

The Menace of Female Foeticide in India: Current Scenario and Socio- Legal Implications

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Abstract

The advent of modern reproductive and sex selection techniques is providing worldwide ample opportunity to the female foeticide. Now –a –days the world population is significantly passing through gender imbalances due to different available sex selection methods. The menace of Female foeticide was invented, touted and sold by the medical profession, and it operates with the complete consent of our society. In the United States, sex selection is becoming a multimillion-dollar industry. During the last few decades, Indian society had also been facing female foeticide as a burning social problem. In strongly patriarchal society Parents prefer sons and availability of these techniques, has led to deterioration of female sex-ratio and is eliminating girls from the social scenario by misusing the technique which is basically meant to detect the foetal abnormalities. Even the law is a powerful instrument of social change but law alone cannot dismantle out this social problem from Indian society. The real challenge before Indian society and government authorities is to remove loopholes in The Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002. It is pertinent to note that until and unless this menace is controlled, the country will be heading for a grave gender imbalance, which in turn would adversely affect the nation's economic progress. A concrete and meticulous effort by the medical fraternity, the law, political leaders, NGOs, women's group, the mass media, teachers and the community itself is the need of the hour. This review article is an attempt to draw attention towards Current Scenario of female foeticide in India and its socio-legal implications.

Keywords: Gender, Sex ratio, Female foeticide, Sex selection techniques, Ultrasonography, Diagnostic Laboratories, sex selective abortion.

I. Introduction

“That society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male

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child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A (e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.” -- Hon'ble J. Smt. Ranjana Desai².

Female foeticide is a burning social problem which has been plaguing Indian progress since a very long time. It is nothing but cold-blooded murder. The Indian society considers the birth of a girl child as a bad investment for future, which is very disgraceful. Killing of female child has been a phenomenal characteristic of Indian society under the rule of patriarchy since ancient days. The Atharvaveda says, “The birth of a daughter, grant it elsewhere, here grant a son”. This saying in the Holy Scripture sums up the Indian attitude towards female children who are subjected to multifarious travails inflicted by the society on them³. ^[2]The girl children in India have been the most vulnerable to the insults of deprivation as well as discrimination for centuries and, are even today. The practice first dubbed as female foeticide came into vogue due to the lack of scientific discovery and unavailability of modern and progressive technology and sophisticated sex determining instruments. With sufficient availability and extensive supply of such sophisticated sex determination techniques in the health institutions and clinics, there have been hundreds of incidences of female foeticide surfacing and hence assuming an alarming proportion across the country at present. It seems the sex determination test leading to identification of the sex of unborn child has made the practice of killing the female child unnoticed and easier than before⁴.

²*Vijay Sharma v. Union of India*, A.I.R. 2008 Bom. 29 (India).

³ MARY SCARIA, *WOMAN, AN ENDANGERED SPECIES?* 219, MEDIA HOUSE DELHI (2006).

⁴ JENA, K., *FEMALE FOETICIDE IN INDIA: A SERIOUS CHALLENGE FOR THE SOCIETY*, 15, ORISSA REVIEW, (2008).

In contemporary Indian society, the belief that the higher incidence of female foeticide was committed among the rural uneducated and poor people and those unable to pay the dowry been proved wrong. The practice of female foeticide now is seen rapidly proliferating from the country's rural, poor and uneducated to the urban, affluent and educated classes as well⁵. It seems to be showing a moving trend and rather getting further escalated even in the rise living standard of the average of India's population, with the growth in per capita income, improvement in the rational thinking and development in the educational level of the society.

From past to the present society, enormous efforts had been undertaken by the social thinkers, reformers and philanthropists to put an end to the practice of killing of the female child, either in the form of female infanticide or female foeticide. In spite of all their efforts the practice has been continued and posing a big threat to the mankind by creating unendurable imbalance in male female population of the country. The laws are not adequate and effective to curb the menace created by the practice of female foeticide. Even the law enforcing agencies are seen as ineffective and weak as the law itself to check the growing practice of female foeticide in the country.

