CHAPTER – 3

FEMALE FOETICIDE – LEGAL FRAMEWORK

“When girls go missing in a society, when a child is denied the right to life even before being born because of her sex, when discrimination starts when the child is in the womb and continues throughout her life till the grave, when a girl child is denied her basic right to survive, develop, participate and protect, it becomes an issue of paramount concern and urgent action.”

Taking into consideration this position many laws have been enacted by the legislature. But the enactment of any law is not sufficient. Laws must be adhered to and applied rigorously before any change can take place. Inspite of the existing laws, umpteen incidents of female foeticide are taking place. It is still unclear as to who will serve as the watchdog to check the evil of female foeticide. Implementation of policies is difficult considering the fact that only doctors carry out abortions. Many women are forced by family members or society to go ahead with an abortion of a female foetus. Pregnant women are often torn between the choice to abort a female child and endangering their own lives. They also know that giving birth to a girl child would ultimately lead to violation of her rights and given the trend favouring boys, will most probably not be welcome by the society.

Many voluntary organisations, academicians, professionals and volunteers dedicated to the cause of protecting the rights of the girl child and women have initiated a campaign to curb female foeticide and create mass awareness on the issue. Public meetings and demonstrations against female foeticide by voluntary organisations and institutes have led to an increased
mass awareness on the issue. Under the PNDT Act, authorities have been empowered in Delhi and elsewhere with whom complaints can be lodged.

The question is how far is it ethical and legal to undergo the test only for determining the sex of a child. Does this not amount to culpable homicide? It has been medically established that an unborn child has a life and body of its own. Section 312 of the I.P.C. prescribes punishment for such an act. Another relevant Section is 316 which states that whoever does any act causing death of a person, he would be guilty of culpable homicide. Those guilty of such acts, including death of an unborn child, are liable to be punished with 10 years imprisonment.

Though provisions exist in the law pertaining to the Medical Termination of Pregnancy Act, 1973, regarding abortion of a female during pregnancy in case of risk to a female's life, this Act does not cover a situation where the gender of the unborn is a matter of choice. There is no provision in this law which permits termination of pregnancy simply because the foetus is of a particular sex. Hence, even if the woman claims that her mental condition would deteriorate due to birth of a female child, law does not permit her to get the pregnancy terminated.

Besides being violative of the provisions of the I.P.C. and the MTP Act, it has also raised certain other problems. Amniocentesis undergone simply to determine the sex of the child and consequently opting to abort the female in the womb is against the constitutional mandate. Article 51-A(e) of the Constitution says it is the fundamental duty of the citizen “to renounce practices derogatory to the dignity of a woman” and surely this is a practice which is against the dignity of all women.

The main law pertaining to sex detection tests is Pre-Natal Diagnostic Techniques Act, 1994, which is both prohibitive and regulatory. Under this chapter, we shall discuss all the laws relating to this evil or the Indian legal framework on the issue to combat female foeticide/infanticide.
3.1 THE PRE-NATAL DIAGNOSTIC TECHNIQUES
(REGULATION AND PREVENTION OF MISUSE) ACT,
1994 – ACT 57/1994

History of the Act: Sex detection tests started in India in the mid-seventies. In fact it was a fallout of medical research in reproductive biology to detect foetal abnormalities with the help of amniocentesis. Some medical entrepreneurs were smart enough and prompt to encash upon the anti-female and pro-male sentiments of our society and allure people. Clinics performing these tests mushroomed and doctors made good business. The first clinic to perform these tests was inaugurated in Bombay in 1977. Another centre around the same time opened in Amritsar. ‘Invest Rs. 500 now and save Rs. 50,000 later’ was the slogan indicative of the test fee and subsequent saving of wedding expenses of daughters. The message was clear.

The business went on smoothly till 1982 when a male foetus was aborted because of wrong diagnosis. The incident created an uproar, which later snowballed into a national debate. A group of activists organised themselves to fight the reprehensible practice in 1986 and launched a determined campaign through a forum known as Forum Against Sex Determination/Sex Pre-Selection. A survey was conducted in Bombay and it was found that 85 per cent of the gynaecologists performed amniocentesis only for sex detection. A private clinic in Bombay during 1984-85 had performed 15914 abortions and 99 per cent of them were female foetuses. There were similar distressing reports from other parts of the country as well.1

The public outrage following such exposures pressurised the Government of Maharashtra to enact a legislation to curb the practice. There was a lot of opposition not only from the general public but also from professional bureaucrats and politicians. The state government went ahead and passed the law known as the Maharashtra Regulation of Pre-Natal Diagnostic Techniques Act, 1988. But this law did not have the desired

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impact. It only led to influx of such cases to neighbouring states, which had no such laws and Maharashtra state could not cover them.

In fact after passage of the law, the number of female foeticides increased in Gujarat enormously. In other states also the cases increased. There were protests all over the country to impose a ban on the misuse of medical technology to selectively eliminate female foetuses. November 24, 1988, was observed as a National Protest Day against this practice. Many activities were organised to lodge a protest, including signature campaigns, rallies, street plays etc.

As a result, the Central Government set up an expert committee to look into the matter and prepare a report. The committee after a detailed survey, interviews and deliberation, prepared a report. Based on these recommendations, a Bill was introduced in 1991 on which public opinion was invited. As expected there was a mixed response, though wonderfully balanced. Criticism and objections notwithstanding, the legislature went ahead and passed the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. Before going into the provisions of the Act, it would be pertinent to discuss the arguments of those who opposed and those who supported the law banning the practice of sex selection.

