Chapter 5

PRE-NATAL DIAGNOSTIC TECHNOLOGIES: HAZARDS AND REGULATION
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Perception

Scientific development and technological advancements are expected to be pursued by man for general human good, but unfortunately in present times some specific technological know-how is leading to greater abuse on humanity. One such case is the sex determination through scientific methods resulting in female foeticide. This is commonly known as sex-selection.

Sex selection is the “Original Sexist Sin”. Sex-selective abortions have become an alarming social evil in several parts of India. Both in North and South India, the twin processes of “elimination of unborn daughters” and “slow killing” through neglect and discrimination of those that are born, may soon precipitate a major demographic catastrophe. Urgent remedial efforts need to be initiated in this regard. The present deficit of women in India is greater than the entire female population of Britain. Due to all pervading influence of patriarchy, sex selection has transcended all barriers of caste and community, and even the North-South dichotomy. Sex pre-selection clinics employing modern medical technology have already spread to countries of the North and the South. Cross-cultural studies of the attitudes of the providers and users of sex-selection technology reveal few basic differences between the North and the South. The issues at stake are numerous – social, demographic, cultural and political. The most urgent are the fundament right to life, the survival of half of human kind and the right to equality. It involves all of us men and women, North and South experts and the lay public.¹

Restricting sex-selection does not infringe upon “women’s right to choose the sex of their offspring “because such a “right” does not exist.

Victims of sex-selection the women have no basic right to participate in decision making in matters such as education, marriage and contraception. It is insulting to them to impose this “choice” on them, which has been created by researchers, “techno-docs” and patriarchy to serve their own interests.

Practically and conceptually, sex-selection cannot be treated as a family planning tool nor can the matter be left as being “personal”, the personal is indeed very political in this context. Discrimination and subjugation on the basis of gender is a real social problem. There can be no technical solution to it.\(^2\)

Legal solution, however, is possible and indispensable. Equally significant is the consciousness raising among medical experts and there is a need of self-restraint on their part. The enactment and enforcement of comprehensive legislation prohibiting sex-selections an essential responsibility of the state as it has an obligation to uphold the right of all citizens to equality and to ensure their freedom from discrimination. It should be motivated by public interest. This will help to prevent the social damage, which may be occasioned by a sex ratio that is adverse to women. Appropriate legislation would initiate the long pending task of mobilizing the complex process of regulating medical (especially reproductive technology in India. It would provide the much needed space for discussing more intricate and controversial issues such as surrogacy, in vitro fertilization and genetic engineering. Progressive laws are always several steps ahead of popular public perception. So “offending public opinion” and fear of the inability to implementing these statutes should not be used to retard efforts to develop legislation.

After more than two decades of nation wide campaigning, assurances by six Prime Ministers and dozens of Union Ministers and effective implementation of Central legislation banning sex determination tests is still

\(^2\) Ibid
nowhere in sight. Any further delay by the government will only confirm our worst fears about its lack of political will. The alternative, as attempted by the terrorist in Punjab who threatened "direct action" against sex determination clinics is a lesson for the legitimate governments. So the state must act at lest to reestablish its authority as the custodian of people’s rights.

The girl child’s right is the right to be born and not to be aborted purely because she is a girl. So far there are no fail safe ways of preventing the misuse of foetal sex-determination through amniocentesis or ultrasound tests to ensure this right. Denial to a girl child of her right to be born is one of the most heinous violations committed by society. Gender bias and deep-rooted prejudice and discrimination against girl children and preference for male children have led to female foeticide. To eliminate yet to be born life, just because it happened to be a girl, is the worst kind of gender bias practiced by parents and society. As a result, sex-determination centres and abortion centres are flourishing and expanding in spite of a governmental ban. The point to note is that the people demanding foeticide include not only the poorer section who have socio-economic compulsions but members of the upper and middle classes as well.

According to one estimate between 1981 and 1991 more than four million girl children joined the ranks of India’s missing women and an estimated 1.2 million lives were snuffed out either through “abortion or postdate murder”.

Eleven million “murders” take place on an average (according to a survey) every year in this country in the name of abortion. Though abortion is a hotly debated issue in the West, the urgency of population control measures and the mysterious silence of religious groups here keep the issue in the background. Legally it may be asked that whether the elimination of a

\[^3\text{Ibid}\]
\[^4\text{Ibid}\]
mere foetus can amount to an offence, destruction of a life or an in-human action, because it may yet be said to have no life. But the fact is not so, the life begins with the mere conception and can be practically shown to exist in the foetus. In this respect we may refer to a conference held at Chennai in which a film on abortion, "Silent Scream" produced by Dr. Bernard Nathensan of the United States was screened, which explained through ultrasound pictures, the growth of the foetus within the womb. The unborn baby in the womb was shown wriggling continuously to avoid the instrument of death wielded by the doctor.\(^5\) By this the generally asked question: "When does life actually begin" becomes irrelevant. The said film proves beyond doubt that life begins with the beginning of the growth of foetus. The female foeticide, besides eliminating the girl child also affects adversely the mother of the girl child both physically and psychologically. This amounts to cruelty in law.

When we look at the faces of young women who voluntarily collude in the "murder" of innocent lives, it is difficult to believe that they are without guilt, and if we are to go by the medical statistics, the Psychological and other consequences are inescapable as well.

Incidentally Dr. Nathensan who produced the film "Silent Scream" was head of the "Centre for Reproductive and Sexual Health" in New York City back in 1973. The doctor who was on the frontlines campaigning for abortion on demand at the end of the sixties and involved in nearly 60,000 abortions later demanded legislation to protect the unborn. In his book The aborting America, he confesses that what went on in his organisation was a serious mistake. He writes:

"The obvious scientific conclusion is that the foetus is demonstrably an independent human entity. The obvious moral conclusion is that abortion cannot be justified unless, on clear medical grounds, the mother's life is at stake."

\(^{-5}\) Ib\id
He also explained that his movement from a pro-abortion to an anti-abortion position was not caused by religious consideration, but the purely intellectual and scientific discoveries.

In a press release on the occasion the Society for Protection of Unborn Child, the Chennai branch of a U.K. based pro-life organisation, highlighted the risks women went through in the process of eliminating the foetus as follows:

“Abortion is not a simple, safe procedure which many women believe. The mother has to undergo extreme physical and emotional suffering. Thirty percent of them will be affected with chronic diseases and troubles through life. One out of three loses the opportunity to become mother again. Those luckier may get children who are handicapped, underdeveloped or mentally retarded.”

In view of these facts the problem of female foeticide has attained enormous legal dimensions.

**Diagnostic Techniques and Its Hazards**

Amniocentesis is the deliberate puncture of the amniotic fluid sac per abdomen. In this test a 20-22 gauze spinal needle about 4” in length is pierced into the amniotic cavity with the stiletto in. The stiletto is withdrawn and few drops of liquor are discarded. About 10 ml of fluid is collected in a test tube for diagnostic purposes.

**Hazards of Amniocentesis**

A. Maternal Complications are:

- Infection
- Haemorrhage (Placement or uterine injury)
- Premature rupture of the membranes and premature labour.
- Maternal isoimmunisation in Rh-negative cases.

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6 *Ibid*
8 *Ibid*
B. Foetal hazards are:

- Trauma
- Foetomaternal haemorrhage

In majority of cases the infection occurs in illegal and induced abortions that has increased the incidence of septic is due to the fact that proper antiseptic and asepsis are not taken; incomplete evacuation; and inadvertent injury to the genital organs and adjacent structures, particularly the gut. Chorionic villous sampling, which is usually carried out between 8 and 12 weeks gestation, and involves taking a sample of placental tissue. Foetal and sampling or cordocentesis involves puncturing the umbilical vein to obtain a sample of foetal blood. With cordocentesis, the results may be available within 2-3 days.

All the three techniques mentioned above require ultrasound control for success, and carry a risk of foetal loss or damage. Hence the procedures must be attempted by well experienced sonologists to minimise foetal damage.

When the foetus of 20-22 weeks is aborted, the occasional deaths are due to hypernatraemia, endotoxic shock, disseminated intravascular coagulopathy and cerebral hemorrhage due to accidental injection of hypertonic saline into the blood stream.

There is no universally safe and effective method which is applicable to all cases. However, the complications are much less (5%) if termination is done before 8 weeks by suction evacuation or curette. The complications are about five times more in mid-trimester termination irrespective of the methods employed. The complications are either related to the methods employed or to the abortion process.

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9 Ibid
10 Samarjeet Bhadury, Essentials of Radiology and Imaging, p.412, Aditya Medical Books Distributors, Lucknow
11 Ibid
12 Supra note 1
Gynecological complications include menstrual disturbances, chronic pelvic inflammation, infertility due to cornual block, scar endometriosis, and Asherman’s syndrome leading to secondary amenorrhoea.

Obstetrical complication include recurrent midtrimester abortion due to cervical incompetence, ectopic pregnancy, premature labour, dysmaturity, increased perinatal loss, rapture uterus and Rh isoimmunisation in Rh-negative women, if not prophylactically protected with immunoglobulin.

While the published figure of maternal deaths varies widely but the pattern remains almost the same. The maternal death is lowest in first trimester termination especially with suction evacuation. Concurrent tubectomy even by abdominal-route doubles the mortality rate. The rate increases 10 times to that of first trimester.

**Mystification of Technologies**

**Practitioners’ Mischief**

An entire discourse of emancipation and achievement is carefully built around the issue. Practitioners have created clients not only out of the traditional minded uneducated Indians who aspired for sons to perform the family rites, but also among the apparently most modernised well-educated and economically well-off sections of society, who are being convinced that not making use of advancements in technology may be anything but irrational. Moreover it is being argued that this technology is to emancipate women from the burden of repeated pregnancies in their quest for producing a son. Due to this attitude of medical practitioners pre-natal diagnostic techniques legitimize and entrench an essentially negative and unjust through process, the process which leads towards large scale extermination of female foetuses.

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Utilitarian Propaganda

The discursive context of sex-determination tests is further created and sustained by so-called utilitarian arguments in favour of sons and towards averting the birth of unwanted and economically burdensome daughters. The narrow utilitarian logic, especially when defined in terms of individual calculus, easily omits the consideration of many such questions which score poorly when examined from the perspective of society at large, and which are bound to have far-reaching implications for human relations. It is relevant to state here that this line of argumentation is flawed for more than one reason.

For one thing, it overlooks certain historical truths. It is a fact that even at present the male-female ratio is adverse though the low status of women is not difficult for anyone to see. And, where certain specific communities are characterized by an adverse sex-ratio for women, as in states of Punjab, Haryana, Rajasthan and Madhya Pradesh, one comes across practices, such as, wife sharing by brothers, or, even cousins. For another, this argument fails to stand the test of logic too. Even if one goes by the logic of demand and supply one must not forget that scarcity of women would only worsen the crime situation against women. Not only is it difficult to rule out an increased incidence of crimes like rape, abduction and forced polyandry in such a state. one will not be surprised if in an eagerness to ensure that one's son married in some form child marriage makes a come-back in a state of scarce 'supply' of women.

The most serious objection to this argument of demand and supply principle, however, is that it relates the position of women to the sheer fact of their number, thereby overlooking the numerous structural factors which have systematically deprived and devalued women in the present state of things. Any explanation regarding the status of women regardless of the legal and political framework which has given all kinds of support to the patriarchal
structures of society and thereby devalued women's power will be misleading.

