FEMALE FOETICIDE: A JURISPRUDENTIAL AND CONSTITUTIONAL PERSPECTIVE

There can be no spirituality, no sanctity, and no truth without the Female Child.65

The system of Infanticide is a very old phenomenon, and it has recorded millions of sex selection deaths in our ancient history. It’s always criticized and committed in two most popular countries in all over the universe i.e. India and China. Female Infanticide and foeticide reflects the low status of woman in a particular country. It is most cruel and harsh demonstration against female by male dominating society. It is specifically connected with abortion on the basis of sex selection, with aim to remove female foetus and curb the population of girl child. Infanticide means killing of girl child after birth due to preference of a male child in the family. In this way ‘Female Foeticide’ and Infanticide is one kind of genocide.

As we all are aware about the thing that, Fundamental Rights of many women are violated or subject to attack not because they are not having those rights or they are made to suffer violence, but because, they are the women. Therefore, the International

65Diane Frolov and Andrew Schneider, Northern Exposure, evolutions, 1993
community has always played active role to protect Human Rights of woman. In furtherance of this object they always tried to give importance to Human Rights of woman on an International level, which includes documentation of violation of Human Rights, published in Journal, through print and electronic media with aim to make a possible effort to prevent the violation against woman. Another objective of these publicity and documentation is to inform the Government that, they have failed to perform their duty to protect their own citizen including woman with International criticism.

So far as Indian society is concerned, it is a symbol of high cultures and follower of family values. This Society is the systematic ordering of social relationships based on definite patterns. Both men and women together contribute to the continuity of human generations on earth. Nature designed both sexes for the perpetuation of the human races. Traditional India has always accorded full respect for woman in every walk of life. During the Vedic era woman enjoyed almost equal status with that of men. The daughters were awarded the same status in ancient India. The traditional value system of Indian society, sex segregation, poverty and the growing problem of dowries - all these have created an atmosphere where females are often considered on inferior status as compare to men. The result is a declining child sex ratio in successive census reports. The orthodox mentality and status problem at the root level of society are directly responsible for occurrence of such gaps which leads to various kinds of crimes in the forms of violence, rape, foeticide, Infanticide, marginalization, exploitation, cultural imperialism and traditional notion of polyandrous marriages to woman of our contemporary society.

Therefore, the researcher in this chapter has tried to find out that where the law stands regarding ‘Female Foeticide’ as well as she has defined the ‘Female Foeticide’ and its jurisprudential prospective with reference to national and International scenario. The researcher in this chapter has also studied the Human Rights of foetus as well as the scope of Article 21 of Indian Constitution, whether Right to life and personal liberty guaranteed under Indian Constitution gives protection to child in mother womb also.
3.1 MEANING AND DEFINITION OF ‘FEMALE FOETICIDE’:

One of the most common and simple mechanism of eliminating the girl child is ‘Female Foeticide’. It is the act of undermining the sex of the child in the mother’s womb and if it is found to be a female; to get the same aborted. ‘Foeticide’ means the destruction of foetus at any time prior to birth. ‘Infanticide’ means the unlawful destruction of newly born child and is regarded as murder in law.66 ‘Foetus’ means an unborn human from after the third month of pregnancy until birth.67

‘Female Foeticide’ is the termination of the life of a foetus in the womb on the grounds that its sex is female. The term "sex selective abortion" is preferable to the term foeticide, since it points to both of the ethical evils inherent in this practice.68

3.2 JURISPRUDENTIAL PERSPECTIVE:

Researcher in this chapter has discussed the jurisprudential perspective of ‘Female Foeticide’ in India as well as in other countries for prevention of ‘Female Foeticide’. She has also discussed the scope of law where ‘Law’ is a measure instrument to prevent all kind of offences from the society still in this matter of ‘Female Foeticide’ law failed miserably in India as well as in other countries also. Therefore, researcher in this chapter specifically elucidated laws of different countries for prevention of ‘Female Foeticide’.

A. National Scenario:

In the national scenario researcher has explained the position of our law of land i.e. India, where ‘Female Foeticide’ frequently committed and which is a basic reason for decreasing rate of woman from the society at large.

From the inception, in our whole lives, we heard one thing very frequently that, God awarded us with a beautiful ‘gift’ on the earth that is a ‘Child’ and we also heard that

66Parikh C. K. Parik’s Textbook of, Medical Jurisprudence Forensic Medicine and Toxicology: C.B.S. Publisher and Distributor, 2000, P.72
where it is not possible for the God to look after his each and every child, he has created
a creature in the form of God and that is ‘Mother’. Still knowing all this fact, we are
committing offence of ‘Female Foeticide’. It is always seen by us that; parents have
frequently prayed for blessings of child. But, if that child is a girl child then, they feel
that, they are not blessed by the God but it is an anathema. Therefore, to remove this
curse, they started demanding another child in the form of male child from the God and
if it is not at all possible by doing all efforts then they took the help of Doctors. Thus
technology indulged in this female slaughter by using its skilled effort to remove female
foetus from mother womb.

We are proud to be an Indian, and we are celebrating 24th September as the
International Girl Child Day. When we are celebrating and enjoying the development
and Empowerment of woman, still this heinous offence of ‘Female Foeticide’ and
Infanticide is being committed in our own country before us, and we are handicapped
because we are not taking any effort to prevent this offence or to remove it from our
society. It’s very shameful for us that, after 68 years of independence every hoarding
on a public street present through woman faces if, we want to speak about cruelty,
violence, sexual harassment and ‘Female Foeticide’. Hence the time has come, to
change our mentality and to think that girl child is really precious gift given by the God
in each and every family, it is our duty to protect, preserve and respect it. Then and then
only we will really be proud to be a citizen of India.

