is solely the outcome expressed in impersonal terms that counts and since the desirable outcome is to have the most equal sex ratio, we should avoid any sex-selective methods. The second is that since it is solely the outcome expressed in impersonal terms that counts and since the desirable outcome is to have the most equal sex ratio, we should employ sex-selective methods. None of these answers is better than the other. If the outcome is what exclusively counts, and if there are less women in a given society (or in the world) than men, then we can reach this outcome either by letting girls be born (resigning from sex-selective methods) or by killing male foetuses (using sex-selective methods). So, *The Equal Sex Ratio Claim* does not and cannot provide justification for the prohibition of sex-selective methods. It is rather live-by-the-sword-die-by-the-sword kind of explanatory strategy.

Conclusions

In this paper I analysed implications that the prohibition of preconception and prenatal sex-selective methods has for women's right to abortion and for the proponents of the position that women should enjoy extensive freedom in this area. These implications are:

- 1) Prohibition of preconception and prenatal sex selection presupposes that the foetus is a human being who has rights

- and who can be discriminated against and whose rights can be violated.
- 2) To bestow the status of a human being on the foetus weakens the case for women's right to abortion.
 - 3) Weakening the case for women's right to abortion is viewed by the proponents of gender equality as discrimination (men can decide about their bodies, women cannot). So, prohibition of preconception and prenatal sex selection is discriminatory a solution.
 - 4) There is another position that explicitly denies the status of a human being to the early foetus; from the vantage point of this position it is true that: if preconception and prenatal sex selection is not an act of gender discrimination and rights violation because early foetus is not a human being, and since in some societies women are discriminated against, preconception and prenatal sex selection in such societies are not discriminatory practices but preventive measures against gender discrimination.
 - 5) There is finally another position that explicitly criticises the category of personal identity; from the vantage point of this position it is true that: if the outcome is what exclusively counts, and if there are less women in a given society (or in the world) than men (or the other way around), then we can reach this outcome either by letting girls be born or by killing male foetuses (or the other way around).
 - 6) For any possible position different than the pro-life position the prohibition of preconception and prenatal sex-selective methods that are used before the time when the foetus becomes a being that is identical with the future being that is regarded as human being would mean an infringement on individual rights and liberty.

Abstract

The paper analyses by the method of reflexive equilibrium background theories of the prohibition of pre-conception and prenatal sex-selective procedures in India. Particularly, the inquiry focuses on the theory of identity presupposed by the legal solutions. The main thesis of the paper is the contention that metaphysical background theories that the prohibition of prenatal femicide is based on undermining the anti-discriminatory objectives of this prohibition. The paper demonstrates that prohibition of pre-conception and prenatal sex selection presupposes that the foetus is a human being who has rights and who can be discriminated against and whose rights can be violated that considerably weakens the case for women's right to abortion.

Keywords: prenatal sex-selective methods, femicide, gendercide, abortion, Indian law, theory of identity

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