With judiciary's professed commitment to eradicate female foeticide by punishing all those responsible for the heinous crime the rise of this crime has remained unabated. Selective abortions of the female foetuses have become a common trend and led to disturb the male-female ratio in the country over a period of time, which is a matter of grave concern. The drop in sex ratio against the females is expected to show further decline with the sex determination techniques reaching to the doorsteps of all hospitals and even PHCs in rural communities and being misused for wrong intention. Female foeticide in 21st century the India is a biggest challenge against the laws of the land in general and women's empowerment in particular. Eradication of this practice is the

⁵ NEELIMA DESHMUKH, *FEMALE FOETICIDE : IT'S SOCIO LEGAL IMPLICATIONS IN INDIA WITH REFERENCE TO MAHARASHTRA STATE*, RTM NAGPUR UNIVERSITY.

urgent need of the hour and thus has become a genuine concern of each one of us⁶.

II. Child Sex Ratio in India

The decline in India's sex ratio during the 20th century has been the subject of much discussion in recent years. Sex- selective abortion of the female foetus following a prenatal diagnostic test is widely believed to be the major contributor to this phenomenon⁷. The child sex ratio is calculated as number of girls per 1000 boys in the age group 0-6 years. In many states of India, there are several evidences that indicate a widespread practice of using female birth intervention. As a result, an alarmingly lowest ever sex ratio in the age group 0-6 has been reported by the 2001 census. The 1991 Census reported a child sex ratio of 945 girls per 1000 boys compared to 976 in 1961, which further declined to 927 according to 2001 census⁸. Census, 2011 has pegged the population of India at 1.21 billion (up 17.4% from 2001) and has indicated that only 914.23 girls were born compared with 927.31 for every 1,000 boys in the 2001 Census⁹. The current overall sex ratio of the nation stands at 943 females for every 1,000 males¹⁰. The overall sex ratio of 933 according to census 2001 figures is lower as compared to the child sex ratio in other developing countries like China (944), Pakistan (938), Bangladesh (953) and Nigeria (1016)¹¹.

The provisional census 2011 and the recent news reports data indicate a grim demographic picture of declining female to male ratios. Surprisingly the most

⁶ ARITRA GHOSE, *FEMALE FOETICIDE AND GENDER INEQUALITY IN INDIA*, 4, JOURNAL OF RADIX INTERNATIONAL EDUCATIONAL AND RESEARCH CONSORTIUM, (2013) Volume 2, pp. 1-11.

⁷ According to latest estimates, five lakh female fetuses are aborted illegally annually. UNICEF, in a recent report, said that India has lost over one crore girls since 2007. <http://www.dailymail.co.uk/indiahome/indianews/article-2696488/Supreme-Court-orders-status-report-femalefoeticide.html>. visited on 15 march 2016.

⁸ OFFICE OF THE REGISTRAR GENERAL AND CENSUS COMMISSIONER, India.

⁹ Booklet On (Missing Girl), www.censusindia.gov.in/2011census/missing.pdf

¹⁰ SOUMO GHOSH, *CHILD SEX RATIO SHOWS DRASTIC DECLINE IN INDIA, COULD LEAD TO MORE RAPES: UN REPORT*, AUGUST 22, (2015), INTERNATIONAL BUSINESS TIMES .

¹¹ SAMIR DASGUPTA(ED.) *SOCIAL DEMOGRAPHY*, 166, Dorling Kindersley (India) Pvt. Ltd.

affected states are progressive states like Punjab, Haryana, Delhi and Gujarat. In 2011 Census, an improvement in the child sex ratio has been noted only in the state of Kerala and the two Union Territories of Lakshadweep and Pondicherry¹². India has yet a long way to go for fight against pre-birth elimination of females. Time is quickly ticking away. A shortage of girls would lead to a shortage of eligible brides thus making the girl a "scarce commodity". According to UNFPA projection, by the year 2025 a significant share of men above 30 would still be single, and that many will never be able to marry at all¹³. Men in the states of Haryana and Punjab are already experiencing a nearly 20% deficit of marriageable women¹⁴. This phenomenon, in turn, drives such practices as the kidnapping and trafficking of women, who are sold to men who cannot find wives. A report by the United Nations Office on Drugs and Crime¹⁵, says the following: "With skewed sex ratios (Punjab-893, Haryana-877 females per 1,000 males) it is impossible to find a bride for each man, and 'importing a bride' has become the only solution. The demographic situation of these states has become so skewed that it will take many years to stabilise the situation. The demand for "marriageable age" girls is so intense that organised trafficking rackets have started operating in Haryana, Punjab and Uttar Pradesh."