I.  Position of Girl Child in India:

As per the report of Government, it is observed that, more than 10 million of girls have
been subjected to ‘Female Foeticide’ and Infanticide by their own parents and family
relatives in spite of all the rules and regulations enforced by Government and other
implementation machineries. The United Nation also reported that, near about 2000
girls are illegally aborted in India, every day. Therefore, it’s time to make efforts for
giving in reality equal status to girls with boys or women with men in our family as
well as in the society. Almost all the missing woman belongs to Asian countries, where
there is a long history of ‘son preference’.

51
In fact, India historically had a deficit of women compared to most other countries. For instance, even in 1901 there were just 972 women to 1000 men. Subsequent census figures indicated that the number had been gradually decreasing until it reached an all-time low of 927 in 1991 and then rose again marginally to 933 in 2001. To understand the enormity of the problem, one has to keep in mind that the population of India is around 1 billion. So if there is a shortfall of 70 women to every 1000 men that means by 2001, about 70 million women had gone missing in India alone.

How did this happen? Could the census figure be wrong? Could it be that women were never counted when the enumerators came around? In part of India, woman is so devalued that only sons are mentioned as children. The girls became invisible people. They might not even figure in the census data. But how many women could have disappeared this way? Obviously they would represent just a small percentage of missing woman. So, what happened to the rest of them? Whether they were killed as soon as they were born? Whether their births never registered or even officially acknowledged? Had they died because they were starved or neglected by their own parents? Had they died because they did not receive proper medical attention by giving birth? Or had they died while having abortions under unhygienic conditions? Had they been brutally done to death by their own families because they fail to bring in Dowry? Or killed because they were disobedient? They might have died for any of a thousand reasons. But until the 1980s, they usually died after they were born.

By 2001 and alarming and radical changes had taken place. A careful analysis of the census data showed that over the decade, while the adult sex ratios in India had improved marginally, the child sex ratio had dropped or to put it simply, more women were staying alive, but fewer girls were being born. Previously the sex ratio was bad because woman and girls were dying of neglect, or because they were killed in a variety of ways after they were born. But now they were not even being born. The most gruesome indicator of this was the plummeting child sex ratio. In some of the worst hit areas, the ratio had declined to less than 800 girls per 1000 boys. In Punjab Haryana, Himachal Pradesh, Gujarat and Maharashtra the CSR had plummeted by more than 50

---

points in pain short years. Following are some examples in most popular state in India where child sex ration tremendously decreasing in recent year.

II. Delhi:

The most shocking situation was observed in the capital city of Delhi. Sophisticated Delhi people with its large urban educated population, was the city where most girls were going missing. Thousands of girls were going missing every year and right under the nose of the most powerful politicians and bureaucrats in the country. The worst height was South Delhi. News from the office of Registrar of births and deaths is not better. Statisticians and Doctors, there monitoring the trend in Delhi confirmed that the situation had worsened in all the nine Delhi districts even after the 2001 census figures were published. The capital city in fact now ranked third after Haryana and Punjab among states having the lowest CSRs. Following table indicate the sex ratio as per 2015 census.

III. Sex Ratio of India 2015:

<table>
<thead>
<tr>
<th>State / Union Territory (U.T.)</th>
<th>Sex Ratio(^{72})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uttar Pradesh</td>
<td>908</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>946</td>
</tr>
<tr>
<td>Bihar</td>
<td>916</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
<td>992</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>930</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>995</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>926</td>
</tr>
<tr>
<td>Karnataka</td>
<td>968</td>
</tr>
<tr>
<td>Gujarat</td>
<td>918</td>
</tr>
<tr>
<td>Punjab</td>
<td>893</td>
</tr>
<tr>
<td>Haryana</td>
<td>877</td>
</tr>
</tbody>
</table>

\(^{70}\)ibid
\(^{71}\)ibid
\(^{72}\)http://www.indiaonlinepages.com/population/sex-ratio-of-india.html last visited on 02.05.2015 at 4.00 pm
As per above table it is clear that, capital of our country is really not safe for woman, when they are always talking about improvement and impoverishment of status of woman. But by the census report it is clear that, they have completely failed to perform their duty to take care towards girl child in mother womb. Let’s see the situation in Maharashtra; so far as researcher’s research is concerned it is as follows:

IV. Maharashtra:

As we all know that, Maharashtra State is fastest and developing state in the country, but it is not at all applicable on the girl child because it’s really dangerous state for the girl child as per the decreasing rate of girls due to ‘Female Foeticide’ in Maharashtra. The current sex ratio of the state is 925 females for every 1000 males. So far it’s concerned to districts, Mumbai; capital of Maharashtra has the lowest sex ratio that is 838 females for every 1000 males.73

In June 2009 Government surveyed 33 district in Maharashtra and shocking results come out that, there are 14 district in Maharashtra having a girl sex ratio below 900. It includes Beed at peak of all, then Jalgaon, Aurangabad and Buldhana.74 Following table indicate the sex ratio in Maharashtra as per 2014 census:

<table>
<thead>
<tr>
<th>a. Sex Ratio of Maharashtra 2014:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Population of Maharashtra in 2014</strong></td>
</tr>
<tr>
<td>Sex Ratio in Maharashtra</td>
</tr>
<tr>
<td>Literacy Rate</td>
</tr>
</tbody>
</table>

---

73http://www.indiaonlinepages.com/population/population-of-maharashtra.html last visited on 29.04.2015 at 11.30 pm  
b. Some worst example of ‘Female Foeticide’ in Maharashtra:

As study of researcher is based on ‘Female Foeticide’ in Marathwada region therefore she emphasized on Maharashtra and incidents in Maharashtra of ‘Female Foeticide’ which are as follows:

c. ‘Female Foeticide’ in Beed (Maharashtra):

