

**CHAPTER - VI**  
**MOTHERHOOD AND MATRIMONIAL**  
**CAUSES AND CURE**

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# **MOTHERHOOD AND MATRIMONIAL CAUSES AND CURE**

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Women in India since the ancient period have been deprived of her rights. Many heinous crimes are committed against her even today. One of such crime is female infanticide and foeticide, which takes away the rights of the girl child even before she is born. Not only this, it also strikes at the motherhood of the woman as well as causes matrimonial woes in her life. The practice of female infanticide and foeticide is a gross violation of human rights. It depicts the low status of women in a society and reflects on the issue of gender discrimination which begins from the womb and ends up in her tomb. This practice is in existence in India since generations. It cut across the boundaries of caste, class, religion and even the division between the rural and urban comes to an end. Hence, it exists in every strata of the society. This practice of killing the girl child either before birth or after birth merely because she is a female is one of the extreme forms of discrimination and violence against women. In fact, female foeticide and infanticide is the beginning of the suffering of a woman in the course of her life, and now the situation in India is such that the ratio of women to men has been decreasing every year. In 1901 the gender gap was 972 females per 1000 males. The survey which was conducted in 1981 shows that the sex ratio has declined from 935 females per 1000 males in India. However, after 20 years when the survey was conducted it showed that the situation has gone worse as now the

ration of female per 1000 male is only 927.<sup>1</sup> The 2001 census conducted by the Government of India, showed a sharp decline in the child sex ratio in 80% districts of India.<sup>2</sup> The said census revealed that there were 795 women for every 1000 men in Punjab,<sup>3</sup> which is the poorest sex ratio of all the States in Punjab. This is the most imbalanced ratio of sex in the world. The decline in the sex-ratio in the successive censuses in India since 1872 proves that the girl child is neglected in India right from the beginning of her birth. The biggest challenge which India is facing today is of the female infanticide and foeticide.

Female infanticide and foeticide, though, are both related to crimes committed against the girl child yet there is a slight difference in the timing of killing of the girl child. '*Female infanticide*' means intentional killing of the girl child just after she is born alive or at any time before the completion of one year. The practice of female infanticide is an age old practice wherein girl child is killed just after her birth as she is not wanted in the family. In fact, there is an entire village in Rajasthan wherein it is a record that all the children born out there are male child. No girl child is born in the village for the past decades.<sup>4</sup> This practice shows that in India, on the one hand, wherein we worship women in the form of various Goddesses, the arrival of the girl child in the family is not welcomed. However, '*female foeticide*' is not a new form of crime; it is an advanced form of female infanticide wherein the girl child is killed even before she steps into this world by using advanced technology. The difference between two of them lies only in the timing and method of killing the girl child. Both the methods of killing the girl child is an extreme manifestation of violence against women as it not only

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1. <http://everything2.com/e2node/Female%2520infanticide%2520in%2520India>[Visited on 14<sup>th</sup> January 2009].
  2. [http://www.savegirlchild.org/declining\\_sex\\_ratio.html](http://www.savegirlchild.org/declining_sex_ratio.html)[Visited on 14<sup>th</sup> January 2009].
  3. <http://www.merineews.com/catFull.jsp?articleID=124946>[Visited on 14<sup>th</sup> January 2009].
  4. <http://www.rediff.com/news/2001/oct/24spec.htm> [Visited on 14th January 2009].

depict discrimination against the girl child and women but also a crime against motherhood.

## **BACKGROUND OF FEMALE INFANTICIDE:-**

Infanticide was a common form of crime committed against the girl child in the ancient cultures, including India. Earlier during the Carthage the practice of infanticide was in the form of child sacrifice to the supernatural figures or forces. However, many societies regarded child sacrifice as morally repugnant and did not consider infanticide a religious or spiritual act. Although the practice of child sacrifice has become less common but it still continues in some of the extremely high poverty and populated parts of the world such as China and India. Particularly, the girl child is at more risk in such practices as a sex-selective infanticide. The infanticide was a common method among Jews in ancient period. One of the frequent methods used for infanticide was simply to abandon the infant, leaving it to die by exposure or whatever other fate will befall on her. Another method of infanticide was to severely malnourish them which may put them at increased risk of death by accident or disease. However, the ancient Jewish practice condemned infanticide.

In Roman history, parents traditionally brought their newborn to the *pater familias*, the family patriarch who would then decide whether the child was to be kept and raised or left to die by exposure. The Twelve Tables of Roman Law obliged the *pater familias* to put to death a child with visible deformities. Roman texts describe the practice of smearing the breast with opium residue so that a nursing baby would die with no outward cause.<sup>5</sup> In the Solomon Island, some people reportedly kill their first-born child as a matter of custom. Then they

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5. <http://www.newsworldencyclopedia.org/entry/Infanticide>[Visited on 14<sup>th</sup> January 2009].

adopt a child from another island, a practice suggesting the complex and diverse factors which contributes to infanticide.<sup>6</sup> The condemnation of infanticide spread with Christianity. During the U.S. Slavery the infanticide was practiced because the enslaved women thought it better to kill their children rather than to subject them to a life without freedom.

### **CAUSES OF FEMALE INFANTICIDE IN INDIA:-**

The Indian culture is the ramification of patriarchal values and traditional discriminative practices. The *Atharvaveda* says, “*The birth of a daughter, grant it elsewhere, here grant a son*”. This saying in the Holy Scriptures sums up the Indian attitude towards female children who are subjected to multifarious travails inflicted upon them and also acquires a more virulent form when seen from the perspective of the girl child as the discrimination between boy and a girl begins even before her birth. The rights of the girl child as a human being are being violated even before they open their eyes to the harsh realities of the world. She becomes the victim of unjust cultural practices and their life is sacrificed at the convenience and the altar of our society’s arbitrary religious practices which becomes the plight of the girl child. The practice of female infanticide is not a new concept in India in fact it has existed in different parts of India since ancient period which has now taken a different shape due to technological advancement. Following are the main factors which gave rise to this social evil:-

**(1) Preference of son in the family:** - The basic ground for the practice of female infanticide is preference of the son in the family. Where the birth of a son is a matter of celebration and rejoices, the birth of a daughter is considered a curse

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6. *Ibid.*

to the family. The main reason behind such social thinking is that sons are the fixed deposit of their parent's life which can be used in their old age, whereas girl child is seen as the property of others and will be of their no help; in fact they are financial burdens upon their parents. Sons are called upon to provide the income; they are the ones who do most of the work in the field and hard labour. Hence, sons are looked to as a type of insurance. Moreover, having at least one son is mandatory in order to continue the familial line i.e., *Vansha*. The paternal or ancestral property is known as the Hindu Undivided Family which was equally divided among sons, thus, a male child is necessary to maintain the property rights. In such a situation many sons is an additional value of a family. Another reason for not preferring a female child is that women are considered in India as impure because of menstruation and child birth.

**(2) Cultural Factors:** - The Indian society is a male dominated society, which places the male gender in a place much higher in value than the female gender. This has cultivated a deep-rooted preference for producing boys over girls. The value of male and female children are different in our society, hence, the sex-related infanticide may be practiced simply to increase the proportion of children of the preferred sex, i.e., male. Where in a culture the childbearing is strongly tied to social structures, infants born outside those structures such as illegitimate children, children of incest, children of cross-caste relationships, etc., may be killed by the family members to conceal the violation of the taboo. Besides these one of the most important cultural factors supported or justified for the sex-selective infanticide and foeticide is the concept of "*Vanshodharak*" wherein the male child has to perform last rites of his father among the Hindus. Under the Hindu religion, a Hindu must beget a son (*putra*) in order to attain *moksha* which is ultimate goal of every person, as son is said to be rescuer who can rescue his

considered to be a source of monetary loss to the family not only among the poor but also in the well to do families. Due to this social evil female infanticide and foeticide is in increase.

**(5) Lack of education:** - In India maximum percentage of people are illiterate. In 1951, shortly after independence, the Census recorded that only 25% of men and 7% of women were literate. By the 1991 Census, female literacy has risen to 39%. Census 2001 provisional figures indicate that 54.16% of women and men are now able to read and write. Still 245 million Indian women cannot read or write, comprising the world's largest number of unlettered women.<sup>7</sup> Due to this high percentage in illiteracy, people do not understand the importance of a female child in our life. They still believe in superstition which was once prevalent in the society and has been passed on to them. The women folks are especially deprived of education since their childhood which gives rise to the problems like female infanticide and foeticide detrimental to the society at large.

**(6) Advanced technology:** - Female infanticide in India has changed its concept to female foeticide due to the advanced technology. One of the leading factors which have increased the decrease in female sex ratio in India is the advanced technology such as ultra sound scanning, amniocentesis, and in vitro fertilization. The ultrasound scanning is a non-invasive technique which has gained popularity in determining sex of the foetus. This technology is available even in remote villages of India. Amniocentesis was introduced in 1975 to detect the foetal abnormalities but it soon began to be used for determining the sex of the baby. Due to these technologies the family comes to know the sex of the baby and if it is not the desired sex the foetus is aborted. Recently, another advanced technology

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7. <http://wcd.nic.in/CEDAW4.htm> [Visited on 14<sup>th</sup> January, 2009].

has penetrated the society which is facilitating the decreasing ratio of female sex in India, i.e., in vitro fertilization. The science has invented this method for those who are not capable of conceiving children normally. In vitro fertilization ensures the birth of a baby of the desired sex without undergoing abortion. Ironically, in India this method is used to avoid giving birth to girl children. Hence, even the medical profession is being part of the gender biased society in India. In fact there is a slogan alleged to be given by doctors who are engaged in foeticide is "*Better to spend Rs. 1000 now and save Rs. 10 lakh later.*"

**(7) Oppression of women in the Society:** - In the patriarchal society of India women are victims of patriarchal ideology that oppresses them. In case of sex selective infanticide and foeticide the women (i.e. mother) often has no say. The decision to kill the female infants and to abort the female foetus is in the hands of the husband and in-laws. Generally in India midwives are very common and they are entrusted with the additional responsibilities to assist the mother in childbirth. For extra fees they are instructed by the senior women in the patriarchal family to euthanize the female babies. Even in case of sex-selective abortions the women is not asked of her opinion to keep the foetus. Where she does not agree to abort the foetus she is threatened with dire consequences. The mother of the baby does not have right to say anything against it as she fears of being abandoned by her husband or of being homeless, which generally happens when such women oppose the in-laws or against such practice.

### **METHODS OF KILLING FEMALE INFANTS:**

The female infanticide was practiced since ancient period and there are number of methods for killing the infants which have been handed down through the generations, much like the recipes. Sometimes soon after the birth of

the child the infants are fed milk laced with sap from poisonous plants. Sometimes the infant is fed milk laced with paddy husk as soon as they are born; it slits the tender gullet with its sharp sides as it slides down the tiny throat. Now due to modern technology the modern family uses pesticide or the sleeping pills. The infants are sometimes suffocated with a pillow. With the passing years the government through various studies is cracking down various methods of infanticide. From a quick and relatively painless procedure it has turned into a long, painful and torturous one such as starvation and dehydrates the infant. Sometimes the infants are wrapped in a wet towel or dipped into cold water soon after delivery so that it would contract pneumonia. With these methods infanticide will not be proved as to support it there will always be medical prescription claiming the infant to be suffering from pneumonia. The infants are sometimes fed a drop of alcohol to create diarrhea which is another certifiable disease. There are times when the mother of the child is not allowed to breastfeed her child or she herself does not feed with an intention to starve the infant.