About the Act


Keeping in view various fundamental guarantees under the Constitution, the government took note of female foeticide. The Parliament realised the implications arising out of the misuse of ‘sex-determination tests’ and intended to regulate the same for certain medical purposes. Thus this Act was exacted and was also amended in 2001 along with Pre-Natal Diagnostic Techniques (Regulations and Prevention of Misuse) Rules, 1996.
In the recent past, pre-natal diagnostic centres sprang up in the urban areas of the country using pre-natal diagnostic techniques for determining the sex of the foetus. Such centres became popular and their growth was tremendous as females were not welcome in many Indian families. The result was that these centres became dens for female foeticide. Such abuse of the technique is against the female sex and affects the dignity and status of the women. It was considered necessary to bring a legislation to regulate the use and to provide deterrent punishment to stop the misuse of such techniques.

The matter was discussed in Parliament and the Pre-Natal Diagnostic Techniques Bill 1991 was introduced in 1991 in the Lok Sabha. The Lok Sabha, after discussion, adopted a motion for reference of the Bill to a joint committee of both the Houses of Parliament in September 1991. The joint committee presented its reports in December 1992 and on the basis of the recommendation of the committee, the Bill was considered by both the Houses of Parliament.

The Act prohibits sex selection before or after conception. It regulates but does not deny use of pre-natal diagnostic techniques such as ultrasound for the purpose of detecting genetic abnormalities or other sex-linked disorders.

No person, including the one who is conducting the procedure as per the law, will communicate the sex of the foetus to the pregnant woman or her relatives. The purpose is to prevent misuse of such techniques for sex determination that could eventually lead to elimination of the female foetus and thereby create a gender imbalanced society.

Under the Act, a person who seeks help for sex selection can face at first conviction, imprisonment for a three-year period and be required to pay a fine of Rs. 50,000.

The State Medical Council can suspend the registration of the medical practitioner involved and at the stage of conviction can remove his/her name from the register of the council.
Under the Act, pre-natal diagnostic techniques cannot be conducted unless the person conducting the test has explained all the known side and after effects to the pregnant woman. He must obtain her consent in writing in the language that she understands.

**Details of the Act:**

This Act was extensively amended during 2003. This Act of 1994, amended during 2003, stands with the following objectives:

- Prohibition of misuse of pre-natal diagnostic techniques for detection of the sex of the foetus leading to female foeticide.
- Prohibition of advertisements of pre-natal diagnostic techniques for the purpose of detection or determination of sex.
- Permission and regulation of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorder.
- Permitting the use of such techniques only under certain conditions by registered institutions.
- Punishment for violation of the provisions of the laws.

Formerly the Act was known as Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection ) Act, 1994, which stood amended in 2003 as Pre-Natal Diagnostic Techniques (Regulations and Prevention of Misuse) Act.

This Act has the following fundamental concepts:

This law has tried to define the words embryo as a developing human organism after fertilization till the end of eight weeks (56 days). Foetus has been defined as human organism during the period of its development beginning from the 57th day following fertilization or creation, but it does not include the period which was suspended towards its development and ending at the birth.

‘Sex selection’ means 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.
The law requires to regulate the functioning of:

(i) Genetic counselling centres

(ii) Genetic clinics

(iii) Genetic laboratories such as institutions either in hospitals, nursing homes or otherwise at any place where such tests are done or conducted. Law requires the regulation of the working of the following persons, technicians or doctors: gynaecologists, paediatricians, sonologists, imaging specialists, scanners, medical practitioners, relatives of the woman or her husband.

The prohibitions -- Section 3

Genetic counselling centres, genetic laboratories or genetic clinics unless registered shall not conduct or associate with or help in conducting activities relating to pre-natal diagnostic techniques. The Act talks about following provisions.2

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2 Section 3A: Prohibition of sex selection: No person, 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 another person, sex selection on a woman or a man or on both or on any tissue, embryo fluid or gamete derived from either or both of them.

Section 3B: No person shall sell any ultrasound machine or imaging machine or scanner or any equipment capable of detecting sex of the foetus to any centre, clinic or laboratory which is not registered under the Act.

Section 4 (Regulation of pre-natal diagnostic techniques): The following are the purposes for which pre-natal diagnostic techniques shall be conducted:

a) Chromosomal abnormalities;
   • On a woman of age 35 years or above;
   • If the woman has undergone two or more spontaneous abortions or foetal loss;
   • The pregnant woman has been exposed to ceratogenic agents such as drugs, radiation, infection or chemicals;
   • The pregnant woman or her spouse has a family history of mental retardation or physical deformities such as spastic or other genetic disease.

The above conditions are required to be fulfilled in the case of:

(i) Generic metabolic disease
(ii) Haemoglobinopathies
(iii) Sex-linked genetic disease
(iv) Cognital anomalies

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The manner of keeping such records on ultrasonographic test are prescribed and contravention of such prescription is violative of the law as laid down in Section 5 and 6.

Section 5: This section says that no person shall conduct the pre-natal diagnostic procedure unless:

(a) The pregnant woman has been explained the known side-effects and after-effects.
(b) She has given written consent of which a copy should be give to her.

Section 5(2): No person, including the person conducting pre-natal diagnostic procedure, shall communicate to the woman concerned or her relatives or any other person the sex of the foetus by words, signs or any other manner.