The fact remains that availability of such technology in a context marked by prejudice against women opens the door for reinforcing rather than changing that bias. It is that technological facts are offered in place of social solutions to the problems and these may not succeed in actually solving the problems to be answered. The trouble is that technological solutions are in fact likely to further intensity the problem itself. Selective abortion is no answer to the problem of devaluation of women; it only facilitates the already biased attitudes and practices and thus further strengthens their hold on the society.

**Social Arguments**

Numerous other arguments are offered by the supporters of sex-determination and considered quite acceptable by their clients. Some of these are also formulated in terms of social goals. Thus, for instance, it is very conveniently argued that the availability of sex-determination techniques will help in achieving family planning targets and therefore it should be permitted. For, sex determination, it is contended that it will enable couples to avoid adding to the number of children for the sake of producing a male child. How this eagerness to avoid the birth of girls will result in serious demographic imbalances and make sex-ratio increasingly unfavourable to women is either not considered at all, or its threatening implications are not fully understood by them. Ironically, even when the need for population control is expected on social grounds, individual choice based arguments in support of sex determination techniques are given precedence over the social concern based arguments. Social problems which would result in case of an extremely adverse sex ratio as a consequence of this are not given any consideration by the supporters.
Further, the implications of pre-natal diagnostic technologies for social relations are not considered at all by their proponents. In the name of ‘choice’ not only is the position of women likely to be further devalued, control of men over reproductive rights of women will be further strengthened. What is made out to be an issue of choice is in effect an issue of control. Technologies which offer instruments of furthering exploitative processes in the society cannot be supported simply because they appear to increase individual choice. The various forms of control and repression which underline these must be carefully understood.

Thus, for instance, the effects of this technology on the health of those who will be its users or objects for its execution, through convincingly termed beneficiaries, are rarely examined by its supporters in terms of the processes it generates simply because of its availability. Even if the health implications of technologies used for sex determination are looked into carefully, the implications of repeated abortions in the hope of conceiving a male child, a hope which is systematically generated by those who offer such technologies, are overlooked. In order to be meaningful, the evaluation of technology must therefore never be confined to the processes its execution generates. It cannot be divorced from all that which emanates from its very availability.

The construction of discursive space for the ready acceptance of the pre-natal diagnostic techniques has thus been very instrumental in the expansion of the practice of sex-determination and selective abortion of female foetuses throughout the length and breadth of the country.

**Plea of Quality Control**

In large part support to pre-natal diagnostic techniques is offered on grounds of right to determine the quality of the child. This line of thinking, however, has extremely threatening implications, which must be carefully perceived. For, it this quest for “quality” of the child is considered legitimate and intervention with reproductive processes is permitted on this ground, the day will not be far when the right to have children itself will be subject to the
‘quality’ qualification. Reproduction will not only be reduced to a mechanical process, it will also become a right of the qualified few. And all this is most likely to be done in the name of interests of the child to be born.\(^\text{14}\)

This will only result in the perception of child as a ‘product’ of a commercialized reproduction process. And this may further reinforce class distinctions even in reproduction, if only by nearly closing opportunities of producing a better quality child for many who will not be able to avail such quality control services offered by the market. Choice made available through such technologies will effect be restricted to those who will be able to afford it. This will increase, not reduce, the basis for inequality in society.

**Disability Argument**

The technologies are justified since these may help to eliminate disability through intervention before birth. This rationalization however, is worked out primarily in terms of the rights of foetus discourse. The most objectionable feature of the arguments put forth by champions of the rights of the foetus in this respect is that these reduce women to the role of carrier only, with the result that women’s bodies are seen as a more physical material for reproduction process.

This is far from liberating women. Apart from this the fact remains that it is not possible to rectify the disability through intervention. These technologies only legitimize and pave the way for abortion in order to avert the birth of handicapped child. Not only will such thinking individualize the problem of disability, and blame individual women for having given birth to disabled children despite available technologies, it also attaches stigma to the handicapped and seeks to eliminate the handicapped from the face of the earth. If one looks at the contributions made by various handicapped individuals to different fields of activity, it will not be difficult to see the flawed reasoning which informs such arguments about the handicapped.

\(^\text{14}\) *Ibid*
There is a need to safeguard reproductive rights of women against the invasion of technologies and market forces. Legislative intervention can be one way of dealing with the issue, provided of course it is not meant to be a symbolic exercise, and provided that it is supported by requisite policy support as well as the strengthening of public space to eliminate the possibility of discourse manipulation by vested interests.

Rapid advancements in medical technologies in recent years have opened the road to wide-ranging interventions in the sphere of reproduction. Significant among the technologies which facilitate such interventions and thereby manipulations of reproductive functions are those of artificial insemination, invitrofertilisation, pre-natal diagnostics, embryo transfer, etc. Most of these technologies are known to have the potential for adverse side effects for women who are supposedly offered their benefits. Some of these are also feared to involve unknown risks for their users. Their implications for social relations are also likely to be very disturbing: and their proneness to being misused too appears to be quite high in many socio-political contexts.

The pre-natal diagnostic techniques involve the use of technologies, such as, ultra sonography, amniocentesis, chorion villi biopsy, foetoscopy, maternal serum analysis, etc. These are supposedly meant to facilitate the detection of foetal abnormalities and thereby facilitate subsequent interventions such as abortion or therapy.\textsuperscript{15}

According to the estimate, between 1978-82, nearly 78,000 female foetuses were aborted after sex determination tests in the country. Between 1986-87, 30,000 to 50,000 female foetuses were apprehended to have been aborted. Between 1982-92, the number of clinics for sex-determination multiplied manifold. In the city of Bombay alone it increased from less than 10 to around 300. Between 1987-88 nearly 13,000 sex-determination tests were estimated to have been done in seven Delhi clinics themselves.\textsuperscript{16}

\textsuperscript{15} Supra note 13
\textsuperscript{16} Source- SAHELI, A Delhi based NGO
The commercial intent behind the growing use of these techniques becomes apparent from the way these facilities came to be publicized through advertisements in newspapers, in trains, buses, on walls and pamphlets. Even training programmes for foetal sex testing became a promising business! And everywhere the idea was to prevent the birth of an unwanted girl child.

The Registrar General of India has admitted to abortion of 3.6 Lakh female foetuses in 1993-94, an estimate based on hospital births alone, and a very large number of these are estimated to have followed sex determination. Although it is not possible to provide exact statistics regarding the present extent of this practice of sex-determination, estimates place the number somewhere around two lakhs in a year.

Apart from posing a serious threat to the demographic balance, the growing resort to pre-natal diagnostic technologies for sex-determination exposes women to additional health risks. The increased risks of abortion or congenital malformation in the foetus apart, the health of women is also known to have been adversely affected in several cases, either directly because of the use of the methods or because of their being used in certain conditions, or due to the action taken in response to the information made available through these health risks for late abortion. The inherent risk lies in the fact that amniocentesis is not possible before 15-16 weeks of pregnancy and an ultrasound, which happens to be the most widely misused technique at present, can help diagnose the sex of child only after 26-28 weeks of pregnancy.

Till recently there was no law against the practice except in Maharashtra which adopted it in 1989. The states of Punjab, Haryana, and Rajasthan passed it recently. Even there, it remained ineffective in deterring the practice both because of its own nature and the wider context. The recent legislative intervention of the Central Government is also unlikely to be of

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17 Supra note 13
18 Ibid
19 The Act is known as "Maharashtra Regulation of use of Pre-natal diagnostic Techniques Act, 1988"
much help in altering the situation because it addresses the issue in a very superficial and token manner. It is full of loopholes and does not find much support through other policies, which in effect create the structural space for continuance of the practice. The continued manipulation of discursive space to sustain and reinforce gender bias in society on the one hand, and legitimize various forms of discrimination in matter of birth in the name of choice on the other, further complicates the issue and demands that this be perceived and handled carefully, and in all its complexity. All this invokes a very strong legal jurisdiction regarding human and fundamental rights relating to women in general and the girl child in particular.\textsuperscript{20}

For several years, women’s groups along with other social groups working on issues pertaining to health, social justice and human rights, have been struggling to get a Central law promoted for dealing with the growing female extermination. It may seem ironical that now when a law pursuant to their efforts – the Pre-Natal Diagnosis Techniques Act was passed\textsuperscript{21}, these organisations themselves are struggling against it. A careful reading of this Act makes it quite clear the reasons for this discontent and demand for changes in it.

The new law appears to have little more than symbolic worth. First, because it does not address the problem of sex-determination in a comprehensive way. The problem is approached in a very superficial and token manner. Secondly, because it does not even possess the mechanisms necessary for its own effectiveness. It leaves enough grounds to ensure defeating its own purpose.\textsuperscript{22}

The Act specifies the purpose for which pre-natal diagnostic tests can be conducted. It permits detection of five types of abnormalities, viz. chromosomal abnormalities, genetic metabolic diseases, haemoglobin-

\textsuperscript{20} Supra note 13
\textsuperscript{21} The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
\textsuperscript{22} Supra note 13
pathies, sex linked genetic diseases, congenital anomalies. The list can, however, be expanded by the Central Supervisory Board, to be created for implementation of the Act also lays down certain conditions which must be fulfilled if these techniques are to be used: the age of pregnant woman being above 35; there being a history of two or more spontaneous abortions or foetal loss, a family history of mental retardation or physical deformities such as spasticity or other genetic disease or the exposure of pregnant woman to potentially teratogenic agents such as drugs, radiation, infection or chemical. The Central Supervisory Board has been authorized to add to this list too. The legislation thus does not question the use of pre-natal techniques as such. It only relates to regulate the motives of its use. This Act appears to have missed completely the relationship between technology servicing the ends of social prejudice and commercial interests taking advantage of its. Contrary to the demands put forth by several concerned social organisations and activist groups that the tests permissible for reasons other than sex-determination should be confined to government hospitals, it in fact grants a renewed legitimacy to the private sector expansion, and consequent misuse of technology. Some of the inadequacies and loopholes in the PAD Act are as follows.\(^23\)

(a) The law makes no provision at all for the registration of ultrasound machines or other sophisticated machines and equipment which are so used, simply because these are also being used for various other purposes.

(b) There is nothing in the law which may challenge the techniques of sex pre-selection which are reportedly being practiced in various parts of the country and which, with rapid developments in technology, will soon become an easily accessible method of determining the sex of the foetus.

(c) The law provides that no person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman or her relatives the sex of the foetus by words, signs or in any other manner. It, however leaves enough scope for a leak within the framework of

\(^23\) Ibid
legality. There is nothing in the act, which for instance bars the communication of such information to non-relatives. One wonders if there will be any problem in case this information is passed on through friends to the woman’s relatives.

(d) There is no provision in the legislation for the creation of any local vigilance committees, which could contribute to the effective implementation of the Act.

(e) The name of the registered medical practitioner convicted by the court will have to be reported by the appropriate authority to the respective state medical council for taking necessary action including the removal of his name from the register of the council for two years for the first offence and permanently for subsequent offence. The act does not, however specify any time period within which action has to be taken by it.

(f) The legislation in its present form is addressed to be limited purpose of dealing with the problem of selective female extermination.

(g) It does not raise any doubts regarding the desirability, safety, or social implications of the pre-natal diagnostic techniques.

The Act can become implementable provided the following points are taken into consideration:

1. Government and NGOs should try to evolve a working group of volunteers to educate people about the Act.
2. These working groups should be empowered to lodge complaints and monitor the implementation of the Act.
3. Licenses for prenatal diagnosis should be restricted to government institutions.
4. The woman undergoing a sex determination test, being a victim rather than the perpetrator of the crime, should not be punished.