On the PIL filed after a large number of female foetuses were found in a well at a doctor's house In Punjab, the Supreme Court has sought detailed affidavits from all states and the Centre on steps taken by them to curb female foeticide. On May 6, 2015, the apex court had passed a slew of directions on the issue of female foeticide including the need to form a statutory board for strict implementation of law prohibiting sex determination¹⁶.

¹² MARGARET GANGTE, *SKewed SEX RATIO: GENDER POVERTY ALLEVIATION IN INDIA*, 55, *Global Jour. of Hum. Soc. Science*, (Dec 2011)

¹³ GUILMOTO CZ. *CHARACTERISTICS OF SEX RATIO IMBALANCE IN INDIA AND FUTURE SCENARIOS*, Paper for the 4th Asia Pacific Conference on Reproductive and Sexual Health and Rights. Hyderabad, India: , (2007 October).

¹⁴ MARY SCARIA, *WOMAN, AN ENDANGERED SPECIES?*

20, www.hindustantimes.com/StoryPage/StoryPage.

¹⁵ United National Office on Drugs and Crime (UNODC)(2013).

¹⁶ <http://indianexpress.com/article/india/india-others/scraps-centre-for-not-publicising-order-on-femalefoeticide/#sthash.necmQcxx.dpuf>

III. Factors Responsible for Female Foeticide

Causes of female foeticide in India are embedded deep in the edifice of society. It is necessary to change the mindset of people and enable them to throw off the yoke of unhealthy and inhuman traditions. Here, they are required to liberate themselves from ruthless and detrimental traditional bonds and develop humane qualities in the true sense¹⁷. People are under constant social pressure that impels them to commit this type of acts. There are several reasons for that:

A. Proliferation of Advance Technology

Increased availability of advanced technologies, especially ultrasonography (USG), has been the single most important factor responsible for decreasing in sex ratios and increasing in female foeticide. In India over 25000 prenatal units have been registered. Facilities of sex determination through "clinic next door" are now conveniently available with the families willing to dish out any amount that is demanded of them. The easy availability of mobile scanning machines has translated into brisk business for doctors. Sex selection techniques became popular in the western and north western states in the late 70s and early 80s whilst they are become popular in the South now¹⁸. Beside this, there are several other factors that have a bearing upon the child sex ratio.

¹⁷ Apex Court observed. "It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of the daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problem faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticides whereby female baby was done away with, after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately developed medical sciences are misused to get rid of a girl before birth. Knowing fully well that it is immoral and unethical and it may amount to an offence foetus of a girl child is aborted by qualified and unqualified doctors or compounders that has affected over all sex ratio in the various States where female infanticides is prevailing without any hindrance". Centers for Inquiry into Health and Allied Themes and others (CEHAT) Vs. Union of India, AIR 2003 SC 3309:

¹⁸GEORGE SM, *SEX SELECTION/DETERMINATION IN INDIA: CONTEMPORARY DEVELOPMENTS*, 186, REPRO'D HEALTH MATTERS, (2002).

B.Desire for Male Child

Indian society gives preferential treatment to a male child. It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. Male children are preferred because (i) they have a higher wage-earning capacity, especially in agrarian economies like India; (ii) they carry the name of the family forward; (iii) only son can perform religious rites at the time of cremation of the parents; (iv) They are said to provide support in the old age; and (v) they are generally the recipients of a family's inheritance¹⁹. Girls are often considered an economic burden because of the dowry system, and after marriage they typically become members of the husband's family, ceasing to have responsibility for their parents in illness and old age. Several socio-economic and cultural factors are responsible for this craving for a son. It is unfortunate that people are still being under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. In Hinduism, the birth of a son is essential because he has to perform the last rites of the father by which his father can attain salvation²⁰.

