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# Judicial Response on the Issue of Female Foeticide in India: Analysis

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**Abstract**

Female foeticide is perhaps one of the worst forms of violence against women where a woman is denied her most basic and fundamental right i.e. "the right to life". The root cause of female feticide, a form of structural violence against women, is multifaceted and complex. 2011 census indicates only 914 females for every 1000 males in the 0-6 years age range. Such a sharp decrease in the sex ratio is a sign of colossal calamity. A skewed sex ratio is likely to lead to greater incidences of violence against women and increase in practices of trafficking, 'bride buying' etc At present there are three laws aiming to prevent the evil practice of female foeticide in India. These are Indian Penal Code, 1860, Medical Termination of Pregnancy Act, 1971 and the Pre-Natal Diagnostic Techniques (prohibition of sex selection) Act, 1994. Apart from legislative provisions Indian judiciary is also playing a very important role for effective implementation of the female foeticide Statutes .Only after several directions were issued by the Supreme Court and the various High Courts, that Government took upon itself the task of creating general awareness, sensitization and also prosecuting doctors and clinics which were found violating the provisions of the Act. This paper aims to discuss the statutory provisions as well as the analysis of some of the judicial pronouncements on the issue of female foeticide in India.

**Key Words**: Female Foeticide, MTP Act, PC and PNDT Act , Role of Judiciary.

## A. Introduction

Discrimination against girl child, gender bias and deep rooted prejudice has led to many cases of female foeticide in India. Although in the culture and civilization of India, the woman represents beauty, prosperity and auspiciousness and mother of human kind. Nevertheless, the social, cultural and religious fiber of India is pre-dominantly patriarchal in nature providing secondary status to woman. A girl child is considered to be a liability, hence neglected at all levels. Birth of a girl child in all strata of society, irrespective of caste, clan or economic conditions is not accepted with open arms. She is looked as a curse. Female child is generally considered inferior to the male child in every sphere of life. The old socio-cultural feelings and religious prejudice and encouraged sons preference in various communities in India. Female foeticide is usually practiced in societies due to the immature belief that having a girl child is economically and culturally less advantageous than having a boy child. Seeing all the misery like rape, domestic violence, dowry death etc., many women themselves do not want to have a girl child as they believe there is a lot of humiliation and dependence of a girl during her entire life.

Though we consider this century as an advanced and modern one, still women are confronting new challenges and facing severe threats to maintain respect, equality and dignity. Female foeticide is perhaps one of the worst forms of violence against women where a woman is denied her most basic and fundamental right i.e. “the right to life”. The phenomenon of female feticide in India is not new, where female embryos or foetuses are selectively eliminated after pre-natal redetermination, thus eliminating girl child even before they are born. ‘*Foeticide*’ means the destruction of foetus at any time prior to birth. The term “sex selective abortion” is preferable to the term foeticide, since it points to both of the ethical evils inherent in this practice. Female feticide has replaced female infanticide as a means to reduce or eliminate female offspring.

The Constitution of India and other laws have been given special attention on equal treatment and prohibition of all forms of discrimination against women. The laws of India have always tried to strengthen various provisions, which protect women and children and encourage their empowerment. Introduction of new laws and landmark interpretation of cases has resulted in controlling the various crimes against women and children in India. The laws in our country provide equal protection and status to men and women. But realization of these rights and laws still needs to be understood by the citizens of our country. The patriarchal society in our country has not allowed the de jure laws to be accepted and implemented on de facto situations. This concept has been repeatedly proved by the practice of female foeticide, which is still been carried on in India and other parts of the world. The traditional mindset and poor representation of girl child in society has encouraged the degradation of women. So

even if the laws are introduced and implemented they prove to be inefficient until strict action is not taken against the people who support the practice of female foeticide.

Female foeticide is one of the most sensitive and burning issues not only for India but for the whole world. The female foetus is transferred from womb to tomb through this insensitive act. In India, the child sex ratio has consistently shown a declining trend, which is a matter of great concern.

A gradual improvement in the overall sex ratios (computed as females per 1,000 males) in 2011 made it almost equal to what was observed in 1961. Opposed to this, the data records a further decline in child sex ratio for children 0-6 years at 914 – a drop of 13 points from the previous decade. This steady decline in India's population aged 0-6 years has been observed ever since 1961. In 1991 it was 945, 2001-927 and in 2011 it further dropped to 914. As more families are opting for fewer children, as reflected in the reduced fertility rates, there seems to be an ongoing attempt to regulate the sex composition of children in favour of boys (Fig 1)