Pre-Natal Diagnostic Techniques Act and Medical Ethics

The issue of abortion care is complex – influenced by religion and morals, the socio-political context, and sexual politics. The issue has been further compounded by sex-selective abortion in India. As abortions before 20 weeks of pregnancy were legal, female foeticide could not be banned per se. The requirement of a new law was therefore felt, to prevent the misuse of the MTP Act for sex selective abortions.
The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

The Indian Government, responding to the petition made by NGOs and women's groups, passed an Act prohibiting the practice of pre-natal diagnosis of sex of the foetus (Pre-natal Diagnostic Techniques – PNDT-Act 1994). Under it, individual practitioners, clinics or centers cannot conduct tests to determine the sex of the foetus or inform the couples about it. It is a cognizable, non-bailable and non-compoundable offence to have recourse to pre-natal diagnostic techniques under the pretext of detecting chromosomal abnormalities. It is also an offence on the part of the pregnant woman who undergoes the tests.

The State of Maharashtra which took the lead in 1988 by enacting the Regulation of Pre-natal Diagnostic Techniques Act, faced a lot of opposition to such a law from certain quarters. The Act got diluted as a result. Further, there was absence of such law in neighboring states. The need for a central legislation with stringent provisions was strongly felt. A Bill was introduced for this purpose in 1991 in the Lok Sabha.

In the statement of Objects and Reasons to the 1991 Bill, it is stated:

"It is proposed to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. Legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act."

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24 The Act was initially the Pre-natal Diagnostic Techniques (Regulation and Prevention fo Misuse) Act, 1995, which came into force on 1.1.1996. The Act was renamed and largely amended in 2002 by the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (14 of 2003). The said amended Act came into force on 14.2.2003. The Central Act is on the same lines as the Maharashtra Regulation of Use of Pre-natal Diagnostic Techniques Act, 1988. Several other States like Karnataka, Haryana and Rajasthan have also passed a similar legislation.

The 1991 Bill seeks to achieve the following objectives:

(i) Prohibition of the misuse for pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide.

(ii) Prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex.

(iii) Permission and regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders.

(iv) Permitting the use of such techniques only under certain conditions by the registered institutions.

(v) Punishment of for violation of the provisions of the proposed legislation.

The PNDT Act, 1994 (as amended by 2002 Amendment) 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 six determination leading to female foeticide.26

The Act has three aspects viz. prohibitory, regulatory and preventive. It prohibits sex selection completely either before or after conception. It regulates the use of pre-natal diagnostic techniques for legal or medical purposes and prevents misuse for illegal purposes. In order to look into various policy and implementation matters the Act provides for the setting up for various bodies along with their composition, powers and functions. Under the Act, registration is mandatory for every genetic clinic.

Regulation of Pre-natal Diagnostic Techniques

On and from the commencement of this Act (i.e. PNDT Act), no Genetic Counseling Centre,27 Genetic Clinic28 or Genetic Laboratory29 unless

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26 The Preamble to the PNDT Act, 1994 (as amended by 2002 Amendment). The Act extends to the whole of India except the State of Jammu and Kashmir. The Scheme of the Act is such that it consists of 34 sections spread over eight chapters.
27 "Genetic Counseling Center" means an institute, hospital, nursing home or any place which provides for genetic counseling to patients [Sec. 2 (c), PNDT Act, 1994]
registered under the Act, can conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques. They cannot employ or cause to be employed or take services of any person whether on honorary basis or on payment who does not possess the prescribed qualifications. Such techniques have also been prohibited to be conducted by a medical geneticist, gynecologist, pediatrician, registered medical practitioner or any other person at a place other than a registered place.\(^30\)

The Act allows pre-natal diagnostic techniques to be conducted only for the purposes of detection of any of the following abnormalities, namely: chromosomal abnormalities, genetic metabolic diseases, haemoglobino-pathies, sex-linked genetic diseases, congenital anomalies, or any other abnormalities or diseases specified by the Central Supervisory Board.\(^31\)

Pre-natal diagnostic techniques can be conducted for the above said purposes only if one of the following conditions is satisfied.\(^32\)

(i) the pregnant woman is above 35 years.

(ii) She has undergone two or more spontaneous abortions or foetal loss.

(iii) She has been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals.

\(^{28}\) "Genetic Clinic" means a clinic, institute, hospital, nursing home or any place which is used for conducting pre-natal diagnostic procedures [Sex. 2 (d), PNDT Act. 1994]. It includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used [Explanation, Sec. 2 (d)]

\(^{29}\) "Genetic Laboratory" means a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test [sec. 2 (e), PNDT Act, 1994]. It includes a place where ultrasound machine or imaging machine... similarly worded as Explanation to Sec. 2 (d) [Explanation, Sex. 2 (e)] Rule 14 (1). PNDT Rules, 1996, lays down that no Genetic Laboratory shall accept for analysis or test any sample, unless referred to it by a Genetic Clinic.

\(^{30}\) Sec. 3, PNDT Act, 1994.

\(^{31}\) Sec. 4 (2) PNDT Act, 1994. The Central Supervisory Board has specified as follows: "any other indication of possible genetic disease/anomaly in the foetus such as sporadic genetic disease in the couple, a positive screening test for carrier status or positive screening test for genetic disease/congenital anomaly in pregnancy, etc" (Vide S.O.189 (E), dated 12th February 2004).

\(^{32}\) Sec. 4 (3), PNDT Act, 1994.
(iv) The pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, plasticity or any other genetic disease.

(v) Any other condition as may be specified by the Central supervisory Board.33

Because the purpose have been specified, no relative or husband of the pregnant woman can seek or encourage the conduct of any pre-natal diagnostic techniques.34

**Guidelines before Using Pre-natal Diagnostic Techniques**

The person qualified to use such techniques has to be satisfied for reason to be recorded in writing that any of the conditions for carrying out such techniques has been fulfilled.35 Further, he has to satisfy the following requirements.36

(a) All known side effects and after-effects of the procedures are explained to the pregnant woman.

(b) A written consent of the woman undergoing the procedures has been obtained after explaining to her in the language in which she understands.

(c) A copy of the written consent has been given to the pregnant woman.37

Strict records have to be maintained of the pregnancy related techniques performed and failure to maintain such records, particularly those related to the conduct of ultrasound tests will attract strict penalties under the Act.38 Any deficiency or inaccuracy in the maintenance of records of

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33 The Central Supervisory Board has added substantially to the list of indications for the purpose of conducting ultrasound tests. These 23 indications are to be found in "Form F" of the PNDT Rules, 1996.

34 Sec. 4 (4), PNDT Act, 1994.

35 Id., Sec. 4 (3)

36 Id., Sec. 5 (1)

37 With the amendments in the Act and the Rules, there has been a bifurcation of procedures adopted for invasive and non-invasive test. For invasive procedures the informed consent of the woman has to be taken in "Form G" provided the PNDT Rules, 1996 [Rule 19 (1)]. This consent from has to be signed by the woman alone. For non-invasive procedures such as ultrasounds the consent of the woman need not be taken but the woman and the medical professional conducting such tests have to sign a declaration stating that she does not want to know the sex of the foetus and the test is not being conducted for the purposes of sex determination and that the sex of the foetus will not be disclosed to the woman [Rule 19 (1)(A)]. The format of this declaration has been provided as part of "Form F" in the PNDT Rules, 1996.

ultrasonography shall amount to contravention of the provisions of Sec. 5 or Sec. 6. It will then be presumed that the sex of the foetus has been disclosed.

**Prohibition of Sex Determination and Selection**

Under the Act, no Genetic Counseling Centre or Genetic Laboratory or genetic Clinic or any person can conduct or cause to be conducted pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus. Further, no person can cause or allow to be caused selection of sex before or after conception.

When otherwise, for determining any abnormality, the pre-natal diagnostic techniques are used and the sex of the foetus is known. Sec. 5 specifically prohibits communication of sex of foetus to the pregnant woman or her relatives. Any form of communication by words, signs, or in any other manner is prohibited.

Thus, Sections 5 and 6 prohibit the determination or communication of the sex of the foetus. While sex-selection techniques are strictly prohibited as they are considered to have no medical indication-natal diagnostic techniques can be used only for the purposes of this Act. It would be worthwhile, here, to examine what constitute sex-selection and pre-natal diagnostic techniques.

**Sex-selection**

"Sex-selection" includes any procedure, techniques, 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. This is a broad definition and can be used to cover any technique where pre-conception sex codeterminations attempted. If, for instance, a person

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40 Id., Sec. 6.
41 Id., Sec. 5 (2).
42 Id., Sec. 2 (o). It has been inserted by the 2002 Amendment Act. The original law targeted only post-conception medical techniques like sonography and amniocentesis, used for the detection of genetic abnormalities, etc since pre-conception was not covered by any law, several clinics were openly offering sex selection services. The amendment expense the ban on sex determination tests to include pre-conception sex selection techniques.
prescribes aryuvedic pills, with the promise that it will ensure the birth of a boy, he/she will be in breach of the provisions of this Act.

The use of the term “ensuring or increasing the probability” in this provision covers any attempt at ensuring the birth of a particular sex. It does not matter that the attempt was not successful. The couple would still be liable under the Act as they tried to increase the probability of the embryo being of a particular sex. Here it is the intention that is relevant and no necessarily dependent on how effective the procedure is.

Under the 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 any tissue, embryo, concepts, fluid or gametes derived from either of both of them. Thus, sex -selection is clearly prohibited under the Act.

Pre-Natal Diagnostic Techniques

“Pre-natal diagnostic techniques” include all pre-natal diagnostic procedures and pre-natal diagnostic tests. The pre-natal diagnostic procedures generally refer to the extraction of samples for the purposes of analyzing the same in pre-natal diagnostic tests. The pre-natal diagnostic procedures include both non-invasive procedures (such as ultrasonogrpahy, foetoscopy) and invasive procedures (such as taking samples of amniotic fluids, chorionic vili, embryo, blood, etc).Similarly, pre-natal diagnostic tests

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43 Sec. 3A, PNDT Act, 1994 (inserted by 2002 Amendment). “Conceptus” means any product or conception at any stage of development from fertilization until birth including extra embryonic membranes as well as the embryo or foetus [Sec. 2 (ba)].
“Embryo” means of developing human organism after fertilization till the end of eight weeks (56 days) [Sec. 2 (bb)].
“Foetus” means a human organism during the period of its development beginning on the 57th day following fertilization ro creation (excluding any time in which its development has been suspended) and ending at the birth (Sec. 2 (be)].

44 Sec. 2 (j), PNDT Act, 1994
include both invasive and non-invasive tests. Ultrasonography has been provided for under both the pre-natal procedures as well as tests.

Under the Act, “Pre-natal diagnostic procedures” means all gynecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid of a man, or of a woman before or after conception, for being sent to Genetic Laboratory / Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception. The pre-conception tests are, thus, included in the definition of pre-natal diagnostic procedures.

All pre-natal diagnostic procedures have to be immediately preceded by locating the foetus and placenta through ultrasonography. And the pre-natal diagnostic procedure will be done under direct ultrasonographic monitoring. This was prescribed so as to prevent any damage to the foetus and the placenta. This was how ultrasound testing was brought in within the ambit of the Act. Special provisions dealing with ultrasound tests have been fitted into the existing legislation by way of amendment.

Under the Act, “Pre-natal diagnostic test” means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid or a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.