C. Dowry

Female feticide is driven by many factors, but primarily by the prospect of having to pay a dowry to the future bridegroom of a daughter. The evil practice of dowry is widely prevalent in India. As a result, daughters are considered to be an economic liability, and this anti-female bias is exploited by Diagnostic teams

¹⁹ ELISABETH J. CROLL, *FERTILITY DECLINE, FAMILY SIZE AND FEMALE DISCRIMINATION: A STUDY OF REPRODUCTIVE MANAGEMENT IN EAST AND SOUTH ASIA*, 17 *Asia-Pacific Population J.* 11, 21 (June 2002), <http://www.unescap.org/esid/psis/population/journal/articles/2002/v17n2a2.pdf> ("blessings, status and good fortune are defined not in terms of daughters or children but of sons"); Vibhuti Patel, *A Cultural Deficit*, *India Together*, Aug. 2003, at <http://www.indiatogether.org/2003/aug/wom-sexratio.htm> ("The birth of a son is perceived as an opportunity for upward mobility while the birth of a daughter is believed to result in downward economic mobility.")

²⁰ JAMIL FAROOQUI, *FEMALE FOETICIDE: A SOCIAL MENACE*, *Radiance views weekly web edition*, <http://www.radianceweekly.com/184/4656/femalefoeticide-a-curse-of-society/2009-12-27/cover-story/story-detail/>

with ultrasound scanners which detect the sex of a child advertise with catch lines such as spend 600 rupees now and save 50,000 rupees later. The dowry system is more rigid in the northern states of India which is likely to contribute to the lesser child sex ratio. Women have little control over economic resources and the best way for a young north Indian bride to gain domestic power mainly comes from her ability to produce children, in particular, sons²¹. Most often in South Indian communities, marriages are not exogamous (but often consanguineous), and married daughters usually stay close socially and geographically to their original family. Until recently, dowries were unheard of and benefits of inheritance for the daughters were not ruled out²². In the Muslim community, paying of high dowry is not a prevalent practice. Also consanguineous marriages are highly prevalent and women are entitled to a portion of parental inheritance²³.

D. Gender Discrimination

The bias against females in India is grounded in cultural, economic and religious roots. Sons are expected to work in the fields, provide greater income and look after parents in old age. In this way, sons are looked upon as a type of insurance. In addition, in a patriarchal society, sons are responsible for "preservation" of the family name. Also, as per Hindu belief, lighting the funeral pyre by a son is considered necessary for salvation of the spirit²⁴. Such a strong preference for sons which results in a life- endangering deprivation of daughters is not considered abhorrent culturally and socially²⁵. In north India, girls currently constitute about 60% of the unwanted births and the elimination of

²¹ DYSON T. & MOORE M., *ON KINSHIP STRUCTURE, FEMALE AUTONOMY AND DEMOGRAPHIC BEHAVIOR IN INDIA*, Popul Dev Rev (1983).

²² GUILMOTO CZ. *CHARACTERISTICS OF SEX RATIO IMBALANCE IN INDIA AND FUTURE SCENARIOS*, Paper for the 4th Asia Pacific Conference on Reproductive and Sexual Health and Rights. Hyderabad, India: , (2007 October).

²³ BANDYOPADHYAY S& SINGH A., *HISTORY OF SON PREFERENCE AND SEX SELECTION IN INDIA AND IN THE WEST*, BULL INDIAN INSTHIST MED HYDERABA, (2003).

²⁴ NASSIR R & KALLA A.K..*KINSHIP SYSTEM, FERTILITY AND SON PREFERENCE AMONG MUSLIMS: A REVIEW*, ANTHROPOLOGIS, (2006).

²⁵ MILLER B.,*THE ENDANGERED SEX: NEGLECT OF FEMALE CHILDREN IN RURAL NORTH INDIA*, ITHACA, NEW YORK AND LONDON: Cornell Univ. Press; (1981).

unwanted fertility in this manner has the potential to raise the sex ratio at birth to 130 boys per 100 girls²⁶.

Gender discrimination manifests itself in the form of delay in seeking medical care, seeking care from less qualified doctors and spending lesser money on medicines when a daughter is sick²⁷. The extreme disappointment of a mother as a result of a daughter's birth can adversely affect her ability to breastfeed the girl child, which leads to poor nutritional status. It is no wonder that the prevalence of malnutrition and stunting is higher in girls than boys²⁸.