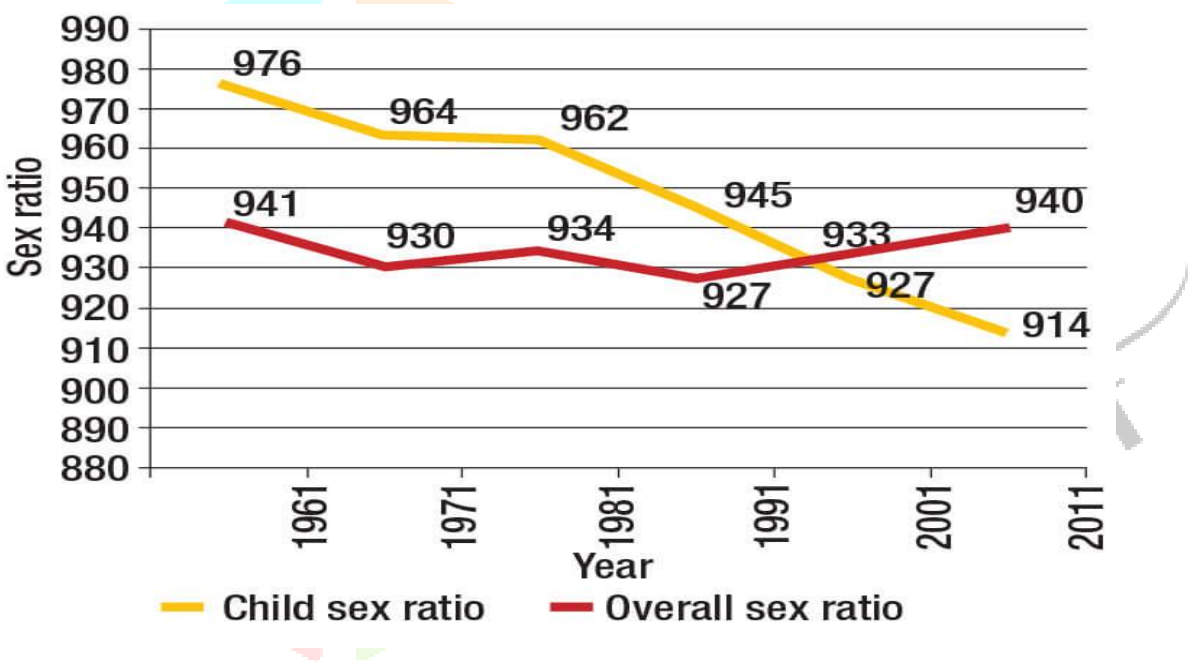


**Fig 1: Child-sex ratio (0-6 years) and overall sex ratio in India, 1961-2011**

## B. Laws relating to Female Foeticide

Though sex ratio in the country has improved from 927 in 1991 to 940 in 2011, Child Sex Ratio has dipped from 945 females per thousand males in 1991 to 914 females per 1000 males in 2011. Some of the reasons for female foeticide are son preference, low status of women, social and financial security associated with sons, socio-cultural practices including dowry & violence against women, small family norm and consequent misuse of diagnostic techniques with the intention of female foeticide.

In order to curb the social evil of female foeticide, Government of India has taken many legislative measures like **Medical Termination of Pregnancy Act 1971**, which rendered abortion legal for almost every state of the country, but it was specially rendered for the cases of medical danger to the mother and infant conceived by rape. The Medical Termination of Pregnancy Act, 1971 provides provisions relating to termination of pregnancy. Pregnancy may be terminated by registered medical practitioner only if he in good faith believes continuation of pregnancy would involve risk to the life of the woman and there is a substantial risk that child will born with some physical or mental abnormalities. However, the government still hadn't addressed the probability of female feticide based on technical advancements. Due to this cause, this law considered being extremely unsuccessful. During the 1980s, sex screening technology in India became readily available to the general public. Thanks to this cause, a significant number of incidents began coming in around the misuse of sex screening technologies. Understanding this issue, the Government introduced the **Pre-natal Diagnostic Techniques Act (PNDT)** in 1994. This law also was modified due to different problems, and then it ultimately had become the **Pre-Conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) (PCPNDT) Act** in 2004. Its primary objective was avoidance and punishment of prenatal sex diagnosis and female feticide. The Government have intensified effective implementation of the said Act and amended various rules covering provision for sealing, seizure and confiscation of unregistered ultrasound machines and punishment against unregistered clinics. Regulation of use of portable ultrasound machines within the registered premises only has been notified. Restriction on medical practitioners to conduct ultrasonography at maximum of two ultrasound facilities within a district has been placed. Registration fees have been enhanced. Rules have been amended to provide for advance intimation in change in employees, place, address or equipment.

Apart from these two statutes India's oldest penal Code i.e. Indian Penal Code also deals with such offence .Sections 312 to 319 fall under the group of offences relating to the birth, death, and exposure of children. Causing death of an unborn child with any illegal and malicious intent is considered as a serious offence under Sections 312 to 319. Each and every person who contributes and is a part of this act of illegal miscarriage is punishable under the provisions of Indian Penal Code. Sections 312 to 319.

It is normally the function of the Government to implement laws enacted by the legislature. But when the Government fails to do so, resort is taken to judiciary. The primary credit for implementation of the Pre Natal Diagnostic Techniques (Prevention of Misuse) Act goes to the judiciary. The PNDT Act was enacted by Parliament in 1994. However it came into operation after 2 years, on 1.1.1996 and even after lapse of 5 years neither the Central nor the State Governments had taken any action for its implementation. Hence the judiciary had to take upon itself the task of giving effect to the said Act. There are a series of petitions filed either Suo motu or being moved by NGOs in which the Supreme

Court and the High Courts, have issued various directions and pronounced orders to the Central and the State Governments for creating public awareness and for effective implementation of this Act.[1]