**Persons Conducting Pre-natal Diagnostic Techniques**

In order to conduct pre-natal diagnostic techniques, medical professional must possess the basic qualifications recognized under the Act. The Rules prescribed additional training and experience requirements.

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45 Id., Sec. (2 (i).
46 Rule 14 *2(0, PNDT Rules, 1996
47 Sec. 2 (k), PNDT Act, 1994.
depending on the unit in which the professional is allowed to render his/her services:

(i) Gynecologist – A person possessing a post-graduate qualification in gynecology and obstetrics.\(^{48}\)

As per the Rules, a gynecologist has to possess in relation to a Genetic Counselling Centre (GCC), a six months experience in genetic counseling or 4 weeks training in genetic counseling. While in relation to a Genetic Clinic (GC), he/she needs an experience of at least 20 procedures under the supervision of an experienced gynecologist.

(ii) Pediatrician – A person possessing a post-graduate qualification in pediatrics.\(^{49}\)

As per the Rules, a pediatrician has to possess in relation to a GCC, a six months experience in genetic counseling or 4 weeks training in genetic counseling.

(iii) Medical Geneticist – A person who possesses a degree/ diploma in genetic science in the fields of sex selection and pre-natal diagnostic techniques or has experience or not less than 2 years in any of these fields after obtaining:

(a) any one of the medical qualifications recognized under the Indian Medical Council Act, 1956; or

(b) A post-graduate degree in biological sciences.\(^{50}\)

No additional training/ experience has been prescribed for a medical geneticist under the Rules. It may be noted that a medical geneticist can offer his/her services in any of the units (GCC, GC or GL) and is the only category of professionals who can render his/her services in a Genetic Laboratory (GL) with the aid of a laboratory technician.

(iv) Registered medical practitioner – A medical practitioner who possesses any recognized medical qualification as defined in Sec. 2 (h) of the Indian Medical Council Act, 1956, and whose name has been entered in a State Medical Register.

It may be noted that only those doctors with a degree in allopathic medicines are recognized under the Indian Medical Council (IMC) Act, 1956. In many States, persons with

\(^{48}\) Id., Sec. 2(f)

\(^{49}\) Id., Sec. 2 (h).

\(^{50}\) Id. Sec. 2 (g).
recognized degrees in Ayurvedic/alternative medicines are allowed to enter their names on the State medical register. Though these may be valid entries, such persons cannot conduct pre-natal diagnostic techniques, as they are not recognized under the IMC Act.

As per the Rules, a RMP (in relation to GC) need a post graduate degree/diploma in sonography or image scanning, or 6 months training or one years' experience in sonography or image scanning.

(v) Sonologist or imaging specialist – A person who possesses any one of the medical qualifications recognized under the IMC Act. 1956, or has a post-graduate qualification in ultrasonography or imaging techniques or radiology.51

It may be noted that a Sonologist/imaging specialist/radiologist could work in a GC only.

(vi) Laboratory technician – A person who possesses a B.Sc. degree in biological sciences or a degree/diploma in medical laboratory course with at least one-year experience in conducting appropriate pre-natal diagnostic techniques.52 He/she could work a GL only.

An “employee” under the PNDT Rules, 1996, means a person working in or employed by a GCC, a GL or a GC, or an Ultrasound Clinic and Imaging Centre and includes those working on part-time, contractual, consultancy, honorary or on any other basis.53 The owner of the unit need not possess the necessary qualifications or experience but he/she has to hire the qualified personnel, as he/she is responsible for the activities conducted within the premises of his/her unit.

Procedure of Obtaining Registration

All applications for registration have to be made to the Appropriate Authority in whose jurisdiction the unit lies.54 Applications have to be made “Form A”, contained in the Rules, and have to be accompanied with

51 Sec. 2(p), PNDT Act, 1994. The term “radiologist” does not find mention in the Act. Upon reading of the Rules, it may be inferred that this term alludes to a persons who has a post-graduate degree in radiology.
52 Rule 3 (2) (a) (ii), PNDT Rules, 1996.
53 Id., Rule 2 (b).
54 Application can be made to either of the following: (i) Chief Medical Officer at the district in which area the unit is situated; or (ii) The officer appointed as Appropriate Authority in the sub-district where the unit is situated.
enclosures containing details of the personnel and equipment engaged in the clinic, the registration fee and prescribed undertakings.\textsuperscript{55}

With the amendment (2002) to the Act/Rules, units are now required to submit two undertakings at the time of application:

(i) That the unit will not conduct any tests for sex selection and will not disclose the sex of the foetus to any person.

(ii) That the unit will display in a prominent place statutory notice stating that no sex determination tests are conducted within their premises.\textsuperscript{56}

The Appropriate Authority shall, after holding an enquiry and after satisfying itself that the applicant has complied with all the requirements of this Act/Rules and having regard to the advice of the Advisory Committee in this behalf, grant a certificate of registration in duplicate in 'Form B' of the Rules.\textsuperscript{57} This process has to be completed within a period of 90 days.\textsuperscript{58} The certificate of registration shall be displayed by the unit in a conspicuous place at its place of business.\textsuperscript{59}

If, after the inquiry and after giving an opportunity of being heard to the applicant and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that the applicant has not complied with the requirements of this Act/Rules, it shall, for reasons to be recorded in writing reject the application for registration and communicate such rejection to the applicant (within 90 days) in 'form C'.\textsuperscript{60} The applicant can re-submit application after effecting changes in the unit for the purposes of complying with the Act/ Rules. If the resubmission takes place within 90 days of

\textsuperscript{55} Sec. 18 (2) of the act and Rule 4 of the Rules. The applicable registration fee will be Rs. 3,000 for registration of a single unit and Rs. 4,000 as joint registration for units providing more than one kind of pre-natal diagnostic service. See Rule 5.
\textsuperscript{56} Rule 4 (1), PNDT Rules, 1996.
\textsuperscript{57} Sec. 19(1) of the Act and Rule 6 ((1) – (2) of the Rules. The Appropriate Authority may physically inspect the premises to verify the contents of the application. An enquiry, including inspection, shall be carried out only after due notice being given to the applicant [Rule 6 (4)].
\textsuperscript{58} Rule 6 (5), PNDT Rules, 1996.
\textsuperscript{59} Sec. 19 (4) of the Act and Rule 6 (2) of the Rules.
\textsuperscript{60} Sec. 19 (2) of the Act and Rule 6 (3) of the Rules.
receiving the rejection, then fresh application fees will not be required. No fees shall be refunded on rejection of application. The applicant may also appeal against the rejection.

The certificate of registration is non-transferable. In the event of change of ownership/management or on ceasing to function as a unit, both copies of the certificate or registration shall be surrendered to the Appropriate Authority. It may be noted that in the event of change of ownership/management, fresh registration will have to be sought.

A registration is valid for a period of 5 years, after which renewals have to be sought. The same procedure will be followed at the time of renewal. Application for renewal has to be made 30 days before the expiry of the registration period. Half of the fees paid at the time of registration need to be paid at the time of renewal. On receiving the renewal of registration, the previous certificates of registration will have to be surrendered to the Appropriate Authority. In the event of failure of the Appropriate Authority to renew registration or to communicate rejection of application for renewal within 90 days, the certificate of registration shall be deemed to have been renewed.

In case of vehicular registration also, all the above requisites of registration apply. If a unit owner possesses both portable and stationary machines, he/she should obtain a separate registration for each of the vehicles in which the portable machine can be used. The registration certificate of the center/unit will mention both the portable and stationary machines, while the vehicle registration certificate will only mention the portable machine. A medical professional with only one portable ultrasound machine and no clinic/nursing home, intending to use the machine in his vehicle, could also apply for vehicular registration. If the machine is taken out, it should be used only a

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63 Id., Rule 8.
registered unit. However, the registered unit in which the portable machine is being used should have a record of this machine on its own registration certificate.

It may be noted that the operation of the vehicle should be confined to the jurisdiction within which the registration has been obtained. The application for vehicular registration has to be made to the Authority within whose jurisdiction the owner resides.

Cancellation and Suspension of Registration

The Appropriate Authority is vested with powers to cancel or suspend a registration if it is found that such a centre has misused diagnostic technique. The action can be initiated by the Authority on its own (suo moto) or based on a complaint received.\textsuperscript{64}

As this is a quasi-judicial function, due care has to be taken to ensure fair procedure. A show-cause notice has to be issued to the unit owner, asking him to explain why its registration should not be suspended or cancelled for the reasons mentioned in the notice. The unit owner should be given a reasonable opportunity of being heard. The advice of the Advisory Committee has also to be elicited. If, after these steps, the Appropriate Authority is satisfied that there has been a breach of the provisions of the Act/Rules, it may suspend its registration for such period as it may think fit or cancel its registration.\textsuperscript{65}

If it is required in public interest, the Appropriate Authority may also suspend the registration without show case notice. However, it will have to record its reasons in writing for doing so.\textsuperscript{66}

\textsuperscript{64} Sec. 20 (1), PNDT Act, 1994. The suspension or cancellation of registration does not prevent the Appropriate Authority from filing any criminal action against a unit [Sec. 29 (2)].

\textsuperscript{65} Id., Sec. 20 (1) – (2).

\textsuperscript{66} Id., Sec. 20 (3).
A unit may, within 30 days of the date of receipt of the order of suspension or cancellation of registration, prefer an appeal against such order to (i) the Central government, where the appeal is against the order of the Central Appropriate Authority, and (ii) the State Government, where the appeal is against the order of the State Appropriate Authority. 67

Offences and Penalties

Pre-natal diagnostic techniques can be conducted only under the conditions mentioned under the Act and only in registered places by qualified personnel. The Act, thus, prohibits use of such techniques for purposes other than those mentioned under the Act (viz. sex determination, sex selection) and by unqualified personnel. An unregistered unit, even if possessing qualified personnel, is likewise prohibited to conduct such techniques. The Act also prohibits sale of ultrasound machines to unregistered units. All these prohibitions have been discussed above.