Abortion on the basis of sex selection we can call it as Gendercide because female foetus aborted in this selection procedure. In USA there is a system of planned pregnancy and knowledge of sex, it means that they already know the sex of the child before it is delivered. But in China and India ‘Female Foeticide’ on the basis of sex selection is rampant. In our Maharashtra state the position is worse, where our state is at the highest rank in low ratio of female. The lowest rate of female as compare to male shows the increasing practice of ‘Female Foeticide’ in Maharashtra. Now this practice takes horrible guise, when newspapers and television media disclosed the unbelievable fact of ‘Female Foeticide’ in Beed district of Maharashtra, where aborted female foetus was fed to dogs. It was really shocking to all the persons by hearing the news that, how it could be possible, that to abort in such quantity of female foetuses on the basis of sex selection and then there after with an intention to destroy the evidence Doctors disposed female foetus by feeding them to dogs. This dreadful fact was disclosed by Mrs. Varsha Deshpande Lenient Advocate working with an NGO against this practice of ‘Female Foeticide’ under the name of ‘Lek Laadki Abhiyaan’. She has conducted Sting Operations by arranging dock in Sudam Munde’s clinic and came out with this shocking result.

Thereafter police arrested him and his wife who was also a Doctor. This issue raises the eyebrows of each and every person towards one of the trustworthy profession i.e. is medical profession and it influence the mind of every person that, for the purpose of gaining money, any person including Doctors can do anything without thinking about the repercussions of that immoral act. This incident can set the law into motion that, to find out other districts where ‘Female Foeticide’ frequently committed but not known to the Government. It’s really unbelievable after the survey, the shocking result came into the hand of the Government that, it is not only committed in Beed district but other
districts also indulged their hands with this heinous crime. After this incident every person well versed about ‘Female Foeticide’ and how it is frequently committed in Maharashtra.

V. Mumbai:

A couple who has one girl child, they want baby boy second time. To satisfy this purpose they want to determine the sex of child by using ultra sound Sonography Technique, but this test is banned by the Act. Therefore, they have filed public interest litigation against Union of India before Honorable Bombay High Court, claiming to remove ban on sex determination test. The Union of India in answer clearly stated that, there is no question of removing ban on sex selection test, because it is as per the provisions of PCPNDT Act as well as by considering the gravity of offence of ‘Female Foeticide’ which is continuously committed by the parents with help of Doctors.

Furthermore, the Union Minister of Health in affidavit filed on behalf of Government specifically stated that, this Act has enacted by the parliament to check the rising incident of ‘Female Foeticide’ and therefore there is no question of lifting ban on this sex determination test. In that affidavit it is also contended that, the child sex ratio of 0 to 6 years of age completely adverse against girl child, specifically in states of Punjab, Rajasthan, Delhi, Himalchal Pradesh, and Gujrat. Hence in this case the Honorable Bombay High Court held that, the sex determination test for the baby boy is violating the Right to life of Female Foetus and therefore it is un-Constitutional.\textsuperscript{75}

VI. Tamil Nadu:

In Tamil Nadu, Uslampatti area has been declared as lowest sex ratio of female. When the survey conducted by the Government, it revealed that in this area not only ‘Female Foeticide’ but also Infanticide is committed by the people. Infanticide means killing of child after birth. A voluntary organization namely Society of Integral Rural Development has conducted survey in Uslampatti area and found that, many Doctors admitted the facts that, they performed sex selection abortion but on the demand of

\textsuperscript{75}Vijay Sharma and others v. Union of India, AIR 2008 Bom. 29
family members. They also stated that, they disclosed the sex of the child in the form of ‘XX’; it means foetus is of female. In 1992, State Government being aware about this fact and situation of increasing rate of ‘Female Foeticide’ and Infanticide in State of Tamil Nadu. Thereafter Government implemented different schemes for protection of female child and to prevent foeticide. Like, it started cradles for unwanted girl child where, they could get free food facility, health facilities and orphanages also. In 1997 again Government introduced another scheme that, it invests 2000 rupees in every girl child after born in poor families. Instead of all these things, till today, the situation in Tamil Nadu did not change. ‘Female Foeticide’ is rampant over there but one change is there that is Infanticide tends to be committed by the people. Because, introduction of new technology in the form of ultra sound Sonography to determine sex of child.

VII. Rajasthan:

Jaipur, a capital of Rajasthan state in which the ‘Female Foeticide’ has been rampant as compare to other states in India. Taking into consideration enhancing rate of ‘Female Foeticide’ the Chief Justice of the High Court at Rajasthan with the consultation of Chief Minister of Rajasthan decided to establish a separate fast-track court to deal with these matters. Because in last two years in Rajasthan the team of Health Department Government sealed and raided many Sonography centers, clinics and also filed near about 308 cases of ‘Female Foeticide’, which are highest in all over the country. Instead of commission of highest rate, till 2012 no conviction had been given in any case of ‘Female Foeticide’. This report published by the Government itself. Out of 308 cases only three of them closed but remaining other cases still pending in court of law without any proceeding. By knowing the gravity of the offence and circumstances Government have decided to establish fast track court in Rajasthan to dispose the matters related to ‘Female Foeticide’ as quickly as possible. The main purpose was to create deterrent effect in the mind of public as well as Doctors that, if they are involved in the offence of sex determination, to detect sex of male or female foetus they will also have punished with imprisonment and their license will have also seized by Government. In this way Rajasthan was declared as the most sensitive state of ‘Female Foeticide’ and it was also telecasted in actor Amir Khan’s show ‘Satyamev Jayate’ by Star plus. Thereafter, the

actor personally met with Chief Minister of Rajasthan and requests him to take some serious steps for preventing ‘Female Foeticide’ in Rajasthan. So on the basis of above discussion it is clear that, the ‘Female Foeticide’ increasing day by day because in the states like Rajasthan, Punjab and Maharashtra son preference or superiority of the male child in a family is still today preserved by the society and ultimately its result into ‘Female Foeticide’.