Section 6: No centre, genetic laboratory or genetic clinic shall conduct any test through pre-natal diagnostic techniques, including ultrasonography, for the purpose of determining the sex of the foetus.

- No person shall conduct any such test for determining the sex of the foetus.
- No person shall, by whatever means, cause or allow to cause selection of sex after conception.

Section 23: Any
(1) Medical geneticist
(2) Gynaecologist
(3) Registered Medical Practitioner
(4) Or any person, who owns a
   (a) Genetic counselling centre
   (b) Genetic laboratory
   (c) Genetic clinic

or is an employee of the above, who renders his professional or technical service in contravention of any provision of this Act or rule, shall be punished with imprisonment for three years and fine of Rs. 10,000. For a subsequent offence, the punishment will be imprisonment for five years and Rs. 10,000 as fine.

Section 23(3): Any person seeking aid of such clinic/centre ultrasonic clinic, imaging clinic, medical geneticist, gynaecologist, or medical practitioner in conducting pre-natal diagnostic techniques on any pregnant woman for any purpose other than chromosome abnormalities, genetic metabolic disease, haemoglobinopathies, sex-linked genetic disease, or congenital anomalies shall be punished with imprisonment of three years with or without Rs 50,000 as fine. But no woman who has been compelled to undergo such diagnostic technique shall be covered by the Section noted above.

Section 24: Where no specific penalties are provided for violation of any rule or provision of this Act, the violator will be punished with three months' imprisonment or a fine of Rs. 1000.

Section 25: The law provides to seek aid of the presumptive principles of the Evidence Act where it says that the court shall presume, unless the contrary is proved, that the pregnant woman was compelled by her husband or any other relative to undergo pre-natal-diagnostic techniques and such person shall be liable for punishment for abetment of the offence under Sub Section 3 of Section 23 and shall be punished with three years' imprisonment and fine of Rs. 10,000.

Section 26: No person, clinic, or centre using ultrasonic, imaging, scanner, or any other technology capable of determining the sex of the foetus or sex selection may issue, publish, distribute communicate, or advertise, including through the Internet, regarding any such
• Employment of any person who does not possess prescribed qualifications is banned in genetic counselling centres, genetic laboratories and genetic clinics.

• No medical geneticist, gynaecologist, paediatrician, registered medical practitioner or any other person shall conduct, cause to be conducted, aid in conducting by himself or through any other person, any pre-natal diagnostic technique at a place other than a place registered under this Act.

Administrative set-up:

1) Central supervisory board
2) State supervisory board
3) Appropriate authority
4) Advisory committee

Central Supervisory Board:

i) Chairman: Ex-Officio, Minister in charge of Ministry of Family Welfare;

ii) Vice–Chairman: Secretary to the Government of India in charge of the Department of Family Welfare.

iii) Members ex-officio:

    a) Central Government representative from the Women and Child Development Department;

facility. Such person or clinic etc. shall be punished for contravention with three years' imprisonment and fine.

Section 27: The offences are cognizable, non-bailable and non-compoundable.

Section 28: Courts are forbidden to take cognisance of the case unless the complaint is made by appropriate authority of Central or state government as the case may be, or by any person who has given a notice of 15 days in the prescribed manner to the appropriate authority of his intention to make a complaint to the court about the alleged offence. Here any person means a social organisation. Any person/social organisation seeking to prosecute the appropriate authority, on demand, shall supply all relevant papers in its possession. No court official below the rank of First Class Judicial Magistrate can try the offence.
b) Representative of the Department of Legal Affairs in the Ministry of Law and Justice;

c) One representative of the Indian System of Medicines and Homeography.

iv) Ten members appointed by the Central Government

a. Two members from among eminent medical geneticists;

b. Two from among eminent gynaecologists, obstetricians or specialists in women’s diseases;

c. Two members from amongst eminent social scientists;

d. Two members from amongst eminent paediatricians;

e. Two from women’s welfare organisations.

v) Three women MPs, two from Lok Sabha and one from Rajya Sabha;

vi) One officer not below the rank of Joint Secretary of the Central Government, in charge of family welfare who shall be member secretary, ex-officio.

What this board is supposed to do :-

(i) Advise the Central Government on policy matters;

(ii) Review and monitor the implementation of the Act and the rules of the Act. It may recommend changes in rules of the Act;

(iii) To create public awareness regarding foeticide;

(iv) To take steps to ensure smooth functioning of various bodies.

State supervisory board:

It shall be constituted in each state and Union Territory for the purpose of creating public awareness and to review and monitor the functioning of appropriate authorities in the state.

The Board shall comprise of :-
(i) Chairperson: Minister in charge of the Department of Health and Family Welfare;

(ii) Vice-Chairman: Ex-officio Secretary in charge of the Department of Health and Family Welfare.

(iii) Ex-officio Secretaries or Commissioners of:
  a. Department of Health and Family Welfare;
  b. Social Welfare;
  c. Law;
  d. Indian System of Medicines and Homoeopathy.

(iv) Ex-officio Director of Health and Family Welfare or Indian System of Medicines and Homoeopathy;

(v) Three women MLAs or members of the Legislative Council.

(vi) Members to be appointed by the state government from amongst:
  a) Eminent women activists from NGOs;
  b) Eminent scientists and legal experts;
  c) Eminent gynaecologists, obstetricians or specialists in women’s diseases;
  d) Eminent paediatricians or medical geneticists;
  e) Eminent radiologists or sonologists.

