"THE RIGHTS OF THE UNBORN"

I thank Dr. Delon Human, Secretary-General and the World Medical Association for asking me to speak on this increasingly relevant topic of "The Rights of the Unborn".

Who are the Unborn?

There is a tendency in medical law to equate 'the unborn' with human foetus. The unborn refers to (1) The already conceived entity within its mother's womb; (2) The yet-to-be conceived-a hypothetical entity. The latter entity which may seem too abstract has actually received its due in the realm of human rights. However, from a strictly medico-legal point of view, the 'unborn' may be equated with the foetus.

Definition

The foetus has been defined as "a living entity that comes into being as the result of the fertilisation (in vivio or in vitro) of human egg by a human sperm that develops in the uterus of a woman or that is physically separated from a woman's body but is incapable of surviving and developing outside the uterus".

The definition takes within its purview not only embryos but also preembryos and recognises the status of the foetus as a living entity. Foetal life, medically speaking, progresses in five stages: (a) Conception, (b) Implantation, (c) Onset of cerebral electrical activitiy, (d) Viability, (e) Delivery. The term "The Unborn" assumes all these categories.

Address delivered at 51st World Medical Association, General Assembly Scientific Session, TEL. AVIV, Israel 14th October 1999.

Right to Life of the Unborn

The right to life of the 'the unborn' is not merely to be alive but the right to be born alive with a functionally sound body and mind. Extermination of foetus constitutes an infringement of the right to be born alive. External interference (with the foetus) that causes the foetus to be born with physical or mental deformities also constitutes an infringement of the right to be born with a functionally sound mind and sound body. A few situations that may fall within the latter category are genetic disorders or malformations, genetic mutations caused due to interference, accidents, improper and inadequate nutrition during pregnancy, ingestion of various deleterious drugs during pregnancy, infectious disease, undue physical excercise and sexual intercourse during pregnancy, use of drugs and general anaesthesia during labour.

The Primary Issue—Legal Status

Does the foetus have a right to life? The answer to the question would naturally depend upon whether the foetus may be termed a "Human being". One school—by far the most predominant one, dictates that no entitlement may be conferred until the foetus is born as a human person. The Unborn has thererfore, no constitutional or legal entitlements. However "Doctrine of Viability" has been inserted according to which a legal personhood may be conferred upon the foetus in the third trimester of pregnancy when it is capable of survival outside the mother's womb. The other opinion is that when zygote becomes a discrete living organism-immediately after conception, it be considered on par with already born human beings.

In England, under the Infant Life (preservation) Act, 1929 "Any person who with intent to destroy the life of a child cabable of being born alive, by any wilful act causes the child to die before it has an existence independent of its mother shall be.....child destruction and shall be liable.....to penal sevitude for life.....unless for the purspose of only preserving the life of the mother"—Not murdrer but child destruction.

The Penal Code of California contains "Murder is the unlawful killing of a human being, or a foetus with malice afore thought". There is a fundamental similarity between Indian penal code and infant life Act of England. One might always contend that, prior to delivery, a foetus is a part of the body and process of the mother and that if the foetus is terminated through medical or third party acts, the mother can claim damages for

injury caused to person and also initiate prosecution for grievous hurt. But then what if the mother terminates the foetus itself? In other words about abortion?—"Abortion self-inflicted grievous hurt" —though fictuous should come under criminal law.

The Abortion Issue

Abortion is defined as the destruction of a foetus by its removal from the wall of the womb to which it has become attached. The issue of abortion is a highly convoluted one raising questions of a highly ethical and moral nature as well as certain imperatives. Abortion was legalised in USA. Since foetus was not a living person it could not avail of rights, hence there was no right conflict involved in abortion and that being so, abortion was a discretion available to the mother (as an integral part of the right to privacy and bodily anatomy).

In India the Medical Termination of Pregnancy Act 1971 which operates as exception to the provisions of the Indian Penal Code 1860 legalises abortion conditionally. The conditions for termination are as follows... ...