VIII. Punjab:

The native and residents of Punjab state, who founded the green revolution in the last decade, are now famous for the shocking and disturbing socio-economic condition in near future because of decreasing sex ratio in the form of 874 girls behind 1000 boys. Sons preference in Punjab State seems like a social economic and political status of families. As agricultural status of Punjab, it gives more value to son to protect, preserve and to work in the agricultural property, which automatically gives low status to woman in their families. By considering the seriousness of problem of ‘Female Foeticide’ and child labour prevalent in state of Punjab, the Chief Justice of Punjab and Haryana High Court declared year 2007 as a child year and also stated that the state legal services authority should create maximum awareness amongst the people of Punjab regarding equal status of woman as well as to arrange a legal aid camp to combat with the peril of ‘Female Foeticide’ and Infanticide. One lakh female foetus aborted every year in state of Punjab as per report of Government.

See, where we are going? What we are doing? When researcher read all this things, she was in shock that, our human community not only doing sin but also act against law of nature by committing such kinds of offence. Now the time has come, that it should be stop somewhere, we should create agitation against all this thing with the help of law and Government, because by doing ‘Female Foeticide’ our own brothers and sisters ending our own living creatures by their own hands. On the other hand, it is one kind of genocide against female community on the earth. So this is a national scenario based

77 http://timesofindia.indiatimes.com/city/jaipur/Female-foeticide-Rajasthan-has-maximum-cases-but-no-conviction/articleshow/13114696.cms
on the position of ‘Female Foeticide’ in our country India, let us take a look at International scenario that, whether the same position is there in other countries related to ‘Female Foeticide’, which has explained by the researcher in following points.

Therefore, as per national scenario of India and other states in India it is clear that the female Infanticide in Vedic period turned into the ‘Female Foeticide’ in modern period. As the researcher has discussed above, there are many states like Delhi, Haryana, Punjab, Rajasthan and Maharashtra those are highly developed States in India but their female sex ratio is declining day by day. Instead of Government trying their level best by providing different policies, campaigning to save girl child but everything is vague. Hence the researcher wants to suggest here that strict implementation of PCPNDT Act may definitely help to curb the menace from the society at large. As well as if, Government gives the projects in the hand of NSS students of different colleges and NGO’s to change the mindset of people then also it will help out to deal with this problem of ‘Female Foeticide’.

B. International Scenario:

As the researcher in this research has explained about the position of woman in different countries all over the world, which clearly enumerated the low and high status of woman and on that basis rates the commission of ‘Female Foeticide’. As we all know that two largest countries have already been blacklisted for ‘Female Foeticide’ that is India and China but there are also some other countries which are not provided with full Empowerment of woman in all sense. Even the countries like Britain, Germany, New Zealand, Australia and other European countries did not fully empower the woman in true sense or in these countries still woman depend upon some support system. Even one survey conducted by world economic Forum at Geneva, has published a report that, complete economic and political Empowerment of woman is still a distance dream to achieve, though the countries are fully developed. It has surveyed 58 countries and come to the conclusion that, no country has fully eliminated the gender inequality between men and women.

The basic aim of UNPF is to provide gender equality and Empowerment of woman in all over the world. Every possible effort has been made on an International level to
remove these gaps between men and women or girls and boys. SAARC celebrated year 2000 as an opposing year of discrimination against girl child. It is medically proved that, if the equal care with the boy is provided to the girl child then girl child survival will be better than the male child. On the basis of this we can say that, the sex ratio must be like 1005 girls behind 1000 boys, but it’s not possible due to ‘Female Foeticide’. In many countries it was a permitted practice that if the girl or boy child is born deformed or handicapped then to kill that child. But in some countries this practice was misused and baby girls were killed by showing the reason of handicapped or deformity. In this way offence of ‘Female Foeticide’ was not uncommon in ancient International history, but it was in the form of Infanticide and now it takes a draconian look in the form of ‘Female Foeticide’. Therefore, the researcher in the following points has explained the situation of ‘Female Foeticide’ in other countries.

i. China:

We all know that in China there was one child policy introduced by their Government to reduce the population of the country. When China introduced this one child policy in 1979, there was only one choice in the hand of parents about child and therefore obviously they would have preferred male child. Hence this position made rampant ‘Female Foeticide’ and Infanticide practice in China. Due to scarcity of the woman in China, they used to kidnap girls for marriages from Vietnam and Cambodia.

The preference for boys, in China too is tied to their religious belief that male heirs are necessary to carry on the family name and take care of the family spirits. A Chinese family worries that if there is no son no one will look after them and keep them company in the afterlife. Chinese parents openly celebrate when they have boys, and some even show disappointment when they have girls. Newborn girls are given names like Pandi (“Expecting a Boy”), Yanan (“Second to a Boy”) in hopes the next child will be a boy. Six million women bear the names Lai-di (“Call for a Brother”) and Ziao-di (“Bring a Brother”). A Chinese saying resonates with the belief we as South Asians have of girls being a ‘guest’ in their parent’s homes. The statistics suggest that after the enforcement of one child norm, the rate of abortion of female foetus increased in China.
Hence by considering the seriousness of problem, China has enforced law for the protection of woman as well as maternity law to prevent sex determination test for knowing the sex of foetus. Government has also planned to provide financial help to the parents of girl child so that, everyone should have welcomed the birth of girl child in their families and not to go for sex selection test. In this way, they tried to their level best to tackle the issue of ‘Female Foeticide’ which is going to increase day by day in China due to one child policy and their orthodox belief.