(vii) Member secretary: An ex-officio Joint Director-rank officer in the Department of Health and Family Welfare. The member can be co-opted but the number shall not go beyond one third of the total strength of the state board.

Appropriate Authority: One or more appropriate authorities in one Union Territory shall be appointed by the Central Government. The state government shall appoint one or more appropriate authorities in the whole or parts of the state for the purpose of implementing the Act having regard to the
intensity of the problems of pre-natal sex determination leading to female foeticide.

Appropriate authority shall consist of:

a) Chairperson – above the rank of Joint Director of Health and Family Welfare;

b) A woman representative from a women’s organisation;

c) An officer of the Law Department of the state or UT.

Functions of the Appropriate Authority:

(i) To grant, suspend, cancel registration of genetic counselling centres, genetic laboratories or genetic clinics;

(ii) To oversee working in those centres;

(iii) To investigate violation or breach of the provisions or rules of the Act and take immediate action;

(iv) To seek advice from the advisory committee on application for registration or on complaints for suspension or cancellation of registration;

(v) To take appropriate legal action against the use of any sex-selection technique by any person at any place suo motu or when brought to its notice and initiate independent investigation;

(vi) To create public awareness against the practice;

(vii) To take action on the recommendation of the advisory committee made after investigation of the complaint.

Advisory committee:

Each appropriate advisory committee will have:

i. Chairman: One of the members of the advisory committee;

ii. Three medical experts from amongst gynaecologists, obstetricians, paediatricians or medical geneticists;
iii. One legal expert;
iv. One officer to represent the department dealing with information and publicity of the state government;
v. Three eminent social workers of whom not less than one shall be from amongst representatives of women’s organisations.

Thus this is the law enacted by the legislature specifically for prohibition of this evil and regulation of rules provided within the Act. It is very important to note that the Act permits use of such techniques provided that the medical practitioner has explained all the known side-effects and after-effects of such techniques to the pregnant woman and more importantly, has obtained her written consent in the language she understands.

Practices relating to female foeticide and technology connected with the same are considered discriminatory to the female sex, not conducive to the dignity of women.

The proliferation of technologies mentioned above may in future precipitate a catastrophe in the form of severe imbalance in male-female ratio. The state is also duty-bound to intervene in such matters to uphold the welfare of society, especially of women and children. Therefore, the government felt it necessary to enact and implement in letter and spirit a legislation to ban the pre-conception sex-selection techniques and the misuse of pre-natal diagnostic techniques for sex-selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of society.

**Drawbacks of the new Act:**

Amendment of Section 3, Clause (2) is negatively worded which gives a scope for people, specifically excluded to take advantage of the loophole. Instead, if the provision was positively worded in the sense that it laid down as to who was eligible to carry out pre-natal diagnostic techniques under the circumstances specified under this Act, it would have restrained anyone who
was otherwise not specifically authorised to conduct such tests. Secondly Section 3-B has a major drawback. The Act or the Section does to talk about manufacture of the equipment. Since manufacturing is the first step towards misuse, specific guidelines in respect of the manufacture of equipment to be used are necessary. The manufacturing license should be issued only to government institutions so that monitoring becomes easier. Also very closely linked is the licensing function. If licences for pre-natal diagnosis were granted only to government institutions, the task of vigilance would be further simplified. The ban on misuse of the techniques for SD imposed on government institutions has not been violated for the past 15 years. Also there is no provision to the effect that portable pre-natal diagnostic techniques machinery/equipment is registered.

Thirdly through amendment to Section 4, Clause (3) and (4), the provisions of this section prima facie appear to be good, though toothless. The issue is that though citing a reason which satisfies the condition precedent laid down in the Act before the pre-natal diagnostic techniques tests are conducted, the provision misses out a crucial point. It does not mandate for the production of documents to prove that the condition in fact, is satisfied very much in spirit and objective of the Act. Also should be included in this provision is the requirement to record all these documentary proofs which shall be made available for verification by the CSB/SSB.

Fourthly, Section 13, Subclause (iv) gives a lot of discretionary power to the boards, which have to be curtailed in through guidelines.

Fifthly, the amendment in Section 5 has practical difficulties in terms of implementation. It is suggested that a kind of code be adopted whereby the tests which have satisfied the conditions of the Act be given code number and sent for testing in a place which is authorised to conduct the test for a particular area or region. This is to ensure that there exists no direct link between the family concerned or the medical practitioner who can convey the sex of the foetus and might lead to the death of the foetus in case it turns out to be a female. This is because though the provision bars the practitioner from
conveying in any manner the sex of the foetus, proof that the same has been adhered to, can’t be assured.

Sixthly, insertion of the new Section 16-A regarding the powers of the Supervisory Board, does not mention rules and regulations with regard to the powers of the boards, as to in what way the powers have to be synchronised to fulfil their duties and functions as specified in the Act. Also this Section suffers from a serious defect i.e the Section has adopted an approach which has time and again proved ineffective and fruitless. Therefore, the approach should have been a grass-root level approach. This is even more applicable in the case of PNDT because of the fact that a good chunk of cases are from rural areas which are very difficult to monitor and control. Panchayat-level machinery working hand-in-hand with local rural institutions like the ‘anganwadis’ and schools would be an ideal way to tackle and combat the problem of PNDT.

Seventhly, this Act has certain vague and ambiguous terms and expressions like eminent, which are very problematic as to how they should be interpreted.