(a) Periodicity	(b) Supervision	(c) Reasons
(i) Less than 12 weeks of pregnancy	One registered medical practitioner	If the concerned medical practitioner opines that
(ii) More than 12 weeks but less than 20 weeks of pregnancy	Two registered medical practitiioners	(a) risk to life/grave injury to physical or mental health of the women
(iii) More than 20 weeks of pregnancy- Abortion disallowed		(b) substanttial risk of child being seriously handi-capped due to Physical/mental abnormalities if born

The conception due to rapes or failure of contraceptive device would be sufficient cause to terminate pregnancy. Similarly, a minor has such a

right irrespective of mode of conception.

The Act thus makes the right of abortion a conditional one taking into account the safety of the woman and progressively stricter set of conditions for abortion with advancement of pregnancy. In essence, there exists three possibilities (1) Foetal life, (2) Mother's right to privacy and bodily autonomy, (3) A balanced perspective—right to abort until a particular stage of foetal development after which primacy shifts in favour of the foetal rights to life.

Justification for Abortion "Social Good"

The justification for abortion is upon the social good and individual entitlement. Justification dictates "Population is getting out of control". One needs to stabilise it. Conception is booming well. Accordingly it is not only pragmatic but also philosophically justifiable to terminate the lives of foetuses. Therefore there are two aspects to the right to life of unborn—on the one hand foetuses being living persons and functionally dependent, hence no justification for complete denial of right to them, and on the other hand—they are not autonomous human entities, as such certain rights—abrogations may be necessitated by social demands and welfare imperatives.

Where have All the Girls Gone? (Table I & II, Graphs I, II & III).

Since 1901 the female population is on decline in India. The decline was dramatic between 1981-91. The cause could be the beginning of new culture of female foeticide. In India the national statistics showed that there were 972 females per 1000 males in 1901 and the figure declined to 927 in 1991. It was feared that out of 8000 foetocides aborted following sex determination, 7999 were female foetocides in Bombay city alone between 1978-82. According to a non-government agency about 2,00,000 female foeticides are estimated to be occurring every year in India and the number of missing women between 40 and 50 million (United Nations Population Division).

Gender inequality and female deprivation are among India's most serious social failures. Instead of achieving progress in promoting gender justice, the gender dicrimination has taken an ugly, extremely voilent and blatant turn. The causes for this practice of female foeticide are that the

daughters are percieved as economic and social burden on the family, worry about her getting married, dowry system, patriarchal society, intrinsically lower status of woman-son preference. "Better to die in the womb rather than to be ill treated later". On the other hand, son is percieved as an asset, a bread winner, capable of suporting himself and rest of the family, no danger to safety or chastity, to continue family lineage, perform funeral rights and support parents in old age. There exists a deep-rooted gender bias in all sections of Indian society.

Prenatal Sex Determination is mainly done by (1) Chorion villous biopsy, (2) Amniocentesis, (3) Ultrasonography.

Chorion Vilwus Biopsy

Performed in the first 7-11 weeks of pregnancy to detect hereditary and congenital defects.

Amniocentesis

Performed in the 16th week of pregnancy and cell culture takes another 3 weeks for antenatal diagnosis of hereditary disease, routinely performed in women over 40 years. In India amniocentesis is synonymous with sex determination tests and if the child is female it is often aborted. Procedure is less expensive in India.

Ultrasonography

Noninvasive, widely used method for sex determination done during 14-16 weeks of pregnancy and the success rate of 96%.

Government of India being concerned with family planning programme became a party to this legalised female foeticide. Amniocentesis technology added fuel to the fire. The problems of female foeticide became so acute that activists group, media persons and intellectuals demanded State intervention. Government of India thought to combat the menace by enacting a separate legislation (PNTD).

Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 (PNDT) India

PNDT Act was enacted in 1994 by an Act of Parliament of India. The

Act prohibits misuse of prenetal diagnostic techniques for detection of sex of foetus leading to female foeticide and regulates it for the purpose of specific genetic abnormalities or disorders.

Nevertheless, abortion being left to the discretion of medical practitioner under "Medical Termination of Pregnancy Act" before the 20th week of pregnancy, in effect, is undertaken in any circumstance. Hence the PNDT may not effectively be a punishment offence.

Government of Tamilnadu has launched the 'Cradle Babies' scheme whereby families were requested to abandon their unwanted female child at primary helath centres and families were also offered monetary incentives. Similiar scheme was announced for the nation as a whole by the Government of India. But longterm social intervention strategies which enhance the status of women and disciplining the doctors are the only ones which are most likely to succeed in reducing female foeticide.