With the advancement in technology, the sex-selective abortion has become common in most parts of India. This is the modern way to prevent girl child to be born alive. The ultrasound devices are used to determine the sex of the fetus. The sex determination scan cost anything from Rs. 300 upwards. The whole package, including abortion of the female foetus costs about Rs. 7000. The portable ultrasound devices can be taken anywhere due to its size, as a result the facility of knowing the sex of the child is available even in the remote villages of our country. Even though in some of the remote places female infanticide are practiced, the modern technology helps such family to know the sex of the child in advance (i.e. before it is born alive) saving them to kill it after birth by the traditional methods. Now the unwanted female are simply aborted or in other words killed in the womb itself. Another method of determining the sex of

the foetus is amniocentesis which was introduced to ascertain birth defects or genetic defects in the infants such as abnormalities. Unfortunately, this method is used only for the purpose of knowing the sex of the foetus. Hence, it can be said that now the sophisticated methods have replaced the crude methods of killing the female child. It is more surprising that the attitude of some of medical practitioners reveal that they view sex determination tests as a “human” service provided by them to the couples who does not want to have more daughters as they feel that it is better to avoid the situation rather than regret over it later. They also feel that it is a necessary weapon to control the population. Many justify that aborting a female foetus is preferable to condemning an unwanted daughter to a lifetime of neglect and abuse. Some of the eminent economists also endorse the argument that abortion of females is preferable to neglect, and assert that if the sex ratio of India further worsens as a result of these tests and technologies, then the law of supply and demand will operate and raise the value of women; thus, curbing these tests and technologies is unnecessary or even retrograde.<sup>8</sup>

### **EFFECTS OF DECLINING FEMALE SEX RATIO:**

The rate at which the female sex ratio of our country is declining can impose serious repercussions for the future. It is feared that the decline in female sex ratio can impose difficult in finding match for the male children, as with such rate it is apprehended that it would lead to families where there would be only males. The society which has come a long way to be civilized by introducing the concept of marriage especially monogamy will again go back to the primitive societies wherein there was no form of marriage and sex life was free from any taboos, as there will be limited numbers of female in the society. Such

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8. Nidhi Misra, *Legal Aspects of Foeticide and Infanticide-An Indian Perspective*, Law and Child-I, R.Cambray &Co. Pvt. Ltd, 2004, 262.

situation will be against our cultural ethos. Polyandry form of marriage will be call of the time and problems relating to paternity of the children will again haunt the society. One of the adverse effects of declining female sex ratio is that if the situation will not improve and the female sex ration will continue to decline than it will lead to degradation of moral values and degradation in society. The violence against women will reach its peak in the forms of incidence of rape, molestation and other forms of immorality, as the society will consist of only males and very few females the men will opt for immoral methods of fulfilling their sexual gratification.

The above mentioned are the long term effects of female infanticide and foeticide. Along with this there are some instant effects of female infanticide and foeticide in our society. One of the worst effects is that women in our society are expected by her in-laws and husband to give birth to a son and if she gives birth to a daughter she has to suffer lots of humility and insult at the hands of her in-laws and husband. Due to this the woman is pressurized to undergo many tests which are available for the determination of sex of the foetus and abort it if it is a female. The constant pressure on women to give birth to a son and to undergo repeated abortions makes her suffer from physical as well psychological traumas. It also hampers her health as she becomes habitual aborter. The decline of fertility in urban and educated family however, the preference for a son remains strong due to this the woman has to undergo the tests available to determine the sex of the foetus and abort again and again which may result in the decline in the fertility of the woman to produce any children. Men tend to marry younger women to raise in fertility a rate which has resulted in high rate of population growth. Another phenomenon attached to it is that for the purpose of marriage young girls are being abducted. The Hindustan Times recently reported

that young girls from Assam and West Bengal are kidnapped and sold into marriage in neighbouring Haryana.<sup>9</sup>

## **INTERNATIONAL INSTRUMENTS AGAINST THE PRACTICE OF FEMALE INFANTICIDE AND FOETICIDE:**

Every human being has right to life. However, the existence of a new life in the womb of its mother apparently becomes very short if it happens to be a female. Even if the child is born alive there are various methods by which she can be disposed of. The girl child suffers various forms of atrocities even before she is born; in fact her existence in this world is at stake due to increase in the decline of female sex ratio all over the world, especially in the Asian countries. There are various international instruments which protects the rights of a girl child.

The **Universal Declaration of Human Rights, 1948**, recognizes not only inherent dignity but also equal and inalienable rights of all members.<sup>10</sup> It states that everyone shall have the right to life and liberty as the security of persons.<sup>11</sup> The **International Covenant on Civil and Political Rights, 1966**, provides that every human being has inherent right to life. This shall be protected by law and no one shall be arbitrarily deprived of his life.<sup>12</sup> It also promotes right to liberty and security to every person.<sup>13</sup> In order to provide all children to develop physically, mentally, socially, spiritually, and morally, the United Nations General Assembly adopted the **Declaration of the Rights of the Child** in 1959. The Declaration provides that the child by reason of his/her

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9. <http://www.iheu.org/node/1049> [Visited on 15th January 2009].

10. Article 1, *UDHR*.

11. Article 3, *Ibid*.

12. Article 6, *ICCPR*.

13. Article 9.1, *Ibid*.

physical or mental immaturity needs special safeguards and care including its appropriate legal protection before as well as after birth.<sup>14</sup> It also confers right to enjoy all the rights set forth in the declaration without discrimination on account of race, colour, sex, language, religion...<sup>15</sup> The Declaration also provides special protection to child and also the right to opportunities and facilities given by law and by other means to enable it to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and conditions of freedom and dignity.<sup>16</sup> The child should have right to name and nationality.<sup>17</sup> The children also have right to social security and to grow and develop in health.<sup>18</sup> The Declaration also provides that the child has a right not to be separated from its mother, and the society and public authorities shall extend particular care to children without family or adequate means of support.<sup>19</sup> The children have right to free and compulsory education at least up to the elementary stages,<sup>20</sup> right in all circumstances to be among the first to receive protection and relief,<sup>21</sup> and above all right to be protected from practices which may foster racial, religious and any other form of discrimination.<sup>22</sup>

The United Nations General Assembly resolved the **Beijing Rules** in 1986 wherein the **Standard Minimum Rules for the Administration of Juvenile Justice** was adopted. It provides that all the actions concerning children whether undertaken by the public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies

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14. The Preamble, *Declaration of the Rights of the Child*.

15. Principle 1, *Ibid*.

16. Principle 2, *Ibid*.

17. Principle 3, *Ibid*.

18. Principle 4, *Ibid*.

19. Principle 6, *Ibid*.

20. Principle 7, *Ibid*.

21. Principle 8, *Ibid*.

22. Principle 10, *Ibid*.

shall be for the best of interest of the child.<sup>23</sup> It also provides that every child has an inherent right to life,<sup>24</sup> and a right to development.<sup>25</sup> It is the duty of the state to ensure implementation of these rights in accordance with law and their obligations.<sup>26</sup> The United Nations General Assembly also adopted the **Declaration on the Right to Development** in 1986. According to this Declaration the State shall undertake at the national level all necessary measures for the realization of the right to development and shall ensure equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and fair distribution of income.<sup>27</sup>

In 1989, the United Nation's General Assembly adopted a major convention to protect the rights of the children, i.e. the **Convention on the Rights of Child**. The Convention provides that the primary consideration in all the matters concerning the children should be for the best interests of the child. It provides variety of rights of the children and the most important of all is the inherent right to life and it is the duty of the State Parties to ensure that the maximum extent possible the survival and development of the child.<sup>28</sup> The child as per the Convention shall be registered immediately after birth and shall have the right from birth to a name and nationality. The child also has the right to know and be cared for by his or her parents.<sup>29</sup> The State Parties as per the Convention shall take appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence.<sup>30</sup> The State Parties should recognize the right of the child to the enjoyment of the highest attainable

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23. Article 3(1), *Standard Minimum Rules for the Administration of Juvenile Justice*.

24. Article 6, *Ibid*.

25. Article 6(2), *Ibid*.

26. Article 7(2), *Ibid*.

27. Article 8, *Declaration on the Rights to Development*.

28. Article 6, *Convention on the Rights of the Child*.

29. Article 7, *Ibid*.

30. Article 9, *Ibid*.

standard of health and to facilities for the treatment of illness and rehabilitation of health.<sup>31</sup> It also provides that the child should be protected against all forms of exploitation which is prejudicial to any aspect of the child's welfare.<sup>32</sup> The Convention provides that an international Committee shall be established on the Rights of the Child which shall consist of 10 independent experts and this Committee has the competence to hear the State reports.<sup>33</sup> The Committee mentioned under it was established in 1991 and have set aside from time to time for general discussions on particular topics. At its eighth session it discussed matters relating to girl child.

**The Convention on Elimination of All Forms of Discrimination against Women** provides the meaning of the term "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex.<sup>34</sup> It recognizes the ability of a woman to control her own fertility as a fundamental right to her full enjoyment of the full range of human rights to which she is entitled. It also provides equality in access to health care, including family planning, appropriate services in connection with pregnancy, period, granting free services where necessary, as well as adequate nutrition during pregnancy lactation.<sup>35</sup>

**The World Summit for Children, 1990**, was a follow-up action to the Convention. The Summit was held at the UN headquarters which enabled the national leaders to focus on issues affecting the future of the children. In 1993 a **World Conference on Human Rights** was held wherein the urgency with regards to the protection and implementation of the rights of the

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31. Article 24, *Ibid.*

32. Article 36, *Ibid.*

33. Article 43, *Ibid.*

34. Article 1, *CEDAW.*

35. Article 10, *CEDAW.*

child was discussed. It underlined the importance of the role of UNICEF in the protection and promotion of the rights of the child. The UNICEF in this regards gave a new perception to the promotion of rights of the child by declaring that the human rights begins with Children's Rights.

The **American Convention on Human Rights** guarantees that every person has a right to have his life respected. This shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.<sup>36</sup> The **Convention of Human Rights and Fundamental Freedom of the Commonwealth of Independent States** provide that everyone's right to life shall be protected and no one shall be deprived of his life intentionally.<sup>37</sup>

The **Cairo Declaration of Human Right in Islam** provides that life is a god given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies, and the States to protect this right from any violation.<sup>38</sup> The European Convention of Human Rights recognizes that everyone has right to life and such right shall be protected by law.<sup>39</sup>

## **NATIONAL INSTRUMENTS AGAINST THE FEMALE INFANTICIDE AND FOETICIDE:**

The discrimination against women starts from her house itself as the family in general desire for a male child. She faces covert violence even before she is born. To eliminate her methods like female infanticide and foeticide is adopted by the family who desire for a male child. The practice of female

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36. Article 4(4), *American Convention on Human Rights*.

37. Article 2, *The Convention of Human rights and Fundamental Freedom of the Commonwealth of Independent States*.

38. Article 2, *Cairo Declaration of Human Rights in Islam*.

39. Article 2, *European Convention on Human Rights*.

infanticide and foeticide is not uncommon in Indian society. It is in practice in our country since centuries, and is still prevalent in certain parts of the country. It is reported that female infanticide existed in India since 1789 in several district of Rajasthan; along the western shores in Gujarat – Surat and Kutch; and among a clan of Rajputs in eastern part of Uttar Pradesh.<sup>40</sup> In the 18<sup>th</sup> Century, infanticide was initially documented by British officials who recorded it in their dairies during their travels. The scopes of the problem of infanticide become clear in 1871, in the setting of India's first census survey. At that time it was noted that there was a significantly abnormal sex ratio of 940 women to 1000 men. This prompted the British to pass the Infanticide Act in 1870, making it illegal. But the Infanticide Act was difficult to enforce in a country where most birth took place in the home and where vital registration was not commonly done.<sup>41</sup> The method of eliminating girl child is still in practice and has in fact taken a new shape at the hands of advanced technology. The fall in the rate of sex ratio in India especially post independence became more rapid. Out of all the States in India, Punjab tops the list with 793 girls per 1000 boys, Haryana is second with 819 girls per 1000 boys, Chandigarh stands third with 845 girls per 1000 boys in the age group of 0 to 6, Delhi is fourth on the list with 865 girls per 1000 boys and Gujarat occupies fifth place with a 878 girls per 1000 boys.<sup>42</sup> The female infanticide and foeticide is one of the issues that is gaining much importance from all quarters these days due to adverse consequences the society may face by the rapid decline in the female sex ratio. India being the founder member of the United Nation has made its best

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40. Sneha Lata Tandon and Renu Shrama, *Female Foeticide and Infanticide in India: An Analysis of Crimes against Girl Children*, International Journal of Criminal Justice Sciences, Vol 1(1), 2006.