## C. Female Foeticide and the Judicial Response

Whatever the positive results have been achieved to curb the menace of declining sex ratio, that is only due to the positive intervention of the Hon'ble Judiciary. Without the intervention of the judiciary the challenge can't be addressed properly and there have been experience in the past also where only after the intervention of the Hon'ble Supreme Court, various amendments could be brought into the Act. The PC and PNDT Act, 1994 come into force from January 1, 1996. Though, the provisions for the Constitution of Supervisory Board, Appropriate Authority, Advisory Committee were incorporated at the inception of the Act of 1994, however the functioning of these bodies remained defective. Similarly, since there was no public awareness about the provisions of the Act, no PIL or any other litigation was filed under the Act. It was obvious that there was no occasion for the Supreme Court to issue directions for the enforcement of the Act. The occasion for the first time arose in ***CEHAT v. UOI***.[2] Though the Act was passed but was not implemented effectively inter-alia due to the reason that it is to deal with a peculiar kind of situation wherein there is collusion between the service seeker and the service provider and the foetus (the victim) is already done away and there is no complainant or victim to file the complaint. Ultimately the various members of Civil Society and NGOs were left with no alternative but to pray to the Hon'ble Apex Court to intervene through *Civil Writ Petition No. 301 of 2000* which was disposed of in 2003 after issuing various directions to the Union of India and to the States. On various dates during adjudication the petitioners submitted before the Hon'ble Apex Court the various loopholes and lacunas in the Act which was ultimately along with the Rules was amended on February 14, 2003 and the sex selection was also included in the ambit of the Act. It would not be out of place to mention here that though the Act had become operative on 1.1.1996, but it was almost in dormant situation and only after the various interim orders of the Hon'ble Apex Court and also the final order, the States and Union of India became active. Whatever the positive results have been achieved to curb the menace of the declining sex ratio that is only due to the positive intervention of the Hon'ble Judiciary. While considering this issue, the Supreme Court in ***CEHAT*** case passed an order on 4th May, 2001. The court observed that:

"*It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect*

[1] Shalini Phansalkar Joshi, Compilation and Analysis of Case-laws on Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994, https://www.wbhealth.gov.in/uploaded_files/PNDT/Compilation%20and%20Analysis.pdf (accessed on 25/5/2021)
[2] CEHAT and Others v. Union of India & Others, AIR 2001 SC 2007.

*on the parents. One of the reasons may be the marriage problems 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 infanticide 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 science is misused to get rid of a girl child before birth. Knowing fully well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected the overall sex ratio in various states where female foeticide is prevailing without any hindrance. For controlling the situation, the Parliament in its wisdom enacted the PNDT Act, 1994. It is apparent that to a large extent, this Act is not implemented by the Central Government or by the State Governments.*"

The Supreme Court in this writ petition passed certain directions to the Central Government as well as to the State Government for the proper implementation of the **Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994**. The petitioners approached the Supreme Court because the Central Government and State Government both are not implementing the provisions of 1994 Act properly. Central Government has failed in creating public awareness against the practice of female foeticide. Advisory Committees are not meeting regularly. Same is the case with the Central Supervisory Board which is not functioning effectively. State Government and Union Territory Administrations are not publishing the list of Appropriate Authorities, they are not taking steps to ensure whether all state and UT Appropriate Authorities are furnishing quarterly reports to the CSB. Appropriate Authorities are not taking prompt action against any person or body who violates the provisions of this Act. All this necessitated the petitioners to approach the Supreme Court. This case shows that because the provisions of the Act of 1994 have not been implemented properly therefore, there is no decline in the practice of female foeticide. The petitioner in this case are CEHAT which is a research center, Mahila Sarvangeen Utkarsh Mandal and Dr. S.M. George. The Secretary Department of Women and Child Development, Govt. of H.P. is one of the respondents. Supreme Court in this case said that despite the PNDT Act 1994 being enacted five years back, neither the State Government nor the Central Government has taken the appropriate action for its implementation. After filing of this petition, various orders were passed from time to time to see that the Act is effectively implemented.

(i) **Directions Issued to the Central and State Government and Appropriate Authorities:**

**1. Directions to the Central Government:**

- To create public awareness against the practice of sex determination and female foeticide through electronic media. This shall also be done by Central Supervisory Boards (CSB).
- Implement PNDT Act, 1994 and Rules strictly.
- Rule 15 of PNDT Rules, 1996 provides that intervening period between two meetings of Advisory Committees shall not exceed 60 days.

**2. Directions to the Central Supervisory Board (CSB) :**

- CSB will hold meetings at least once in 6 months.
- CSB shall review and monitor the implementation of the Act.
- It shall issue directions to all State/UT Appropriate Authorities to furnish quarterly report to the CSB which shall contain information about survey of bodies, registration of bodies, action taken against non-registered bodies, complaints received by the Appropriate Authorities, number and nature of awareness campaigns conducted.
- It shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties in implementing the Act and make recommendations to Central Government.
- It shall lay down a Code of Conduct to be observed by persons working in bodies specified.
- It will take help of medical professional bodies to create awareness against the practice of sex determination and female foeticide.

**3. Directions to State Government/UT Administrations:**

- To appoint Appropriate Authorities at district and sub-district levels and also Advisory Committees.
- To publish a list of Appropriate Authorities in the print and electronic media.
- To create public awareness against sex determination and female foeticide through print and electronic media.
- To ensure that all Appropriate Authorities furnish report to CSB regarding implementation and working of the Act.

**4. Directions to Appropriate Authorities :**

- To take prompt action against any person or body who issues advertisement in violation of Section 22 of the PC & PNDT Act, 1994.
- To take action against all bodies specified in Section 3 of PC & PNDT Act, 1994 and also against persons who are operating without a valid certificate of registration.
- To furnish report to the CSB regarding implementation and working of the Act.
- The CSB, State Government and UT are directed to report on or before 30th July 2001.