Eighthly, a major hurdle in the endeavour to prohibit sex-determination and regulation of PNDT techniques is that there is no proper duty laid upon any of the authorities in the Act. There is no penalty attached for non-performance of duties, or acts of commission or omission. In fact, so far the CSB has never met regularly as per the provisions of the Act.

Lastly, the financial memorandum affixed to the Bill with regard to expenses falling under Section 16-A of the Act has no regulation with regard to transparency, accountability and regulatory control. This is very problematic and might just prove to be plunderers’ paradise.3

Despite all these laws available in hand, cases of female foeticide and female infanticide are on the rise.

Arguments against the law:-

Those who opposed the law argued that putting a ban would be detrimental to the interests of women. If unwanted girls go on increasing, they will be ill-treated and exploited.

Disallowing a woman a choice in the matter would mean multiple pregnancies. She will go on producing children till she gets her choice.

A legal ban would also give impetus to the unholy practice because doctors would be under threat. Hence, the cost of the test would increase. Those able to afford will get the test and abortion done at safe, hygienically equipped places while others who are not able to afford, shall suffer.

Prohibiting a woman to make a choice in the matter of composition of her family, would be an infringement of her right to freedom. These matters are too personal to be invaded.

Arguments in support of the law:

Those who support a legal ban have the following arguments:

If not banned it will create an imbalance in the sex ratio with the result that males will not get females. This will lead to increase in cases of polyandrous marriages, rapes, incest and kidnappings.

The argument of freedom of women and her choice is utterly forced, as women are dependent on their husbands and in-laws etc. A woman has to face immense pressure to do and not to do things against her wishes.

A legal ban will be a deterrent and will certainly check the frequency. Doctors would have to think time and again before violating the law.

The inadequacies of the present law are largely because the Government of India has not been seriously committed to achieving the intent of this Act. Also due to effective lobbying by doctors in the early nineties, several positive features of the Maharashtra Act, 1988, were watered down in the 1994 national Act. A recent administrative directive from the Family Welfare Ministry excluded a sex-determination technique like Erikson’s from
the preview of the 1994 Act asserting that it applied only to tests conducted on pregnant women. The immediate reaction to this directive was the presumption of newspaper advertisements in North-West India, again promoting this sophisticated reproductive technology. These very advertisements had been stopped only a year before when a petition challenging the illegality of these advertisements was filed with the Punjab Human Rights Commission by ‘Women Against Violence.’ The unwillingness of the government to interpret a legislation to keep it in tune with the progress in technology is self defeating.

3.2 MEDICAL TERMINATION OF PREGNANCY ACT, 1971:-

This Act permits medical termination of pregnancy on the following grounds:

- Where continuation of pregnancy involves risk to the life or to the physical and mental health of the mother.

- Where there is substantial risks that if the child is allowed to be born, it would suffer from physical and mental abnormalities and to be seriously handicapped.

A medical practitioner, who is registered, may operate for termination when pregnancy does not exceed 12 weeks. But if it is over 12 weeks and within 20 weeks, then it is to be performed by two registered medical practitioners. It is the duty of the doctors to be satisfied that there are justifiable grounds for the operation.

It is to be noted with interest that only after 16 weeks, a test through amniocentesis reveals the sex of the child.

However, there are several loopholes in this Act which facilitates the misuse of the law purely for selective elimination of the female foetus. The most glaring is the provision of Section 3(2)- explanation), where it allows abortion when pregnancy occurs as a result of failure of contraceptive devices used for the purpose of limiting the number of children. This has been used as a scapegoat.
Another interesting provision of law is that doctors are protected from any liability if they perform the abortion in good faith. Section 8 says no suit or other legal proceedings shall lie against any doctor for any damage caused and likely to be caused by anything which is done or intended to be done in good faith under the Act.

The rules of the Act relieve the doctors of responsibility or accountability as there is a form in which they have only to tick the reasons for abortion. No further details are required like what type of injury to the mental or physical health of the mother could be caused if the pregnancy was not terminated or what risk of abnormality in the child was apprehended or what was the device or method of family planning adopted and which failed resulting in the unwanted pregnancy and so on.

In 1964, the Government of India constituted a committee to study the question of liberalisation of miscarriage contained in Section 312 of the IPC, which makes induced abortions illegal except to save the life of a woman. The Shantilal Shah Committee submitted its report in 1966 on the basis of which a comprehensive Bill was brought in Parliament in 1970, setting forth various situations under which pregnancy could be lawfully terminated. The Act came into force in 1971 to liberalise abortions. It was intended to be used as one of the birth-control methods to curb the demographic explosion. This Act allows termination of pregnancy only by legal practitioners.

The Medical Termination of Pregnancy Rules were revised by the Government of India on October 10, 1975, on recommendations of a workshop held in New Delhi on the implementation of the programme of medical termination of pregnancies at the district or block levels organized by the World Health Organisation.4

This Act is meant to legalise abortion only when there is some kind of risk to the female, but not to legalise the illegal abortion with the intention to commit the act of female foeticide through pre-natal-sex determination.

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4 Alice Jacob, World Congress on Law and Medicine Discussion, Session III (a) New Delhi, Feb.1998, p.1
People used to take the other side of law or interpret the law in their own way and misuse it for their benefit. Hence, punishment is mandatory.

