



Sex selective abortions: A legislative approach

Falak Naaz

Ph.D. Scholar, Central University of Kashmir, Jammu & Kashmir, India

Abstract

Gender bias, deep rooted prejudices, and discrimination against girl child have led to many cases of female foeticide in the country. Medical Termination of Pregnancy Act, 1971 passed by the Parliament of India significantly liberalised the abortion laws in India in conformity with the ethical, moral and humanitarian sentiments of our people. Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003 regulates the pre-conception and pre-natal sex selection and determination of sex before the birth of the foetus. Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 passed by the parliament of India is a comprehensive legislation. In this Act the techniques of pre-conception sex selection have been brought within the ambit of the Act so as to pre-empt the use of such technologies, which significantly contribute to the declining sex ratio. However PCPNDT Act has not been successful to curb out this menace completely due to poor implementation of the said legislation.

Keywords: foeticide, pre- natal, pre-conception, determination, medical termination, legislation

Introduction

India's legal framework stipulates equal rights for all regardless of gender. In practice, however, unequal power equations between males and females have led to violations of women's reproductive rights. The girl child has often been a victim to the worst forms of discrimination. Gender bias, deep rooted prejudices, and discrimination against girl child have led to many cases of female foeticide in the country. Strong male preference, with the extreme consequences of elimination of the female child, has continued to increase rather than decline with the spread of education and economic development. This trend has been helped further with the progress in science and technology^[1]. Female infanticide now in most places has been replaced by female foeticide. Denial to a girl child of her right to be born and to live with dignity is one of the heinous violations of the right to life^[2].

During the recent past, one of the worst forms of violence committed against the fair- sex is that girl child is not allowed to be born and through various medical and technological devices, the sex of the foetus is ascertained and if it happens to be female, the foetus is destroyed and if it happens to be a male it is allowed to be born and is all welcome in the family. The rise in female foeticide has assumed dangerous proportions and as such many constitutional and legislative guarantees and protections have been incorporated in the Indian legal system to arrest this menace. The Constitution ensures not only gender equality in its preamble and recognised as a Fundamental right but also empowers the state to adopt measures of positive discrimination in favour of

women by ways of legislation and policies^[3].

Constitutional Provisions

Right to Equality and Prohibition on Grounds of Sex

Article 14 thus means that 'equals should be treated alike'; it does not mean that 'unequal ought to be treated equally'. Persons who are in the like circumstances should be persons treated equally. On the other hand, where persons or group of persons are not situated equally, to treat them as equals would itself be violative of Article 14 as this would itself result in inequality.

The Constitution specifically bars any classification on the grounds only of religion or caste or race or sex or place of birth. Therefore, no classification can take place on the ground of sex. Indian Constitution has conferred equality of status and opportunity to all citizens, whether men or women, including the right to take birth.

Article 14 embodies the general principle of equality. A specific application of the same is provided in Article 15. Article 15 concretises and enlarges the scope of Article 14. According to Article 15 all laws are to be applied to members of both sexes equally, and there is an express prohibition on discrimination on the ground of sex. The right guaranteed in clause (1) of Article 15 is conferred on a citizen as an individual and is available against his being subjected to discrimination in the matter of rights, privileges and immunities pertaining to him as a citizen generally^[4]. Once the principle of equality is accepted it becomes impossible to discriminate against any person or group of persons. The principle of non- discrimination is based on equality and dignity. Discrimination can be said to be the denial of

¹ B.R Siwal, Preventive Measures for Elimination of Female Foeticide, available at www.eldis.org/fulltext/preventive_measures_for_female_foeticide.pdf. (Visited on 25 May 2013 at 3:25pm).

² *Ibid*.

³ Preamble of the Constitution of India, 1950.

⁴ Sheetal Mishra, "Gender Justice: The Constitutional Perspectives and the Judicial Approach", 55 *AIRJ* 2006.

fundamental Rights and universally accepted rights of all human beings. However, the provisions of non-discrimination on this account do not prevent the state from making any special provisions for women and children ^[5]. Clause (3) of article 15 provides that special treatment of women on account of the peculiar position of women in India is justifiable and is not violative of clause (1) of Article 15. The main object of Article 15(3) is based on 'protective discrimination' keeping in view the weak physical position of women. The reason is that "women's physical structure and performance of maternal functions place her at a disadvantaged position in the struggle for subsistence, and her physical well-being becomes an object of public interest and care in order to preserve the strength and vigour of the race. This provision has enabled the State to make special statutory provisions exclusively for the welfare of the women ^[6].

Thus, by incorporating Article 14 and 15, the status of women has been uplifted and a new life of equal rights at par with men has been accorded to them by the Indian Constitution.

Right to Life

Article 21 ^[7] of the Indian Constitution guarantees the protection of life and personal liberty of persons. The marginal note of Article 21 gives protection against deprivation of life. It clearly mentions; "protection of life" is a basic human right and the absence of which renders all the other rights meaningless, useless and worthless. In today's scenario, this right has received a global recognition and it has been incorporated in almost all the human rights legislations all over the world. Of late, the horizons of right to life has been widened by judicial interpretation and today it encompasses all the elements which one can think of as an aspect for leading a complete, clean, healthy and dignified life ^[8]. Taking of life without lawful means is forbidden from a religious, philosophical as well as legal perspective. Human beings have been the target of other human beings to be killed ^[9]. In all cases persons aggrieved can claim violations of their human rights as they have a physical existence and voice but the same is not true for unborn babies. So the big question; does the foetus have a human right not to be aborted? Of course, such potential human being cannot utter such claim but, the key is whether we have sufficiently strong reasons to act in such a way.