**ii. Pakistan:**

The sex ratio of male to female in Pakistan is 1.06% to the total population. The reason behind this declining sex ratio is, discriminating behavior of Muslim society towards woman. In Pakistan from the birth, the girls are always famished and undernourished, even they are not treated same as of their brother in family. Due to modernization of Technique the sex selection practice also begins in Pakistan because, son gives preference over girl child is also a trend in Pakistani like in other country. On the other hand, we can say that, as Islam religion does not permit abortion that’s why the sex selection abortion is not common practice in Pakistan. Therefore, it is not correct to say that, sex section or ‘Female Foeticide’ is increasing in Pakistan. But as per report published by one news channel in Pakistan that, there are 3000 clinics in Karachi which has performed illegal abortion, despite the fact that abortion is illegal in Pakistan.79 Hence, it can be said that, in near future ‘Female Foeticide’ will also increase in Pakistan.

**iii. European Countries:**

European countries have accorded with status of fully developed countries and there is no question of ‘Female Foeticide’. Their laws permitted them to disclose the sex of foetus after pregnancy. In America, it’s a regular practice that, once you are pregnant, you know the sex of your child before birth. Despite of knowing the sex of child before birth, they do not commit foeticide on the basis of discrimination between male and female child. That’s why in many European countries sex ratio of female is more than

the male for example, in Russia female sex ratio is 1165 behind 1000 boys, France 1056, Germany 1038, UK 1037, USA 1026 and Australia 1011.\textsuperscript{80} Hence, above data shows that in European countries female birth rate is always more than the male even though they know the sex of the child before birth.

Survey conducted by the US Government it revealed that, sex selection abortion also performed in their countries but, by the demand from Asian immigrants, especially from China and India. They also blamed that; due to these peoples only ‘Female Foeticide’ committed in their countries otherwise it is not permitted in their law of land that aborts a child after sex selection.

The Law of US also prescribed punishment of five years’ imprisonment to the Doctors who perform sex selection abortion as per their Prenatal Non-Discrimination Act. As per study of researchers in USA also found that, 40\% of immigrated Indian woman accepted the fact that, by determining the sex of foetus, as a female, they abort the foetus. After these, US Government also present a bill in the House of Representatives to ban sex selection abortion by making law but it could not past due to insufficiency of majority. Because, majority representatives of the house of people was of the view that, to know the sex of the child is the right of each and every mother who carry on pregnancy but, to abort a child after sex selection is not a right.

Therefore, the researcher as per the study of national and International scenario has come to the conclusion that, the Asian countries are always interested in sex selection abortion. This is the reason behind increasing rate of ‘Female Foeticide’ in these countries like India and China. On the other hand, European countries do not have any interests in sex selection of child before birth but, the Chinese and Indians those are immigrated in their countries; they are only to take undue advantage of their facilities and committing ‘Female Foeticide’.

Hence it is clear that this menace of ‘Female Foeticide’ covers whole world. However, it is now needed to study the Constitutional validity of Right to life of foetus. Because,

\textsuperscript{80}https://en.wikipedia.org/wiki/List_of_European_countries_by_area retrieved on 5.4 2015
if it is come under the scope of Fundamental Right to life then killing female foetus will automatically invoke the penal liability under penal code and the person who has committed this offence, prosecuted for commission of murder or abetment to commit murder. In the below Para’s researcher has explained the Constitutional prospective and Human Rights aspect of foetus.

3.3 CONSTITUTIONAL PERSPECTIVE:

The protection of rights of both men and woman is now a reality, since part III of the Constitution assigns paramount importance to the Fundamental Right and freedoms. This was not something unusual to expect from the drafters of the Constitution, who were natives and shared the same blood. Hence, they could have ignored the protection of right and interest of woman the least, especially when the need was felt to construct a new political society. Indian woman was, as such, looking forward to forge a real partnership both at home as well as outside. But, did the drafters of the Constitution really desire to achieve Empowerment of woman? This question demands attention because the woman has not hitherto achieved much notwithstanding the Constitutional promise and guarantees assured.81

It appears that, Indian woman primarily justified accepting the Constitution and the mechanism drawn by the drafters of the Constitution with regard to Empowerment of woman. It is believed that the maker of the Constitution was well versed with the culture and scriptural philosophy of the country were in, inequality bore the social-cultural undertones and sex determinatory component, which has to be weeded out for the good and the formulation of the Constitution was the first opportunity to achieve the same without experiencing much resistance. Needless to mention that the Vedic philosophy stands for the recognition of human dignity as well as fairness in the partnership of men and woman, be it familiar or other matters.

Whether or not the drafters of the Constitution desire to achieve mathematical equality is a separate issue, still the kind of strategy they adopted appear to be sufficient to

overcome the societal hiatus against woman and thus, break the barriers on its way to achieve equality irrespective of the sex. This would ensure that woman too would enjoy equal access to law, education and employment, which have historically been the burning issues and continue to remain so at the contemporary times.

The plain reading of the Constitution’s suggesting of the fact that, the Constitution does not only designs measures to weed out inequality otherwise rooted in the historical conditions but also provides for preventing the perpetuation of inequality, so that it does not pass on from one generation to another in the form of legacy. In order to achieve it, strategy has been formulated to fight discrimination at various levels so as to improve the whole lot of the people, in general.82

Is the Constitution really geared up to fight sex-based determination? In this regard it is mentioned in the Constitution that, no state shall be discriminate any citizen on the basis of caste, race, religion or sex.83 The same may suffice to convey that desire of the drafters of the Constitution has been to fight the intrinsic or initial handicaps and other infirmities squarely rooted in biological self or historical inequality, shrouded in cultural conditions and legal jargons. But, is the same per se sufficient to bring about Woman Empowerment since, simply discouraging inequality on the basis of sex is an insufficient measure that could be relied upon to stop anyone Article 15(1) does not go beyond this as Article 15(2) and (3) lay more emphasis on fighting historical inequalities and social handicaps that tackling with the gender bias. 84

Therefore, as per above discussion it is clear that Article 15 of Indian Constitution is not clearly emphasized discrimination on the basis of sex only it also covers other forms of discrimination on the basis of caste and religion. Hence, it never creates any kind of binding force for prevention of sex determination tests or to prevent ‘Female Foeticide’ from the society. It means that drafters of the Constitution at the time of making it had no idea about future consequences of selection of sex for male or female child.