3.3 STATUTORY PROVISION UNDER THE INDIAN PENAL CODE

There are seven sections which deal with miscarriage as a punishable offence. They are meant to punish a person who assists in the killing of an infant or concealing the birth of a child because killing of an unborn is tantamount to culpable homicide as the foetus has life and limb in the womb. These provisions are:

1. Causing miscarriage, Section 312-314:- Offences relating to causing miscarriage are the following:-
   a) Voluntarily causing a woman with child to miscarry, otherwise than in good faith for the purpose of saving the life of the woman with her consent (S-312) and without her consent (S-313).
   b) Causing the death of a woman by an act with intent to cause miscarriage (S-314)

Section 312 says the offence is cognisable or bailable so far as three years’ imprisonment is concerned. However, if a woman is quick with one child, imprisonment extends to seven years while the offence remains cognisable and non-bailable. Causing miscarriage without a woman’s consent (S- 313) has serious implications resulting in life imprisonment or ten years’ imprisonment while the offence is non-bailable and cognizable. Section 314 prescribes 10 years’ imprisonment and fine. If the act is done without the consent of the woman, the punishment is either 10 years’ imprisonment or life term.

2. Injuries to unborn child: Sections 315-316:- Injuries to the unborn are mainly:-
   a) Doing an act without good faith with intent to prevent a child being born alive or to cause it to die after birth (S-315)
b) Causing the death of a quick unborn child by an act amounting to culpable homicide (Section 316). Punishment under Section 315 is 10 years' imprisonment or fine and under Section 316, it is 10 years' imprisonment and fine.

3. Exposure and abandonment of infants, Section 317:-

Exposure and abandonment of a child under 12 years of age, by the parents or by persons having care of the child with the intention of wholly abandoning him is an offence, punishable with imprisonment of seven years or fine or both.

4. Concealment of birth, Section 318:

Intentional concealment of the birth of a child by secretly burying or otherwise disposing of the body of the child, whether such child dies before or after or during birth is an offence under Section 318. The punishment is imprisonment for two years and fine or both.

3.4 OTHER RELATED LAWS

The use of pre-natal diagnostic techniques for slaughtering female foetuses is violation of several constitutional provisions.

3.4.1 CONSTITUTIONAL PROVISIONS

**Fundamental Rights:-**

Article 14: It guarantees equality before the law.

Article-15: This guarantees equality before law and prohibits discrimination on the basis of sex.

The Preamble of the Constitution speaks about securing to all citizens equality of status and opportunity as well as justice -- social, economic and political. For this purpose the Constitution provides Fundamental Rights and Directive Principles of State Policy to citizens of India.

Fundamental Rights, Article 14: The state shall not deny to any person equality before law or equal protection of laws within the territory of India.
Article 15 contains provision for a particular application of the general principle of equality of treatment under Article 14. It prohibits discrimination against a citizen on the grounds of religion, race, caste, sex, or place of birth.

Clause (1) of Article 15 states: “The state shall not discriminate against any citizen on the grounds of religion, race, caste, sex, place of birth or any of these.”

The words ‘discriminate against’ means to make any adverse distinction or to distinguish unfavourably from others. It includes an element of unfavourable bias.

- Clause (3) of Article 15 states: “Nothing in this Article shall prevent the state from making any special provision for women and children.” It means a special status is given to them to secure them.

- Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Right to life does not only mean the continuance of a person’s animal-like existence. It means fullest opportunity to develop one’s personality and potential to the highest standard of comfort and decency. Right to life includes right to social security, protection of family and even duty to preserve life.

**Directive Principles:**

1) **Article 39:** The state shall, in particular, direct its policy towards securing:

   (a) To all citizens, men and women, equal right to an adequate means of livelihood.

   (b) Equal pay for equal work for both men and women.

   (c) That the health and strength of workers, men and women, and children of tender age are not abused and that citizens are not forced by economic necessity to enter a vocation unsuited to their age and strength.
That children are given opportunities or facilities to develop in a healthy manner in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

**Article 42:** This requires that the state shall make provisions for securing just and humane conditions of work and for maternity relief.

These are the constitutional safeguards provided by our Constitution to secure the life of a woman in all spheres of her life.

### 3.4.2 OTHER PROVISIONS

3. Special Marriage Act, 1954. The wife may sue the husband for divorce on the ground that he has committed rape, sodomy or bestiality.
4. The Hindu Succession Act, 1956, gives a woman ownership in the property inherited or acquired by her. Now by an amendment in Section 6 of the Hindu Succession Act, 1956, a daughter will be a coparcener and has the right to partition in her father’s property equal to her brothers’.
5. The Hindu Adoption and Maintenance Act, 1956.

### 3.4.3 JUDICIAL RESPONSE ON GENDER EQUALITY

In *Yusuf Abdul Aziz v The State of Bombay*[^5], the validity of Section 497 of the Indian Penal Code was challenged. This Section makes an abettor of adultery punishable, but provides that, “in such the wife shall not be punishable as an abettor.” It was argued that Clause (3) of Article 15 should be confined to provisions which are beneficial to women and could not be used to give them a license to commit and abet crimes. The court found no such restriction under Clause 15(3) nor a license to commit offence of which punishment has been prohibited.

[^5]: AIR 1954 SC 321
The provision under Order 5, Rule 15, of the Civil Procedure Code, 1908, for making service of summons on any male member of the family, if the defendant could not be found, was held not discriminatory of Article 15(3) which covers any provision either for betterment or for some other purpose specially made for women. It was held that there was no discrimination between a woman and man simply on the ground of his or her sex in receiving a notice on behalf of some other member of the family.6

In Raghubans Saudagor Singh v State7 an order of the Governor of Punjab rendered women ineligible to posts in men’s jails other than those of clerks and matrons. The order was assailed as violative of Article 16(2). The court turned down this plea and held that what was forbidden under the Constitution was discrimination on the ground of sex alone, but when the peculiarities of sex added to a variety of other factors and considerations from a reasonable nexus with the object of classification, then the constitutional bar under Articles 15 and 16 (2) could not be attracted.