Besides these prohibitions, the Act also prohibits advertisements relating to sex determination. No person, organization or unit should advertise in any form facilities available for pre-natal determination of sex or sex selection at such centers or laboratories. Therefore, no publicity can be given as to the existence or availability of the facility. No person or organization or unit shall issue, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or per-conception selection of sex by any means whatsoever, scientific or otherwise. 68

Violation of the prohibitions contained in the Act entails punishment as prescribed under the Act. A unit as well as the persons seeking aid of such units could be penalized. Depending on the nature of the offence, the persons liable will be identified and the penalty imposed:

67 Id., Sec. 21.
68 Id., Sec. 22
(i) For breach of any of the provisions of the Act/Rules by any of the service providers (unit owners, medical professionals, employees of units who renders professional/technical services), the prescribed punishment is imprisonment for a term which may extend to 3 years and a fine which may extend to Rs. 10,000. For subsequent offences, imprisonment may extend to 5 years and fine up to Rs. 50,000.69

(ii) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State medical Council for taking the necessary action including (a) suspension of registration if charges are framed by the court and till the case is disposed of, and, (b) on conviction, for removal of his name from the register of the Council for a period of 5 years for the first offence and permanently for the subsequent offence.70

(iii) Any persons seeking sex determination tests or sex selection may be punishable with imprisonment for a period extending up to 3 years and with a fine extending to Rs. 50,000. For any subsequent offence, the imprisonment may extend to 5 years and fine up to Rs. 1 lakh.71

The aforesaid provisions shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.72 In fact, the Act lays down a presumption in the case of conduct of pre-natal diagnostic techniques. 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/relative to undergone such techniques. Such person shall be liable for abetment of offence under Sec. 23 (3).73 Thus, special protection has been given to a pregnant woman taking into consideration the fact that for a mother her child is important and not its sex.74

(iv) Any person connected with or any unit issuing advertisements for sex determination and sex selection services shall be liable to a term of imprisonment which may extend to 3 years and a fine extending to Rs. 10,000.75

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69 Id., Sec. 23 (1)
70 Id., Sec. 23 (2).
71 Id., Sec. 23 (3).
72 Id., Sec. 23 (4)
73 Id., Sec. 24.
75 Sec. 22 (3). PNDT Act. 1994
(v) The Act also provides for minor penalties in cases where for contravention of the Act/ Rules no specific punishment has been provided (viz non-maintenance of records, non-compliance with standards prescribed for the maintenance of units, etc.). The offending person shall be punishable with imprisonment for a term which may extend to 3 months or with fine up to Rs. 1,000 or, with both. In the case of continuing contravention, an additional fine (up to Rs. 500 every day during which such contravention continues) to be imposed.\(^76\)

(vi) Where any offence, punishable under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the company’s business, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.\(^77\)

However, no action will lie against a persons if he can prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the offence from taking place.\(^78\)

Notwithstanding anything contained in Sec. 26 (1), where any offence ahs been committed by a company and it is proved that the offence ahs been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence.\(^79\)

**Nature of Offences/ Cognizance of Offences**

The seriousness of the offences committed under this Act is reflected by Sec. 27; every offence under this Act shall be cognizable, non-bailable and non-compoundable.\(^80\)

\(^{76}\) Id., Sec. 25.
\(^{77}\) Id., Sec. 26 (1)
\(^{78}\) Id., Sec. 26 (1), Proviso
\(^{79}\) Id., Sec. 26 (2)
\(^{80}\) A ‘cognizable’ offence implies a serious offence and for which the police do not require any warrant to make arrests. A ‘non-bailable’ offence implies that the granting of bail lies at the discretion of the court. A ‘non-compoundable’ offence means that the parties cannot settle the matter outside court.
No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.\textsuperscript{81}

**Complainants**

The courts shall take cognizance of offences under the Act only on complaint made by:

(a) the Appropriate Authority or any other officer authorized by the Central or State Government or Appropriate Authority, or

(b) a person (including a social organization) who has given not less than 15 day’s notice of the alleged offence to the Appropriate Authority and of his intention to make a complaint to the court.\textsuperscript{82}

That means if the Appropriate Authority fails to take any action within 15 days than such person can directly approach the court with his complaint.

Further, on such a complaint being made, the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.\textsuperscript{83}

**Implementing Bodies**

The Act provides for three kinds of implementing bodies:

(1) **Policy level bodies** – The Central / State Supervisory Boards are primarily responsible for advising the Central / State government on policy matters. They are also responsible for overseeing the performance of various bodies constituted under the Act and creating public awareness on the issue of sex selection and sex selective abortions.

(2) **Appropriate Authorities** – The chief implementing authority, appointed at the district and sub-district levels.

(3) **Advisory Committees** – Aid and advise the Appropriate Authority, at the district and sub-district level.

\textsuperscript{81} Id., Sec. 28 (2)
\textsuperscript{82} Id., Sec. 28 (1)
\textsuperscript{83} Id., Sec. 28 (3).
Policy Making Bodies

(i) Central Supervisory Board: It is constituted by 24 members by the Central Government with representation from the:

- Minister and Secretary of Ministry of Family Welfare (the former is the Chairman ex officio and latter the Vice-Chairman ex Officio).
- Three members representing the ministries of Women and Child, Law and Justices, and Indian System of Medicine and Homeopathy.
- Director General of Health Services.
- Ten members, two each from amongst eminent (i) medical geneticist, (ii) gynecologist and obstetricians (iii) pediatricians, (iv) social scientist, and (v) representatives from women welfare organizations.
- Three women members of Parliament (two to be elected by Lok Sabha and one by Rajya Sabha)
- Four State representatives appointed on a rotation basis (recommendation by the State Government).
- An officer, not below the rank of a Joint Secretary, in charge of Family Welfare (Member Secretary, Ex Officio).

The Act also provides for temporary association of persons with the Board for Particular Purposes. One of the disqualifications for appointment as a member of the Board is that a person has, in the opinion of the Central Government, been associated with the use or promotion of pre-natal diagnostic techniques for sex determination or with any sex selection technique.

The Central Supervisory Board has to meet at least once every six months. The Board shall have the following functions.

1. To advise the Central Government on policy matters relating to the use of pre-natal diagnostic techniques/sex selection techniques and against their misuse.

2. To review and monitor the implementation of the Act and recommend changes in the said act and Rules.

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85 Id., Sec. 11.
86 Id., Sec. 14 (f).
87 Id., Sec. 14 (f).
88 Id., Sec. 9 (1), proviso.
89 Id., Sec. 16.
(3) To create public awareness against the practice of preconception sex selection and pre-natal determination of sex of foetus leading to female foeticide.

This is a unique feature of the Act as it clearly entrusts this function to a designated authority within the ambit of the law. The legislature takes into account the fact that the phenomena of sex determination and sex selective abortions cannot be countered by the implementation of laws alone. There has to be a change in the mindsets of people.

(4) To lay down code of conduct to be observed by persons working in registered units.\(^90\)

(5) To oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation.

(6) Any other functions as may be prescribed under the Act.

**State Supervisory Board**

The constitution of the State Supervisory Board was brought in with the 2002 Amendment to the Act as it was felt that a body similar in constitution and functioning of the Central Supervisory Board should also be present at the State level.

The State Government/Union Territory is responsible for the appointment of the State / Union Territory Board. The constituting members of the State Board are the same as those appointed at the Central Board, only at the State level. The only missing members are the State representatives. Thus, the number of members in the State Board amount to 20.\(^91\)

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

\(^{99}\) This is one of the unique features of the Act, wherein the manner of monitoring of the Act is provided within the body of the Act. The Central Government in consonance with the Central Supervisory Board was instrumental for effecting the recent amendment (2002) in the Act/ Rules.

\(^{90}\) The Board has notified the code of conduct in Rule 18 of the PNDT Rules, 1996.

\(^{91}\) Sec. 16 A. PNDT Act, 1994.
strength of the Board. The State Board shall meet at least once in four months. In respect of unspecified matters, the State Board shall follow procedures and conditions as are applicable to the Central Board.

The functions of the State Boards are similar to the functions of the Central Board. They are as follows;

(i) To create public awareness against the practice of sex selection and sex determination 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/ Rules and make suitable recommendations to the Central Board.
(iv) To send consolidated reports in respect of the various activities undertaken in the State under the Act to the Central Board and the Central Government.
(v) Any other functions as may be prescribed under the Act.

Implementing Authorities

The Appropriate Authorities are the main implementing authorities recognized by the Act. The Central government shall appoint one or more Appropriate Authority for each Union Territory and the State Government will appoint such authority for the whole of the State or part of it for fulfilling the purposes of the Act, having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.\textsuperscript{92}

At the State/Union Territory (UT) level, the Appropriate Authority (when appointed for the whole of the State/UT), shall have three members. They are:

(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 organization.

\textsuperscript{92} Id. Sec. 17 (1)-(2)
(iii) An officer of the Law Department of the State/ UT.\textsuperscript{93}

The Appropriate Authority when appointed for any part of the State/ UT shall consist of an officer of such rank as the State government or the Central government may deem fit.\textsuperscript{94}

It may be noted that initially the position of Appropriate Authority at the State level was held usually by the Chief Medical Officer of the State. However, there were many complaints of misuse of powers and harassment by such individual members made by practicing medical professional. In order to guard against such future occurrences, a multi-member Appropriate Authority was put in place at the State level. However, for any part of the State i.e. at the district and sub-district levels it is usually the Chief Medical Officer and the Medical Officer in charge of the sub-district respectively who are appointed to the post of Appropriate Authority.\textsuperscript{95}

The Appropriate Authority shall have the following functions. namely:\textsuperscript{96}

(1) The grant, suspend or cancel registration of unit.

(2) To enforce standards prescribed for a registered unit.

(3) To investigate complaints of breach of the provisions of the Act/ Rules and take immediate action.

(4) To take appropriate legal action against the use of any sex selection technique by any person at any place, \textit{suo moto} or brought to its notice and also to initiate independent investigations in such matter.

\textsuperscript{93} \textit{Id.} Sec. 17 (3) The proviso lays down that it shall be the duty of the State/ UT to constitute multi-member Authority within three months of the coming into force of the PNDT (Amendment) Act, 2002. Provided further that any vacancy occurring therein shall be filled within three months of the occurrence.

\textsuperscript{94} \textit{Ibid}

\textsuperscript{95} In the initial stages of (non) - implementation of the Act, the Supreme Court directed that Appropriate Authority should be appointed at the district and sub-district levels (Order of the Supreme Court dated 4\textsuperscript{th} May, 2001). The Act was amended to take care of the Apex Court's directive.

\textsuperscript{96} Sec. 17 (4), PNDT Act. 1994.
(5) To seek and consider the advice of the Advisory Committee, on application for registration and on complaints for suspension or cancellation of registration.

(6) To take action on the recommendations of the Advisory committee made after investigation of complaint for suspension or cancellation of registration.

(7) To create public awareness against the practice of sex selection or pre-natal determination of sex.\(^7\)

(8) To supervise the implementation of the provisions of the Act/Rules.

(9) To recommend to the Central/ State Boards modification required in the rules in accordance with changes in technology or social conditions.

(10) To compile quarterly reports on the implementation of the Act for submission to the Central Board (Supreme Court directive).

**Advisory Bodies**

The Central / State Government shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions.\(^8\) Infact, the advice of the Advisory Committee has to be sought before the Appropriated Authorities can take any decision. The advice tendered by it shall be adopted by the Appropriated Authorities. The Advisory committee shall consists of:\(^9\)

(i) three medical experts from amongst gynecologists, obstetricians, pediatricians and medical geneticists.

(ii) One legal expert.\(^10\)

(iii) One officer to represent the department dealing with information and publicity of the state government / UT.\(^11\)

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\(^7\) The funds collected by way of registration fees may be utilized for that purpose. Rule 5 (2), PNDT Rules, 1996, lays down that registration fees shall be utilized by the Appropriated Authorities in connection with the activities connected with implementation of the provisions of the Act/Rules.

\(^8\) Sec. 17 (5), PNDT Act, 1994.

\(^9\) Id., Sec. 17 (6).

\(^10\) This member is crucial for the functioning of the Advisory committee. Since the Appropriated Authorities are medical professionals this member can render any assistance on the law.

\(^11\) While such person may be accessible at the State level, this appointment is difficult at the district and sub-district levels.
(iv) three eminent social workers of whom not less than one shall be
form amongst representatives of women’s organizations.

No person who has been associated with the use or promotion of pre-
natal diagnostic techniques for sex determination / selection shall be
appointed as a member of the Advisory Committee. A member of
committee shall hold office during the pleasure of the Central / State
Government (normal term is for 3 years).

Besides the PNDT Act/Rules, the manner in which the Advisory
Committee should conduct its affairs is prescribed in the PNDT (Advisory
Committee) Rules, 1996.