41. Rita Patel, "The Practice of Sex Selective Abortion in India: may You Be the Mother of a Hundred Sons", [www.ucis.unc.edu/resources/pubs/carolina/abortion.pdf](http://www.ucis.unc.edu/resources/pubs/carolina/abortion.pdf) [Visited on 28<sup>th</sup> Dec' 2008]

42. Padma Bhargav, *Female Foeticide: Society sans women*, <http://www.canadafreepress.com/2006/india090106.htm> [Visited on 28<sup>th</sup> Dec' 2008].

effort to implement the provisions of the international instruments in its national front. In order to combat the discrimination against the girl child in the name of female infanticide and foeticide which is a grave social problem and a social evil, following protections are available for the girl child:

### 1. CONSTITUTION OF INDIA: -

In order to protect a girl child from the evils of female foeticide and infanticide, the Constitution of India under Part III confers certain rights of the child. It provides right to equality in general.<sup>43</sup> It also prescribes right against discrimination on the ground of religion, race, caste, sex, etc.<sup>44</sup> One of the most important rights which the Constitution provides is that right to life and liberty.<sup>45</sup> This right is supported and conferred by various decisions of the Supreme Court such as in *Maneka Gandhi vs. Union of India*<sup>46</sup> and *Francis Corelli's Case*.<sup>47</sup> The Constitution under Part IV provides that every person has right to opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and to protection of the childhood and youth against exploitation and against moral and material abandonment.<sup>48</sup> It also provides that it is the duty of the state to provide early childhood care and education for all children until they complete the age of six years.<sup>49</sup> An unborn person can be brought within the ambit of person under the said provisions and in fact it possesses the right to be born and stay alive. This right is being denied without due process of law. The practice of infanticide and foeticide selectively resorted to in the case of female children only would make them violative of Articles 14 and 15

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43. Article 14, *Constitution of India*.

44. Article 15, *Ibid*.

45. Article 21, *Ibid*.

46. AIR 1978 SC 597.

47. AIR 1981 SC 746.

48. Article 39 (e) and (f), *Ibid*.

49. Article 45, *Ibid*.

as such practice would violate not only the right to equality as provided by the Constitution, to the girl child but also hits at the right to equality of the woman who is carrying the baby in her womb to decide whether she wants the child or not irrespective of to whatever sex the unborn child belongs. Such practices also rob the right to life and liberty of the girl child under Article 21 wherein every person has right to life. The girl child too has right to be born and not aborted, killed or abandoned just because she is a girl. She too have right to remain alive after birth and not to be killed at any moment after birth; she also have right to her mind, her body, right to childhood and rights to a healthy family environment. Such practices also makes the protection provides under the Directive Principles of States Policy mere provisions wherein protection is provided without any implementations. Along with these, the Constitution also provides certain fundamental duties to its citizen wherein it is the duty of every citizen to develop the scientific temper, humanism and the spirit<sup>f</sup>of inquiry and reform and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. The State has a duty to equip the child in every way so that it could efficiently perform the duty enjoined upon it.<sup>50</sup>

The Government of India formulated national policy for children by Resolution dated 22-08-1974.<sup>51</sup> The policy was made as per the duties conferred upon the State to protect the rights of the child by the Constitution. The policy chalked out certain programmes to enforce the rights conferred upon a child by the international and national charters. The Indian Government ratified the Convention on the Rights of the Child on 2<sup>nd</sup> December 1992. The Government being the signatory to the World Declaration on the Survival, Protection and

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50. Article 51-A, *Ibid*.

51. G. Kameshwari, *Basic Rights of A Child – Born and Unborn*, AIR 2002 J141 at 143.

Development of Children and the World Summit established the Department of Women and Child Development under the Ministry of Human Resource Development has formulated a **National Plan of Action for Children**. It formulated a National Plan of Action exclusively for the girl child (1991-2000) in 1992 for the "*Survival, Protection and Development of the Girl Children*." The Plan recognized the rights of the girl child to equal opportunity, to be free from hunger, illiteracy, ignorance and exploitation. Towards ensuring survival of the girl child, the objectives of the Plan were as follows:

- Prevent cases of female foeticide and infanticide and ban the practice of amniocentesis for sex determination;
- End gender disparity in infant mortality rate; eliminate gender disparities in feeding practices, expand nutritional interventions to reduce severe malnourishment by half and provide supplementary nutrition to adolescent girls in need;
- Reduce deaths due to diarrhea by 50% among girl children under 5 years and ensure immunization against all forms of serious illnesses; and
- Provide safe drinking water and ensure access to fodder and drinking water nearer home.

To raise the overall status of the girl child the Government also launched the **Balika Samridhhi Yojana** in 1997. This initiative by the Government was taken in order to change the attitudes of the family towards the girl child and her mother. Under it about 25 lakh girl children born every year in families below the poverty line are to be benefited. The first component of the scheme, which has already been launched provides Rs. 500/- as a post-delivery grant to the mother of the girl child. This scheme was launched by the then Prime Minister I.K. Gujral on 2<sup>nd</sup> October, 1997. The main objective behind this scheme was to "change the negative attitude of the Family and the community to the girl

child at birth and towards her mother.” The other components proposed under the scheme are provision of annual scholarships to the beneficiaries when they go to school i.e. Rs 300 at the junior level and Rs. 1000 at the senior level. This scholarship will be deposited in the account of the beneficiary so as to provide her added benefit and assistance for taking upon income generating activity when they attain the age of maturity. The amount payable to the child will depend upon the fact that for how many years such child undergone school education. However, the scheme has limitation to the first two daughters, and becomes ineffectual for the every daughter born after the two children.

Similarly, the State Government too made efforts through various schemes to tackle the issue of problems related to female infanticide and foeticide. For Example; in Haryana Government introduced a scheme called **Apni Beti Apna Dhan** on 2<sup>nd</sup> October 1994. The Scheme aimed at making girls financially independent and provides monetary assistance of Rs. 3000/- to the family at the birth of first three girls. The mother of the girl child will be given Rs. 500/- within 15 days of each girl’s birth for the post delivery needs of the mother for increased nutritional requirements. The said sum will be delivered in the hands of mother at her door steps. The Government will invest the sum of Rs. 2500/- in the name of the girl child in Indira Vikas Yojna within three months of her birth. This investment is made available to the girl when she reaches 18 years of age. In 1995 the Haryana Government expanded the scope of the said scheme and announced a sum of Rs. 35,000/- and Rs. 30,000/- against Rs. 25,000/- for the girls who agree to defer the encashment of their Indira Vikas Yojna. In the first year of the implementation, the scheme provided Rs. 500/- to 36,000 women in the State and invested Rs. 2500/- each in Indira Vikas Patra for more than 23,000 girls.

On the same ground the Tamil Nadu State Government too introduced two schemes to tackle the problem of female infanticide and foeticide

in the state. The first scheme is called “cradle baby scheme” wherein instead of killing the girl child, she is given in adoption. It offers shelter and upkeep for the baby girls who have been abandoned by their parents. The scheme involved placing of the unwanted girl child at the primary health centres and one percent reservation in job for the ‘cradle babies’ when they grow up. However, the scheme failed because of poor implementation and neglect of the abandoned child. The second scheme initiated by the Tamil Nadu Government involves an incentive of Rs. 5000 to be invested in the name of 1 of 2 girls if the couple has only two girls and no son and if the family is below poverty line and one of the parents agrees to undergo sterilization. The investment made in the name of the girl child will be made available to her when she is 20 years of age. However, even this scheme has not been well received as the incentives were not made immediate and therefore, the scheme held no charm to lure such parents. These two schemes failed miserably. Ultimately the Tamil Nadu government has formulated various plans of action under Vision 2000 Programme wherein one such plan was Nutrition Programme which concerned the health of the pregnant women. The government under this scheme initiated campaigns to educate women and made efforts to raise their economic status through employment schemes.

Besides this recently, the religious organizations too are taking active participating by condemning the practice of female foeticide and infanticide as against the religious practices. Even the Indian Medical Association is organizing campaigns against the problem relating to female foeticide and infanticide in collaboration with various NGO’s working in this field.

## **2. LEGISLATIVE ENACTMENTS:-**

The Constitution confers duty upon the State to protect the rights of the girl children against the practice of infanticide and foeticide. The

increase in the instances of female infanticide and foeticide resulted in the alarming decline in the female sex ratio of our country. Hence to curb the evil of infanticide and foeticide and to protect the girl child from such discriminatory and inhuman practice certain legislative measures were taken by the Indian government which is as follows:-

**(a) Indian Penal Code: -**

The Indian Penal Code was enacted in 1860 and contained certain provisions which brought female infanticide within its ambit. Various censuses taken at that time showed that the practice of female infanticide is prevalent in large scale in various parts of India. This Code was enacted to also check the practice of female infanticide. It treats female infanticide as culpable homicide and murder. Female infanticide means intentional killing of a girl child after she is born alive by any members of the family, parents of the child or any person who assists them. Hence, female infanticide is an offence which can be brought under the offence of culpable homicide. The Code provides that whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.<sup>52</sup> It also provided that culpable homicide under the said provision include to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or have completely born.<sup>53</sup> Female infanticide can also be covered under Section 300 which provides for provision with respect to murder. The said section states that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or the offender commits it with full knowledge that his

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52. Section 299, IPC.

53. Explanation 3 of Section 299, *Ibid*.

act will cause death of the person, or to cause such bodily injury with an intention to kill the person, or the act of the offender is dangerous that it will in all probability cause death of the person. Female infanticide is covered under it because the offender knows that by his/her such act the infant will die or the offender does the act with an intention to cause the death of the infant.

The Indian Penal Code also provides protection of a girl child against female foeticide. Female foeticide or abortion in India was governed by the Indian Penal Code till 1971. The Code does not use the term foeticide or abortion, it uses the term miscarriage. Miscarriage means premature expulsion of child or foetus from the mother's womb at any period of pregnancy before the term of gestation is complete. It provides the protection of a foetus under certain circumstances. Section 312-316 of the Code made abortion punishable offence. It provides that whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment of maximum three years or with fine or with both; and if any woman be quick with child, shall be punished with imprisonment of maximum seven years and shall also be liable to fine.<sup>54</sup> Explanation to Section 312 states that a woman who causes herself to miscarry, is within the meaning of section 312. However, this provision has an exception which provides that miscarriage may only be caused in good faith for the purpose of saving the life of woman. The provision also uses the term 'quick with the child' which means when the woman starts to feel the particular experience from about the fourth or fifth month of pregnancy. The symptoms are popularly ascribed to the first perception of the movement of the foetus. As per the law 'quick with child' means having conceived i.e. when embryo has assumed foetal form and started moving in the womb. In order to prove the offence under the said provision following things are necessary to prove:-

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54. Section 312, *Indian Penal Code*.

- That the woman was pregnant whether it is initial stage of pregnancy or is quick with the child,
- That the accused did some act likely to cause a miscarriage,
- That the accused did so voluntarily,
- That such woman did miscarry in consequences,
- That such miscarriage was not caused in good faith i.e. to save woman's life.

The Code also provides that a person who aids and facilitates a miscarriage is liable for the abetment of the offence of miscarriage under section 312, even though the abortion did not take place.<sup>55</sup> However, there is one exception to this provision i.e. abortion is permitted on therapeutic medical grounds in order to protect the life of the mother. In *Rex vs. Bourne* (an English case)<sup>56</sup> a girl under 15 years, who was criminally assaulted in the most revolting circumstances became pregnant. An eminent obstetrics surgeon and gynecologist who terminated the pregnancy were charged with causing abortion against the law under section 58 of the Offences Against the Person Act, 1861. It was held that since the operation was done *bona fide* to save the life of the mother practically from the physical and mental breakdown the defendant is entitled to an acquittal. Similarly, in *Sharif vs. State of Orissa*<sup>57</sup> termination of pregnancy of a minor girl was performed to save the life of the mother. In this case the accused accompanied the girl with her consent to the nursing home, who wanted to terminate the pregnancy to avoid social stigma. The accused did not instruct her to go for termination. The accused was charged with section 312. It was held that the accused is not liable for causing the girl to miscarry. The offence is non-

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55. Section 109, Explanation 2, IPC.

56. (1938) 3 All ER 615.

57. (1996) CrLJ 2826 Ori.

cognizable, bailable, non-compoundable offence, can be tried by the Court of Sessions.

The Code also provides that whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment of life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.<sup>58</sup> The most essential element in this Section is that the act of abortion must have been done without the consent of the woman. Under this section the person procuring the abortion is alone punished i.e. the woman whose abortion is done is not punished. The woman is punishable under section 312. In *Dr. Akhil Kumar vs. State of M.P.*<sup>59</sup> a woman living separately from her husband for 3 to 4 years got conceived as a result of illicit intercourse with her distant cousin. Where her pregnancy was for 24 weeks she approached a Medical Practitioner<sup>d</sup> who pushed Menstrogen Forte injection into her which caused her death. The literature of Menstrogen Forte clearly stated that the effect of such injection could be miscarriage. The plea of the accused physician that he had pushed that injection to determine if she was pregnant was not believed because the 6 month old pregnancy was writ large on her abdomen discernible from outside and the doctor was convicted for attempt to cause miscarriage. In *Moideenkutty vs. Kunhikaya*<sup>60</sup> an allegation was made by a woman who was pregnant. It was alleged that the accused took her to a doctor who terminated her pregnancy. The termination of pregnancy was done under medical advice. However, the Court held that the case against the accused could not be made out as the woman willingly submitted herself to abortion and even after the abortion had sexual intercourse with the accused and there was nothing to show that

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58. Section 313, IPC.