IV. Legal Provisions

Female infanticide had been prohibited through legislation in the pro-independence period. In the late 18th century, infanticide was initially documented by British Official who recorded it in their diaries during their travels. The scope of the problem of infanticide became clear in 1871 in the setting of India's first census survey²⁹. 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 Act was difficult to be enforced in a country where most birth took place in the home and registration was hardly done. As such the legislation sadly remained toothless with few or no conviction under the law. Certain provisions were also included

²⁶ International Institute for Population Sciences (IIPS) and Macro International. National Family Health Survey (NFHS-2), 1998-99, India: Key Findings. Mumbai: IIPS; 2000.

²⁷ M. A REPORT ON INDIAN WOMEN FROM BIRTH TO TWENTY, New Delhi: National Institute of Public Cooperation and Child Development; 1990.

²⁸ JATRANA S., *EXPLAINING GENDER DISPARITY IN CHILD HEALTH IN HARYANA STATE OF INDIA*, Asian Metacenter Research Paper Series No. 16. Asian Meta center for Population and Sustainable Development Analysis Singapore, (2003).

²⁹ PATEL R., *THE PRACTICE OF SEX SELECTIVE ABORTION IN INDIA: MAY YOU BE THE MOTHER OF HUNDRED SONS*, 7, Center for Global Initiatives: International Health Papers, (1996), http://cgi.unc.edu/uploads/media_items/the-practice-of-sex-selective-abortion-in-india-may-you-be-the-mother-of-a-hundred-sons.original.pdf

in the Indian Penal Code 1860 punishing causing of miscarriage and other like offences but unfortunately these provisions were rarely resorted to³⁰.

The Indian Penal Code, 1860 permitted 'legal abortions' committed with bona fide intention in the interest of mother's health or such other circumstances that nullifies presence of any criminal intent. Where an offence with requisite *mens rea* is committed, the offence is made punishable. The offence takes aggravated forms if it is done without the consent of the mother or when the mother is 'quick with the child'. Hence in the former case, the absence of consent of mother makes the offence a more serious one while in the latter the stage of pregnancy being that which has passed few weeks, thereby making the mother's pregnancy stage as "quick with child" makes the offence a more serious one. A mother who consents to such an offence is also made an accused thereby treating an unborn child a 'legal person' under the presumption of law. However application of the entire relevant provisions of the code depends on a condition, that is, that the women must be pregnant. Committing an act with an intention of

³⁰ Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 312 of Indian Penal Code - Causing miscarriage :Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; Section 313- Causing miscarriage without woman's consent 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 for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.; Section 314- Death caused by act done with intent to cause miscarriage Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term may extend to ten years, and shall also be liable to fine. And if the act is done without the consent of the woman, shall be punished either with imprisonment for life or with the punishment above mentioned. It is not essential to this offence that the offender should know that the act is likely to cause death. 750 Nagarathna et al., Int J Med Res Health Sci. 2015;4(4):744-748

killing the child in womb however if results in the death of child immediately after its death makes the offence a culpable homicide under IPC.

The Medical Termination of Pregnancy Act was passed in July 1971, which came into force in April 1972. This law was conceived as a tool to let the pregnant women decide on the number and frequency of children. It further gave them the right to decide on having or not having the child. However, this good intentioned step was being used to force women to abort the female child. In order to do away with lacunae inherent in previous legislation, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (PNDT Act) had to be passed in 1994, which came into force in January 1996. The Act prohibited determination of sex of the foetus and stated punishment for the violation of the provisions. It also provided for mandatory registration of genetic counselling canters, clinics, hospitals, nursing homes, etc. Thus both these laws were meant to protect the childbearing function of the woman and legitimise the purpose for which pre-natal tests and abortions could be carried out. However, in practice we find that these provisions have been misused and are proving against the interest of the females.

Sex determination techniques have been in use in India since 1975 primarily for the determination of genetic abnormalities³¹. However, these techniques were widely misused to determine the sex of the foetus and subsequent abortions if the foetus was found to be female. Invariably the person who seeks the illegal service and the service provider, both are in agreement to defeat and circumvent the provisions of the law. Unlike in other cases, both the parties are gainers in this matter. On the one hand, the people are able to get rid of the foetus of unwanted sex and on the other, the service providers are benefited financially. Non-availability of evidence and witness is therefore the main hindrance in the way of punishing errant doctors unless they are caught red-handed.