The chairman of the Advisory committee shall be appointed by the
Central/ State Government. Incase, the government has not appointed so,
the members from amongst themselves may elect him. The Advisory
Committee will meet as and when it deems fit and / or on the request of the
Appropriated Authorities for consideration of any application for registration
or any complaint for suspension / cancellation of registration and to give
advice thereon. The intervening period between meetings should not
exceed 60 days.

A 7 clear days’ notice has to be given prior to the conduct of any
meeting of the Advisory committee. The Chairman with 3 clear days’ notice
can call an urgent meeting. In case of unavailability of chairman, the
Appropriate Authority can call the meeting with 7 clear days’ notice after
consulting at least 4 members of the Advisory Committee.

The Appropriated Authorities will have to be present at all Advisory
Committee meetings, provide all secretarial and other assistance as well as
prepare minutes of the meeting, notes on the agenda, etc. However, the
Authority does not have the right to vote at such meetings. The notes,
minutes and other supporting documents of the meetings will have to be

102 Sec. 17 (7), PNDT Act, 1994.
103 Id., Sec. 17 (5).
104 Rule 8, PNDT (Advisory Committee) Rules, 1996.
105 Sec. 17 (8), PNDT Act, 1994.
107 Rule 5, PNDT (Advisory Committee) Rules, 1996.
108 Id, Rule 9.
authenticated by the Chairman/presiding member and maintained as permanent records by the Appropriated Authorities. Under the Supreme Court directive, such records will have to be made accessible to the public.

**Inspections, Investigations, Searches and Seizures Under the Act**

Appropriate Authorities have been vested with various powers relating to enforcement of the Act. For instance, it 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 the Act/Rules.

(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.

Thus, in order to conduct investigations, Appropriated Authorities have been vested with the investigative powers of a civil court. As the police have no role in the implementation of the Act, the appropriate authorities have been entrusted with the role of investigation and inspection of units as well as search and seizure of offending objectors. Investigations and inspections is a crucial element of monitoring the implementation of the Act. Expect in certain circumstances, only the court can impose any penalties or sentence a person for the breach of any of the provisions of the Act.

The Appropriated Authorities are obligated to be vigilant and conduct inspections on a regular basis and take prompt action in case there is any suspicion or compliant that the Act is being violated. Thus, every registered unit or any nursing home, hospital, institute or any other place having equipments/machines capable of detecting the sex of the foetus, shall afford

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109 *Id.* Rule 12.

all reasonable facilities for inspection of the place, equipment and records to the appropriate Authority or authorized officer for:

(a) registration of such institutions under the Act.
(b) Detection of misuse of such facilities or advertisement therefore.
(c) selection of sex before or after conception.
(d) detection / disclosure of sex of foetus.
(e) detection of cases of violation of the provisions of the Act in any other manner.\(^\text{111}\)

It is clear from the above that an unregistered unit is also under the purview of investigative powers of Appropriated Authorities. Likewise, it can conduct search and seizure operations in any registered or unregistered unit or any other place, if it has reason to believe that an offence under this Act has been or is being committed. It can search and examine any record, register, document, book pamphlet, advertisement, or any other material object (including records, machines and equipments) found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.\(^\text{112}\)

The Appropriated Authorities may seal and seize any ultrasound machine, scanner or any other equipment capable of detecting sex of foetus used by an unregistered unit. These machines may be released if such unit pays penalty equals to five times of the registration fee to the Authority concerned and give an undertaking that it shall not undertake sex determination or sex selection.\(^\text{113}\)

Search and seizure operations have to be conducted in a fair and just manner. The procedure to be followed by the Appropriated Authorities has to be in consonance with the search and seizure procedures contained in the Code of Criminal Procedure, 1973.\(^\text{114}\) The Appropriated Authorities should

\(^{111}\) Rule 11 (1), PNDT Rules, 1996.

\(^{112}\) Sec. 30 (1), PNDT Act, 1994, and Rule 12 (1), PNDT Rules, 199699.

\(^{113}\) Rule 11 (2), PNDT Rules, 1996.

\(^{114}\) Sec. 30 (2) PNDT Act, 1994. Sections 99-105 of the Criminal Procedure Code deal with search and seizure provisions. The basic requirements of a search procedure is that a search has to be conducted in the presence of two independent witnesses, which can be any two respectable persons from the
maintain proper records of all search and seizure operations to guard against any allegation of abuse. The Authorities can conduct such operations themselves or authorize a person in that behalf. They can also seek any assistance that they may consider necessary.

After conducting a search on the unit, the Appropriated Authorities can seize any offending items. The following requirements are laid down in the Rules for effecting seizures.115

(i) A list of seized items/ objects ah}s to be prepared in duplicate at the place of effecting the seizure, and both copies shall be signed on every page by the Appropriated Authorities / authorized officer and by witnesses to the seizure.

(ii) The list has to be made in the place where the search is taking place. If this is not possible, it can be made in another place provided that the reasons for doing so are recorded in writing.

(iii) One copy of the list is to be handed over, under acknowledgement, to the person from whose custody the items are being seized. In case of unavailability of such person, then the list can be sent by registered post to the owner/ manage of the unit.

(iv) If any perishable material is seized (viz. samples for testing), then arrangements for the identification and preservation of such materials and to convey it to a facility for analysis/ test have to be made immediately. The refrigerator / other equipment used by the unit to preserve such perishable material may be sealed until such time as arrangements can be made for its safe removal. The mention of keeping the material object seized, on the premises of the unit, shall be made in the list of seizure.

(v) When the search and seizure operations cannot be completed in a day, the Appropriate Authorities can make arrangements to mount a guard or seal the premises of the unit in order to avoid any tampering with the materials.

115 Rule 12 (2) – (5) PNDT Rules, 1996.
After the list is prepared, it has to be sent to the court seeking permission to retain the seized items. This has to be done within 24 hours of seizing. The seized items should be kept in the office of the Appropriated Authorities, or in the premises of a respectable person in the locality. In case the material objects cannot be removed from the premises of the offending gun it, it can be kept there after taking a bond from the unit owner that the same will be produced in court if required.116

After the completion of search and seizure operation, the Appropriated Authorities is required to file a complaint in the court of the Metropolitan Magistrate or the Judicial Magistrate (First class). It is advisable that the Appropriated Authorities seeks guidance from the legal expert in the ‘Advisory Committee at the time of drafting of the complaint.

**Protection of Action Taken in Good Faith**

The Act shields the Government Appropriate Authority from any action taken by it (viz cancellation of registration, search and seizure, etc) in good faith. No suit, prosecution or other legal proceedings shall lie against the Central/State Government or the Appropriate Authority or any officer authorized by the Government/Authority for anything which is in good faith done or intended to be done in pursuance of the provisions of the Act.117

**Public Information**

Public awareness against the practice of pre-conception sex selection and pre-natal determination of sex of foetus leading to female foeticide is a crucial component of preventive strategy to curb female foeticide. As noted earlier, the Central /State Supervisory Boards as well as Appropriate Authority have been entrusted with the function of creating public awareness in this regard.

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117 Sec.31, PNDT Act, 1994
It is also laid down that the Appropriate Authority, the Central/State Government, and the Government/Administration of the Union Territory may publish periodically lists of registered units, and, findings, from the reports and other information in their possession, for the information of the public and for use by the experts in the field. The Supreme Court has also clarified that the public shall have access to all records maintained under the Act/Rules. Further, at the State and Central levels, the Supervisory Boards have been directed to consolidate and publish all the quarterly reports for information the public at large.

Public information is a duty of the registered units too. Every unit shall prominently display on its premises a notice in English and in the local language or languages for the information of the public, to the effect that disclosure of the sex of the foetus is prohibited under law. Further, at least one copy each of the Act and the Rules shall be available on the premises of every unit, and, shall be made available to the clientele on demand for perusal.

As noted earlier, a written consent of the woman has to be obtained prior to the conduct of any pre-natal diagnostic test/procedure and it has to be taken in ‘form G’ provided in the Rules. Form G is required to be in a language the person undergoing such procedures understands. All the State Governments and Union Territories may issue translation of Form G provided in the Rules. Form G is required to be in a language the person undergoing such procedures understands. All the State Governments and Union Territories may issue translation of Form G in languages used in the State or Union Territory and where no official translation in a language understood by the pregnant woman is available, the Genetic Clinic may translate Form G into a language she understands.

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118 Rule 17 (3), PNDT Rules, 1996
119 Id. Rule 17 (1)
120 Id. Rule 17 (2)
121 Id. Rule 10 (1) – (2).
Power to Make Rules

The Act confers power on the Central Government to make rules for carrying out the provisions of the Act. The rules may provide for, inter alia, the minimum qualifications of persons employed at GCC or GL, facilities, equipments and other standards to be made available by these centers, the form in which consent of a pregnant woman has to be obtained under Sec.5, the form and manner which application has to be made for registration, manner in which the seizure of documents shall be made and the manner in which the seizure list shall be prepared.\textsuperscript{122}

The Central Supervisory Board has been granted powers to make regulations with the previous sanction of the Central Government. The regulations dealing with conduct of the affairs of the Board are not to be inconsistent with the provisions of this Act and the rules made thereunder.\textsuperscript{123} The Rules and Regulations so made shall be laid before each House of Parliament while it is in session.\textsuperscript{124}

If any difficulty arises in giving effect to the provisions of the PNDT (Regulation and Prevention of Misuse) Amendment Act, 2002, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of the said Act as appear to it to be necessary or expedient for removing the difficulty. The order has to be made within three years from the date of commencement of the amendment Act, 2002. Every such order shall be laid before each House of Parliament.\textsuperscript{125}

Implementation of the PNDT Act

The PNDT Act came into force on 1\textsuperscript{st} January 1996. From the declining sex ratio, it is apparent that to a large extent, the Act is not implemented by the Central Government or by State governments. The

\textsuperscript{122} Sec. 32, PNDT Act, 1994.
\textsuperscript{123} Id. Sec. 33
\textsuperscript{124} Id. Sec. 34
\textsuperscript{125} Id. Sec. 31A
situation of foeticide continues to worsen despite the introduction of the PNDT Act. Though non-implementation of the Act could not said to be the root cause of the problem, the growing misuse of reproductive technologies have widened the gap in the already skewed sex ratio.

Expressing its concern, public interest litigation (PIL) was filed by same NGOs in the Supreme Court of India.\textsuperscript{126} It highlighted several lacunae in the implementation of the PNDT Act. In most of the States, Appropriate Authority are not actively functioning and in fact there are over 200 applications for registration of genetic clinics pending with the Appropriate Authority in the state of Tamil Nadu alone. The net result is that the genetic clinics are functioning in full swing without authorization and this delay in the process of applications has given a leeway for many such clinics to operate without bothering even to apply for registration. In almost all the States, Appropriate Authority have not been set up at district levels and in some States at the State level. There are hardly any complaints made by the Appropriate Authority to the concerned Magistrate for the violations under the Act, nor have been any proceedings been initiated for cancellation of registration of these clinics.\textsuperscript{127}

The petitioners contended that the Act for all its intents and purposes was toothless piece of legislation. It has been interpreted in various ways and misused or not used at all. "The problem today is the interpretation of this Act by the ultrasonologists, the abortionists, the doctors and most importantly the government", the petition says. The petitioners contend that the narrow interpretation of the Act presupposes the exclusion pre-natal sex selection from its purview.\textsuperscript{128} Thereby there were widespread advertisements by

\textsuperscript{126} Petition of CEHAT to the Supreme Court of India, Extraordinary Original Jurisdiction. Writ petition © No. 301 of 2000. The petition was filed under Article 32 of the Constitution of India by the Centre for Enquiry into Health and Allied Themes (CEHAT), Mahila SarvangeenUtkarsh Mandal (MASUM), and activist Dr. Sabu M. George.