59. 1992 Cri. LJ 2029.

60. AIR 1987 Ker 184.

abortion was at the instance of the accused. Further, it was not clear from the allegation that whether he was only accompanying the lady at her request and whether he even made a request to the doctor to have the abortion done. Finally, the doctor who conducted the abortion was not made an accused, which showed that she had no complaint against him.

The offence mentioned under Section 314 is cognizable, non-bailable, and non-compoundable and may be tried by the Court of Sessions and is punishable with imprisonment up to ten years of either description and shall also be liable for fine.

The Code also punishes any act which is done with intent of causing miscarriage causes the death of such woman. It provides that whoever with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. It also states that if the said act is one without the consent of the woman, the accused shall be punished with either the imprisonment for life, or with the punishment above mentioned.<sup>61</sup> It is not essential for the offence that the offender should know that the act is likely to cause death.<sup>62</sup> In *Maideen Sab vs. State of Karnataka*<sup>63</sup> the deceased mother of 4 children became pregnant. The son-in-law of a pregnant woman left her at the house of the accused doctor. Her dead body was recovered from the place where it was buried in the accused house. The dead body was exhumed after about 12 days. It was found in a decomposed state. The accused made extra-judicial confessions to three different persons to the effect that the death took place during abortion. Circumstantial evidence also proved this fact beyond reasonable doubt. The fact that the accused was absconding was proved by

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61. Section 314, *IPC*.

62. Explanation to Section 314, *Ibid*.

63. 1993 Cr LJ 1430 (Kant).

his surrender to the court. His conviction under the section was confirmed and he was sentenced to five years rigorous imprisonment, however, the fine was set aside. Again in *Jacob George vs. State of Kerala*<sup>64</sup> a homeopath operated upon a pregnant woman to cause abortion but she died a few hours after operation because her uterus got perforated. His conviction was upheld under Section 314, however, the Apex Court reduced his sentence to one already undergone but enhanced the fine of Rs. 5,000 to Rs. 100000 to be deposited in the name of the minor son of the deceased and also passed the detailed orders as to how the money was to be utilized. The court discussed the purpose of punishment at length and emphasized the need of awarding compensation liberally but reasonably to meet the ends of justice. However, in *Vatchhalabai Maruti Kshirsagar vs. State of Maharashtra*<sup>65</sup> a nurse attempted to cause miscarriage of a pregnant girl but was unsuccessful. On the third day another person, the accused who was an attendant, made an attempt and succeeded and as a result of this the girl died. She died of septicaemia which had developed from ruptures and tears in the internal parts of vagina. There was no evidence to show that ruptures and tears had occurred at the hands of the accused. It was held that the conviction of the accused under Section 314 was not proper.

With the help of the above judicial decision it is clear that it is not essential for the offence that the offender should know that the act is likely to cause death. The provisions of Section 314 will also be attracted even if the accused has taken proper precaution in order to prevent risk to the life of woman. The offence committed under the said section is non-cognizable, non-bailable and non-compoundable and will be tried by the Court of Sessions.

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64. 1994 Cr LJ 3851.

65. 1993 Cr LJ 702(Bom).

In order to curb the social evil called infanticide the Code provides that whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causing it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which extend to ten years, or with fine, or with both.<sup>66</sup> The section thus makes an act offence if the accused has intention to inflict injury to the child which results in the destruction of the child's life. However, there is an exception to this rule i.e. if the said act is done in good faith for the purpose of saving life of the mother then such act is outside the purview of this section. The said offence is non-cognizable, non-bailable and non-compoundable and shall be tried by the Court of Session.

The Code also provides that whoever does any act causing the death of a quick unborn child by an act amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.<sup>67</sup> The offence provided under Section 316 is non-cognizable, non-bailable and non-compoundable and shall be tried by the Court of Session. This provision will be attracted under the following circumstances:-

- That the woman was quick with child;
- That the accused did an act to cause the death of the child;
- That the circumstances under which the act was done was such as to make the accused guilty of culpable homicide if the death has been caused;
- That such act did cause the death of quick unborn child.

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66. Section 315, *IPC*.

67. Section 316, *Ibid*.

*Illustration* to Section 316 states that A, knowing that he is likely to cause the death of a pregnant woman does an act which, if it caused the death of the woman would amount to culpable homicide. The woman injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

Unless the act is done against the mother with an intention or with a knowledge which brings it within the purview of Section 299, it can not constitute an offence under this section merely because the death of a quick unborn child has resulted from an act against the mother. In *Murugan vs. State*<sup>68</sup> a husband striking his wife dead was held guilty of the offence under this section. The medical evidence showed that she was carrying a male child of 20 weeks. A foetus gets life after 12 weeks of conception. The principle laid down in Section 301 is applied here.

In India we read and hear more or less every day that an unwanted girl child was left in the garbage, disposed off in plastic bag, wells, secluded areas etc. With an intention to prevent the abandonment or desertion by the parents of the child under the age of twelve years or by the person having the care of such child, the Code provides that such parents or such person if expose or leave the child with the intention of wholly abandoning such child shall be punished with imprisonment of either description for a term which may extend to seven years or with fine, or with both.<sup>69</sup> It also provides that wherein the child dies as a consequence of the exposure then the charge for murder or culpable homicide will be applicable.<sup>70</sup> The offence mentioned under this section is cognizable, bailable, non-compoundable and shall be tried by a magistrate of first class. The term “*expose*” means to put outside physically, so that such an act puts some

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68. 1991 Cr LJ 1680 Mad.

69. Section 317, *IPC*.

70. Explanation to Section 317, *Ibid*.

physical risk to the person who has been put out. With reference to a child, it would mean to put it somewhere where the child could not receive the protection which is essential for its tender age for example; putting it outside the house, whereby the child would be at risk of the climate, wild beasts etc. The exposure to the child means exposure by which danger to life may immediately ensue. The term “*leave*” means leaving of a child without any protection. Even an illegitimate child comes under the purview of this section.

The Code also provides that whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.<sup>71</sup> This section deals with secret burial of a child. It will apply only where one intentionally conceals the birth of a child from the world at large. This section also intended to prevent infanticide. In order to prove the offence under this section following things must be proved:

- The birth of the child;
- Secret burying or disposing of the dead body of a child; and
- With intention to conceal the birth of such child.

If it is foetus only then Section 312 and 511 of the Code will be applied. The offence is cognizable, bailable and non-compoundable offence triable by the Court of Session or the magistrate of first class. In an unreported criminal case in 1895 the accused gave her new born illegitimate dead child to a woman with instructions to dispose of it secretly, and the latter carried out the instructions by throwing it into a river, it was held that the accused was not guilty of a substantive offence under this section, though the fact more appropriately

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71. Section 318, *Ibid.*

came under the definition of abetment.<sup>72</sup> In *Lulano Lotha*<sup>73</sup> the court found that there was no evidence to show that the accused, a teenaged tribal girl was carrying and there was also no evidence of any child birth or its secret disposal nor was there any evidence that the girl complained of any pain in her private parts at the time of her medical examination soon after the alleged delivery, it was held she could not be convicted under this section merely on the basis of her judicial confession which was not voluntary as it was made while she was still under the influence of the police.

Hence, the Indian Penal Code recognizes the problem of female infanticide and female foeticide as a social evil and tries to prevent such a practice by imposing punishment of grave nature along with fine.

#### **(b) The Medical Termination of Pregnancy Act, 1971:-**

The Indian Penal Code till 1971 governed the law on abortion. It permitted 'legal abortion' without criminal intent to kill the foetus and which is done in the good faith for the express purpose of saving the life of the mother. Abortion is a major cause of maternal morbidity and mortality in India because most of the abortions are not reported and the sex selective abortions are carried out secretly. Due to these factors it is difficult to maintain the statistics of abortion in India and the available statistic is also inadequate as the hospitals keep records of only legal and reported abortions. According to the Consortium on National Consensus for Medical Abortion in India, every year an average of about 11 million abortions take place annually and around 20,000 women die every year due to abortion related complications. Most abortion related maternal deaths are

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72. Quoted in Ratanlal & Dhirajlal, *The Indian Penal Code*, Wadhwa and Company Law Publishers, Nagpur, 1997, 452.

73. 1981 Cr LJ 522 (Gau).

attributable to illegal abortions.<sup>74</sup> The laws provided were not deterring families from sex selection abortions as a result of this it has been reported that from the survey of one million household in 1998 by the Indian government at least 50,000 female fetuses in 1997 were aborted. Lots of people in India are turning towards abortion for girls due to factors mentioned above and this in turn is resulting in the decline of female sex ratio. In order to prevent the misuse of induced abortions which may even cause the death of the mother along with the removal of the foetus, most countries in the world have created strict abortion laws where only the qualified doctors under stipulated conditions can perform abortion on a woman in a clinic or hospital. India too legalized abortion in 1971 with an aim to regulate the illegal abortions in India. It is estimated that around four million Indian women still resort to illegal abortions because of social taboos, and from the quacks i.e. who are not skilled practitioners and minus the medical facilities. This results in the death of the woman also. Now the abortions in India are governed by the Medical Termination of Pregnancy Act, 1971.<sup>75</sup> Another reason for passing out the abortion law is the boom in the population of our country which has reached more than 1.1 billion people, only next to China.

The MTP Act carves out exceptions to the provisions contained in the Indian Penal Code which criminalize the performance of an abortion. Hence those abortions which fall outside the purview of the MTP Act and the exceptions contained within the Indian Penal Code are regarded as illegal and punishable.

Pregnancy is the condition of having a developing embryo or foetus in the female. It is the condition resulting from the fertilized ovum. Although the Act is related to abortion it does not define the term "*abortion*".

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74. [http://en.wikipedia.org/wiki/Abortion\\_in\\_India](http://en.wikipedia.org/wiki/Abortion_in_India) [Visited on 14th Jan' 2009].

75. Hereinafter referred to as MTP Act.

Abortion is the spontaneous or artificially induced expulsion of an embryo or foetus. In legal context it is usually referred to induced abortion. Webster's Ninth New Collegiate Dictionary defines abortion as the expulsion of a non-viable foetus; a spontaneous expulsion of a human foetus during the first 12 weeks of gestation; illegal abortion. The Wikipedia Dictionary defines abortion as "*The removal or expulsion of an embryo or foetus from the uterus, resulting in, or caused by, its death.*"<sup>76</sup> The difference between abortion, miscarriage, and premature labour is not recognized in law and all are referred as abortion. Sometimes it is used to signify expulsion of the contents of a pregnant uterus during the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> trimesters of pregnancy respectively. Abortions may be classified into various categories depending upon the nature and circumstances under which it occurs. It may either be: -

- (i) Natural abortion: - which is a common phenomena and may occur due to many reasons such as bad health, defect in generative organs of the mother, shocks, fear, joy etc.
- (ii) Accidental abortion: - it very often takes place because of pathological reasons where pregnancy cannot be completed and the uterus empties before the maturity of foetus.
- (iii) Induced abortion: - which is voluntary action of a person with an intent to destroy the uterus. It may be procured at any time before the natural birth of the child.<sup>77</sup>

Throughout history, induced abortions have been a source of considerable debate and controversy.

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76. Manisha Garg, *Right to Abortion*, [http://www.legalserviceindia.com/articles/adp\\_tion.htm](http://www.legalserviceindia.com/articles/adp_tion.htm) [Visited on 7th April 2009].

77. Kirti Dwivedi, *Medical Termination of Pregnancy Act, 1971: An Overview* <http://www.legalservicesindia.com/articles/pregact.htm> [Visited on 7th April 2009].