These pathetic situations were also taken note by Supreme Court in case *CEHAT and Ors. v. Union of India*³² where it was observed that amendments to the PNDT Act were necessary. After detailed deliberations the Act has been

³¹ [https://www.iria.in/pndt/PNDT%20FAQ%20for%20Publi c.pdf](https://www.iria.in/pndt/PNDT%20FAQ%20for%20Publi%20c.pdf); Amniocentesis was first introduced in India in 1975 by the All-India Institute of Medical Sciences (AIIMS), New Delhi, for detecting congenital deformities in fetuses.

³² (2003) 8 S.C.C. 412 (India).

amended. The main purpose has been to ban the use of sex selection techniques before or after conception as well as the misuse of Pre Natal Diagnostic Techniques for sex selective abortions and to regulate such techniques. To make this clear, the long title of the Act has been suitably amended to read:

“An Act to provide for the prohibition of sex selection, before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.”

Again, in 2003, in *Centre for Enquiry Into Health v. Union of India and others*³³, the Supreme Court while expressing concern in the matter held that for effective implementation of the Act, information in this regard should be published by way of advertisements as well as on electronic media and suggested many other steps for continuing monitoring. Consequent to the concern expressed by the Supreme Court, the Parliament took the necessary step by amending the law. The said Act has since been amended with effect from 14.2.2003 to make it more comprehensive and renamed as “Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) at the same time certain amendments have also been brought about in the Rules of 1996 to ensure effective implementation of the Act and in view of the observations of the Supreme Court. The amended Rules have come into effect from 14th of February, 2003. The Act defines the terms used therein, lays down when the use of Pre-Natal Diagnostic Techniques is prohibited and where it is regulated, it has provisions for bodies which are responsible for policy making under the Act, and those which are responsible for the implementation of the Act. The penalties for various offences, how and by whom cognizance of complaints is to be taken are also elaborated. Now, it would be expedient to refer here few relevant provisions of the Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.

Use of ultrasound machines has also been brought within the purview of the Act more explicitly so as to curb its misuse for detection and subsequent disclosure of sex of the foetus test it should lead to female foeticide. In 2003, the

³³ A.I.R. 2003 S.C. 3309 (India).

administrative rules implementing the 1994 Act were amended to regulate the sale of ultrasound machines. Amended Act, prohibited the distribution of any ultrasound or other machine capable of “detecting the sex of the foetus” to any laboratory, clinic, or other person unless the recipient is registered under the Act³⁴.

A new section 22 was inserted by amended act to deal prohibition of advertisements related to pre-natal determination of sex and provides punishment for its contravention³⁵. In *Sabu George v. Union of India*, the Supreme Court is looking at the constitutionality of sex- selection ads appearing on search engines. In its order of 28 January 2015, the Supreme Court has

³⁴ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, (2002). Section 3(B)

³⁵ The Pre- Natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Amendment Act, (2002) Substitution of new section for section 22.- For section 22 of the principal Act, the following section shall be substituted, namely:-' 22. Prohibition of advertisement relating to pre- conception and pre- natal determination of sex and punishment for contravention.- (1) No person, organisation, Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic including clinic, laboratory or center having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of the foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities of pre- natal determination of sex or sex selection before conception available at such Centre, Laboratory, Clinic or at any other place. (2) No person or organisation including Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre- natal determination or pre- conception selection of sex by any means whatsoever, scientific or otherwise.(3) Any person who contravenes the provisions of sub- section (1) or sub- section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees. Explanation.- For the purposes of this section," advertisement" includes any notice, circular, label, wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall- painting, signal, light, sound, smoke or gas.'

directed that, as an interim measure, “Google, yahoo and Micro Soft shall not advertise or sponsor any advertisement which would violate Section 22 of the PCPNDT Act, 1994. If any advertisement is there on any search engine, the same shall be withdrawn forthwith by the respondents”. The Court plans to hear arguments on the “total blocking of items that have been suggested by the Union of India³⁶”.