**(ii) Further Directions by the Supreme Court:**

Supreme Court held that inspite of the above directions issued by this court, the Central Government and State Government have not complied with the order. No action has been taken against clinics which are not registered, but only warning is given. The Appropriate Authorities or any officer of the Central or State Government is required to file complaint against such offenders, but this is not done by these Governments. States and Union Territories have not submitted quarterly reports to CSB. Hence it is directed that quarterly reports should be submitted giving information of survey of Centres/Clinics, registration of these bodies, action taken against unregistered bodies, search and seizure, number of awareness campaigns.[3] Supreme Court held that Central Government should set up National Inspection and Monitoring Committee for the implementation of the Act.[4] The Court directed the State Government to publish the names of Advisory Committee. The Court observed that it would be desirable if Central Government frames appropriate rules with regard to sale of ultrasound machines to clinics and issue directions not to sell machines to unregistered clinics.[5] On 31st March 2003, it was pointed out that in conformity with the various directions issued by this Court, the PNDT Act, 1994 has been amended and titled as The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

The Central Government, State Government/UTs are further directed that:

- For effective implementation of Act, information be published by way of advertisements and electronic media. It should be continued till there is awareness in public.
- Quarterly reports by Appropriate Authority, submitted to CSB should be published annually for information of public at large.

[3] Orders passed on 19th September, 2001 in case titled CEHAT v. Union of India & Others.
[4] *Id.*, Orders passed on 7th November, 2001.
[5] *Id.*, Orders passed on 11th December, 2001.

- Appropriate Authorities shall maintain the record of all meetings of Advisory Committees.
- The National Monitoring & Inspection Committee shall continue to function till the Act is effectively implemented. Reports of this be placed before the CSB and SSB for further action.
- CSB would ensure that following states appoint SSB as per Section 16-A of the PNDT Amendment Act, 2002: Delhi, H.P., Tamil Nadu, Tripura and U.P.
- As per Section 17(3)(a) of the PNDT Amendment Act, 2002 the CSB would ensure that the following States appoint multimember Appropriate Authorities: Jharkhand, Maharashtra, Tripura, Tamil-Nadu and U.P.

In another writ petition[6] filed before the Bombay High Court, the Amendment Act 2002 of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 was challenged on the ground of violation of Article 14 of the Constitution and this challenge rests on the comparison between the said Act and the Medical Termination of Pregnancy Act 1971. The contentions raised in the petition can be summed up as under:

(1) The provisions of the said Act can't be made applicable without any distinction. Couples who have a male or a female child should be allowed to make use of the prenatal diagnostic techniques to have a child of the sex opposite to the sex of their existing child to balance their family. Such couples can't be treated on par with couples who chose the sex of foetus in order to have a male child leading to imbalance in male to female ratio.

(2) The MTP Act 1971 provide certain grounds on which pregnancy can be terminated. However, under the said Act, a woman having children of the same sex is not allowed to use the pre-natal diagnostic techniques to have children of the opposite sex. The legislature has not taken into consideration the fact that having a child of the same sex as that of the existing child/children also causes grave mental injury to a woman. Whereas MTP Act allows abortion in case a child is conceived on account of failure of contraceptive device on the ground of anguish to pregnant woman. While enacting the said Act the legislature has not considered what anguish would be caused to a prospective mother who conceives a female child or a male child for the second or third time. The legislature has not appreciated that such anguish must also be termed as grave injury to the mental health of the prospective mother. Thus, there is discrimination between

[6] Vijay Sharma v. Union of India, AIR 2008, Bombay, 29.

women situated in similar position. The said Act, therefore, violates Article-14 of the Constitution of India. The MTP Act and the PC & PNDT Act 1994 are Central Acts. If by one statute certain rights are conferred upon a prospective mother, the same can't be denied to a prospective mother by another statute originating from the same course.

(3) Under the MTP Act, termination of pregnancy is allowed under certain circumstances. Foeticide is sanctioned under certain circumstances. However, by sex selection before conception with the help of the pre-natal diagnostic techniques, sex of the child is determined by choosing the male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. This does not lead to foeticide. There is, therefore, no reason to impose a blanket ban on the use of the pre-natal diagnostic techniques.

(4) The pre-natal diagnostic techniques can be used to achieve positive result i.e. to attain an ideal male to female ratio. Due to the stringent provisions of the said Act, the pre-natal diagnostic techniques are used by doctors and couples in hasty and hush hush manner which is likely to affect the mindset of prospective mothers.

Strong exception is taken to the submission of the petitioner's counsel and the contentions raised by the petitioners. The challenge on the ground of violation of Article-14 rests on the comparison between the PC & PNDT Act 1994 and the MTP Act 1971 which are Central Acts. The object of both the Acts and the mischief they seek to prevent differ. They can't be compared to convass violation of Article-14. The statement of objects and reasons of the Amendment Act 2002 seeks to ban the pre-conception sex selection techniques and use of pre-natal diagnostic techniques for sex selective abortions. Having taken note of the alarming imbalance created in male to female ratio and steep rise in female foeticide, legislature has amended the Act of 1994. It, inter alia, prohibits sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them. It prohibits any person to cause or allowed to be caused selection of sex before or after conception. The MTP Act is an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Statement of objects and reasons of the MTP Act indicates that it concerns itself with the avoidable wastage of the mother's health, strength and sometimes life. It does not deal with sex selective abortion after conception or sex selection before or after conception. It must be remembered that termination of pregnancy under the MTP Act is not promoted because of the