Battle Against Gender Bias

Indian Medical Association (IMA) proposes to lead a massive campaign against female foeticide. As a first step IMA in association. with UNESCO organised a National Workshop on "Gender Bias female foeticide and female infanticide" on 7th and 8th August 1999 at New Delhi. The workshop arrived at an Action Plan' to combat this social evil. The action plan is a holistic approach against unholy alliance of Tradition and Technology. Action comprises of setting up of surveillance cell, mass awareness programmes, generating gender sensitivity among public, empowerment of women through social and economic independence that strikes at the low status of women in society.

Right to Life *vs.* A Right Against Injury

Unborn person could enforce his/her such a right only upon birth. But a system which considers abortion legal but confers a course of action upon the child in respect of injuries, a strange contradiction arises wherein the foetus has a right against injury but not a right against its termination.

Infringement of Rights of the Unborn Circumstances

Given the definition of right to life of the unborn, two distinctive

circumstances of violation emerge.

I. Negation of life—"Termination of foetus".

II. Deprivation—Defects from the norm; of functional soundness of mind and body-injuries inflicted upon the foetus.

I. Violation (Termination of Pregnancy)

(i) Abortion–Abortion of the child by mother, either by mother's consent or mother's negligence. **(ii) By accident**—In spite of all due care and precaution, the accident was bonafide one and unavoidable, no liability may be fixed. **(iii) Through negligence—**Through negligence by a third party or medical negligence. The expected standard care is higher in the latter and negligent person may be held responsible. **(iv) 'By intent'** such persons are covered by Indian Penal Code Act.

II. Violation (Congenital and Genetic Malformation and Teratogenic Influence)

Feotus is killed by teratogenic influence. Such deaths may occur in vitro or immediately after birth. In such cases, exact nature of the teratogen, its interference and the reasons for its ingestion and the person responsible for its ingestion have to be identified, Action may arise against the mother, the doctor or a third party.

Duty, Standard Care and Liability

Three major parties that emerge as causative agents of potential infringement of the unborn persons to right to life are third parties, the doctor and parents, especially the mother.

The duty and standard care expected of a third party is that of a reasonable man but doctors are expected to adopt a higher standard of care commensurate with the professional responsibilities. Standard care expected of parents particularly that of mother is also necessarily higher—that of a reasonably prudent expecting parent—such standards are conditioned by community standards.

The liability of the third party to the unborn person is conditioned by

the law of Tort and that of the doctors by medical negligence. Because of the fact that the foetus is absolutely dependent on the mother, two aspects that involve the parents are (1) Medical-*e.g.,* physical control (accidents), nutrition, use of drugs, behaviour of the mother during pregnancy, and (2) Legal which is more complex because of extraneous medical and social causes.

The Parent-Child-Immunity Doctrine

This doctrine was postulated on the plea that no course of action against the parents is desirable in the public and familial interest and also because of technical disability.

Right to Compensation Against Parents When and How?

There is no real period of limitation within which a person should act. There should be no unreasonable delay. The point of time when the born person comes to know of the injury caused to him is also a relevant one. There exists no hurdle in fixing the liability upon the third parties and doctors. The fixation of parenteral liability causes probtem but the next friend of the child who is willing and able may be the person to institute the suit.

Congenital and Genetic Malformation

Wrongful Birth : The mother or father might not have desired a particular birth had all the facts been known, and for lack of proper service action, a defective child is born. The fault lies against the person who should have known the information or was in a position to find out the information and did not advise the parents or advised her/him wrongly. A and B, husband and wife decide to have a child. B is 40 years of age. They go to an obstetrician for advice and the obstetrician encourages them to go ahead and have the baby. The baby is born with Down's syndrome. It has been medically established that older the mother, the greater the chance of the baby being born with congenital defect. B (mother) decides to sue the obstetrician through wrongful birth for non-disclosure of the fact that having a baby at 40 was risk-prone. She contends having that when a patient asks an obstetrician whether she can have a baby, she means a normal and functionally sound baby and not a mongoloid. Doctors and

medical experts shall be presumed to know the consequences of their acts if such consequences are known to medicine.