The maintenance and preservation of records particularly in case of pregnant women undergoing ultrasonography, under the pain of heavy penalties, was part of a strategy to curb the misuse of diagnostic techniques and without such compulsion to keep the records in the prescribed manner, it would be well-nigh impossible to trace and prove the offences under the Act. The requirement of maintaining the records was itself an effective check against commission of other offences³⁷.^[36]

The offences under the Act have been made cognizable, non-bailable and non-compoundable³⁸. Section 23 of the Act, deals with offences and penalties and from a bare reading of Section, it is apparent that the actual determination or an agreement to determine the sex of a foetus is punishable under the Act. The penalties for the offence have been increased where the punishment will be for the term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with

³⁶ <http://cis-india.org/internet-governance/blog/search-engine-and-prenatal-sex-determination>.

³⁷ Maintenance of records; (1) All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed: Provided that, if any criminal or other proceedings are instituted against any Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings. (2). All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.

³⁸ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, (2002). Section 27 of The PNDT Act, 1994; Offence to be cognizable, non-bailable and non-compoundable.-Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

imprisonment which may extend to five years and with fine which may extend to one lakh rupees³⁹. One of the other demands of the women's movements was to situate critically of the law in favour of women's far as penalties under the act are concerned. The amended Act clearly supports this when its provide in section 24 that "Presumption in the case of conduct of pre-natal diagnostic techniques, Notwithstanding anything in the Indian Evidence Act, 1872 (1 of 1872), the court shall presume unless the contrary is proved that the pregnant woman has been compelled by her husband or the relative to undergo prenatal diagnostic technique for the purposes other than specified in the Act"⁴⁰.

³⁹ The Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; Section 23 offences and penalties.- (1) Any medical geneticist, gynecologist, registered medical practitioner or any person who owns a Genetic Counseling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees. (2) The name of the registered medical practitioner who has been convicted by the court under subsection (1), shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence. (3) Any person who seeks the aid of a Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic or of a medical geneticist, gynecologist or registered medical practitioner for conducting prenatal diagnostic techniques on any pregnant woman (including such woman unless she was compelled to undergo such diagnostic techniques) for purposes other than those specified in clause (2) of section 4, shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

⁴⁰ Ministry of Health and Family Welfare(2006) Handbook on Pre-Conception and Pre-Natal Diagnostics Techniques Act, 1994 and rules with amendments , Governments of India at p.76

Lawyers and legal institutions regularly face technological changes. In the midst of a genetic revolution in medicine, Assisted Reproductive Technology (ART) has become a well-established technique to help infertile women achieve pregnancy. But many women are now turning to ART not just to circumvent infertility, but consciously to shape their families by determining the sex of their children. Many patriarchal cultures have a gender preference for males and to date have used technological advances in reproductive medicine to predetermine the sex of the child being born⁴¹.

If prior to conception by choosing male or female chromosome sex of the child is allowed to be determined and fertilized egg is allowed to be inserted in the mother's womb that would again give scope to choose male child over female child. In such cases, even if it is assumed that there is no female foeticide, indirectly the same result is achieved. The whole idea behind sex selection before pre-conception is to go against the nature and secure conception of a child of one's choice. It can prevent birth of a female child. It is as bad as foeticide. It will also result in imbalance in male to female ratio⁴². The techniques of pre-conception sex selection have been brought within the ambit of the Act⁴³ so as to pre-empt the use of such technologies, which significantly contribute to the declining sex ratio⁴⁴.

⁴¹ MONICA SHARMA, *TWENTY -FIRST CENTURY PINK OR BLUE: HOW SEX SELECTION TECHNOLOGY FACILITATES GENDERCIDE AND WHAT WE CAN DO ABOUT IT*, 198, family Court Review, (2008), V. Vijay Sharma and Mrs. Kirti v Union of India, A.I.R. 2008 Bombay 29.

⁴²The Pre- Natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Amendment Act, 2002, Amendment of section 6.- In section 6 of the principal Act, after clause (b), the following clause shall be inserted, namely:-" (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception."

⁴³ PATEL T. *SEX-SELECTIVE ABORTION IN INDIA: GENDER, SOCIETY AND THE NEW REPRODUCTIVE TECHNOLOGIES*, Sage Publications (2007).