unwanted sex of the foetus. It could be a male or a female foetus. Apart from the fact that both the Acts operate in different fields and have different objects, acceptance of the contentions of the petitioner would frustrate the object of the said Act. A prospective mother who does not want to bear a child of a particular sex can't be equated with a mother who wants to terminate the pregnancy not because of the foetus of the child but because of other circumstances laid down under the MTP Act. To treat her anguish as injury to mental health is to encourage sex-selection which not permissible. Therefore, by process of comparative study the provisions of the said Act can't be called discriminatory and hence, violative of Article-14. It is well settled that when a law is challenged as offending against the guarantee enshrined in Article 14, the first duty of the Court is to examine the purpose and the policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which the legislature seeks to obtain. The purpose or object of the Act is to be ascertained from an examination of its title, preamble and provisions. Attention is drawn to the frightening figures which show the imbalance in male to female ratio in various parts of India. ***Ms. Sushma Rath***, Under Secretary, Ministry of Health and Family Welfare has in her affidavit in reply stated that there is a considerable decline in the number of female children and the financially sound areas of Punjab, Haryana and Delhi are worst effected. It can't be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. Sons are said to provide support in the old age. Several socio-economic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be 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. These hard realities will have to be kept in mind while dealing with the challenge raised to the constitutional validity of a statute which tries to ban sex selection before or after pre-conception and misuse of the said techniques leading to sex-selective abortions. None can be allowed to use the said techniques for sex selection. The justification offered by the petitioner is totally unacceptable. 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 ratio. The argument that sex selection at pre-conception is an innocent act, must, therefore, be rejected. So, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14. 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 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 51 A (e) of the Constitution which state 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 women-hood. This is perhaps the greatest argument in favour of total ban on sex selection. Therefore, it can be said that the provisions of the said Act as amended by the Amendment Act, 2002 are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition. Therefore, it is not necessary for the Central Government to issue any order in the official Gazette under Section 31-A of the PC & PNDT Act 1994 for removal of difficulties on the grounds stated in the petition. Hence, the petition was dismissed by the Court.

## D. Interpretation of The Legislative Provisions

Judiciary has done a commendable work in every sphere, which means not only through Public Interest Litigation but under certain other laws also which are related to the problem of female foeticide like PC & PNDT Act 1994 and IPC 1860. Out of these MTP Act 1971 does not create any individual offence, it mainly refers to the provisions of IPC 1860. Since, the offences which are covered by the statutes are social in nature, the offender and the parents conceived together to commit this offence, only few offences are reported, though large number of them are committed. So only few cases have come before the court which are discussed below:

The Bombay High Court in one case[7] held that sub-section(3) of section 20 provides for a suspension of the registration and that power can be exercised notwithstanding anything contained in sub-sections (1) and (2) for the reasons to be recorded in writing. As in this case the petitioners very much knew that a PIL (i.e. CEHAT Case) was filed in the Apex Court because petitioners had joined as Respondent No. 38 in that case. They had filed an affidavit in that proceedings and defended the sex determination test on the ground of family balancing, though subsequently they had tendered an apology in July 2003. Thereafter on 22nd July 2003 they knew that they were prosecuted. This being the position, if the Appropriate Authority refers to that prosecution and issues an order of suspension, then there is sufficient mention of the reasons from the Authority which have led it to take the action. The High Court further held that if the Authority has some material before it, which prima facie, it had, at the relevant time, it ought to have such a power to suspend the activities of such a nature. If such a power is not read into the section 20(3) of PC & PNDT Act, the provisions of a welfare enactment will be rendered nugatory. In such a situation, where there is a conflict of private interest to carry on a particular activity which the Public Authority considers as damaging to the social interests, the power under the Statute has to be read as an enabling power.

[7] Malpani Infertility Clinic Pvt. Ltd. & Others v. Appropriate Authority, PC & PNDT Act & Others. Civl Writ Pet. No. 5295 of 2003, Bom. H.C.

In another case,[8] the question which arose was that whether the Respondent No. 1, who was a Medical Officer, was competent to institute criminal action against the applicants in relation to offences punishable under section-22 read with Rules 6(2), 4(I)(ii) and 9 (1) of PC and PNDT Act, 1994, though no notification had been published in the Official Gazette appointing him as the Appropriate Authority as is required by Section-17 of the Act. To this question, Bombay High Court gave the answer in negative. The High Court held that when the statute requires the notification to be published in the Official Gazette and that act is not undertaken, the Notification issued in any other manner is of no consequence for the purposes of Section-17 of the Act. A person is clothed with the power of the Appropriate Authority only upon publication of the Notification in the Official Gazette, naming such person as such. In other words, publication of notification in the Official Gazette is the since qua non. The contention passed into service on behalf of the Applicants is supported by the exposition of the Apex Court in ***I.T.C. Bhadrachalam Paperboards*** v. ***Mandal Revenue Officer***.[9] A priori, in law, the Respondent No. 1 was not competent to initiate criminal action nor the Court could take cognizance of the complaint filed by person other than Appropriate Authority in view of the mandate of section-28 of the Act.

In another case[10] a complaint was filed by the District Appropriate Authority cum Civil Surgeon Faridabad in the Court of Sub-Divisional Judicial Magistrate Palwal. He directed Dr. C. Paul, SMO, Incharge G.H. Ballabgarh cum Team Incharge PNDT to conduct raid along with PNDT team and volunteer decoy patients at Dr. Anil's Ultrasound Centre, who was reportedly engaged in illegal sex determination. It is the first case in which the accused was convicted by the Court. The point of determination in this case was whether the prosecution has successfully proved that the accused in a raid conducted at their ultrasound center were found conducting sex determination of foetus and were found not explaining the side effect by not obtaining written consent and was communicating to the patients the sex of foetus by words and signs and used ultrasound centre for conducting sex determination and conducted the same in violation of the provisions of the Act and also failed to maintain proper record of the ultrasound centre and contravening the various provisions of the Act. It is also pertinent to note that being the first of its kind cases under the Act and having been registered on the basis of the complaint filed by the District Appropriate Authority there never was the role of any prosecuting agency as such like police or some other organizations related to the prosecution agency to investigate the case and conduct investigation or record statements of witnesses or visit the site. All this work was done by the complainants, which was a team of doctors under the District Appropriate Authority and they have done the investigation part to the best of their knowledge and capability. It is to be noted that the present case although triable as a criminal