Wrongful Life : A child who has been defective brings a legal action on the basis that the child did not desire to be born into an existance of suffering and that this came about through negligence on the part of those who were in a position to avert this tragedy. This constitutes wrongful life action. A child may sue the doctor through the parents for wrongful life on the ground that if the obstetrician had informed the parents about the possibility of giving birth to a baby with malformation, parents would not have had the baby. Secondly if the doctor advises about the possible genetic defects that their child migfht suffer, but the parents decide that a genetically deformed child is better than no child at all and decide to have a baby and a defective child is born; here the legal action is against parents.

Conflicts—Parental Right *vs.* Right of Unborn

In India, legal position does not read into the constitutional entitlement in the context of right to life. Suicide and euthanasia are illegal actions. If one does not have a right to die-one has no right to be born. Prenatal right to life is riddled with rights and legal conflicts, eg., a pregnant woman who is in need of urgent blood transfusion to save potential damage to the foetus raises an objection to the transfusion on religious grounds. Here the idelogical autonomy prevails (The right to freedom of belief and conscience under Art 19).

A pregnant woman aware of consequences of her act continues to smoke during pregnancy asserting her right to bodily autonomy and privacy. It boils down to the question of the right to smoke and the right to a functionally sound mind and body of the person (baby). It seems logical that foetal right prevails.

INTERFACE : A pregnant woman with serious illness is admitted to the hospital where she dies. An emergency Caesarian Section is performed. A child with brain damage is delivered.

Doctors who were questioned why the foetus was not delivered earlier so as to avoid the damage it suffered, replied that had such an operation been performed the least fighting chance of mother for survival would have been extinguished.

References

1. Ashis Bose; Gender issues and Population change : Tradition, technology and social turbulance. International Social Science, Journal Population: Issues and policies UNESCO 1994,141:387.

2. 'Avashesh' Female Infanticide and Foeticide-A Legal Perspective 1999; Centre for Child and the Law 1999 National Law School of India Univeristy, Bangalore-72.

3. National Workshop on Gender bias: Female FoeticidelInfanticide; IMA & UNESCO 7th and 8th August 1999, New Delhi.

4. Sandeep Srikumar, Legal Aspects of the right to life of the Unborn. Law and Medicine 1997, Vol. 3.50, Institutute of Law and Ethics in Medicine, Bangalore-560 072.

5. Vatsalya, Lucknow-22 6016, India.

TABLE-I

POPULATION BY SEX DECADAL VARIATION AND SEX RATIO

1901-1991

	Population (in Milloion)			Percent Decada Variation		
Year	Persons	Male	Female	Person	Female	Sex-Ration
1	2	3	4	5	6	7
1901	238.40	120.79	117.36	-	-	972
1911	252.09	128.39	123.71	+5.75	+5.41	964
1921	251.32	128.55	122.77	-0.31	-0.75	955
1931	278.98	142.93	135.79	+11.00	-10.60	950
1941	318.66	163.69	154.69	+14.22	13.92	945
1951	361.09	185.53	175.56	+13.31	+13.49	946
1961	439.23	226.29	212.94	+21.51	+21.29	941
1971	548.16	284.05	264.11	+24.89	+24.03	930
1981	683.33	353.37	329.95	+24.65	+24.93	934
1991	846.30	439.23	407.07	+23.85	+23.37	927