⁴⁴ KALPANA SHARMA, *NO GIRLS, PLEASE, WE'RE INDIAN*, The Hindu, (August 29, 2004), at <http://www.hindu.com/mag/2004/08/29/stories/2004082900130100.htm>. 751 Nagarathna et al., *Int J Med Res Health Sci*. 2015;4(4):744-748

A conjoint reading of the above provisions would clearly indicate a well-knit legislative scheme for ensuring a strict and vigilant enforcement of the provisions of the PNDT Act directed against female foeticide and misuse of pre-natal diagnostic techniques. In fact, the use of those techniques is restricted to the purpose of detection of any of the abnormalities or diseases enumerated in sub-section (2) of section 4 of the Act. There is now substantial data that reveals that private as well as government facilities are used for sex-selective abortions despite the law that prohibits it⁴⁵.^[44] Over 300 doctors have been prosecuted for violating the law, but few convictions have resulted, and the medical community has pressured the government not to prosecute doctors who reveal the sex of the fetus to the mother.^[45] In a 2003 ruling on a lawsuit brought to demand more rigorous enforcement of the Pre-Natal Diagnostic Techniques legislation, the Indian Supreme Court acknowledged its poor implementation, but its ruling only called for local governments to enforce it more strictly.^[46]

V. Conclusion and Suggestions

The preference for a male child in large sections of Indian society even in highly educated groups is the root cause of female foeticide in India. The menace of Female foeticide was invented, touted and sold by the medical profession, and it operates with the complete consent of our society. Even the law is a powerful instrument of social change but law alone cannot dismantle out this social problem from Indian society. The Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 is a step towards the right direction. In view of the skewed female to male sex ratio in our country, this Act is an initiative for protection of the unborn girl child. Strict interpretation and implementation of the Act is helping create a positive trend with respect to the female child sex ratio in several districts of the country, but it is also putting doctors under constant pressure. The scope to misuse the technology is very real. The real challenge before Indian society and government authorities are to remove loopholes in The Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002. It is pertaining to note that until and unless this menace is controlled, the country is

⁴⁵ ASHLEY BUMGARNER, *A RIGHT TO CHOOSE: SEX SELECTION IN THE INTERNATIONAL CONTEXT*, 14 Duke J. Gender L. & Pol'y (2007).

heading for a grave gender imbalance, which in turn would adversely affect the nation's economic progress. So, there is a need to plug the loopholes. Registration procedures should be made tougher and clinics run by technicians and unqualified personnel should be registered and better regulated. Use of ingenious ways to convey the sex of the fetus should also be curbed through greater use of surprise checks and dummy patients.

Merely enforcing a ban on the use of medical technology for sex selection has been no solution to female foeticide. The issue is a social one wherein the age-old prejudices and traditions are the main culprits which promote the practice of female infanticide (killing of new-born female child). With availability of ultrasonography (USG) a shift has occurred from infanticide to female foeticide (killing of the female foetus). Without cultural change, legal measures will continue to be undermined and ineffective. But the link between the technology and gendercide is so clear that nations must find the will and means decisively to implement such laws. At the same time, it is imperative that nations marshal the resources to reverse the culture of degrading women which sex-selection technology has exacerbated. The dream of a world of sons is a global nightmare with untold consequences. Neither nations nor cultures can afford to rest in the face of Female foeticide. Female foeticide can only by a combination of monitoring, education campaigns, and effective legal implementation that the deep-seated attitudes and practices against female can be eroded from the society. The Government of India launched "*BalikaSamriddhiYojana*" in 1997 as a major initiative to raise the overall status of the girl child. It intends to change family and community attitudes towards girl child. In the same manner, the Government has recently launched "Save the Girl Child Campaign". One of its main objectives is to lessen the preference for a son by highlighting the achievements of young girls. To achieve the long-term vision, efforts are afloat to create an environment where sons and daughters are equally valued. Role of medical colleges and professional bodies would be very important in curbing menace of female foeticide. Many medical practitioners have joined campaigns against the misuse of these technologies. The mass media must be involved in promoting a positive image of women. However, this should be combined with highlighting the issue and dangers of female foeticide and skewed gender ratio. Various Non- Governmental Organizations (NGOs) are already taking an active lead in this area. It must be emphasized that involvement of community leaders

as well as influential persons would go a long way in assuring success in such campaigns. Now, we want to sum up this review article with these beautiful lines:

“ekcheekhraatko cheer kemaakehirdayetakaayiAureknanhisiawaaz sun kemaatohbahutroiMaamujhe mat maro, mat maronaniisijaankojanam se pehelehi matmaro Isnanihisijaanko.....”