[8] Dr. Aniruddha Malpani & Another v. Dr. Jaywant Anant Khandare & Anothers, Cr.App. No. 4644 of 2004, Bom. H.C.
[9] (1996) 6 SCC 634.
[10] State through District Appropriate Authority cum Civil Surgeon, Faridabad v. Dr. Anil Sakhani & Others.

case, but still the handling of the case under this Act can't be replica of what is seen or looked for in other criminal cases such as cases relating to hurt or injury. In cases relating to hurt or injury where an occurrence is alleged with eye witnesses to the occurrence, the contradictory statements made by the witnesses relating to the occurrence, the number of injuries suffered and kind of medical reports brought by the doctor, are very material, but in case in hand the minor contradictions pointed out would not be very material due to the different and typical nature of the case. There were several oral complaints with regard to the accused indulging in sex determination in his clinic and as provided under section 17 of the Act, the appropriate authority had full right to investigate the complaint of breach of the provisions of this Act or the Rules made thereunder and he is also competent to take immediate action. When it had come to the notice of the Appropriate Authority about the accused violating the provisions of the Act, he was not required to wait for written complaints and then take the action. The Court also observed that here the need arises to take care of such witnesses who by going against all odds tried to help the prosecution with its case which was for noble cause and then none cared to look back at these witnesses and the circumstances in which they were maintaining themselves. Whenever a person goes to the ultrasonologist for determination of the sex of the foetus, the act is not alone of the persons like the accused, but equal role is also played by the patient and his family members. On the mere instigation of the person like the accused no sane person would agree to abort their child until time they have an interest in the termination of the pregnancy. The persons like the accused can't force any person to know the sex of the child till the said person is also interested in knowing the same. This, however, does not mean that the persons like the accused are not to be blamed at all and rather such persons like the accused should deter the patient from making enquiries about the sex of the foetus and should repain from disclosing the same as provided under the Act. Due to the illegal acts of the persons like the convicts, the sex ratio is declining day by day in the country and in the State and because of the persons like the convicts the day is not far when there would be no girl child around. In the present case, the convicts orally conveyed the sex of the foetus to the patients, but due to the check of such illegal acts the persons like the convicts have worked out their own sex determination code. It was reported in the newspaper recently that "If the doctor tell us to come and get the report on Monday, we know it’s a boy. Friday means a girl, says Sarla, proud mother of three strapping boys in Karnal's Chonchda village. Her neighbour's doctor adopted a slightly different modus operandi, signature in red ink to indicate a girl child and blue for a boy. No words are exchanged. Its an unspoken thing and one doesn't even have to ask. If the doctor doesn't oblige, some tout does".

The convicts together have indulged in a very serious crime. To kill a person who may have the opportunity to defend himself is a very serious offence, but even more serious is the offence where a person kills someone who is not even in a stage to defend himself. So, both

the accused were punished by the Court to undergo a simple imprisonment for a period of two years and to pay fine of Rs.5000/- each for offences mentioned in section 6(a) (b), 5(1) (2), 4 (1) (2) (3) and section 29 read with Rule 9 of the Act and all the offences punishable under section 23 of the Act.

As we are discussing the role of judiciary in checking female foeticide, it will be interesting to investigate how the judiciary at different levels heeds the exhortations of the highest in the judiciary. The case in this instance refers to Morena in Madhya Pradesh, one of the very few districts in the country where this issue has been vigorously persued and a game of snakes and ladder is being played out. A team of district officials did a door-to-door survey in a village and came up with an alarmingly adverse child sex ratio. When this was discussed with the villagers in the evening, they not only accepted the figures but also openly disclosed the fact of sex determination through sonography and termination thereafter in case of a female child and also the names of the nursing homes they visited for sex determination. Discussions were undertaken with the medical fraternity in the district with a view to discouraging sex determination and so that the district authorities would not permit this heinous practice. However, there was no visible change in the attitude of doctors, therefore the records of nine centres registered under the Act were seized. These records were scrutinized and it was observed that non-compliance with the maintenance of mandated records was very common at the registered centres. The laxity was more prominent with the **Form-F** requirement. Through this form, the vital information which can be obtained is (a) Number of children with sex of each child (b) Purpose for which ultrasound was done during pregnancy (c) Result of ultrasonography – if any abnormality detected (d) Was MTP advised/conducted, date on which MTP carried out (e) Declaration of doctor that while conducting ultrasonography, he has neither detected nor disclosed the sex of her foetus to anybody in any manner (f) Declaration of the pregnant woman that by undergoing ultrasonography she does not want to know the sex of the foetus. After a scruitiny of the records, the appropriate authority, the chief medical and health officer, issued show cause notices and finally cancelled seven registrations. In the instance of one centre, which was operating two machines in two different locations with one registration a case was submitted before the Court of Chief Judicial Magistrate. No discernible result in this case could be seen till date. All the seven nursing homes/ultrasound centres appealed against the cancellation in the month of June 2005, much after the prescribed duration. The State Appellate Authority condoned the delay in all the cases and decided all the seven cases on the same date of June 10, 2005 giving almost identical reasons for accepting the appeal and quashing the order of the appropriate authority even though the merits and grounds were different in all the cases. The Appellate Authority, while admitting that **Form-F** was not maintained by these centres and also that records for the last two years were not maintained, observed that although there is no clear evidence of maintaining all the prescribed