In Air India v Nargesh Mirza8 the validity of the Indian Airline’s and Air-India’s service rules providing that an air hostess had to retire from service at the age of 35 or on marriage, whichever was earlier, or if she got married within four years of confirmation or on first pregnancy, was in question. The rules also empowered the Managing Director to retain in service an unmarried air hostess up to the age of 45 years on her being found medically fit. The court held that an air hostess could work up to the age of 45 years and that her services could be terminated on third pregnancy provided her two children were alive. The judgement attempted to recognise that their right to service benefits was equal to their male counterparts and came down heavily on the corporation management for its chauvinistic attitude of looking upon air hostesses as sex symbols employed for business consideration.

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6 AIR Shadab v Mohd. Abdullah, AIR 1967 K&K 120
7 AIR 1972 P 9H 117
8 AIR 1981 SC 1929
In *T. Saritha v Vankata Subbaiath* the AP High Court extended the application of the principle of reasonableness to matrimonial matters and invalidated Section 9 of the Hindu Marriage Act, 1955, dealing with the restitution of conjugal rights and found that “the remedy of restitution of conjugal rights provided for by the Section is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed under Article 21 of the Constitution.”

In *State of Maharashtra v Madhukar Narain* the Supreme Court without referring to Article 21, has held that even a woman of easy virtue is entitled to privacy and that no one can invade her privacy as and when he likes.

In another case the Supreme Court has held that the right to privacy of a woman would preclude such questions to be put to female candidates as modesty and self respect may preclude an answer. In the instant case, the petitioner, a probationer assistant in the L.I.C., gave a false declaration regarding the last menstruation period, during her medical examination, since the clauses in declaration were indeed embarrassing if not humiliating like the regularity of menstrual cycle, the term therefore, the number of conceptions taken etc. The Supreme Court found that such embarrassing questions violated the right to privacy of women employees and further directed the corporation to delete such columns in the declaration.

In *Gautam Kundu v State* a woman refused the husband’s application for blood test to disprove paternity, as it would be slanderous, embarrassing and humiliating for the woman.

No legally-conscious citizen will forget the case of *Rupan Deol Bajaj v K.P.S. Gill* which is the latest in the series upholding the dignity of women. In this case the apex court did not allow the blue-eyed and mighty

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9 AIR 1983 AP 356  
10 AIR 1991 SC 207  
11 Neera v LIC, AIR 1992 SC 392  
12 AIR 1993 SC 2295  
13 AIR 1995 SCW 4100
police officer KPS Gill to escape judicial scanning of his alleged insult to the modesty of the complainant who was none else than a very sensitive I.A.S. officer.

Indian women are known worldwide for their decency and shy nature. A judgment delivered in State of Punjab v Gurmit Singh\textsuperscript{14} the hon'ble Supreme Court while convicting three rapists of a minor girl, directed that all such trials must be held in camera. This ruling has been widely welcomed, as it will save character assassination and humiliation of the victim in public. Indian judiciary has high regard for women victims.

In Bodhi Satwa Gautam v Subra Chakraborty\textsuperscript{15} the Supreme Court held that rape was a crime against basic human rights and also violated the victim's most cherished Fundamental Right, normally the right to life contained in Article 21. Women also have the right to life and liberty; they also have right to be respected as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. It is the basic right of the female to be treated with decency and the search of a woman by a person other than a female officer is violative of it.\textsuperscript{16}

Making special provision for women in respect of employment on posts under the state is an integral part of Article 15 (3). It is not whittled down in any manner by Article 16. The special provision which the state may make to improve women's participation in all activities under the supervision and control of the state can be in the form of either affirmative action or reservation.\textsuperscript{17}

In a historic judgement, Sarla Mudgai v Union of India\textsuperscript{18} the Supreme Court directed the then Prime Minister, Mr Narasimha Rao, to take a fresh look at Article 44 of the Constitution which enjoins the state to secure a

\textsuperscript{14} AIR 1996 SCW 998
\textsuperscript{15} (1996) SCC 490
\textsuperscript{16} State v Baldev Singh, AIR 1999 SC 2378
\textsuperscript{17} Govt of AP v PB Vijay Kumar, AIR 1995 SC 1649
\textsuperscript{18} (1995) 3 SCC 635
uniform civil code which, accordingly to the court, was imperative for both protection of the oppressed and promotion of national unity and integrity. The court directed the Union Government through the Secretary to the Ministry of Law and Justice, to file an affidavit by August 1995 indicating the steps taken and efforts made by the government towards securing a uniform civil code for the citizens of India. The court held that a Hindu marriage continued to exist even after one spouse converted to Islam. There is no automatic dissolution of a Hindu marriage. It can only be dissolved by a decree of divorce on any of the grounds mentioned in Section 13 of the Hindu Marriage Act 1955. Accordingly, the court held that the second marriage of a Hindu after his conversion to Islam was void in terms of Section 494 of the I.P.C. and the husband was liable to be prosecuted for bigamy.