The MTP Act defines the term “Registered Medical Practitioner” as a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics.<sup>78</sup> The Medical Termination of Pregnancy Rules, 2003, provides that in case of a Medical Practitioner who was registered in a State Medical Register shall have experience or training in the practice of gynaecology and obstetrics for a period of not less than three years. In case of a medical practitioner who is registered in a State Medical Register had experience at any hospital for a period of not less than one year in the practice of obstetrics and gynaecology; or he should have performed at least five out of twenty five cases of medical termination of pregnancy independently in a hospital established or maintained or a training institute approved for this purpose by the Government. Such training will enable the Registered Medical Practitioner to do only 1<sup>st</sup> Trimester terminations (up to 12 weeks of gestation) or for terminations up to twenty weeks.<sup>79</sup> The Act provides the termination of pregnancy can be performed by the Registered medical practitioner<sup>80</sup> under the following grounds: -

- The continuance of the pregnancy would involve the risk to the life of the pregnant woman or of grave injury to her physical and mental health;
- There is substantial risk that if the children were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped;
- Where the pregnancy is caused by rape and continuation of pregnancy would mean to constitute a grave injury to the mental health of the pregnant woman.

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78. Section 2(d), *MTP Act*.

79. Rule 4, *the MTP Rules, 2003*.

80. Section 3, *Ibid*.

- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children as the unwanted pregnancy can constitute grave injury to mental health of the pregnant woman.

The Act under Section 3(2) lays down the conditions for the performance of abortion by the registered medical practitioner. It states that such medical practitioner may terminate the pregnancy. Wherein the pregnancy has exceeded 12 weeks but does not exceed 20 weeks; and not less than two registered medical practitioners are of view that it may impose risk to the woman than such pregnancy can be terminated. After 20 weeks of pregnancy abortion is prohibited except when it is immediate necessity to save the life of the mother. With this provision the Act has provided waiver of restrictions on the number of doctor's opinion. Section 3(4) provides that no pregnancy shall be terminated except with the consent of the pregnant woman provided she is not a minor or lunatic where the consent of the guardian is essential. The right of a patient is thus protected by the Act. In order to safeguard the privacy of the women, the Government has formulated the procedure for obtaining the consent of the woman before MTP and forwarding it to the appropriate authority in a sealed envelope marked "secret" and destroying of all the records after five years is stated.<sup>81</sup> The consent given by a pregnant woman for the termination of her pregnancy shall be sent to the head of the hospital or owner of the approved place or the Chief Medical Officer of the State and shall be kept in the custody of the concerned registered medical practitioner.<sup>82</sup>

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81. Rule 9 of the *Medical Termination of Pregnancy Rules, 2003*.

82. Regulation 4, *MTP Regulations, 2003*.

In *Javed and others vs. State of Haryana and others*<sup>83</sup> upholding the constitutional validity of the provisions in Panchayats and Zila Parishads, Haryana Panchayati Raj Act, 1994 was challenged which read as under:-

*“Section 175(1) No person shall be a Sarpanch, up-sarpanch or a panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who-*

*.... (q) has more than two living children;*

*Provided that a person having more than two children on or up to the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.*

*Section 177(1) If any member of a Gram Panchayat Samiti or Zila Parishad-*

*(a) Who is elected, as such, was subject to any disqualification mentioned in Section 175 at the time of his election;*

*(b) During the term for which he has been elected, incurs any of the disqualifications mentioned in Section 175*

*Shall be disqualified from continuing to be a member and his office shall become vacant.”*

The Apex Court observed that the said provisions were not violative of Article 14 or Article 25 of the Constitution. One of the objects of such enactment is to popularize family welfare/ family planning programme which is consistent with the National Population Policy. The Court also observed that if anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and i.e. of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attached to it.

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83. AIR 2003 SC 3057.

Similarly in *Bharatbhai Dhanjibhai Modi Nagarwada vs. The Collector in his Office Porbandar and others*<sup>84</sup> the Collector, Porbandar issued a show-cause notice dated 14/05/2007 under the provisions of Section 11(1)(h) of the Gujarat Municipalities Act, 1963 wherein the petitioner was called upon to show cause why the petitioner should not be removed from the office of the Councillor of Porbandar Municipality as the petitioner's third child was born on 16/12/2006 and the petitioner was disqualified under the above clause read with section 38 which provide that the Councillor who has more than two living children for the period of one year from the date of commencement of the Gujarat Local Authorities Law(Amendment) Act, 2005 shall be disabled from continuing to be a councilor and his office shall remain vacant. The petitioner challenged the constitutional validity of Section 11(1) (h) of the Gujarat Municipalities Act, 1963 as violative of petitioner's fundamental right under Articles 14 and 21 of the Constitution of India and also on the ground that it is inconsistent with the provisions of Section 3(2) of the MTP Act. Relying upon the judgment given by the Supreme Court in *Javed's case* the High Court held that the statutory provisions under challenge do not take away the right of the wife to enjoy the marital bliss, nor do they infringe upon her right to prevent pregnancies. Referring to Explanation II of Section 3 of MTP Act the court held that the petitioner and his wife had option to abort the unwanted pregnancy. Hence, the Court held that it fails to see how the impugned provisions of the Gujarat Municipalities Act can be said to be inconsistent with the provisions of the MTP Act.

In *Murari Mohan Koley vs. the State and Another*<sup>85</sup> a woman wanted to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner who was a registered medical practitioner for an

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84. AIR 2008 Guj 106 (DB).

85. (2003)

abortion. The petitioner agreed to it for consideration. But somehow the condition of the woman worsened in the hospital and she was shifted to another hospital. The woman died although the abortion was not done. The Court held that the petitioner had acted in his good faith hence he can get exemption from any criminal liability under section 3 of the MTP Act, 1971. In *Shri Bhagwan Katariya and Others vs. State of M.P.*<sup>86</sup> the woman was married to Navneet. Applicants are younger brothers of said Navneet while Bhagwan Katariya is the father of Navneet. After the complainant conceived, the husband and other family members took an exception to it, took her for abortion and without her consent got the abortion done. The Court held that if we refer to Section 3 of MTP Act, 1971, a doctor is entitled to terminate the pregnancy under particular circumstances and if the pregnancy was terminated in accordance with the provisions of law, it must be presumed that without the consent of the woman it could not be done. In this case a permanent scar has been carved on the heart and soul of the woman by depriving her of her child, hence, the doctor is liable.

A peculiar case came up before the Supreme Court in *State of Haryana vs. Smt. Santra*<sup>87</sup> wherein it was stated that the respondent underwent a sterilization operation at the General Hospital, Gurgaon. She had already seven children and wanted to take the advantage of the scheme of sterilization launched by the State Government. She was issued a certificate that her operation was successful, and she was also assured that she would not conceive in future. The respondent therein conceived and ultimately gave birth to a female child. She filed a suit against the State Government seeking recovery of Rs. 2 lakhs as damages for medical negligence. The suit was decreed for a sum of Rs. 54,000/- with interest. The said decision was confirmed by the Appellate Court as well as by the

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86. (2000) Quoted in Manisha Garg, *Right to Abortion*,

[http://www.legalserviceindia.com/articles/adp\\_tion.htm](http://www.legalserviceindia.com/articles/adp_tion.htm) [Visited on 7th April 2009].

87. AIR 2000 SC 1888.

High Court. The Apex Court rejected the contention on behalf of the State of Haryana that it was not bound to pay the damages for the negligence of the Medical Officer for performing unsuccessful sterilization operation. The claim ultimately stood confirmed. The said judgment was considered by a larger Bench of the Supreme Court in *State of Punjab vs. Shiv Ram*<sup>88</sup> and it was held that the said case was decided on its own facts as negligence in conducting the sterilization operation was successful and there was assurance that she would not conceive any more. However, the said case does not lay down the law of universal application. In the present case, the Apex Court referred to various aspects of medical sciences in this context and observed that operations of sterilization are not 100% safe and secure. In exceptional circumstances in spite of successful operation a sterilized woman can become pregnant due to natural causes and in such cases the best remedy available to her is to get the pregnancy terminated as it is permissible under the provisions of the 'Act. In view of the said provisions termination of unwanted child is legal and valid. Therefore if a woman has conceived, unwanted pregnancy can be terminated. The Court further observed that: “.....*It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone the sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.*” Similar question came up for consideration in the Supreme Court in *Kanaka Rana vs. State of Orissa & Ors.*<sup>89</sup> In this case, a writ petition was filed asking for payment of adequate compensation to the petitioner for the negligence on the part of the opposite parties. The petitioner claims that she is a poor woman. Her husband is a mechanic and earns his livelihood by running

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88. AIR 2005 SC 3280.

89. AIR 2009 Ori 17.

truck repairing garage at Jajpur. After having two baby girls, petitioner and her husband decided not to have a third child and opted for family planning operation of the petitioner. Tubectomy was conducted by the medical officer, Jajpur Road PHC on 15-01-1994. However, she gave birth to a female child on 25-12-2000. Husband of the petitioner reported the matter to various authorities of the Health and Family Welfare Department and asked for damages, but no action was taken. Therefore, this writ petition was taken. Therefore, this writ petition has been filed seeking compensation for conducting unsuccessful Tubectomy. The Apex Court held that the petitioner should have avoided the said child through abortion which is permissible under Section 3 of the Medical Termination of Pregnancy Act, 1971. In case she did not opt for abortion and gave birth to a child it could not be an unwanted child. Above all there is nothing on record to show as to under what circumstances the operation has failed. It is settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. Hence, the present petition is dismissed as it does not meet the aforesaid legal requirement.

The Act specifically provides that no pregnancy shall be made in accordance with the Act at any place other than a hospital established or maintained by Government; and a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time-to-time.<sup>90</sup>

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90. Section 4, *MTP Act*.

“Hospital” under this Act means the establishment which is maintained by the Central or the Government of the Union territory. It also include nursing home, clinic, medical centre, medical or teaching institution for therapeutic purposes and other like institutions. The MTP Rules, 2003, provides that no place shall be approved under Section 4(b) unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions, and unless the facilities such as in case of the 1<sup>st</sup> trimester a gynaecology examination/labour table, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities for transportation; and in case of the 2<sup>nd</sup> trimester an operation table and instruments for performing abdominal or gynaecological surgery, anaesthetic equipment, resuscitation equipment and sterilization equipment, drugs and parental fluids for emergency use notified by the Government time to time.<sup>91</sup> Hospitals and other such institutions shall maintain an Admission Register for recording the details of the admissions of women for the termination of their pregnancies which shall be kept for a period of five years. It shall be a secret document.<sup>92</sup> The Act however, provides certain exceptions which legalize the abortion such as if the abortion are performed in good faith and it is essential to terminate the pregnancy to save the life of the pregnant woman.<sup>93</sup>

The Amendment to this Act in 2002 substituted the old one and now it prescribes punishment with rigorous imprisonment for term which shall not be less than two years but which may extend to seven years to any person who is not a registered medical practitioner and terminates the pregnancy of a woman.<sup>94</sup> It also punishes any person who terminates any pregnancy in a place other than

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91. Rule 5, *MTP Rules, 2003*.

92. Regulation 5, *MTP Regulations, 2003*

93. Section 5(1), *Ibid*.

94. Section 5(2), *Ibid*.

prescribed by the Act with rigorous imprisonment for a term which shall not be less than two years but may extend up to seven years.<sup>95</sup> It also punishes a person who is owner of the place which is not approved under Section 4(b) of the Act with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.<sup>96</sup> As per the Explanation 1 to Section 5 the term “owner” means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act. The Act also provides that no suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is done in good faith or as permitted under the Act.<sup>97</sup>

The Central Government and the State Government are empowered by this Act to make rules by notification in the Official Gazette to carry out the provisions of this Act viz. the rules regarding the experience or training<sup>98</sup> and with respect to the opinions of the practitioners for the termination of pregnancy, certificate provided by such practitioners, their preservation and disposal, information by the medical practitioner of any abortion or prohibiting the disclosure of intimations given or information furnished in pursuance of such regulations.<sup>99</sup> As per the power conferred by the Act the Central Government has framed the Medical Termination of Pregnancy Rules, 2003, and in exercise of the power conferred by Section 7 the Central Government has framed the Medical Termination of Pregnancy Regulations. Despite the legislation, rules and regulations made for the purpose of licensing, monitoring and regulation of hospitals and clinics engaged in conducting sex determination tests and abortions,

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95. Section 5(3), *Ibid.*

96. Section 5(4), *Ibid.*

97. Section 8, *Ibid.*

98. Section 6, *Ibid.*

99. Section 7, *Ibid.*

still we see thousands of sex-selective abortions taking place in India and majority of it is done in an unauthorized clinics and unauthorized persons which endanger the life of the mother.