Abortion has been practiced from earlier times and from then the question of human existence has long been linked to this issue. This sensitive issue is one of the debated matters in the public discourse and it is intellectually difficult even for an expert to give a simple answer of the issue that it raises. The matter of abortion is related to legal, political, social, ethical, scientific, religious, and human rights matters.

Right to Life of a Foetus

Although there is no law so far which explicitly guarantees the

right to life to a foetus there are a number of statutes that indirectly provide protection to the life of foetus. But it is only an escapist view to deny the right to life to a foetus saying it is not a person. The state is evading the crucial issue of right to life of a foetus by giving frolicsome reasons, although it indirectly recognizes this right through criminal statutes and also recognizes that an unborn can enjoy certain interests in property. In the light of the discussion above it is agreed that foetus should enjoy the right to life. The foetus should be recognized as a separate entity enjoying distinct legal right and is not a part of the mother. The concept of personhood is a myth and a mere creation of law. This legal fiction must not come in the way of conferring rights to the foetus. Failure to recognize the rights of the foetus would amount to discrimination thereby violating the right to equality enshrined in Article 14 of the Indian Constitution ^[10].

Statutory Provisions

Indian Penal Code

Until 1970, the provisions contained in the Indian Penal Code, 1860, governed the laws of abortion. There are a number of provisions that can be invoked in order to prosecute a person convicted for the offences of female foeticide, Infanticide or sex selective abortions. According to Section 312 if any person causes a miscarriage of woman, he shall be punished with the imprisonment up to three years or fine or with both, and if the woman be quick with child, he shall be punished with imprisonment up to seven years and fine also. Under this section a woman who causes her miscarriage or gives consent to miscarry is also liable for punishment.

Section 313 provides the punishment for life or ten years and fine, who causes the miscarriages of a woman without her consent. However the IPC permits abortion for saving the life of the pregnant women. Section 312 allows the termination of pregnancy in good faith for saving the life of the pregnant woman. In addition to these, Section 315 and 316 provides for protection against injuries to the unborn child. Section 315 lays down that any person doing an act without good faith with the intention of preventing a child to be born or to cause it die after birth is punishable with imprisonment of ten years or fine or both. Section 316 provides if a person causes the death of a quick unborn child by an act amounting to culpable homicide he shall be punishable with imprisonment for ten years as well as be fined.

Medical Termination of Pregnancy Act 1971

In 1971, the Parliament of India passed the Medical Termination of Pregnancy Act (*hereinafter referred to as The MTP Act*), which significantly liberalised the abortion laws in India. The MTP Act was implemented from April, 1972.

The MTP Act is a piece of social legislation. The wisdom of makers of the Act deeply felt the urgent need of controlling unwanted growth of population in existing socio-economic condition and then conferred, on woman, certain rights by legislating this statute in conformity with the ethical, moral and humanitarian sentiments of our people. In our country, the liberalization of abortion law has a limit up to 'for social reasons' and has not been extended to 'on request' stage and

⁵ Article 15(3) of the Indian Constitution.

⁶ *Supra* Note 15 at 56.

⁷ No one shall be deprived of his life or personal liberty except according to the procedure established by law.

⁸ Sapna Rathi, *Sex Determination Test and human Rights* 192-193 (Deep and Deep Publications, New Delhi, 2012).

⁹ *Supra* Note 18.

¹⁰ *Supra* Note 27 at 15.

for this social reason we have this MTP Act. Science only looks after the technical aspects of this system whereas the law has to take care of its implementation which certainly depends upon the cultural, ethical, religious and economical background of the various sections of our society. Medical termination of pregnancy (MTP) is a respectable term for abortion. It follows that the MTP Act 1971 is an abortion law. According to the Act, when the length of pregnancy does not exceed 12 weeks, one medical practitioner can perform abortion; when it exceeds 12 weeks but does not exceed 20 weeks, not less than two practitioners should perform the abortion. The sex of the foetus will not be known until the pregnancy is 12-14 weeks old. Couples opt for female foeticide after the sex of the foetus is known, that is, after the pregnancy is more than 12-14 weeks old.

The MTP Act 1971 allows abortion when continuance of the pregnancy endangers the life or physical/mental health of the woman; if it is going to result in genetic abnormalities in the child; when the pregnancy is caused by rape; or when it occurs as a result of failure of any family planning device or method adopted by the couples. It is well known that even educated and economically well-off couples resort to female foeticide. Some unscrupulous couples who are aware of the provisions of the MTP Act 1971 might mention one of the reasons for the MTP and resort to sex selective abortions. The doctor who ultimately does the MPT may not even be aware of the reason that he/ she is doing it on the ground that a female child was not needed by the parents. The parents may say to the doctor that they do not just want the child at this particular moment which as per the MTP Act they have a right to do so ^[11].

The number of MTPs performed increased from 388,405 in 1980-81 to 770, 714 in 2001-02. Not all the additional MTPs are sex selective abortions. But one can say with certainty that some of them could be female foeticides. Although it may be said that the MTP Act 1971 abets female foeticide, it is difficult to suggest the extent to which it does ^[12]. Therefore, MTP Act 1971 should be amended in such a way that it permits the abortion of only the first trimester pregnancies, and not those which are more than 12-14 weeks old when the sex of the foetus will be known.