GRAPH-I

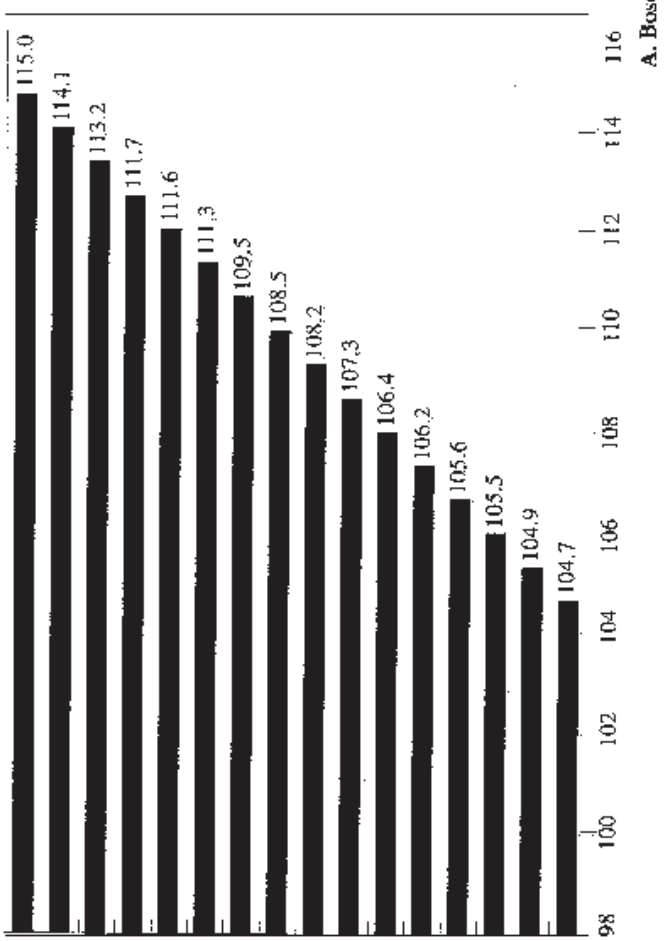

SRS Estimates of Sex Ratio at Birth, 1981-90
(Male live births per 100 female live births)
Haryana 115.0
Rajasthan 114.1
Punjab 113.2
Bihar 111.7
Uttar Pradesh 111.6
Gujarat 111.3
INDIA 109.5
Maharashtra 108.5
Madhya Pradesh 108.2
Karnataka 107.3
Assam 106.4
Orissa 106.2
West Bengal 105.6
Kerala 103.5
Tamil Nadu 104.9
Andhra Pradesh 104.7
98 100 102 104 106 108 110 112 114 116
A. Bose