### **Suggestion of NCW for Amendments in the Medical Termination of Pregnancy Act, 1971 by NCW:-**

The NCW suggests certain changes in the Medical Termination of Pregnancy Act, 1971. It has recommended that Section 2, clause (a) should be revised to broaden the definition of guardian to include an individual having the care of the person of a minor women or a women of unsound mind. It is also suggested that the definition of “*lunatic*” should be deleted from Section 2 of the Act. Explanation I of Section 3 Clause (2) should be amended to include offences under Sections 376A to 376D of IPC as within its scope. Section 3, clause (4) should be revised so as to make it clear that the consent of the women concerned must be obtained in every case. And Further, it is suggested that Section 5 Clause (2) should be amended so as to indicate clearly which particular offence is constituted if a person who is not a registered medical practitioner performs abortion.

### **(c) The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994: -**

Women are created at par with man in all aspects. She has equal rights with in this world. Neither is superior to the other. Female foeticide has emerged as a burning social problem during the last few years in India. From the very beginning girl child in India is treated as an additional burden, an extra mouth to feed. The birth of the son is regarded as essential in Hinduism which has now been adopted by the other religion too and many prayers and lavish offerings

are made in temples in the hope of having a male child.<sup>100</sup> In every religion women have equal rights with men and both of them are important element of the world. Thus, to deprive women arbitrarily of their rights and privileges, or to deprive them to even being born or killing them in infancy is both immoral and unjust, a violation of God's Law. It has a detrimental effect on the society and the individuals who are involved in this practice are responsible for such acts.<sup>101</sup>

With the advent of new and advanced technologies developed by the Medical Science new apparatus for detecting any abnormalities in the foetus was invented. With the help of these apparatus the parents could know the defects and may terminate the pregnancy. Such devices are known as pre-natal diagnostic tests. Following are the three forms by which we can know the in born defects in a child:-

- **Ultrasonography:** - It is the most common technique as it is non-invasive and can identify upto 50 percent of abnormalities related to the central nervous system of the foetus.
- **Amniocentesis:** - Amniocentesis is meant to be used in high risk pregnancies, in women over 35 years. Amniocentesis is advised in the cases when the pregnant woman has a history of one abnormal child-mentally or physically challenged; when either parent has a congenital defect; when couple fall within the high-risk category of producing a defective child; when a previous child has been born with Down's Syndrome or neural tube defects; when parents have hereditary and metabolic disorders, to detect hemophilia, a rare blood disease; and when sex has to be determined for sex-linked hereditary diseases. Amniocentesis tests can detect 1500 genetic abnormalities which help in advising parent to decide whether they would

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100. Krishna Chandra Jena, *Female Foeticide in India: A Serious Challenge For the Society*, Cri LJ 2008, J 55 at 56.

101. Bahais View Point, PUCL Bulletin, September 2001, Quoted in *Ibid*.

have child carried till full term or whether they would prefer to get it aborted.

- **Chronic Villi Biopsy (CVB):** - CVB is used to diagnose inherited diseases like thalassaemia, cystic fibrosis and muscular dystrophy.

These scientific techniques which were developed to know the genetic diseases are now used as sex-selection techniques with the help of which the parents are aborting the female foetus. Out of these the most commonly used technique is ultrasonography as it is the cheapest among all the techniques. Amniocentesis entered India in 1975 and from then on it became a method through which sex of the foetus can be known. These techniques were misused towards ensuring the pre-birth elimination of females and have given raise to female foeticide which has resulted in the decline in the female sex ratio in India. In 1980 when women's group first exposed the misuse of the technology, only a few people were alarmed. It was not expected that the pre-natal diagnostic techniques would become so widespread and affordable that they would be available all over the country with devastating consequences on the child sex-ratio.<sup>102</sup> Earlier female infanticide was prevalent in rural India only but with the advent of these technologies in India the people of all spectrum avail these techniques for the purpose of sex-selective abortions which is also known as gender selection abortions.

The alarming fall in the female sex ratio in the past few decades compelled the Parliament to realize the grave implication arising out of the misuse of the pre-natal diagnostic techniques and therefore intended to regulate its use only for certain medical purposes. It realized that such techniques is leading in high rate of female foeticide in India which is discriminatory against

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102. G. Kameshwari, *Sex Selection and Sex Selective Abortion-Problems and Perspectives*, CrLJ 2006, J-217 at 217-218.

the female sex and also affects the dignity and status of women. Thus, the Parliament passed the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.<sup>103</sup> It came into force on 1-1-1996. Despite the intent and purpose of the Act it proved to be inadequate and poorly implemented and the sharp decline in the child sex-ratio in the last decade is the stark illustration of this reality. Hence, a PIL was filed in the Supreme Court by the Centre for Enquiry into Health and Allied Themes (CEHAT), Mahila Sarvangeena Utkarsh Mandal (MASUM) and Dr. Sabu M. George urging effective implementation of the Act.<sup>104</sup> The main aim for filing this PIL was to ensure the implementation of the Act, plugging the various loopholes and launching a wide media campaign on the issue. The second goal was the amendment of the Act to include pre and during conception techniques like X and Y chromosome separation pre-implantational Genetic Diagnosis (PGD). Finally, in 2001 the Apex Court provided certain direction to the Central Government for the implementation of the Act and to make recommendations. It directed the Supreme Court to create public awareness against the practice of pre-natal determination of sex and female foeticide. And to implement with all vigour and zeal the Act and the Rules framed in 1996. The Court also gave directions to the Central Supervisory Board to hold meeting at least once in six months as provided by the Act. The Board shall review and monitor the implementation of the Act and shall issue directions to all the State as well as Union Territories Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. The Board shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in the implementation of the Act and to make recommendations to the Central Government. The Board will

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103. Hereinafter will be referred to as PNDT Act.

104. *Centre for Enquiry into Health and Allied Themes (CEHAT) vs. Union of India*, AIR 2001 SC 2007.

require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and foeticide and to ensure the implementation of the Act. With reference to the Supreme Court order and recommendations of the CSB the Parliament on Dec' 20 amended the Pre-Natal Diagnostic Techniques Act and titled it the Pre-Conception and Pre-natal Diagnostic techniques (Prohibition of Sex Selection) Act, 2002. The Act provides for the regulation of the use of prenatal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders. It also prevents the misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide. The main objectives of the Act are as follows: -

- Prohibition of the misuse of prenatal diagnostic techniques for determination of sex of foetus leading to female foeticide;
- Prohibition of advertisement of the techniques for detection or determination of sex;
- Regulation of the use of techniques only for the specific purposes of detecting genetic abnormalities or disorders;
- Permission to use such techniques only under certain conditions for registered institutions;
- Punishment for violation of the provisions of the Act; and
- To provide deterrent punishment to stop such inhuman acts of female foeticide.

The Act consists of 34 sections divided into eight chapters. The Act provides definition for “pre-natal diagnostic techniques” as all pre-natal diagnostic procedures and pre-natal diagnostic tests.<sup>105</sup> “Pre-natal diagnostic tests” means ultrasonography or any test or analysis of amniotic fluid, chorionic villi,

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105. Section 2(j), *Ibid.*

blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital abnormalities or haemoglobinopathies or sex-linked diseases.<sup>106</sup> It also defines “pre-natal diagnostic procedures” as all gynecological or obstetrical or medical procedures such as ultra-sonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic tests.<sup>107</sup> The definitional difference between pre-natal diagnostic procedure and pre-natal diagnostic test is that in former procedures are employed for sex-selection whereas the later is to detect certain kinds of diseases. The Act also provides legal definition of many biological terms. It defines “*conceptus*” as any product of conception at any stage of development from fertilization until birth including extra embryonic membranes as well as the embryo or foetus.<sup>108</sup> “*Embryo*” is defined as a developing human organism after fertilization till the end of eight weeks (56 days).<sup>109</sup> “*Foetus*” is defined as a human organism during the period of its development beginning on the fifty seventh day following fertilization or creation (excluding any time in which its development has been suspended) and ending at birth.<sup>110</sup>

The Act also provides regulation of Genetic Laboratories and Genetic clinic unless registered under the Act shall conduct pre-natal determination technique activities. They can not employ or take services of any person whether on honorary basis or on payment who does not possess the prescribed qualifications. No medical geneticist, gynaecologists pediatrician, registered medical geneticist, gynaecologists paediatrician, registered medical

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106. Section 2(k), *Ibid.*

107. Section 2(i), *Ibid.*

108. Section 2(ba), *Ibid.*

109. Section 2(bb), *Ibid.*

110. Section 2(bc), *Ibid.*

practitioner or any other person shall conduct such tests at a place other than registered one.<sup>111</sup> The Act also prohibits sex selection and provides that no person shall conduct sex selection on a woman or on man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.<sup>112</sup> The Act also prohibits sale of ultrasound machines to unregistered persons, clinics, laboratories etc. provides that no person shall sell any ultrasound machine or imaging machine or scanner or any other machine capable of sex detection foetus to any genetic centre, genetic laboratory, genetic clinic or any other person not registered under the Act.<sup>113</sup>

There is an important provision under the Act which lays down that no pre-natal determination tests shall be conducted except for abnormalities, viz., chromosomal abnormalities; genetic metabolic diseases; haemoglobinopathics; sex linked genetic diseases; congenital anomalies; any other abnormalities or diseases specified by the control supervisory board.<sup>114</sup> Section 4 also provides that the pre-natal diagnostic techniques may be conducted if any of the following conditions are fulfilled, namely:-

- (i) age of the pregnant woman is above 35 years;
- (ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;
- (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
- (iv) the pregnant woman or her spouse has a family history or mental retardation or physical deformities such as, spasticity or any other genetic disease; and

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111. Section 3, *Ibid.*

112. Section 3A, *Ibid.*

113. Section 3B, *Ibid.*

114. Section 4, *Ibid.*

- (v) Any other condition as may be specified by the Board.

Section 5 of the Act provides that side and after effects of such diagnostic procedure must be explained to the pregnant women and her written consent to undergo such procedure be obtained in the prescribed form in the language which she understands. No person shall communicate to the pregnant woman or her relative or any other person the sex of foetus by words, signs or in any other manner. Similarly, the Act prohibits the determination of sex by techniques including ultrasonography for determining the sex of foetus.<sup>115</sup> In *Vijay Sharma and Another vs. Union of India*<sup>116</sup> the petitioners were married couple having two children. They were desirous of expanding their family provided they are in a position to select the sex of the child. They were desirous of having a male child. They approached various clinics for the selection of the sex of the foetus by pre-natal diagnostic techniques. However, all clinics denied the treatment on the ground that it is prohibited under the Act. They contended that they only want to balance their family and also stated that a married couple already having child belonging to one sex should be permitted to make use of the pre-natal diagnostic techniques to have a child of the sex of their existing child. In fact, ideal ratio of females to males can be maintained if such is allowed. The petitioners challenged the constitutional validity of the Sections 2, 3-A, 4(5), and 6(c) of the Act. The Court held that if such sex selection is allowed that it will violate the very essence of the Act which would result in unprecedented imbalance in male to female ratio having disastrous effect on society. It can prevent birth of a female child and is as bad as foeticide. The challenged provisions of the Act are thus not arbitrary, unreasonable or violative of Article 14 of the Constitution. The Court thus, rejected the petition.

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115. Section 6, *Ibid.*

116. AIR 2008 Bom 29.

The provisions of the Act are backed by supervisory and administrative machinery. The Act provides for the constitution of the Central Supervisory Board,<sup>117</sup> the State/Union Supervisory Board,<sup>118</sup> Appropriate Authority and Advisory Committee.<sup>119</sup> The Central Supervisory Board shall be controlled by the Central Government. Section 16 empowers the Board to perform the following function:-

- (a) to advise the Central Government on policy matters relating to use of and against the abuse of PNDT;
- (b) to review and monitor implementation of the Act and rules made there under and recommend to the Central Government changes in the said Act and rules;
- (c) to create public awareness against pre-natal determination of sex of foetus leading to female foeticide;
- (d) to lay down<sup>f</sup> code of conduct to be observed by persons working at genetic counseling centres, genetic laboratories and genetic clinics;
- (e) any other functions as may be prescribed under the Act.