In *Air-India Statutory Corporation v United Labor Union*\(^{19}\) the Supreme Court has held that the Directive Principles now stand elevated to inalienable Fundamental Rights and they are enforceable by themselves. The directives in our Constitution are forerunner of the UNO convention of right to development as an inalienable human right and every person is entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedom would be fully realised. It is the duty of the state to take responsibility for further development of these human rights and fundamental freedoms. The state should provide facilities and opportunities to ensure development and to eliminate all obstacles to development by appropriate economic and social reforms so as to eradicate all social injustice. These principles are embedded as an integral part of our Constitution in the Directive Principles. Therefore the Directive Principles now stand elevated to inalienable fundamental human rights.

In *Pragati Varghese v Cyril George Vargheshe*\(^{20}\) the full bench of the Bombay High Court struck down Section 10 of the Indian Divorce Act under

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19 AIR 1997 SC 645
20 AIR 1997 Bom. 349
which a Christian wife had to prove adultery along with cruelty or desertion while seeking a divorce on the ground that it violated the Fundamental Right of a Christian woman to live with dignity under Article 21 of the Constitution. The court also declared Section 17 and 20 of the Act invalid which provided that an annulment or divorce passed by a district court was required to be confirmed by three judges of the high court. The court said that Section 10 of the Act compelled the wife to continue to live with a man who had deserted her or treated her with cruelty. Such a life is subhuman. There is denial to dissolve the marriage when the marriage has broken down irretrievably.

In another significant judgement in *Noor Saba Khatoon v Mohd Quasim* the Supreme Court has held that a divorced Muslim woman is entitled to claim maintenance for her children till they become major. The court held that both under the Muslim personal law and under Section 125 of the Criminal Procedure Code, 1973, the obligation of the father was absolute when the children were living with the divorced wife. This ruling was given by the court while allowing an appeal by Ms. Noor Saba Khatoon challenging the judgement of the Patna High Court which had reduced the amount of maintenance. The court observed that “we have opted for a secular republic. Secularism under the law means that the state does not owe loyalty to any particular religion and there is no state religion. The Calcutta High Court has extended the ‘iddat’ period till such time the woman remarries, to allow Muslim women a maintenance allowance beyond the customary ‘iddat’ period of about three and a half months under the Muslim Women (Protection on Divorce) Act, 1986.22

In *Lalitha Sundari v R. Kethar Nathan* two vacancies in the education committee of a family trust were to be filled from amongst female descendants of the trustees. The Supreme Court, which was the appointing authority, appointed two male members and observed that female descendants included male descendents, and females who appeared in the

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21 AIR 1997 SC 3282
22 The Pioneer, New Delhi, (21.6.2000) at 4
23 AIR 2002, March 17
interview lacked practical experience. Setting aside the appointment of two males, the Madras High Court held that the two petitioners were qualified and eligible to be appointed to the education committee. It also observed that female descendants did not include males.

The Supreme Court said India was heading in the right direction in case of gender equality. The apex court interprets constitutional provision in favour of women. Whenever there is an anti-women legislation, rule or order of the government or any other agency, the court comes into the picture to rescue the rights of women. It is the helper as the last resort and fortunately, it is also working for the welfare of women.

Despite a healthy legal framework in our hands, the 2001 national Census of India has revealed the worst ever ratio of females to males for all ages, especially in the 0-6 age group. Early childhood, care and education rights and all the underlying protections and entitlements needed for the first five years of life, begin with the assurance of three simple essentials -- the right to be born, the right to survive the birth and the right to stay alive through infancy to the fifth birthday. For half of India's children (girls) this assurance is at grave risk, simply because they are girls.24 The national population policy promotes a two child norm, but is gender-blind to what it proposes. Amniocentesis and ultrasound tests are used to find out the sex of the unborn child and female foetuses are increasingly being aborted. The small- family 'norm' is disposing of daughters. The unborn child is most at risk in northern states of India, with both foeticide and infanticide being practised to get rid of her. The private sector, meanwhile, has gone to town marketing and providing the sex-detection technology. The advent of ultrasound testing has made detection easy. The Census has shown clearly that the early disposal trend is hardly invisible. The National Crime Record Bureau 2000 report shows a 56.8 per cent rise in female foeticide cases in five years since 1996. The government also reported in 2001 that 3.34 million girls in India in the 0-19

24 India's Girl Child – Early Childhood or Early Disposal ? By R. Ismail Abbasi, Mainstream, Oct 9, 2004
age bracket were missing in 1991 but provided no update and gave no age-wise breakdown to show where the 0-6 age group stood. Every year 12 million girls are born and three million of them do not survive to see their 15th birthday. About one-third of these deaths occur in the first year of life. It is estimated that every sixth female death is directly due to gender-discrimination. The history of feminist engagement with law is conventionally traced to the demand for equal legal rights by suffragettes. Women demanded and eventually gained civil rights. An increasing parity of rights between men and women led to the realisation that mere equality between men and women in the public sphere was not enough to change the socially subordinate position of women. Some feminists argue that non-oppression and non-discrimination of women involves recognition of the difference between men and women. Others insist that men and women should be treated the same.

The central issue here became the definition of equality; whether legal equality meant same treatment or could it accommodate differences and ensure substantive equality. Now the question is not directly of equality, but indirectly it does refer to the same. The main stress is on the rights of the girl child and law enacted for her benefit which itself contains loopholes. Girls who escapes foeticide, infanticide or neo-natal techniques are still in the 0-6 high risk frame. Law alone is not enough to root out this social evil. A holistic approach and a social movement are the need of the hour.

25 Supra Note 24
26 Supra Note 25, 24.