Need for the PNDT Act

The diagnostic technologies that are useful for detection of genetic disorders, chromosomal abnormalities, congenital malformations or birth defects, also make sex detection of the foetus easy. This information led to replacing the traditional forms of eliminating a female child through measures such as female infanticide by the pre-birth sex detection and subsequent elimination. Because of simplicity of the tests and their easy availability, female-specific abortions appear to have become popular and widely used. However due to the relentless efforts of activists and after intensive public debate all over India, the Parliament enacted the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act on 20th September 1994 and it was brought into operation from

1st January, 1996.

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 - (Unamended)

The Act was passed on 20th September 1994. The act regulates the use of Pre-natal sex determination techniques. It permits the use of pre-natal sex determination techniques for the purpose of detecting genetic or chromosomal disorders or certain congenital mal-formations or sex linked disorders and not for the purpose of killing the female child in the mother's womb.

Structure and Content of the Act

The Act has two aspects viz; regulatory and preventive.

Regulatory Measures

- The Act permits and regulates use of Pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders.

The provisions of the Act permit use of Pre-natal diagnostic techniques under certain specified conditions by registered institutions. These conditions are:

1. The age of the pregnant woman must be above 30 years.
2. The pregnant woman has undergone two or more spontaneous abortions or foetal loss.
3. The pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disorder.
4. The pregnant woman must give her consent in writing to undergo such a procedure.
5. All the side effects of such procedure must be explained to the pregnant woman.

Preventive Measures

- The Act prohibits misuse of Pre-natal diagnostic techniques for determination of sex of foetus leading to female foeticide.
- It prohibits advertisement of Pre-natal diagnostic techniques for detection of sex of the child.

Punitive Measures

- Both the medical practitioner who offers such service and the person who seeks such service are liable for punishment of imprisonment up to three years and a fine which may extend up to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and a fine which may extend to fifty thousand rupees. In addition the Medical Council of India could take an action to remove the name of such doctor who has been convicted for such an offence for a period of two years.

Authorities under the Act

- The Act has a Central and a State level Supervisory Board an Appropriate Authority and Supporting Advisory Committee.

Constitution and Functions of the Supervisory Board

The Central Supervisory Board consists of Minister of family Welfare, as a Chairperson, Secretary to Government of India

¹¹ Shakeel Ahmad, "Pre-Natal Diagnostic Techniques - A source of Gender Bias" 206 *KULR* 1998.

¹² P. Sundaramma, *Does Abortion Law Abet Female Foeticide*, *The Hindu* 27 May 2012.

in Charge of family welfare, as its Vice Chairperson, and others to advise the government on policy matters relating to use of pre-natal diagnostic techniques to review implementation of the Act to create public awareness against the practice of pre-natal determination of sex and female foeticide, to lay down the code of conduct to be observed by persons working in Genetic counselling centres, laboratories and clinics. The function of the Supervisory Committee is to oversee, monitor and make amendments to the provisions of the Act.

Powers and Functions of the Appropriate Authorities

The Act empowers the central Governments to appoint Appropriate Authorities for the states and the union territories to appoint appropriate committees to enforce standards prescribed for the genetic counselling laboratories, counselling centers and clinics, monitor registration for such centers, to investigate complaints of breach of the provisions of the Act, etc.

Although, the law was meant to protect the child-bearing function of the woman and legitimize the purpose for which the Pre-natal tests and abortions should be carried out. However, in practice we find that these provisions have been misused and have proved to be against the interests of the females^[13].

Analysis of the Act

The PNDA Act 1994, was brought to provide for regulation and use of pre-natal diagnostic techniques for the purpose of genetic and metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for prevention of misuse of such techniques for pre-natal sex determination for the purpose of committing female foeticide and for matters concerned and incidental to such acts^[14]. But there were certain loopholes in this law and doctors taking advantage of these loopholes continued to abort the girl child with impunity. The Act for all intents and purposes have proved to be a toothless tiger, because it faces the problem of interpretation as well as implementation. Firstly, the intent and purpose of the Act, undoubtedly being prevention of sex determination, it has not been interpreted by ultrasonologists, abortionists, doctors and more shockingly Government alike, in order to exclude pre-conceptual sex selection^[15]. This has conveniently allowed the medical practitioners using modern technology to escape the legislative net. They used to apply a technique called as 'Pre-Implantation Genetic Techniques' (PGD)^[16], and the