\textsuperscript{127} The State of Tamil Nadu later stated in its affidavit that there were 1,541 Clinics in the State, of which 1,489 had been registered under the Act.

\textsuperscript{128} The Ethical Committee of Indian Council of Medical Research (ICMR), on the X-Y chromosomal separation of sperm for the pre-determination of sex, had opined that the concept of pre-conceptual
various clinics providing pre-natal sex selection. This technique has been condemned by the Beijing Convention as violation of human rights and ethical medical practices, and India is a signatory to the same as early as from 1995 and the same is binding on India.

The petitioners further contended that, by ultrasonography and amniocentesis, the sex of the foetus is determined during the pregnancy of the woman and the foetus is aborted if found to be a female. These tests were carried out by compounders and doctors without the necessary qualifications. At times the ultrasonologist and abortionist is one and the same person, but no one really cares as families want to get rid of their female child and the medical professionals (abortionist) want to make money.\textsuperscript{129}

The Supreme Court issued a series of directions to appropriate Governments during 4\textsuperscript{th} May 2001 to 10\textsuperscript{th} September 2003.\textsuperscript{130} The Apex Court observed that advancement in diagnostic technology in medical sciences is increasingly used for removal of foetus (may be seen as causing death of a person) but it certainly creates imbalance in the sex ratio. The unfortunate state of affairs of the crime is that it is more prevalent in economically better off and developed States within the country. The dismay has been that ‘we are not in a position to change mental set up which favours a male child against a female.’ The executive arm of the nation ought to have implemented the PNDT Act in its normal course, but there are gaps it is not happening.\textsuperscript{131} Such, then, is the attitude of the government towards a crime which hits at dignity even before conception.

The Court feeling the need for intervention issued a set of guiding directives, so as to get the PNDT Act executed by the (i) Central Government (ii) Central Supervisory Board (CSB), (III) State Governments/Union Territories’ Administrations, and (IBV) Other Appropriate Authorities. At the

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sex planning is not covered under the PNDT Act. However, as noted earlier, the PNDT Act has been amended in 2002 to take care of such practices under its ambit.


\textsuperscript{130} CEHAT v Union of India (2001) 5 SCC 577; (2003) 8 SCC 398.

\textsuperscript{131} The Court castigated Union Government for not setting up an Appropriate Authority to implement the Act. It should have set up the authority five years ago, the court added.
The directions issued by the Apex Court were:

(i) Central Government directed to implement with all vigour and zeal the PNDT Act and the rules framed in 1996.

(ii) The intervening period between two meetings of the advisory Committees to advise the Appropriate Authorities shall not exceed 60 days.\(^{132}\)

(iii) Meeting of the CSB will be held at least once in six months. The members (medical practitioners, social scientists, etc) consulting the CSB are to be appointed by the Central Government. It is hoped that this power will be exercised so as to include those persons who can genuinely spare time for the implementation of the Act.

(iv) The CSB shall review and monitor the implementation of the Act.

(v) The CSB shall issue directions to the Appropriate Authorities to furnish quarterly reports to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(a) Survey and registration of bodies specified in Sec. 3 of the Act.

(b) Action taken against non-registered bodies operating in violation of Sec. 3, inclusive of search and seizure of records.

(c) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(d) Number and nature of awareness campaigns conducted and results flowing there from.

(vi) The CSB, being an expert body, shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendation is to the Central Government.

\(^{132}\) The authorities and committees in the majority of States, barring West Bengal, Tamil Nadu, Bihar and Chhattisgarh, have not had such meetings.
(vii) The CSB shall lay down a code of conduct under Sec. 16 (iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.

(viii) The CSB will required medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female foeticide and to ensure implementation of the Act.

In the course of judgment, the Apex Court directed all States to confiscate ultrasound equipment from clinics that are being run without licenses. On 19th September, 2001, the Court took notice of the fact that even though certain Genetic Counselling Centers, Genetic Laboratories or Genetic Clinics were not registered, no action has been taken as per the provisions of the Act, except issuing warning. An anguished Bench (comprising M.B. Shah and R.P. Sethi, JJ) expressed surprise and wondered “whether the implementing authorities are aware of law?” “The Act provides for prosecution and not warning. Authorities under the Act are not empowered to issue warnings and allow these centres to continue their illegal activities.”

Visualising the significance of a data base of information, the Court emphasized the survey of Clinics and empowered the district level authorities to conduct the survey and to initiate criminal action, search and seizure of documents, records, objects, etc of unregistered bodies under Sec. 30 of the Act.

On 6th November, 2001, the Central Government came forward by assuring the Supreme Court, with concrete steps in the direction of implementation; and suggested that it is setting up a National Inspection and Monitoring Committee for the implementation of the Act. In 2003, the Court

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133 The Court also asked the manufactures of ultrasound machines – Philips, Symons, Toshiba, Larsen and Tourbo and Wipro – to give the names and addresses of the clinics and persons in India to whom they sold these machines in the last five years. “This” the Court said, “would help the government find out whether these clinics or persons were registered”
said that such committee is to continue to function for the effective implementation of the Act.

On 31st March, 2003, it was brought to the judicial notice that in conformity with the various directions issued by the Apex Court, the PNDT Act has been amended inter alia and re-titled as “The pre conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act.” The amended PNDT Act, 2002 provides for:

(a) Ban on sex determination tests to include pre-conception sex selection techniques.
(b) A compulsory registration for clinics having sex determination/selection techniques.
(c) Maintenance by doctors of written records of procedures carried out.
(d) Ban on advertisements promoting sex determination/selection.
(e) Vehicles (mobile labs) with ultrasound machines should also be surveyed and reported.
(f) Seller/dealer of ultrasound machines should furnish information to the Appropriate Authority.
(g) State’s monitoring authorities will have to include non-government entities like women activists and doctors.
(h) Vesting in authorities, at the State, district and sub-district level, powers equivalent to those of Civil Courts to ensure compliance with the law. Authorities empowered to initiate suo moto legal action.
(i) Follow up of reports on violations and misconduct.
(j) Increase in punishment for violation of the law.
(k) State authorities to create public awareness about the issue.
(l) Publication of reports by Supervisory bodies regarding implementation and working of the Act.
(m) Public information and access to records maintained by various bodies under the Act.
(n) Code of conduct for medical professionals, owners and employees of medical units.
The most of the directions issued by the Supreme Court have been incorporated in the 2002 amendment of PNDT Act. The Court’s judgment has been rightly hailed as a positive step in the implementation of the PNDT Act. The Apex Court specifically announced that its portals are open to the parties finding any difficulty in implementing the directives.

However, the fact that the Supreme Court directive was necessitated brought to the fore the lack of political will, indeed reluctance, to correct the prevailing gender imbalances and biases.134

Some Ground Realities

It does not really matter that the law prohibits doctors from telling their patients anything more than the health status of the unborn child, but they do it anyway. It is done in a manner where they cannot be booked or taken to court.

According to the non-official jargon for telling couples that they have a baby boy, doctors in Delhi would use “congratulation”, “touch the right ear”, give a “thumbs up sign” and even tell the parent “not to worry.” These gestures effectively convey and let the couple know of the sex of the baby.135

Similarly, in Gujarat, erring doctors and radiologists are employing code language to inform expectant parents about the sex of the foetus. Religious greetings are the most popular – while a male foetus is announced with a “Jai Shri Krishna”, “Jai Ganesh”, “Jai Shri Ram” or “Har Har Mahadev”, indicators of a female foetus include “Jai Mataji” “Jai Ambe” and soon. Other popular code words include, Report barabr ehhe (The report is

134 Dr. Dahiya, a Civil Surgeon of Faridabad district in Haryana, who exposed two Clinics found violating the PNDT Act, faced the threat of transfer. His zealousness in booking the violators had perhaps ruffled some feathers in the political establishment of the state. Appreciating Dahiya’s role, Union Health Secretary A. R. Nanda wrote to Secretary (Family Welfare), Haryana government, G. Madhavan, saying that the “excellent initiative taken by the Civil Surgeon and his team has made the district Faridabad as exemplary district in successful implementation of the Act. The campaign both interims of legal enforcements and social awareness campaign in the district has to be sustained for about six months more if any significant impact is to be expected. The transfer of Dr. Dahiya at this crucial stage will slow the pace of implementation.” When counsel for the petitioners, represented by Supreme Court advocate Indira Jaising and others, pointed out the case of Dahiya’s transfer, the Bench observed that the action of the State government was unjustified if the officer was being transferred because he was taking action against defaulting clinics. See Frontline P. 87. February 1 (2002)

for a male foetus, and, Report barobar athi (with doctors grimly looking at the parents) for a female. Another way of sending out signals is by distributing sweets – Peda for a boy and jalebis for a girl.136

This is so when revealing the sex of a foetus by word, sign or other means is illegal under the PNDT Act [Sec. 5 (2)]. In this provision lies the essence of the Act and it is also the most difficult provision to implement. This is because the information relating to the sex of the foetus is asked in privacy.

The problem of female foeticide becomes more pronounced by the fact that the enforcing authorities are also headed by doctors and by and large it is noted that the doctors will try and protect some one from their own fraternity. which is why prosecution is very low and investigations take forever.137

Karnataka is the only State that ahs authorized non-medical offices such as officials in the State women’s Commission to take action for non-registration of diagnostic machines and maintenance of records of all medical terminated pregnancies. In fact, the State Women’s Commission has jointly worked with Vimochana (a forum for Women’s rights, fighting the menace of female foeticide in Bangalore and Mandya districts) to conduct several raids on clinics and nursing homes suspected of conducting sex-determination tests and sex-selective abortions in Bangalore and Mandya districts.138

Even so, the officials involved are quite cynical. A source in the women’s Commission says. “There is very little support from politicians and the State Advisory Committee which comprises doctors.” Adds a senior health department official, “It’s a big nexus between doctors and politicians. Politicians demand that no action be taken against the offending clinics. Even when charges against nursing homes were proved in court, they were fiend just Rs. 500-600.”139

136 The Times of India, New Delhi, November 26 (2004).
138 Anonymous, “Karnataka in grip of son syndrome” Times of India, New Delhi, June 12 (2005)
139 Ibid
In village, the situation is no different. The villagers do not have any direct links with doctors, thus, they approach the intermediaries like the *anganwadi* workers or the ancillary nurse midwives (ANMs). At the nursing home, it is the nurse who meets the women first.\(^{140}\)

The modified/ amended Act has become a tool in the hands of corrupt officials to extort money from private clinics and hospitals. Under the changed Act, the Chief District Medical Offices (CDMO) had been given blanket powers to conduct searches, etc. and register FIRs against clinics conducting ultrasound, etc to determine gender. It is the only competent authority appointed by the government to have cases registered against clinics. The Act also grants protection to CDMOs against legal action while discharging of their duties.\(^{141}\)

The revised law makes it necessary for these clinics to maintain detailed records of every medical investigation carried out on pregnant women and send all such reports to the concerned CDMO. Many times, some typographical errors creep in or there may be incorrect noting in the records, which are used as a ruse by the CDMO to blackmail clinic owners. The latter are threatened with suspensions of their registration license and jail.\(^{142}\)

The registration process lacks transparency and simplicity. A female radiologist who went for registration was kept waiting for a long time. The officer then declared her papers were not in order and that she would have to reapply for the registration. After the papers were resubmitted, he arrived one day for the inspection. Accompanied by a quiescent woman doctor, he subjected the radiologist and her clinic procedures to a grilling scrutiny. He demanded seeing the prescription of the doctor recommending an ultrasound.