The Act empowers the Central and the State Government to constitute an advisory committee to assist appropriate authority to discharge its functions. The Appropriate Authority shall have power in respect of the following matters:

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

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117. Section 7, *Ibid.*

118. Section 16 A, *Ibid.*

119. Section 17, *Ibid.*

- any other matter which may be prescribed.<sup>120</sup>

The Act made it compulsory for all Diagnostic Laboratories like the Genetic Counselling Centres, Genetic Laboratories, Genetic Clinics and Ultrasound Clinics, etc having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection or renders any such services should register themselves under the Act.<sup>121</sup>

The Act also prohibits advertisement relating to pre-conception and pre-natal determination of sex, provides that no person or organization, genetic counseling centre or centre having ultrasound machine or any other technology capable of undertaking determination of sex of foetus or sex issue shall issue, publish or cause to be issued or published any advertisement in any form regarding facilities of pre-natal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place. Further, no person or organization including genetic counseling centre or genetic clinic shall issue, publish, distribute etc. and advertisement in any manner regarding pre-natal determination of sex by any means whatsoever, scientific or otherwise. Any person who contravenes the prohibition shall be punished with imprisonment for a term, which may extend to three years and fine not exceeding to Rs. 10,000/-.<sup>122</sup> It also provides that any medical geneticist, gynaecologist, registered medical practitioner, who owns a genetic counseling centre or clinic or is employed at such place and renders professional or technical service to or at such a centre and who contravenes any of the provisions of the Act or rules made thereunder, shall be punished with imprisonment for a period not exceeding three years and fine not exceeding Rs. 10,000/-. On subsequent conviction the imprisonment will be for a

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120. Section 17A, *Ibid.*

121. Section 18, *Ibid.*

122. Section 22, *Ibid.*

period not exceeding five years and fine not exceeding Rs. 50,000/-.<sup>123</sup> It also states that the name of medical practitioner shall be reported by the appropriate authority to the State Medical Council for necessary action including suspension of registration if the charges are framed by the Court till the disposal of the case by the Court, if he is convicted, name shall be removed from register for five years and permanently for the subsequent offence.<sup>124</sup> In *Dr Pradeep Ohir vs. State of Punjab and another*<sup>125</sup> the petitioner was a medical practitioner. He was running Satyam Diagnostic Centre inside Ohir Nursing Home. On July 9, 2002, an inspection of the said centre was made and it was found that the petitioner violated Section 5(a)(b)(c) of the PNDT Act, 1994 and Rules 9(1)(4) and (10) of the Pre-conception and Pre-natal Diagnostic Technique Rules, 1996. He was convicted under Section 23 (1) of the said Act. As a result of this an order dated 7/11/05 was passed by the Medical Council removing his name from the State Medical Register for a period of 5 years under Section 23(2) of the Act. He challenged this order and also the subsequent order dated 21/08/06 whereby the Medical Council reaffirmed its earlier decision to remove the name of the petitioner from the State Medical register. The Court held that the removal of his name from the State Medical Register on his conviction under the Act is directly and automatically flowing from his conviction under the same provisions because the Section 23(2) uses the word “shall” and not the word “may”. Since, both the subsections are part and parcel which provides penalty for the alleged offence, the whole of Section 23 of the said Act is a penal provision which attracts the rigour of Article 20 of the Constitution of India. The court also held that the removal of petitioner’s name from the State Medical Register shall not be removed for more than the period prescribed in the Statute.

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123. Section 23(1), *Ibid.*

124. Section 23(2), *Ibid.*

125. AIR 2008 P&H 108(DB).

The Section also provides punishment for any person who seeks the aid of genetic counseling centre or registered medical practitioner for sex-selection or conducting pre-natal diagnostic centre, he shall be punished with imprisonment for a period not exceeding three years and fine not exceeding Rs. 50,000/- for the first offence and for any subsequent offence with imprisonment which may extend to 5 years and with fine which may extend to Rs. 1 lakh.<sup>126</sup> However, this provision will not apply to woman, who was compelled to undergo such diagnostic techniques or such selection.<sup>127</sup> Section 24 provides that unless the contrary is proved the Court shall presume that the pregnant women was compelled to undergo such test by husband or any other relative and such person shall be liable for the abetment of the offence. The Act under Section 25 provides that whoever contravenes any of the provisions of the Act or rules made there under for which no penalty has been prescribed under the Act, shall be punished with imprisonment for a period not exceeding three months or fine not exceeding Rs. 1000/- or both and for continuing contravention an additional fine not exceeding Rs. 500/-. Where an offence under the Act is committed by a company every person who at the time of committing the offence was in charge of and responsible to company shall be deemed to be guilty of the offence and liable to punishment.<sup>128</sup> Every offence under the Act is cognizable, non-bailable and non-compoundable<sup>129</sup> and no court other than that of a Metropolitan Magistrate or Judicial Magistrate I class shall try any offence punishable under the Act.<sup>130</sup> In *Hemanta Rath vs. Union of India and Others*<sup>131</sup> a writ petition was filed in public interest by Hemanta Rath, that the State of Orissa is not implementing the

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126. Section 23(3), *Ibid.*

127. Section 23(4), *Ibid.*

128. Section 26, *Ibid.*

129. Section 27, *Ibid.*

130. Section 28, *Ibid.*

131. AIR 2008 Ori 71.

provisions of Pre-Conception and Pre-natal Diagnostic Technique Act even though the Act was brought into existence in 1996 and was amended in order to make its provisions more effective by the Amendment Act 14 of 2003. The said amendment has come into existence with effect from 14/02/2003. The said PIL was filed noticing series of news items in the newspapers and in the electronic media that there has been recovery of hundreds of skeletons, skulls, body parts of children from different parts of the State. It has been complained in the petition that without constitution of appropriate authority, the provisions of Section 28 become nugatory. Therefore, the complaint in the petition is that there is total inaction both on the part of the State and the Central Government in the matter of implementing the provisions of the Act which was enacted for preventing infanticide and foeticide. The State and the Central Government both filed affidavits wherein they have disclosed that immediate steps are being taken and doctors and staffs of Nursing Homes and Ultrasound Clinics are arrested. However, it has not been stated that whether bodies have been created by the State Government under Section 17 of the said Act or whether any steps have been taken under Section 28 of the said Act for filing of complaint. The Court thus, directed that the Appropriate Authorities as contemplated under Section 17 of the said Act and as defined under Section 2(a) of the said Act has been constituted. Such authorities must act strictly in terms of the provisions of the said Act. If, however, such Committee has not been constituted, it must be constituted within six weeks from the date of service of the order upon the Chief Secretary of the State. After its constitution it must take strict measures to implement the provisions of the said Act. The State is thus under both a statutory and constitutional obligation to implement the provisions of the said Act.

The amended Act has been passed for so long yet we hardly find any conviction under the Act. The continuing decline of the sex ratio is

evident enough to show the failure of this Act. Though the law relating to female foeticide has been recently made more stringent but it is not proving to be effective. Although the legislation is aimed at achieving high aspirations, it suffers still from some lacunae and the most important of all is the implementation of the Act itself. Again a PIL was filed by CEHAT in the Supreme Court which is known as *CEHAT vs. Union of India*.<sup>132</sup> Under the said case the Supreme Court further directed the Central Government, State Government and the Union Territories that:-

- information should be published by way of advertisements as well as on electronic media till there is awareness in the public that there should not be any discrimination between male and female child;
- quarterly reports submitted by the Appropriate Authority to the Supervisory Board has to be consolidated and published annually for the information of the public;
- appropriate authorities have to maintain the records of all the meetings of the Advisory Committee;
- the National Monitoring and Inspection Committee constituted by Central Government for conducting periodic inspection should continue to function till the Act is effectively implemented. The reports of the Committee have to be placed before Central Supervisory Board and State Supervisory Board for any further action;
- public must have access to the records maintained by different bodies constituted under the Act;
- Central Supervisory Board has to ensure that all the States appoint State Supervisory Boards as required under Section 16-A and the multimember Appropriate Authorities as required under Section 17(3)(a).

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132. AIR 2003 SC 3309.

As a result of this order of the Supreme Court a new section has been inserted in 2003 i.e. Section 31-A which provides that if any difficulty arises in giving effect to the provisions of the Act the Central Government can by order published in the Official Gazette, make such provisions of the Act as appear to it to be necessary or expedient for removing the difficulty within three years from the date of commencement of the Amendment Act and such order shall be laid as soon as may be after it is made before each House of the Parliament. The Central Government also set up National Inspection and Monitoring Committee for the implementation of the Act.

**Recommendation of the All India Conference of State Secretaries convened by NCW in New Delhi on 11<sup>th</sup> August, 2005 for effective implementation of the Act: -**

Despite the Amendment the Act could not make significant impact at grassroots level because of the difficulties associated with the implementation of the Act. The situation remains grim and this is reflected in the overall sex ratio in various states where female infanticide and foeticide still prevails. In order to understand the ground realities and impediments, in the implementation of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, the National Commission for Women, decided to organize an All India Conference to debate the issue and to involve the concerned Government departments and NGO's in the consultative process. Hence, an All India Conference of State Secretaries was convened at the Vigyan Bhawan, New Delhi on 11<sup>th</sup> August, 2005, by the National Commission for Women. In the said Conference following recommendations were made: -

- ❖ The Conference recommended for advocacy, awareness and sensitization of the matter. For this the Commission welcomed the idea of setting up the

National Surveillance Cell to counter the practice of sex-selection. For this purpose the help of retired senior police officers, lawyers, NGO's and women commissions will be taken. The Appropriate authorities and the Advisory Committees will be provided with the copy of the judgment of the Supreme Court in *CEHAT & Ors* case and they will be made aware of the provisions of the Act, Rules as well as programmes will be undertaken to sensitize them. The NCW with the help of Ministry of Health & Family welfare, State Governments, State Women Commission, the medical fraternity and NGO's would launch a campaign against sex-selection in a concerted manner and to create awareness among medical fraternity society and the public. There is a need to empower women and educate them along with creating awareness and sensitizing MP's, MLA's, Government servants, and to involve them in the campaign against sex selection. Interactions with the religious leaders shall be made to make them co-operate in preventing the sex-selection. Programmes and Plans relating to "Value Girl Child" shall be initiated and systems of awards shall be made to encourage the government servants to participate in such programmes. Documentation, research, consultations with the stakeholders, sessions in medical colleges, short films on the issue, campaigns in colleges and schools, help of the media etc shall be made in furtherance of the said objective.

- ❖ The Conference also recommended the State level inspection and monitoring Committee wherein representatives of the State Commission for Women, Social Welfare Department, Legal Activists, NGO's shall be the members. This Monitoring Committee shall be constituted at District level to assist the Appropriate Authorities in regularly visiting and monitoring registered clinics. Records of all diagnosis done by the ultrasound machines

or other machines as well as other relevant data used for the purpose of pre-natal diagnosis should be maintained for at least two years or as directed by the Appropriate Authorities. Periodic meetings of the Appropriate Authority and Advisory Committee should be held and the NCW and the State Commissions should be authorized to ask for these reports for its independent assessment. NCW is empowered by the National Commission for Women Act to investigate and inquire into the proper implementation of any Act. The Appropriate authority should also be empowered to conduct inquiry leading to search, seal and seize the machines, records and documents.

- ❖ The Commission provides that the provisions of the Act should be strengthened. For this purpose an expert Committee shall be made comprising of representatives from the Ministry of Health & Family Welfare, Advocates and the representatives from the medical fraternity to look into the provisions of the Act and make suitable recommendations on the amendments. In case of violation of the provisions the Appropriate Authority shall have power to seize any ultrasound machine or other equipment capable of detecting sex of foetus. Rule 11(2) takes away the rigor of the punishment as it permits the clinic/laboratory to run without registration. It takes away the teeth from the Act as often it is misused by the persons indulging in this heinous crime. Submission of Form F should be made mandatory. Fast track Courts should be set up to provide remedial measures. Disincentives and other coercive measures to ensure small family norms must be dropped from all population policies and measures at Central and State levels.

## **RIGHT TO ABORTION OF THE MOTHER VIS-À-VIS RIGHT TO LIFE OF A FOETUS: -**

Abortion in India was practiced earlier by many but as it was illegal, it was practiced in a clandestine manner. However, passing of the Act made medical termination of pregnancy legal and with certain conditions for safeguarding the health of the mother. Abortion is severely condemned in *Vedas*, *Upanishads*, *purans* and *smriti*. Even the Code of Ethics of the Medical Council of India under Paragraph 3 states that: *I will maintain the utmost respect for human life from the time of conception*. The Supreme Court of India has said in various cases that the right to privacy is implicit in Article 21 of the Constitution of India and right to abortion can be read from this right.

The right to abortion of a woman depends on certain circumstances which must fall into the following categories:-

- To preserve the life or physical or mental well-being of the mother;
- To prevent the completion of a pregnancy that has resulted from rape;
- To prevent the birth of a child with serious deformity, mental deficiency, or genetic abnormality; or
- To exercise birth control, that is to help from having a child for social or economic reasons.