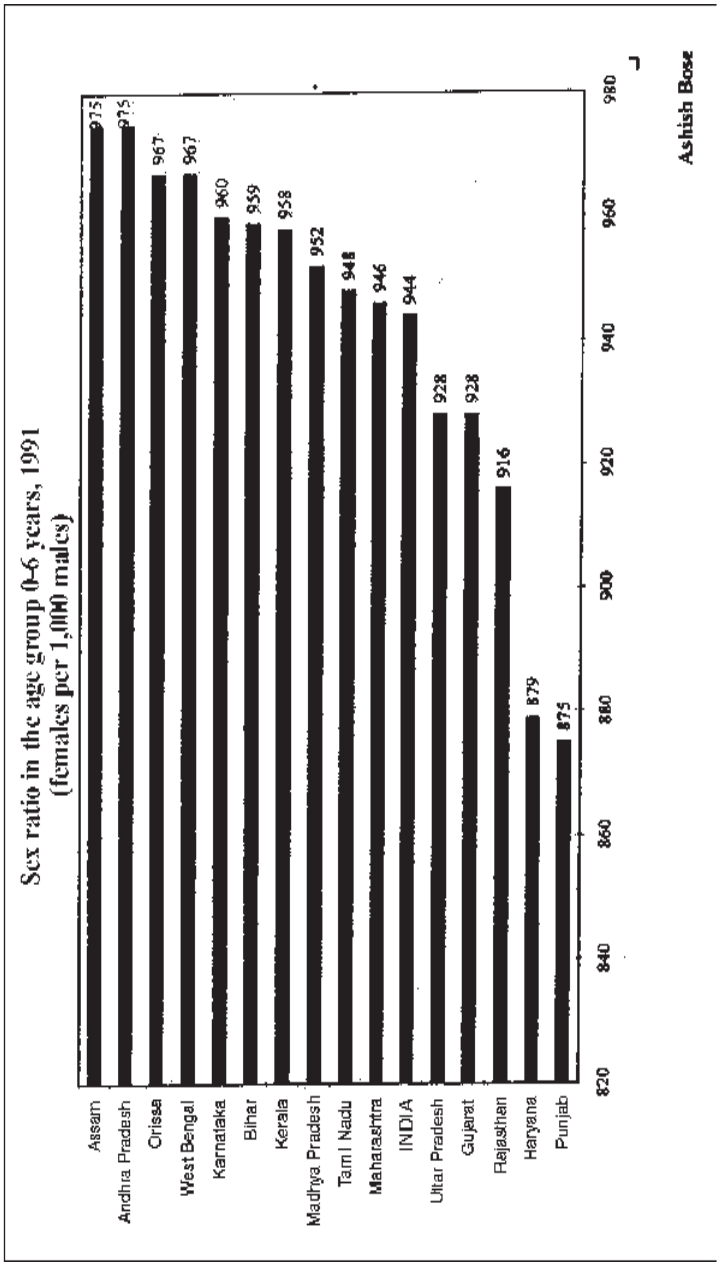
TABLE-II

SEX RATIO IN SOME SELECTED STATES, 1991

State	Sex Ratio (Female/1000 male)
Andhra Pradesh	972
Bihar	911
Gujarat	934
Haryana	865
Himachal Pradesh	976
Jammu & Kashmir	923
Karnataka	960
Kerala	1036
Madhya Pradesh	931
Maharashtra	934
Orrisa	971
Punjab	882
Rajasthan	910
Tamilnadu	974
Uttar Pradesh	879
West Bengal	917

Source : Census of India, 1991, Final Population Totals: Brief Analysis of Primary Census Abstracts, Series 1, Paper 2, 1992.

GRAPH-II


Sex ratio in the age group 0-6 years, 1991
(females per 1,000 males)
Assam 975
Andhra Pradesh 975
Orissa 967
West Bengal 967
Karnataka 960
Bihar 959
Kerala 958
Madhya Pradesh 952
Tamil Nadu 948
Maharashtra 946
INDIA 944
Uttar Pradesh 928
Gujarat 928
Rajasthan 916
Haryana 879
Punjab 875
820 840 860 880 900 920 940 960 980
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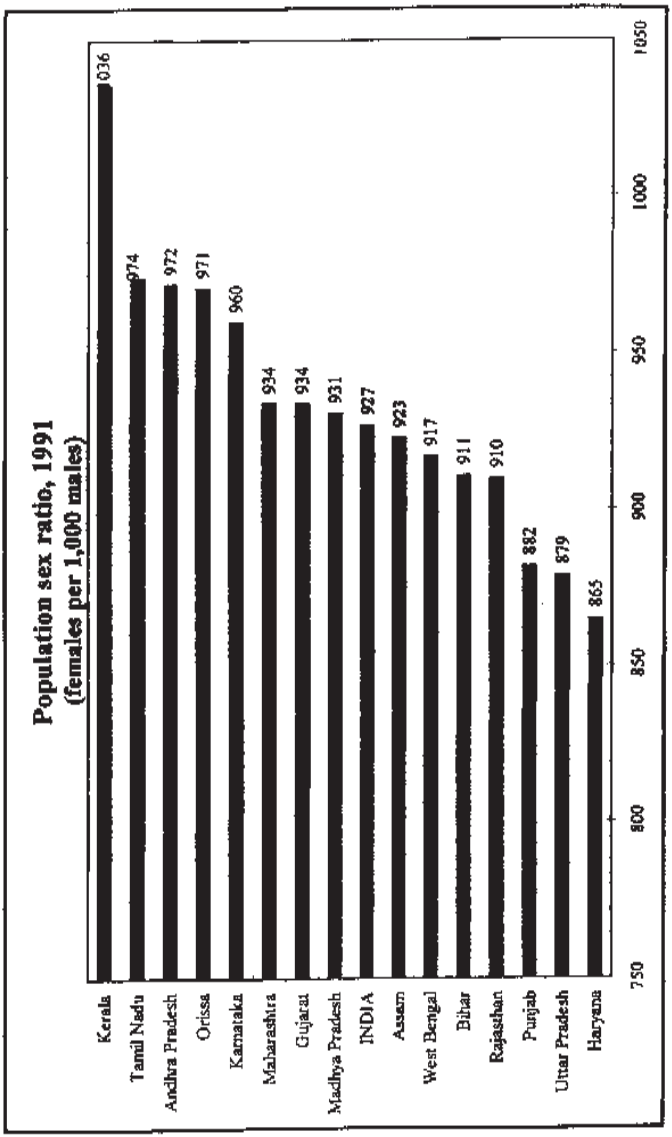
GRAPH–III



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