records as envisaged under section 4(3) and rule-9 of the Act, but looking to the records made available, it does not amount to a gross irregularity to cancel the registration of the appellant. This order of the State Appellate Authority was challenged by two NGOs namely '***Prayatn***' and '***Dharti Gram Utthan***' which work in Morena on this issue, by filing a PIL in the High Court of Madhya Pradesh's Gwalior Bench. The petitioners argued that the erroneously called such violation a mere irregularity and felt that if the reasoning given by the SAA were accepted, it would result in total non-implementation of the Act and rules against female foeticide resulting in a further decline of the sex ratio in Morena district. This petition was admitted for final hearing and the operation of the impugned order of the SAA was stayed. In the mean time the court directed that all the Chief Medical and Health Officers and district collectors of some districts make a survey and inspect all the nursing homes as well as the laboratories and centres where the ultrasound machines were being used. They would have to verify that in such nursing homes and the laboratories/centres appropriate measures were being adopted to restrain, avoid and prohibit the sex determination and sex selection process. They would have to survey all the towns of the district where these machines were being used and submit the report from the Morena collector about the status of involvement of respondents whose licenses were cancelled, whether they were involved in the cases of sex selection and sex determination at the pre-conception and pre-natal stage. On December 13, 2006, five respondents filed applications and contended that they had applied for permission to run the ultrasound machines, as they were not involved in pre-natal sex determination although the CMHO of Morena submitted that the owners of these machines were not furnishing proper information in proper format. The Court directed that in view of this fact, the respondents would be permitted to run their ultrasound machines but made it clear that they would have to furnish regular information as required under the Act and the rules framed there under. It said the competent authority would also have the liberty to supervise and make proper checks of the machines and take action in case any breach was found against them as per the Act and the Rules. A very obvious question stares in our face on these ten different approaches to the ultrasound centres, particularly in view of the Chief Justice's statement. Is the judiciary really very serious about the problem of abuse of sonography and the resultant grave gender imbalance ? Certainly, a doubt lurks in the mind that the judiciary may take this as a routine social legislation and leave it to time to get sorted out.[11]

In ***Dashrath Shamrao Shinde(Dr.) v. State of Maharashtra and others***[12],writ petition was filed to challenge the order passed by civil surgeon,Buldhana in which it was mentioned that the clinic run by petitioner was a Genetic clinic according to Sec-2(d) of PCPNDT Act and appropriate authority may suspend the registration of Genetic Counselling Centre,Genetic Laboratory and Genetic Clinic without issuing notice But the order was not passed u/s-20(3)

[11] www.femalefoeticide.com (accessed on 25/4/2021).
[12] W P No 5231 0f 2011 ,Bom HC

so as to dispense with issuance of show cause notice and whatever notice issued to the petitioner u/s-3 and 18, it was just a format notice as Sec-3 deals with regulation of Genetic Clinic whereas Sec-18 deals with registration.Opportunity of being heard was not granted as required u/s 20(2) and no reasons were recorded in writing in the impugned order which only refers to deficiency in maintaining form 'F' register.Moreover the respondant did not complain about sex determination.As a result,writ petition was allowed and the impugned order was quashed and set asidein view of non-compliance of Section-20 of PC and PNDT Act.

In ***S.K.Gupta v. UOI(Ministry of Health and Family Welfare) and others***[13],writ petition was filed for compliance of order passed by this court in the matter of securing compliance of provisions of PC and PNDT Act.The reports regarding the progress of the trials pending under provisions of this Act were being submitted regularly which made it clear that the progress in almost all the cases was blocked by the superior courts at various stages and not even a single conviction has been secured in the state of Rajasthan for the violation of this Act.So in order to expedite the trials, various directions were issued by the HC like (a) Member-secretary Rajasthan SLSA was directed to organize special workshops for the special courts entrusted with trial of offences under the Act to acquaint them with the provisions of the Act and the decisions rendered across the country for deciding cases;(b) directed DJ/ADJ to expedite revisions and decide as far as possible within 3 months;(c) the special magistrate will expedite trial and conclude if possible within 6 months and will not adjourn cases unnecessarily.

In ***Federation of Obstetrics and Gynecological Societies of India(FOGSI) v. UOI***[14], FOGSI challenged the constitutional validity of Section-23(1) & 23(2) of PC & PNDT Act and wanted to seek the direction in the nature of certiorari/mandamus for decriminalizing anomalies in paperwork/record keeping/clerical errors in regard of the provisions of the Act for being violative of A-14,19(1)(g) & 21 of the Constitution of India.Rejecting the contentions of Society,the court held that non-maintenance of record is spring board for commission of offence of foeticide and not just a clerical error.The impugned provisions contained in the Act constitute reasonable restrictions to carry on any professionwhich can't be said to be violative of right to equality enshrined under A-14 or right to practice any profession under A-19(1)(g).Considering the fundamental duties under A-51A(e) and considering that female foeticide is most inhumane act & results in the reduction of sex ratio,such provisions can't be said to be illegal & arbitrary in any manner,besides there are various safeguards provided in the Act to prevent arbitrary actions.the SC further held that"dilution of the provisions of the Act/Rules would only defeat the purpose of the Act to prevent female foeticide and relegate the right to life of the girl child under A-21 of the Constitution,to a mere formality."