The United Nations has maintained that the reproductive freedom is a basic human right and as per this the woman has right to terminate her pregnancy. However, this right although recognized by various countries but it is yet to be politically accepted. Although the MTP Act recognizes the free choice of woman to decide whether and when she will terminate her pregnancy and makes guardian's consent irrelevant in case the woman is of the age of 18 years

and above. Such as in *Kamalavalli vs. C.R. Nair*<sup>133</sup> wherein the petitioner, a 28 year old woman and a victim of rape, had sought permission to terminate the pregnancy which was granted subject to the doctor's opinion. However, in another case where the father of a minor girl filed a writ petition before the Madras High Court for a direction from the Court to terminate the pregnancy of his minor daughter. The High Court dismissed the writ petition and held that abortion cannot be forced on a minor girl when she is willing to bear the child. It is quite clear from the nature of the aforesaid writs that some fathers are disturbed at finding themselves powerless in such situations and want the law to be changed so as to give them some powers of decision to control the reproductive functions of their minor daughters. Under the MTP Act the father's consent is essential only in case the minor daughter wants to terminate the pregnancy and not when she chooses to complete the full terms and give birth to a child.<sup>134</sup>

The MTP Act recognizes the free choice of woman to decide whether and when she will terminate her pregnancy and makes guardian's consent irrelevant in case the woman is of the age of 18 years and above. Thus, a question arises that whether woman can terminate her pregnancy without the consent of her husband? If so, does her act amounts to cruelty towards her husband? This question came up before the Court in *Satya vs. Shri Ram*.<sup>135</sup> In this case the court observed that in this sort of a case, the court has to attach due weight to the general principle underlying the Hindu Law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son who can offer a funeral cake and libation of water to the names of his ancestors, and held that termination of pregnancy at the instance of wife but without the consent of her

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133. 1984 Cr LJ 446 (Mad).

134. *The Hindu*, Dec 4, 1993. [Quoted in Subhash Chandra Singh, *Right to Abortion: A New Agenda*, AIR 1997 Journal Section p 129 at P. 129 & 130].

135. AIR 1983 Punj & Har 252.

husband amounts to cruelty. Similarly, in *Sushil Kumar Verma vs. Usha*<sup>136</sup> the wife who became pregnant within one month of her marriage got the foetus aborted the following month in a government approved pregnancy termination centre with the help of a registered medical practitioner without consulting her husband. The husband was kept completely in dark about the fact of pregnancy as also of its abortion. The husband being aggrieved filed a petition for divorce on the ground of cruelty which was dismissed by the Court. But the High Court held that aborting foetus in the very first pregnancy by the wife is a deliberate act without the consent of the husband amounts to cruelty.

In *D. Rajeshwari vs. State of Tamil Nadu*<sup>137</sup> an unmarried girl of 18 years who prayed for issue of a direction to terminate the pregnancy of the child in her womb, on the ground that bearing the unwanted pregnancy of the child of three months made her to become mentally ill and the continuance of the pregnancy has caused great anguish in her mind, which would result in the grave injury to her mental health, since the pregnancy was caused by rape. The court granted the permission to terminate the pregnancy. In *Dr. Nisha Malviya and Another vs. State of M.P.*<sup>138</sup> the accused had committed rape on minor girl aged about 12 years and made her pregnant. The allegations are that the two other co-accused took this girl, and they terminated her pregnancy. So the charge on them is firstly causing miscarriage without the consent of the girl. The Court held that all the three accused are guilty of termination of pregnancy which was not consented by the mother or the girl. Hence, the case laws shows that a woman has an absolute right to abortion and no one can take away this right from her. The Judiciary has been playing a vital role in securing these rights to women.

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136. AIR 1987 Del 86.

137. 1996 Cri. L J 3795.

138. 2000 Cri. L J 671.

The right of the woman to abort coincides with the right to life of a foetus. The present legislations in our country violates some of the basic rights of the woman i.e. her right with planning or preventing the birth of a child. Through these legislations their rights are violated as the legislations considers abortion as an illegal act which is severely restricted by law.

One of the most important rights of an unborn child is its right to birth. Right to life is a well established right which is recognized by various international instruments and by the Constitution of various countries. Sex-selection and abortion on this basis violates these rights. Right to life is available to “persons.” A vital question in this situation thus arises i.e. is foetus a “person” or is it a part of the mother? Does a foetus enjoy this right? And if it does when do the foetus attain the personhood? There are number of questions which come up while discussing the right of the foetus.

The Constitution of India recognizes the sanctity of life, yet has failed to adequately protect the life of the foetus as under Article 21 right to life is guaranteed to every “person”. The concept of personhood complicates the position of legal status of foetus. Although the right to life under Article 21 is recognized in several cases but it is hardly available to the unwanted girl child. Hence, the right of the girl child may be construed in broader terms and should be inferred as

- Right to be born and not to be aborted only because she is a girl;
- Right to remain alive after birth and not to be killed at any moment after birth;

- Right of the girl child to her mind her body, right to childhood and right to a healthy family environment.<sup>139</sup>

Besides the Constitutional protection there are number of Statutes in India which protects the right to life of an unborn person. The Indian Penal Code under its various provisions which has already been discussed above has protected the right of the foetus by prohibiting miscarriages under certain circumstances. The Medical Termination of Pregnancy Act, 1971, too restricts the right to terminate the pregnancy and the Pre-conception and Pre-natal Diagnostic (Prohibition of Sex Selection) Act, 2002 protects the rights of the girl child who are yet to be born.

The law recognizes legal personality to unborn children. A child in mother's womb is by fiction treated as already born and regarded as person for many purposes. Thus, a gift may be made to a child who is still in the mother's womb. Even under the Hindu law of partition a child in mother's womb is entitled to be allotted a share in the property along with the other living heirs subject to a condition i.e. the child should be born alive. The proprietary rights of an unborn child are fully recognized by Indian law. Similarly, the rule against perpetuity under the Transfer of Property Act, 1882 also seeks to protect the proprietary rights in favour of unborn persons.<sup>140</sup> Its object is to protect the property for long a period from the possibility of alienation by their owners being unborn persons.

The Supreme Court in *Bandhua Mukti Morcha vs. Union of India*<sup>141</sup> held that "it is a fundamental right of everyone in this country assured under the interpretation of Article 21 to live with human dignity.....it must

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139. Jessy Kurian, *A Cry Unheard Female Foeticide and Female Infanticide*, Legal News & Views, Vol 17 No.11, Nov, 2003 [Quoted in Krishna Chandra Jena, *Female Foeticide in India: A Serious Challenge for the Society*, Cr LJ, 2008, J 55 at 60].

140. Section 14, *Transfer of Property Act, 1882*.

141. AIR 1984 SC 802.

include the tender age of children to develop in a healthy manner and in conditions of freedom and dignity.” Thus, in addition to the right to birth, the unborn child has the right to healthy growth in unpolluted environment. The British Parliament in 1976 passed the Congenital Disabilities (Civil Liability) Act wherein action may lay against a person or authority whose breach of duty to a parent results in a child being born with disability, abnormal or unhealthy. Similarly, the Nuclear Installations Act, 1965, recognizes liability for compensation in respect of injury or damage caused to an unborn child by occurrences involving nuclear matter or emission of ionizing healthy growth and safe birth to an unborn child.<sup>142</sup> The Code of Criminal Procedure too provides that the High Court shall order of execution of capital sentences on a pregnant woman be postponed or it may commute the sentence to imprisonment for life, thereby indirectly recognizing the right to life of the foetus.<sup>143</sup>

From the above discussion it is clear that foetus should enjoy the right to life. The foetus has right to life which begins from the point of conception. The foetus should be recognized as a separate entity enjoying distinct legal right and is not a part of the mother. Thus, the concept of personhood is a myth and a mere creation of law. This must not come in the way at the time of conferring the rights to the foetus and failure to recognize it would amount to discrimination and violative of Article 14 and Article 21 of the Constitution.

Various scholars have argued on the point that whether abortion should be prohibited which will protect the right to life of the foetus at the cost of infringement of the right of the woman to abort? Or whether legalizing abortion which will protect the right of the woman to abort but will endanger the life of the foetus? The pro-life activists in favour of prohibiting abortion states that

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142. G. Kameswari, *Basic Rights of a Child-Born and Unborn*, AIR 2002 Journal Section, P. 141 at 144.

143. Section 416, *the Code of Criminal Procedure*.

the issue of the foetus life, which raises the question of whether one person's desire for autonomy can extend to ending another's existence. They state that the killing of the innocent is a crime and foetus is also an innocent life. Many women suffer from emotional trauma after having an abortion. Abortion also increases women's risk of breast cancer and may also damage or infect the uterus and the fallopian tubes making women infertile. It also leads to menstrual disturbances. They also state that an embryo is a human being and hence, entitled to be protected from the moment of conception and therefore has a right to life which must be respected. Abortion, thus, according to the pro-life activists is homicide. Even the Madras High Court in *V. Krishnan vs. G. Rajan*<sup>144</sup> held that the MTP Act does not confer or recognize the absolute right to terminate pregnancy in any person. The Court in this case observed that "*Even the pregnant woman cannot terminate the pregnancy except under the circumstances set out in the Act. Even during the first trimester, the woman cannot abort at her will and pleasure. There is no question of abortion on demand.*" Therefore, even the Courts take conservative stance towards the women's right over her own body.

The Women Activists, however, contends that a pregnant woman should have 'personal liberty' to destroy any foetus of her own if she finds it intolerable. The unwanted pregnancies to women impose a kind of slavery upon her and infringe her sense of self-respect and dignity. For a more emancipated woman, pregnancy is not an advantageous status but a burden which she has to bear for many months if she is forced to bear the child. Forced pregnancy is not advantageous from both the woman as well as child's perspectives. Thus, in contrast the planned pregnancy is more advantageous and the children in such case receive more attention from the parents. Women should thus, have the right of

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144. Quoted in Shalu Nigam, *Law Against Practice of Female Foeticide and Infanticide*, Legal Education Series No. 36, Indian Social Institute, New Delhi, P. 45.

sexual and reproductive right. The women activists also argue that if abortion is banned or is more restricted, the society will again return to the olden days wherein abortion is done by quacks endangering the life of the woman herself. The women as a result will resort to some unhygienic measures to abort the foetus. Moreover, if she is forced to carry on with her pregnancy she may carry it but after the birth of the child may abandon the child which in fact impose more danger to the life of the baby. Hence the women should be allowed to terminate her pregnancy at an earlier stage.

Recently in 2008 a petition was filed by Harish Mehta and Nikita Mehta and a gynecologist Dr. Nikhil Datar, in the Bombay High Court under Article 226 of the Constitution wherein the petitioner mentioned that she is pregnant with her first child. It was discovered that the unborn child was suffering from a congenital complete heart block during a routine check up in the 24<sup>th</sup> week. One pediatrician observed that soon after the birth the baby would require the placement of a pacemaker that lasts for 4 or 5 years. This means that the child would require at least five pacemaker replacement surgeries throughout life. Doctors noted that this would seriously compromise the life of the child and also expressed the fears of a possible intra-uterine death of the foetus. The petition also said that being a school teacher Nikita Mehta does not want to have a compromised quality of life for her own child and cannot afford the extraordinary expensive treatment which may or may not give results. The petition has urged the court to strike down the provision of the Medical Termination of Pregnancy Act, 1971 that makes abortion illegal after 20 weeks and to allow such medical termination of pregnancy in cases where the life of the mother or the child is in danger up to 26<sup>th</sup> week. The Bombay High Court rejected

the plea for abortion of the petitioners.<sup>145</sup> The petitioner filed an appeal to the Supreme Court against the judgment of the Bombay High Court.

The right to life of the foetus and right to abortion of a woman should thus, make a balance that the right to life and personal liberty as guaranteed by Article 21 of the Constitution should be interpreted in such a manner so as to include the right to life of the foetus especially in the age of rampant sex-selective abortions and the right to abortion of a woman with a condition that she is not terminating her foetus on the basis of sex-selection. Abortion is perfectly legal in India and the legislation too does not raise any moral or religious issues. It should be the used as the last resort. Thus, the right to life under Article 21 should be interpreted in such a manner so as to strike a balance between the right to life of the foetus and right to abortion of a woman.

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145. The facts of the case have been referred from <http://www.medindia.net/news/Medical-Termination-of-Pregnancy-Act-Under-Scanner-39995-1.htm> [Visited on 7th April 2009] as well as the Telegraph,