Ericsson method^[17]. By use of the PGD technique the female chromosomes are destroyed and male chromosomes are allowed to fertilise without any fear of law as in case of any detection doctor will plead that his act was pre-conceptual and not pre-natal^[18]. Secondly, since most of the restrictions pertain to government hospitals and registered clinics, it led to commercialization and since the use of technology in private clinics brooms it; they do not come under the ban. Thirdly, the government is having power to overrule the decisions of the body set up to monitor facilities, which is empowered to suspend or cancel the license of offending clinics. Fourthly, PNDA Act only focuses on the regulation and controls the techniques of pre-natal sex determination, and not the access to abortion in any form^[19]. Besides the above there are various other flaws in the Act. The 2002 amendment in the PNDA rules, 1996, inserted two new categories of units, i.e. the "Ultrasound Clinics" and the "Imaging Centres". The Rules however, do not provide for any directives as to the requisites for the registration of such units. Secondly, the Rules prescribe for additional training/experience to be possessed by the medical professionals in the registered units. However, the procedure for the certification of such training/experience is not prescribed. Thirdly there appears to be a scope for conflict between the opinions of the Advisory Committee and the Appropriate Authority as neither the Act nor the Rules provide for a situation where the advice of the Advisory Committee is at variance with that of the Appropriate Authority, as the Rules of the Advisory Committee prescribe that the advice tendered by it "shall be adopted". Also, while the role of investigation and inspection of units have been entrusted to the Appropriate Authority, the Police have no role to play. Apprehensions have been expressed by Appropriate Authorities regarding the undertaking of activities such as search and seizure. Another concern raised by the Appropriate Authority is that they have numerous other functions to perform and therefore are unable to devote enough time to carry out their functions efficiently. Also the Penal provisions under the Act are not strong enough to act as a proper deterrent.

A negative outcome of the PNDA Act, was that the practice of sex determination was driven, nonetheless and the availability of service proliferated, correspondingly ultrasound machines continued to be widely available and simple to use. In such an environment it was very difficult to enforce a law which sought to control information that travels through informal channels and can operate secretly. Law cannot control the information that is conveyed through a mere smile or frown on one's face. Unsurprisingly the enforcement of law becomes

¹³ *Supra* Note 33.

¹⁴ Section 2(4) of the PNDA Act 1994.

¹⁵ Gulafroz Jan, "Female Foeticide –A Socio-Legal Analysis" 216 *KULR* 2007.

¹⁶ The Pre-implantation Genetic Diagnosis is a complicated technique which is done in order to study the genetic blue-print to determine whether the embryo is male or female. The extricated cell from this technique for the sex selection purpose is doused with two fluorescent probes: Chemical stains that single out the x and y chromosomes from the intricate genetic master plan. It is then bathed in a stainless steel water-bath to wash away unwanted cellular debris that could interfere with the analysis. Freshly scrubbed X (female) shows up as a pink dot under a special fluorescent microscope, while Y (male) reveals itself as a bright green speck. The embryos that turn out to be male, which always fewer in number, are then

implanted in the woman's uterus and the remaining female embryos are simply discarded.

¹⁷ In the Ericsson's method first a semen sample is diluted and then centrifuged. X and Y bearing sperms and separation when placed in a chemical solution. The faster moving Y sperms penetrate the solutions denser bottom layers, which are collected and centrifuged. The process is repeated and the Y concentrate is collected for artificial insemination. The method is said to have a success rate of about 70% of producing a male child. The method is said to be very expensive, but is still being tried by many families in metropolitan cities.

¹⁸ S.M Afzal Qadri, "Women and Law Relating to Sex Determination Test" 123 *KULR* 2007.

¹⁹ *Supra* Note 67.

weak, there is still utmost controversy as to who will serve as the watch dog to control the misuse of the practice of female foeticide and its implementation is difficult and considering it can only be the doctor who carries the abortion or mother of the foetus who can be punished. This is very ambiguous as many women are indeed forced by family members to go ahead with an abortion of a female foetus. Thus, once again putting the life of thousands of women in danger. Other reasons for limited effectiveness of the law include lack of political will to ensure enforcement. Experience has shown that in general the role of legislation in subverting social evils is limited.

On January 17 2003, the government of India amended its Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 that was renamed as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. It was amended after a Public Interest Litigation^[20], was filed by the CEHAT^[21], MASUM and Sabu George for the implementation of the PNDT Act, 1994. The said Act has since been amended with effect from 14th February, 2003 to make it more comprehensive. The techniques of pre-conception sex selection have been brought within the ambit of the Act so as to pre-empt the use of such technologies, which significantly contribute to the declining sex ratio. Implications of the amendment are

1. Amendment of the Act mainly covers bringing the technique of pre conception sex selection within the ambit of the Act;
2. Bringing ultrasound within its ambit;
3. Empowering the Central Supervisory Board, constitution of State level Supervisory Board;
4. Provision for more stringent punishments;
5. Empowering appropriate authorities with the power of civil court for search, seizure and sealing the machines and equipments of the violators;
6. Regulating the sale of the ultrasound machines only to registered bodies.

One of the important features of the Central Act is that it has expressly included the new and recently developed medical techniques in its ambit. They are PGD, Ericsson method or Pre-implantation Genetic Diagnosis^[22]. According to the Act, the person who seeks the aid of genetic ultrasound clinic or any medical geneticist for sex selection shall be subject to imprisonment for a period of 3 years and a fine of Rupees 50,000.

Pre-natal diagnostic techniques (prohibition of sex selection) act, 2003

The Act is proposed to prohibit pre-natal diagnostic techniques for the determination of sex of the foetus leading to female foeticide. The Act of 2003 provides for:

1. New sections 3-A^[23], and 3-B^[24], have been added after

section 3 of the principal Act. Both these sections aim at preventing sex selection tests by restricting sale of required machinery to registered clinics only.

2. The term sex selection and other terms have been defined in the amendment to section 2 of the principal Act. It says "sex selection" includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex.
3. A new section, Section 16-A^[25], has been inserted which

a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

- 24 3B. No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act."