82ibid
83Article 15(1) of Indian Constitution
Therefore, the researcher here inclined to say that, woman could rightly pin their hopes on Article 14 as the same does not deny any person’s equality before the law or equal protection of the law within the territory of India which also cover Right to life of foetus in mother womb with equal protection of law.

i. **Gender Justice and the Constitution of India:**

In India, male domination with complimentary suppression of woman has been continuing since prehistoric times. There has been discrimination between the male and female child, between men and women. Women are considered as good as cattle. They are considered as object of sense gratification. The history of suppression of woman in India is very long. Indian woman “have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequalities, indignities, and discrimination”. Discrimination de-empowers because discrimination in any form affect the human capabilities. Any factor that negates the human capability has to be reckoned as a factor of de-Empowerment. Discrimination in matters pertaining to personal status de-empowers an individual from leading a dignified life.

The framers of the Constitution were well conscious of the discrimination and unequal treatment meted out to the fairer sex, from time immemorial. They included certain in general as well at specific provision for upliftment of the status of woman. They provided equality of status and of opportunities explicitly at some places and implicitly in all other places on par with men as citizens of India. It is true that the original Constitution of India did not reflect concerns of Gender Justice adequately as expected. It provides against discrimination on the ground of sex but it did not take note of discrimination that is based on Gender. Giving woman certain rights in order to compensate them for their reproductive function is not a charity but an obligation. Woman should be provided with affirmative action by the state in order to help them overcome the handicap which they suffered under the patriarchal regime. As on the

---

Fundamental Rights are made centric, there is no possibility of getting equality for woman.\textsuperscript{87}

Though the Indian Constitution provides equality of status and of opportunity to woman, discrimination is persisting in one form or the other. Discrimination against woman continues to exist even today, as it is so deep-rooted in traditions of Indian society. Therefore, as discussed above this unawareness of woman about their own rights they are subjected to violence as well as they may be participant in commission of ‘Female Foeticide’. Because, they are of the view that their daughters would not have to been suffer the same thing whatever they are suffering now.

\textbf{ii. Fundamental Rights of child in mother’s womb:}

Part III, consisting Articles 12 to 35, relating to Fundamental Rights, is the ‘heart’ of the Constitution. The Fundamental Rights are regarded as ‘Fundamental’ because they are most essential for the attainment by the individual or his full intellectual, moral and spiritual status. Article 21 of Indian Constitution guarantees right to live to every citizen without anyone’s intrusion in his own right and liberty. But these Fundamental Rights do not guarantee equal protection to the foetus in mother womb, even the Indian courts also not interpreted scope of Article 21 in this way. It means that, even today we do not consider child in mother womb as a living human being, because if we considered him or her as a human being then killing of that creature in mother womb would definitely be amounting to violation of its Fundamental Right to live. Therefore, it is necessary here to firstly discuss the scope of Article 21 as related to right of child in mother womb and which has explained as follows.

\textbf{a. Right to Life of Child in Mother’s Womb:}

Article 21 of Constitution of India has recognised Right to life and its widening scope in several cases. But there is no express Fundamental Rights to be born mentioned in our Constitution or we can say that there is no recognised Fundamental Rights available to unwanted girl child. Article 21 can enhance its scope by giving rights to girl child in

\textsuperscript{87}ibid
mother womb by interpreting it in this manner like, right to be for and not to be about because she is a girl child, not subject to Infanticide or killing after birth, right to live in healthy environment with equal opportunity to enjoy childhood in family with male child.

If we interpret the Article 21 of Indian Constitution which means that every person has Right to life which includes all living persons, then as dealing with problem of ‘Female Foeticide’ the question arises that, whether the foetus is also considered as a living person? Because as Article 21 said that every living person is having Right to life then foetus should also be considered as a leaving one. Once it considered as a living in Mother Womb then he/she must have Right to life under Article 21. So the next question is, our law of Constitution says that, the person who takes your Right to life he should be made to compensate or punished with penal liability, but, here in this case the mother who also consented to kill her own child which is in her womb, then, whether she should be punished. Therefore, here it is very difficult to give punishment by invoking liability on the shoulder of one family member for killing of child in mother womb. However, it is important to note here that, if Judges by their Judgments and pronouncements interpret the Article 21 of Indian Constitution in this regard that, right to life to all living person it includes child in mother womb also then it may be possible to tackle with this offence of ‘Female Foeticide’ in easier way.

Our legislature made number of statutes which indirectly provided protection to the foetus in mother womb. Penal provisions are also there to protect the child in mother womb by punishing for illegal abortion or miscarriage. In number of cases Supreme Court also enhanced the scope of Article 21 by stating that, Right to life includes right to live with human dignity and respect like in Bandhu Mukti Morcha case88, People Union Democratic Rights case89 etc. It is also interpreted by court that, right to live with human dignity is available to teenagers or child to live in healthy environment and with full protection. Even though the Medical Termination of Pregnancy Act stated that, the mother is not permitted to abort a child unless and until there will be any apprehension of injury to the life of mother or a foetus. It is also stated that, pregnancy should be

---

88 AIR 1984 SC 802
89 1982 AIR 1473
terminated by the registered medical practitioner by stating the reason of termination of pregnancy. In The Criminal Procedure Code there is one provision that, the woman who is pregnant, against her death sentence should not be executed or remitted the sentence of death into life imprisonment. Because, death imprisonment awarded was against specific woman and not against a child in mother womb, therefore only this sentence commuted into life.

For instance, in case of Rajiv Gandhi assassination, the accused Nalini was pregnant at the time of sentence therefore her death sentence was converted into life imprisonment. In this way indirectly the law protects the rights to life of foetus in mother womb. So, here it is clear that, the child in mother’s womb and mother is not at all one and same person but, child having its own separate entity in the eye of law. Hence he should be protected by the law at each and every time.