\(^{140}\) *Ibid*

\(^{141}\) *The Hindustan Times*, New Delhi, December 18 (2004)

\(^{142}\) *Ibid*
examination. She showed him one such prescription. Not satisfied, he asked for the address of the patient so that he could quiz her.\textsuperscript{143}

The radiologist is also supposed to enter in a register each ultrasound case that he/she examines. The officer demanded to see the entry of case X whose prescription he and just seen. The patient had been examined that very morning. The practice of this clinic was to do all recording work in the evening as a matter of course. When this explanation was offered to the inquisitor, he refused to accept it, threatening the radiologist with arrest for violation of the PNDT Act.\textsuperscript{144}

Next, the demanded of the radiologist that she shows him as evidence all records of all patients who came to the clinic. Some States have made it mandatory for radiologists to file monthly records to the municipal authorities. The Supreme Court has also laid down that radiologists should compulsorily maintain a record of sonography cases. She argued that it was time consuming and expensive for them to keep photocopies of all records and that they usually returned the prescription to the patient. Doctor's fees would climb steeply if the government promulgates that they have to keep all records for a minimum number of years.\textsuperscript{145}

Thus, there was nothing that would satisfy the regulator. He had made up his mind not to grant the all-important registration. Even 'notice' outside the clinic, which a radiologist has to display declaring that sex detection is not carried out on his/ her premises, had been repeatedly ‘failed’ by the officers. Lack of charity over procedures is built into regulation, making even partial compliance next to impossible.\textsuperscript{146}

While the PNDT Act seeks to regulate and prevent misuse of pre-natal diagnostic techniques, it rightly cannot deny them either. The law permits ultrasound clinics, clinics for medical termination of pregnancies and assisted

\textsuperscript{143} R. Kaur, "Law, Heal thyself – Sex detection a pretext to harass honest doctors", \textit{The Times of India}, New Delhi, January 13 (2005).
\textsuperscript{144} Ibid
\textsuperscript{145} Ibid
\textsuperscript{146} Ibid
reproductive facilities as a routine matter and as a legitimate business. Only diagnostic techniques are regulated under the Act and not abortion services.

In a democracy, it is difficult to restrict right to business and livelihood if the usual parameters are fulfilled. But genetic abnormalities do not affect more than 2% of a population; infertility affects about 10 – 12% of the population; and abortion service centres are far in excess of the small numbers which actually require such services for purely bona fide medical reasons. However, the law also permits abortions for failure of contraception. In Maharashtra alone, there are more than 2,700 abortion centres and 3,600 ultrasound clinics (increasing daily). State statistic indicates that more than 1.25 lakh abortions are carried out “legally” every year. It is a huge challenge for the government to detect violations of the PNDT Act, since it is a crime of collusion and by consensus.

The Indian Council of Medical Research has now issued guidelines one regulation of genetic and assisted reproductive facilities. But since such facilities are not used across the board for sex selection, it remains to be seen if this has an appreciable impact on the sex ratio. The preferred methods will obviously remain the cheaper and more dangerous ones such as ultrasound and amniocentesis in the second trimester of pregnancy.

The current mode of functioning of PNDT Act has better worked to drive the abortion services underground, thereby criminalizing them and increasing costs and reducing the power of those in need of services. The publicity around the PNDT Act in recent years has in fact translated to awareness about the illegality of sex detection. Unfortunately, however, most women (and men) have assumed (wrongly) that the law is actually about a ban on abortions and that the government has now banned all abortions, whether sex-selective or not – a dangerous trend that will likely to have a

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148 Ibid
149 Ibid
backlash on accessing safe services for any woman in need of abortion services.\textsuperscript{150}

Since the two activities of sex detection of the foetus and abortion need not be linked at the stage of using the services, it has become possible to evade the law in connivance with the clinics having ultrasound facilities and doing sonography. Anecdotal evidence suggests that strong competition has reportedly led to a reduction in charges for availing these services, which has worked to the advantage of potential clients. Easy access is, to a certain extent, a response to an increasing demand and female foeticide apparently has replaced the old traditions of culture of neglect of the girl child, practice of infanticide among certain communities and sex differentials in the provision of medical care.\textsuperscript{151}

In a study conducted on the women in Gujarat and Haryana, it is found that the awareness about a ban on sex determination tests is fairly widespread among them. Many women also felt that the ban should be removed and couples should have the choice to decide the sex composition of their children. They desire and want fewer children while ensuring that a least one if not two of them are sons. This has also led to increased acceptance and use of sex selection tests to achieve parental preferences to have sons while not exceeding the desired number of children.\textsuperscript{152}

Pressure to comply with the two-child norm has an effect on the already dire problem of sex-determination and sex-selective abortions several States have legislated the two-child norms through Acts such as those disqualifying candidates with more than two children from public office.\textsuperscript{153}

In \textit{Javed and Others v State of Haryana},\textsuperscript{154} the Supreme court took up this issue, which was enacted in the Haryana Panchayati Raj Act. The court upheld the legislation and ruled that it did not violate any fundamental rights.

\textsuperscript{150} B. Ganatra, “Coercion, Control or Choice”, \textit{Seminar} 532, p.22, December (2003)
\textsuperscript{152} Id. p.29
\textsuperscript{154} (2003) 8 SCC 369
The court stated, "population control assumes a central importance for providing social and economic justice to the people of India."¹⁵⁵

Some preliminary studies,¹⁵⁶ which were commissioned by UNFPA and conducted in five States, showed, showed a link between pre-natal sex selection and abortion of female fetuses by families seeking to qualify for representation in a Panchayati Raj. Conversely, the study documented cases of choosing to keep male fetuses despite risk of disqualification because of the perceived benefits of having a son.

The gender discrimination dimensions of these societal problems are revealed in the State of Haryana v S Santra.¹⁵⁷ In this case, a woman sterilized under a government program nonetheless conceived after the operation and underwent delivery since abortion posed a risk to her life. She gave birth to a daughter who was also her eighth child. The Supreme Court awarded the mother damages that covered the child’s expenses until the age of puberty. Its decision acknowledged the extra burden that an unwanted girl child posed, particularly in a country where population growth is a huge problem and are of government priority.¹⁵⁸

Loop Holes in the PNDT Act

Besides the ground realities noted in the functioning of the Act (highlighting inadequacies in the law and its implementation), some other flaws observed in the PNDT Act are:

(1) The 2002 amendment in the PNDT Rules, 1996, inserted two new categories of units – the “Ultrasound Clinics” and the “Imaging centres”. The Rules, however, provide no clear directives on what the requisites are for the registration of such units.

It may be noted that those clinics which do not conduct pre-natal diagnostic procedures may obtain registration under these two categories. Though such clinics require registrations, they do not have to keep records in the manner prescribed under

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¹⁵⁵ *Supra* note 153
¹⁵⁶ *Ibid*
¹⁵⁷ (2000) 5 SCC 182
¹⁵⁸ *Supra* note 153
the Rules (i.e. a strict referral system), unless the test is in any way related to pregnancy.

(2) In respect of qualification to be possessed by medical professionals in registered units (GCC, GC or GL), the Rules prescribed additional training/experience. However, it does not provide for a procedure for the certification for such training/experience or identify institutes or persons who are eligible to provided such certification. Hence the registering authorities, who are medical professional themselves, have the discretion to decide whether such training/experience is valid or adequate.

(3) The Central Supervisory Board has no statutory representation from radiologists or sonologists.

(4) Neither the Act nor the Rules provide for a station where the advice of the advisory committee is at variance with the opinion of the Appropriate Authority. There appears to be scope for conflict as the Advisory Committee rules prescribe that the advice tendered by the Advisory Committee “Shall be adopted.”

However, since the decision-making powers are vested in the Appropriate Authority; the final decision has to be taken by him/her. It must, however, be shown that the advice of the Advisory Committee was duly considered while arriving at a final decision.

(5) The police have no role to play in the implementation of the Act. Hence the Appropriate Authority have been entrusted with the role of investigation and inspection of units as well as the search and seizure of offending objects. There has been apprehension expressed by Appropriate Authorities with regard to undertaking such activities. This is because they feel it is dangerous for a lone medical officer to raid the premise of a unit especially when the unit has political backing.\footnote{The Appropriate Authority could take a police person along with them, as the police have been vested with the responsibility of maintaining law and order under all conditions.}

Another concern often raised by Appropriate Authorities is that they have many other functions to perform and hence are unable to devote enough time to carry out their functions under the Act.\footnote{It is possible for Appropriate Authorities to authorize persons to conduct some functions on their behalf, such as inspections and investigations.}

(6) The penal provisions in the Act are not strong enough to act as a proper deterrent. There had been no convictions under the PNDT Act so far. Since the foetus is done away with in secrecy,
there is no one left to complain about this breach here are no witnesses on whose statement a case can be registered.

Whatever may be the constraints of the present legal system and the broader social system within which it operates, a comprehensive nationwide law on sex determination is both essential and possible. The law is by no means an end in itself, nor will it be sufficient to tackle the misuse of new reproductive technologies effectively. Although monitoring thousands of sex-determination clinics spread all over India is almost impossible, yet indicting one or two culprits might send the right signals to the medical community, which we are confident would be willing to follow the law.

Though the need for state intervention through appropriate legislation is admitted here, we do not suggest that law or even policy support can by themselves provide any final relief to women systematically exposed to the exploitative mechanisms of patriarchic structures, which themselves define both the nature and meanings of technologies that become a way of life in these societies. Nor do we suggest that the meaning of law or policy can be written irrespective of the nature of state power and its relationship to dominant structures of power. Supportive legislation, nevertheless, does strengthen the hands of those who struggle against these forces, much as its absence adds to the power of the dominant interests.

In as much as state is inclined to collude with these very forces, and silently permit both increased commercial exploitation and expansion of technological control in the name of choice by either refusing to intervene or resorting to symbolic law making and token policy action, it is left to the concerned groups in society to put pressure on state for extracting supportive laws and policies as well as to challenge the promoters of technology myth by exposing how it serves their own economic or political objectives. Challenging the legitimacy of market forces and professional interests which thrive on the growth of such technology and demystifying the true essence of the practices these generate is crucial in this regard. Exposing the myths
which sustain these technologies and the practices which follow their use then is the most urgent need of our times.

The unmasking as to how systematic discourse manipulation has been effected to secure the reversal of meaning inherent in certain practices is crucial in this regard. Arguments which contend that restricting the possibilities of using such technologies to make reproductive choice amounts to denying women control over their decisions need to be critically evaluated and the meaning of their failure to take into account either the dynamics which inform such decisions or their implications for not only particular women, but also women in general has to be carefully understood.

The challenge, so to say, lies not simply in getting appropriate laws prompted. The challenge actually lies in exposing the intricate mechanisms through which the contexts of exploitation are produced and reproduced without even becoming suspect. It lies in demolishing these mechanisms and altering the structures, which provide them space for growth and expansion so as to almost take charge of the lives of victims. The challenge lies in demolishing the subtle mechanism of the victimizing discourses of exploitation by systematically turning law, policy and technology in the service of power structures.

We need a law to recognize the legal status of an unborn child and recognise its pre-natal existence. Action should be allowed in case of injuries suffered while 'in utero'. The fact that the unborn child is physically dependant on the mother cannot lead to the assumption that she has no separate existence of legal significance.