25 Section 16A.

- (1) Each State and Union territory having Legislature shall constitute a Board to be known as the State Supervisory Board or the Union territory Supervisory Board, as the case may be, which shall have the following functions: -
 - (i) to create public awareness against the practice of preconception sex-selection and pre-natal determination of sex of foetus leading to female foeticide in the State;
 - (ii) to review the activities of the Appropriate Authorities functioning in the State and recommend appropriate action against them;
 - (iii) to monitor the implementation of provisions of the Act and the rules and make suitable recommendations relating thereto, to the Board;
 - (iv) to send such consolidated reports as may be prescribed in respect of the various activities undertaken in the State under the Act to the Board and the Central Government; and
 - (v) any other functions as may be prescribed under the Act.
- (2) The State Board shall consist of: -
 - (a) the Minister in-charge of Health and Family Welfare in the State, who shall be the Chairperson, ex officio;
 - (b) Secretary in-charge of the Department of Health and Family Welfare who shall be the Vice-Chairperson, ex officio;
 - (c) Secretaries or Commissioners in charge of Departments of Women and Child Development, Social Welfare, Law and Indian System of Medicines and Homeopathy, ex officio, or their representatives;
 - (d) Director of Health and Family Welfare or Indian System of Medicines and Homeopathy of the State Government, ex officio;
 - (e) three women members of Legislative Assembly or Legislative Council;
 - (f) ten members to be appointed by the State Government out of which two each shall be from the following categories:-
 - (i) eminent social scientists and legal experts;
 - (ii) eminent women activists from nongovernmental organizations or otherwise;
 - (iii) eminent gynaecologists and obstetricians or experts of stri roga or prasuti-tantra;
 - (iv) eminent pediatricians or medical geneticists;
 - (v) eminent radiologists or sonologists;
 - (g) an officer not below the rank of Joint Director in-charge of Family Welfare, who shall be the Member Secretary, ex officio
- (3) The State Board shall meet at least once in four months.
- (4) The term of office of a member, other than an ex officio member, shall be three years.
- (5) If a vacancy occurs in the office of any member other than an ex officio member, it shall be filled by making fresh appointment.
- (6) If a member of the Legislative Assembly or member of the Legislative Council who is a member of the State Board, becomes Minister or Speaker or Deputy Speaker of the Legislative Assembly or Chairperson or Deputy Chairperson of the Legislative Council, she shall cease to be a member of the State Board.
- (7) One-third of the total number of members of the State Board shall constitute the quorum.
- (8) The State Board may co-opt a member as and when required, provided that the number of co-opted members does not exceed one third of the total strength of the State Board.

²⁰ *CEHAT v. Union of India*, A.I.R 2002 (5) SCC 577.

²¹ Centre For Enquiring into Health and Allied Themes.

²² *Supra* Note 70.

²³ Section 3A. 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

provides for the constitution of the state Advisory board and Union Territory Supervisory Board.

4. Another section, section 17-A ^[26], defining powers of appropriate authority has been added. This section empowers the appropriate authority to summon any person, who is in possession of any information relating to violation of provisions of the Act and issue search warrant of provisions of a place suspected to be indulging in sex selection techniques.
5. Corresponding changes in several other sections were also done by means of amendments in section 2, 3, 4, 5, 6, 7, 14, 16, 17, 18, 22, 23, 24, 28, 30 and 32 of the Act as required as a result of prohibition of sex selection techniques and sale of ultrasound machines.
 - i) Section 3: Clause 2 of the section was changed and substituted by a new section which reads as follows: no Genetic Counselling Center or Genetic Laboratory or Genetic Clinic shall employ or cause to be employed or take services of any person, whether on honorary basis or on payment who does not possess the qualifications as may be prescribed.
 - ii) Section 4: In section 4 of the principal Act, for clauses (3) and (4), the following clauses were substituted, namely:- (3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing 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 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 or her spouse has a family history of mental retardation or physical deformities such as, spasticity mental retardation or physical deformities such as, spasticity or any other genetic disease; (v) any other condition as may be specified by the Board: Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography; (4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for

the purposes specified in clause (2); (5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

- iii) Section 5: In section 5 of the principal Act, for sub-section (2), the following sub-section was substituted, namely:- “(2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner.
- iv) Section 6: In section 6 after clause (b), the clause (c) was inserted, namely: no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.
- v) Section 17: (i) in sub-section (3), old clause (a), was substituted by a new clause (a) ^[27]. (ii) in sub-section (4), after clause (d), the following clauses were inserted, namely: (e) to take appropriate legal action against the use of any sex selection technique by any person at any place, *suo-motu* or brought to its notice and also to initiate independent investigations in such matter; (f) to create public awareness against the practice of sex selection or pre-natal determination of sex; (g) to supervise the implementation of the provisions of the Act and rules; (h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions; (i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration. (iii) for sub-section (7), the following sub-section was substituted, namely: (7) No person who has been associated with the use or promotion of pre-natal diagnostic techniques for determination of sex or sex selection shall be appointed as a member of the Advisory Committee.
- vi) Section 18: In section 18 of the principal Act, for sub-section (1), the following sub-section was substituted, namely : (1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre,

(9) The co-opted members shall have the same powers and functions as other members, except the right to vote and shall abide by the rules and regulations.

(10) In respect of matters not specified in this section, the State Board shall follow procedures and conditions as are applicable to the Board.