Thus, if we failed to recognize foetus in mother womb as separate legal entity or separate person from mother then we will definitely fail on our part to give equal protection under Article 14 of Constitution of India, which envisage equal status to every living creature before law.

b. ‘Female Foeticide’: Violation of Right to Life:

Right to life is well proven right recognized on International and national level by various Conventions, Constitution of each country as well as by judicial activism. But here the Right to life is in question related to right of foetus that whether this right available to foetus also.

In re F (In Utere)\(^{90}\) it has been held in England that a foetus in not within the jurisdiction of an English court unless born alive. Article 2 of the European Convention on Human Rights reads: Everyone’s Right to life shall be protected by law. No one shall be deprived of his life intentionally save in execution of a sentence of a court following his conviction of a crime for which this penalty is provided.

\(^{90}\)(1988) 2 All E R 193 (CA)
The European courts on Human Rights in *X V. United Kingdom* 91 expressed the doubt that the term everyone in this Article includes a foetus. In *paton v. U.K.* 92 it has been held that Article 2 of the Convention applies only to people who have been born alive because, if Article 2 were to apply to a foetus abortion would have to be prohibited at the cost of the mother’s health. Further this would give the life of the foetus a higher value than that of the mother.

In America the Supreme Court has held in *Webster v. Reproduction health service* 93 that it is Constitutional right of the state to declare an interest in the human life at all stages of pregnancy. It was held in this case, that life begins from the time of conception, earlier in a *Roe V. Wade* 94, the US Supreme Court had held that life develops at a later stage of pregnancy. Thus the foetus enjoys a greater degree of protection under the American Constitution. 95

In India also life of foetus is protected under different laws. The Medical Termination of Pregnancy Act as well as PCPNDT Act has protected the life of foetus by preventing illegal abortion and termination of foetus on the basis of sex selection. Even our Criminal Procedure Code also has not executed death imprisonment against pregnant woman. Because if the death imprisonment has executed against pregnant woman, then it will also take away the life of unborn foetus which is not at all permissible by law and it is also against natural justice. Therefore, our law and laws of other countries also not permitted the execution of death sentence against a pregnant woman. In other words, we can say that, we provide protection to the life of foetus in mother womb and hence it is crystal clear that you also considered the existence of life of foetus. It means that foetus is having Right to life.

In this way International Conventions on Human Rights as well as Constitutional safeguard provided for the protection of female foetus not only in India but also all over the world.

91(8416) (780) DR 19, 244  
92(1980) 3 EHRR 408  
9335 LED 2d 147 (1972)  
9435 LED 2 d 17 (1972)  
3.4 HUMAN RIGHTS OF THE FOETUS:

The Human Rights means, the rights which every person withheld with him from his birth without recognizing any other rights because he is a human being. These rights are the rights which are given to each human being by nature and no one is permitted to violate these rights. The Universal Declaration of Human Rights 1948 is the first major instrument which enforced on an International level unanimously for protection and promotion of Human Rights all over the universe. It’s another aim is to protect the vulnerable group of the society includes children, woman, SC and ST’s and refugees etc.

All over the world population there are so many kinds of offences and violence committed against woman each and every day. In the recent era gender equality and prevention of gender discrimination is on Center point and or we can say that it is a hot topic of discussion on national and International level. The earlier history of India shows that, they did not deal with this issue of gender discrimination. But in 18th and 19th centuries offences against woman in the form of Dowry death, domestic violence, cruelty, sati, sexual assault and Infanticide increased. In year 1996 on an International level it has been declared by the world health assembly that, violence against woman and foeticide is a serious demonstration against woman health. Sex selection abortion is the reason, due to which near about 40 to 45 million girls missing from population of India. Therefore, it is a problem of serious concern.96

a. Viability of Human Rights with Reference to Right of Foetus:

We all are very well aware that age of the child counted from his birth. The unborn child still today is not considered as a person in any law. In Hindu Law the existence of the child determined from its conception in mother womb. In Hindu Law the property transferred in the name of unborn child means he is in the mother womb still not born. The Constitution also gives every foetus right to born.

As per Law Commission Report 1974 the Congenial Disability Act passed in 1976, which gives right to sue to an unborn child if the injury is caused to him before birth. On the basis of this explanation, question arises that, whether the unborn child can claim Human Right and right to live as a Fundamental Right?

So far as Indian Constitution is concern it is a counterpart of American Constitution and American Constitution as per Article 14 stated that, the unborn child cannot have deprived of his life, without due process of law. But failed to recognized unborn as a person. Because no one knows that from which period the life of foetus started i.e. from conception or after pregnancy. Even, a medical expert person not aware of the fact that, from which period age of the child started to count. Therefore, the American court in Roy v. Wade held that, it is a very difficult at this time to decide from when the life of foetus begin but one thing is clear that mother having right to terminate her pregnancy as the Fundamental Rights.

In many cases of ‘Female Foeticide’ woman alone is not liable to commit the offence but they are the victims of dominant family members, who preferred male child in family. See at one hand we praise our motherland and mother on equal footage, give respectable status to both of them and on the other hand we are indulged with the offence of ‘Female Foeticide’ which is very shameful.

American Convention of Human Right, 1969 as per Article 4 of this Convention stated that, every human being has the right to live his life with respect. This right is protected by law and from conception of foetus. Therefore, this right to live has extended to foetus in mother womb. In many Convention of UNO related to child this specifically excluded foetus from definition of child. As per their view ‘child’ it means below the age of 18 years. So, as per the explanation it is cleared that, neither national level nor on International level foetus status of person and hence it is it difficult to recognize the killing of foetus in mother womb is a violation of Human Rights or not.
3.5 PROTECTION OF UNBORN CHILD AND PENAL PROVISIONS:

We could have called mother in Marathi as ‘ज्ञनन’ it means that who gives birth. In our scripture it is very clear that woman who gives birth to a child or who is having capacity to give birth to child is superior in all respect, she’s equivalent as of God. But vice versa if that woman is not having capacity to give birth then the society treats her as non-existence human being. She is also thrown away from family; even she is not given any right to participate into any family function.