²⁶ Section 17A. The Appropriate Authority shall have the powers in respect of the following matters, namely :-

- (a) summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made there-under;
- (b) production of any document or material object relating to clause (a);
- (c) issuing search warrant for any place suspected to be indulging in sex selection techniques or pre-natal sex determination; and
- (d) any other matter which may be prescribed.

²⁷ “(a) when appointed for the whole of the State or the Union territory, consisting of the following three members -

(i) an officer of or above the rank of the Joint Director of Health and Family Welfare - Chairperson;

(ii) an eminent woman representing women’s organisation; and

(iii) an officer of Law Department of the State or the Union territory concerned: Provided that it shall be the duty of the State or the Union territory concerned to constitute multi-member State or Union territory level Appropriate Authority within three months of the coming into force of the Pre natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002: Provided further that any vacancy occurring therein shall be filled within three months of the occurrence.

laboratory or clinic is duly registered under the Act.

- vii) Section 23: In section 23 of the principal Act, for sub-sections (2) and (3), the following sub-sections were substituted, namely: (2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence. (3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees. (4) For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.
- viii) Section 24: For section 24 of the principal Act, the following section was substituted, namely: Notwithstanding anything contained in the Indian Evidence Act, 1872, the court shall presume unless the contrary is proved that the pregnant woman was compelled by her husband or any other relative, as the case may be, to undergo pre-natal diagnostic technique for the purposes other than those specified in sub-section (2) of section 4 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.
- ix) Section 30: In section 30 of the principal Act, for sub-section (1), the following sub-section was substituted, namely: “(1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place, such Authority or any officer authorised in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such Authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act” and;
- x) Section 32: In section 32, in sub-section (2),- (i) for clause (i), the following clauses have been substituted, namely:- “(i) the minimum qualifications for persons employed at a registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under clause (2) of section 3; (ia) the manner in which the person conducting ultrasonography on a pregnant woman shall keep record thereof ultrasonography on a pregnant woman shall keep record thereof in the Clinic under the proviso to sub-section (3) of section 4; (ii) after clause (iv), the following clauses shall be inserted, namely:- “(iva) code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics to be laid down by the Central Supervisory Board under clause (iv) of section 16; (ivb) the manner in which reports shall be furnished by the State and Union territory Supervisory Boards to the Board and the Central Government in respect of various activities undertaken in the State under the Act under clause (iv) of subsection (1) of section 16A; (ivc) empowering the Appropriate Authority in any other matter under clause (d) of section 17A.

6. In order to provide for effective implementation of the Act amendments were also made to the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996.

Critical Analysis of the Act

The PCPNDT Act has not been successful to curb out this menace completely but has somewhere or the other contributed to the mushroom growth of private clinics all over the country where people desperately visit for conducting sex selective abortions. Another disturbing is that doctor's fraternity, more often labelled as Gods in our country, are seen to commit blatant violations of law as well as medical ethics. The social status of the doctor is very high and his monetary condition is so strong that the enforcement machinery does not implement the law effectively. All the violation of the Act are committed confidentially and are not brought to the notice of the authorities. The zeal with which Female Foeticide has been pursued in the last few decades is indeed a matter of grave concern. The 2001 census registered a decline in the child sex ratio in 80% of the districts in India. The juvenile sex ratio, which stood at 976 in 1961, fell to 927 in 2001, for the country as a whole. According to a popular survey, there are 2,379 registered scan centres in Tamil Nadu alone. In Chennai itself, 147 private nursing homes are allowed to carry out medical termination of pregnancy and sterilisation. What actually happens in our country is that laws remain as mere paper legislations only. For example, the PCPNDT Act mandates the seizure of all equipment/machines for non-registration. But what usually takes place in our country is release of machines after payment of a fine. Considering another situation, the Act also mandates that any person conducting ultrasonography or any other pre-natal diagnostic technique must maintain proper records. The Act requires the filling up of a written form, duly signed by the expectant mother, as to why she has sought diagnosis. But in reality there is hardly any form filled by the patient, perhaps one in

every thirty, in 80% of the clinics. Hence, it can be said that mere legislation is not sufficient; it is high time that we need to change the typical biased attitude for the female child and adopt proper social, administrative and judicial steps to put an end to this gradually growing danger in our country.

Jammu and Kashmir Pre-Natal Diagnostic Techniques Act 2003

The laws prohibiting sex determination are prevalent in Jammu and Kashmir but despite the fact, due care is needed. In our State, a legislation has been passed on the lines of the amended Act at the centre titled as the Jammu and Kashmir Pre-conception and Pre-natal sex selection/ sex determination (Prohibition and Regulation) Act, 2002. The provisions of the Act are almost the same as the Central Act and received the assent of the Governor on 21st April 2002, and was published in the Government Gazette dated 23rd April 2002.

The Act prohibits sex selection or determination before or after conception and for regulation of pre-natal diagnostic techniques in order to detect genetic abnormalities or metabolic or chromosomal abnormalities or certain congenital malformation or sex linked disorders and for preventing the misuse for sex determination and for matter connected therewith.

Analysis

This law like the Central Law regulates the pre-conception and pre-natal sex selection and determination of sex before the birth of the foetus. The analysis of Section 4 shows that it prohibits all types of sex determination except the cases mentioned in section 4(b). Furthermore the Act places a medical practitioner under the obligation to fulfil the necessary conditions as laid down in Section 4(c) before applying any of the pre-natal diagnostic techniques. The law makes the consent of the pregnant woman a pre-requisite before applying any such technique. The object and purpose of this provision is to respect and maintain the dignity of the women. Further, it is laid down in the Act that the doctor can not disclose the sex of the foetus ^[28]. The medical centre/hospital is required to maintain a complete record of the patient, name of her husband before any such test is conducted. The centres where these tests are conducted need to register themselves with the authorities mentioned in the Act. The law prohibits any kind of advertisement of these techniques in any form and prescribes a punishment which may extend to three years imprisonment and a fine of Rs.10,000 ^[29], and for subsequent offences five years imprisonment and a fine of Rs.50,000 ^[30]. The names of the medical practitioners who are convicted under Section 22 and 23 shall be communicated to the Appropriate Authority of the state Medical Council by the Court. The appropriate action by the Medical Council includes removal of the name of the doctor(s) from the list of registered doctors for a period of five years for the first offence and permanently for subsequent offence. The law further makes those persons liable who seek the aid of doctors for conduct of these tests except the cases

mentioned in clause (b) of Section 4 ^[31].

As far as the implementation of the law is concerned nothing can be said as there is no authentic survey which could show the existence of this practice and implementation of the law in the State. The law needs to incorporate provisions relating to sale of ultrasound machines to registered medical practitioners only. This law can be abused as both parties doctor and patients are contracting parties to violate the law. One point which has been observed in the state is that most of the ultrasound clinics in the state do not display the notice in their clinics showing that sex determination tests are not allowed by law ^[32]. As both the parties, i.e., the doctor as well as the patients are the parties to the violation of the law, it can be easily misused and abused. The unscrupulous doctors perform these acts as there is high profit and low risk in the game.

Efforts of the Government of Jammu and Kashmir to Curb the Menace

The census department in 2011 revealed the declining sex ratio in the State of Jammu and Kashmir. Voicing concern over the declining sex-ratio in the state, the Jammu and Kashmir government in 2011 sealed 78 unregistered clinics for conducting pre-natal sex determination tests as a part of its drive to check the practice, "more prevalent" in urban areas.

"How would this world be like without women; give it a thought," cautions one of the hoardings put up at busy intersections in Srinagar as part of a massive drive launched by the Jammu and Kashmir government to save the girl child following the Census report released in 2011 pointing at a shocking rise in female foeticide in the state. Worried at the

³¹ Regulation, of prenatal diagnostic techniques

On and from the commencement of this Act:-

- (a) 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 prenatal diagnostic techniques except for the purposes specified in clause (b) and after satisfying any of the conditions specified in clause (c);
- (b) no prenatal 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; or
 - (vi) any other abnormalities or diseases as may be specified by the State Supervisory Board;
- (c) no prenatal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing 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 two or more spontaneous abortions or foetus 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;
- (d) no person, including a relative or the husband of the pregnant woman shall seek or encourage the conduct of any prenatal diagnostic techniques on her except for the purpose specified in clause (b); and
- (e) no person, including a relative or the husband of a woman or wife shall seek or encourage the conduct of any preconception sex selection technique on her or him or both.

³² *Supra* Note 7o at 124.

²⁸ Section 5(2).

²⁹ Section 22.

³⁰ Section 23.

interim Census report showing a sharp decline in sex ratio in the state, chief minister of the State, Mr. Omar Abdullah called for immediate remedial measures and “action on ground” to check the menace of suspected female foeticide and infanticide^[33]. As a part of a campaign against female foeticide and to promote the girl child, the Government of the State has dedicated the year 2013 to daughters and observes it as “*Save the Girl Child Year*”.

Despite the Government of the State claims high, three years after the revelation about the declining sex ratio was made by the census department, only five cases have been registered by the Government against clinics undertaking sex determination tests and 65 clinics have been sealed^[34]. The Health minister of the State admitted that so far no arrests have been made in any case. More recently a committee from the Centre had visited the State in order to take stock of the position in the State. The seriousness of the Government towards the issue is revealed by the fact that the said committee found 24 USG clinics in the state that were not registered and therefore sealed the same^[35]. At present around 42,000 cases are said to take place in the state each year^[36].

To conclude, a hard question needs to be asked on the issue of a law that proscribes pre-birth elimination of female children, as to how effective has the legal remedy been so far. There is enough evidence to suggest and prove that when there was pressure to restrict information regarding the sex of the foetus, conducting the sex determination test did not disappear but went underground and the information was provided in coded language. The consequences included reduced access to safe, legal and affordable abortion. Some clinics stopped doing abortions because of the fear of being criminalized or because, while recording MTP was always mandatory, it became stringent for ultrasound clinics under PNDT Act. Also, it was alleged that there was no guarantee that the clinics that provided the information to the unsuspecting couples about the sex of the foetus were actually basing the information on actual test or that such tests were even conducted. In the present scenario, we need to understand the implications of the rapid and frequent developments in medical technology, which further complicate reliance on legislative strategy to control its use. There are newer and easier tests that are being developed and made available to women. For example, a new blood testing technique makes it possible to determine the sex of the foetus from a simple maternal blood test. These technologies will be hard to regulate. The expansion of medical technologies and tests that can make sex selection easy and possible even at home, would require innovative ways to address the issue of gender equity and challenging the existing social structures and norms that encourage son preference and daughter neglect. A rather delicate and tricky issue that has surfaced from time to time and in the context of legislative restriction that needs careful consideration is the issue of what is sometimes termed as ‘normality’. The