All of above one thing is very important to note that, to give birth to a child is blessing of God given only to woman and no one else. Therefore, she has right to motherhood but, with the same time the woman who gives right to birth by nature, whether she is having right to abort her own child. It is clear that there is a dispute between mother and child that if mother is having right over her body then she is also having right to abort the child in her own womb. As per point of view of child, the life of child is in question, that whether child’s Right to life violated by mother by aborting it. Thus it is necessary to explain here about the jurisprudential prospective of abortion.

Abortion it means illegal and intentional ending life of the foetus at primitive stage of pregnancy. It is also point of debate on national and International level that, some are in support of abortion and some are against it. But US Supreme Court by the judgment in Roy v. Wade held that, woman is having right over her own body and she can also abort her child but within three months from the date of pregnancy. This judgment has criticized and discussed all over the world because other than USA ‘Female Foeticide’ is an increasing problem in all other countries.

So far as India is concern, the Government has enacted separate legislation like The PCPNDT Act to control ‘Female Foeticide’ and also invoked penal liability under penal code for illegal abortion which has explained as follows.

72
a. Offences of Miscarriage:

Sections 312 to 318 of Penal Code explain about offences of miscarriage which are as under:

i. Miscarriage without good faith:

It is a general rule of liability that, if anything is committed in good faith it is excused from the criminal as well as civil liability. Here in this case it is specifically mentioned that, if miscarriage is caused without good faith or with ill intention then it is punishable with seven years’ imprisonment. It means that, the section allows abortion when there is danger to the life of woman otherwise it is not permitted. On one hand we are saying that the mother is having the right on her own body so she can abort a child without any reason as per her will and wish, on the other hand we enforced this section which takes away a right to abort from woman by stating that, without any reason she cannot miscarry the child in her womb. So anyhow Government wants to protect the life of foetus. But in case of rape and sexual assault this rule is not applicable. Hon’ble High Court in case of M.D. Sharif v. State of Orissa, held that the termination on instruction of medical advice. It means that she had passive support for the same, but for that she cannot be held criminally liable u/s 312 of IPC.

ii. Miscarriage Without Consent:

If the child is aborted forcefully by the relatives of woman without obtaining her consent or against her will at any stage of pregnancy, then it shall be punished with 10 years’ imprisonment.

iii. Intentionally Prevent Birth of Child, or Cause it to Die after the Birth:

Any act committed by person, which intentionally cause injury to the child in mother

97 section 312 of IPC
98 Cr. L. J. 1996 p. 2826
99 section 314 of IPC
womb which prevent child to be born alive or if the child born alive, but died after birth due to intentional act of any person, then it shall be punished with 10 years’ imprisonment.100

iv. **Act Causing Death of Quick Unborn Child Considered as Culpable Homicide:**

As per this Section if the child is it not born but about to born, immediately in that situation if injuries is caused and death occurred then it will be amounting to culpable homicide not murder. For example, if any person wanted to kill a pregnant woman and with that intention, he caused injury. Instead of pregnant woman death of a quick unborn child occurred due to injury. Here in this case intention of person was to kill pregnant woman, if that woman could die then the act would be murder, but if without intention to kill quick unborn child died then it is amounting to culpable homicide and it is punishable with 10 years’ imprisonment and fine.101

v. **Secretly Disposed the Dead Body of Newly Born Child by Concealing Birth:**

If, by concealing the birth of child secretly buried or disposed of the dead body of child which has died before birth or after birth, shall be punished with two years’ imprisonment. This section covers both Infanticide and foeticide means killing after birth and killing before birth of child. So the framers of penal code were aware about such kind of offences and due to this why they have inserted these Sections into penal code, so as to punish the evil personality of the society.102

Hence as per the above discussion of Jurisprudential and Constitutional prospective it is clear that the penal laws and provisions of Medical Termination of Pregnancy Act always provide primary safety to the mother and then foetus in mother womb. But Human Rights Conventions on International Law clarifies that foetus in mother womb

---

100 Section 315 of IPC  
101 Section 316 of IPC  
102 Section 318 of IPC
having Right to life because foetus of 12 months and quick unborn child having its own Right to life with mother.

Therefore, researcher in this chapter has also discussed national and International scenario about ‘Female Foeticide’ and emphasized on situation specifically in Maharashtra, because her research has been limited to Marathwada Region. As per above scenario it is cleared that, not only in India but other countries like Pakistan, China also involved with the crime of ‘Female Foeticide’. Thus, it is necessary that Government of each country should take specific steps to curb the menace of ‘Female Foeticide’, because Society is full of likenesses and differences. Mere legal enactments and provisions under the Constitution of India with the purpose of safeguarding the rights of woman and children will not serve their purpose until the mindset and an attitude of people is changed. The growing problem of missing girls and declining child sex ratio will impede human development towards full gender disparity. Thus, everyone has a stake in helping to overcome these destructive and regressive customs. Social Scientists, Medical Practitioners, Common Men, Judicial Officials, Legal Professionals and NGO’s all need to focus on a humanist and scientific approach.

There is extreme need of a strong Ethical Code for Medical Practitioners. The monitoring, regular appraisal and assessment of the indicators such as sex ratio, female mortality, and literacy are required in a time frame management. Therefore, it is necessary that, the people involved, knowingly and unknowingly, must be punished if any violation of the laws related to the protection of woman and female children are brought to the attention of the Appropriate Authority.