discussion with women and their extended families, and with the providers of abortion and other services have pointed out that the justifications used to abort female foetuses are often the same as those used by people who want to abort foetuses that have been diagnosed with medical abnormalities. An abnormal foetus and female foetus are accorded similar status. The distinction between physiologically or medically abnormal foetus for which termination is legal and termination of a foetus that is sociologically undesirable is conceptually clear but is quite subtle. The same set of arguments can be put forward that like a medically abnormal foetus, a female foetus is also expensive to maintain if allowed to be born, is less productive than normal persons, can be detrimental to the parents’ emotional and financial well-being, and is on many accounts better not being born. Arguing for one specific application of genetic selection may suggest to some that other applications of the technology are also endorsed. Also, many of the advocacy activities and protests carried out by some Non-governmental Organizations have tended to interlink the ban on sex selection with the need to regulate abortion that follows sex selection. They have tried to demonstrate through protest marches that sex selection is both illegal, discriminatory and violates the basic rights of the girl child. However, such protests have tended to create more confusion in the minds of the people who feel that by regulating abortion in order to prevent sex-selective abortion, the abortion itself would become more difficult for women to access.

References

1. Bernard Knight *HWV Cox-Medical Jurisprudence and Toxicology* the Law Book Co. Ltd. Allahabad, 1987.
2. Deshpabhu Rashmi, *Health Care System and Sex Laws* Book Enclave Jaipur, 2009.
3. Dr. Sapna Rathi. *Human Rights and Sex determination Tests and Human Rights* (Deep and Deep Publications, 2012).
4. Seervai HM. *Constitutional Law of India*, Vol. I Universal Publishers, New Delhi, 2005.
5. Gaur KD. *Criminal Law and Criminology*, Deep and Deep Publications Pvt. Ltd, 2002.
6. Kumar K, Rani P. *Offences against Women- Socio-legal Perspectives*, Regency Publications, New Delhi, 1996.
7. Jain, *Indian Constitutional law*. Lexis Nexis Butterworths Wadhwa Nagpur, 2010.
8. Merriam Webster. *Merriam Webster Dictionary and Thesaurus*. Merriam Webster, 2012.
9. Shobha Saxena. *Crimes against Women and Protection Laws*. Deep and Deep Publications Pvt. Ltd., New Delhi, 2008.
10. Singh Raizada. *Abortion Law in India- Past and Present* Family Planning Association of India, Haryana, 1976.
11. Dr. Krushna Chandra Jena. Female Foeticide in India- A Serious Challenge for Society, 14 *OR*, 2008.
12. Gulafroz Jan. Female Foeticide-A Socio-Legal Analysis WSR to J and K State, 11 *KULR*, 207(2007).
13. Hassan Daud, Khan Abdul Awal. Right to Life and Abortion; A Study on the Legal Controversy of the Status of an Unborn Child In International Human Rights Law, 408 *ND*, 2011.
14. Jalan V, Bajoria V. The Medical Termination Act, 1971-

³³ Yusuf Jameel, *Bias against girl child growing in Kashmir*, The Asian Age, Jun. 01, 2011.

³⁴ Courtesy, Shabir Khan, Minister of Health, Jammu and Kashmir.

³⁵ Sana Altaf, *Only 5 complaints registered against female foeticide*. Kashmir Times. Oct. 7 2013.

³⁶ Imran Muzaffar, *Female Foeticide: 42,000 girls are killed in wombs every year in JK*, Rising Kashmir, Oct. 07 2013.

- A Doctrinal Anachronism Discounted by Society, 129 *AIRJ*, 2009.
15. Manoj Sharma. Right To Life Vis-A-Vis Right To Abortion: An Analytical Study, 416 *CILQ*.
 16. Sarkar NN. Abortion in the Eye of Science and Law-A Critical Analysis, 212 *HPP&I*, 1985.
 17. Afzal Qadri SM. Women and Law Relating to Sex Determination Test, 123 *KULR*, 2007.
 18. Shakeel Ahmad. Pre-Natal Diagnostic Techniques - A source of Gender Bias. 206 *KULR*, 1998.
 19. Sheetal Mishra. Gender Justice: The Constitutional Perspectives and the Judicial Approach. 55 *AIRJ*, 2006.
 20. Sneha Lata, Renu Sharma. Female Foeticide and Infanticide in India- An Analysis of Crimes against Girl Children. 3 *IJCJS*, 2006.
 21. Siwal BR. Preventive Measures for Elimination of Female Foeticide *available at* www.eldis.org/fulltext/preventive/_measures_for/_female_foeticide.pdf. (Visited on 25/05/2013 at 3:25pm).
 22. Imran Muzaffar, *Female Foeticide. 42,000 girls are killed in wombs every year in JK*, Rising Kashmir, 2013.
 23. Sundaramma P. *Does Abortion Law Abet Female Foeticide*, The Hindu, 2012.
 24. Sana Altaf. *Only 5 complaints registered against female foeticide*. Kashmir Times, 2013.
 25. Yusuf Jameel. *Bias against girl child growing in Kashmir*, The Asian Age, 2011.