[13] Raj HC ,25th Nov 2014
[14] AIR 2019 SC 2214

In another important decision i.e. ***Dr.Sabu Mathew George v. UOI & others***[15],writ petition was filed to seek directions to the respondants(Google India,Yahoo!India & Microsoft Corporation Pvt. Ltd.) to block all websites & advertisements appearing directly or indirectly on the respondant search engines, related to sex determination & sex selection.According to para 3&4 of the Affidavit filed by UOI of India, the nodal agency has already been constituted.That apart ,the 'in-house expert body'that is directed to be constituted,shall on its own understanding delete anything that violates the letter and spirit of language of Section 22 of the Act.The present order is passed so that respondants become responsive to the Indian law. The learned counsel for the respondants contended that they do not intend to take an adversarial position with the petitioner but on the contrary to play a participative & cooperative role so that the law made by the Parliament of India to control sex selection & to enhance the sex ratio is respected. It is further accepted by them that if the nodal officer of UOI communicates to any of the respondant with regard to any offensive material that contravenes S-22,they will block it.

In ***Vinod v. Civil Surgeon,Civil Hospital Jalgaon and another***[16] , petitioner questioned the validity & legality of action of sealing of sonography machine by Medical Superintendant,Chalisgaon and also the order passed by Civil Surgeon,Jalgaon suspending the registration of sonography centre of petitioner. As contended by the counsel of petitioner both orders are without authority of law without following the principles of natural justice and non-compliance of S-20 of PC & PNDT Act.The HC held that it appears that officer concerned couldn't in any way be considered to be an appropriate authority as sealing has taken place under his order in 2011 whereas empowerment is of 2013.In such a case action by him can't be said to be authorized one and justified.Moreover, no notice as contemplated u/s 20 of Act appears to have been issued before suspending the registration or for that matter he was not heard.So the impugned order was quashed and set aside.

In ***Dr.Tej Sharma v. State of Rajasthan*** [17],several criminal miscellaneous petitions u/s-482 CrPC were filed by petioner because of being aggrieved with the complaints filed against them u/s-28 of PC &PNDT Act. The allegations leveled against them were mostly in respect of alleged irregularities committed by them in maintenance of records and other minor irregularities. The court held that the scheme of PC & PNDT Act does not classify offences.The provisions of S-23 and 25 classify the offenders and not the offence.By citing the case of ***Mohit alias Sonu v. State of UP***, decided by SC, the court disentitled the petitioners to get any relief u/s-482 CrPC.The court further added that even after passing of 68 years of independence, we are not in a position to change the mental setup which favours a male child against a female. The misuse of modern science and technology by preventing the girl child by

[15] 2018 3 SCC 229
[16] W P No. 90 of 2014 , Bombay High Court
[17] Raj HC, 25 August,2015

sex determination before birth and thereafter abortion is evident from 2011 census figures which reveal greater decline in sex ratio in several states. An activity for sex selection has a very grave social consequences as it may result in disturbing the balance in the male female ratio. In view of this, strict compliance of provisions of PC & PNDT Act and rules made thereunder is the need of the day.

***Priyanka Shukla v. UOI & others***[18] is another latest matter, where petitioner was seeking permission to allow her to have her pregnancy terminated beyond 20 weeks.Section-5 relaxes rigour of S-3(2) in a case where termination of pregnancy is immediately necessary to save the life of pregnant woman.Provisions of S-3(2)(b) & S-5 have to be construed as part of one cumulative dispensation and not isolated from each other.Even in a case where condition of foetus is incompatible with life,rigour of S-3(2) deserves to be relaxed and right to terminate pregnancy can't be denied merely because gestation has continued beyond 20 weeks.Considering the facts and circumstances of case including report of Medical Board constituted by Director of AIIMS and opinion of doctor,prayer of the petitioner was allowed.

Similarly in ***S.Jeyanthi v. UOI & others*** [19], Medical Board was of the opinion that growth of foetus is weak or confronting severe abnormalities including cardiac malfunction,and if pregnancy is not ordered to be aborted,petitioner would be subjected to mental trauma and hardship.So the court granted the permission to terminate the pregnancy.

In another latest judgement i.e. ***Anita v. State of M.P. & others*** [20], petitioner was allowed to terminate the pregnancy as here the relevant considerations were that the petitioner was of 19 years of age and a victim of rape. Moreover, the opinion of Medical Board was that pregnancy of 9 weeks can be terminated safely.Considering the age of petitioner and trauma which she has to suffer and agony she is going through at present,the permission was granted.

In ***Nidhi Singh v. State of Chhattisgarh & others***[21]**,** petitioner was a victim of forcible sexual assault.Petition was filed when pregnancy was less than 20 weeks.By considering that ,if relief of termination of pregnancy is denied ,it would hound her for entire life as it would be humiliating and embarrassing for her to give birth to a child of a rapist,so the permission for termination of pregnancy was granted by the High Court.

Himachal Pradesh High Court in ***Geeta Devi v. State of H.P. & others***[22]**,** has allowed the writ petition and directed the Medical Superintendant,KNH,Shimla to arrange for termination of pregnancy of petitioner by expert gynaecologist under the supervision of Medical Board because as per the report submitted by Medical Board, continuous of pregnancy involves risk

[18] AIR 2019 (NOC) 790 Del.
[19] AIR 2019(NOC)585 Mad.
[20] AIR 2019 (NOC)605 M.P.
[21] AIR 2019(NOC)672 Chh.
[22] AIR 2018 H.P. 1

to the life of petitioner and in case she is not permitted to terminate the pregnancy , is likely to suffer grave injury, not only to her physical but mental health also. The relief sought in this writ petition is ,therefore, also covered by S-3(2)(i) of Medical Termination of Pregnancy Act,1971.In this case pregnancy was at an advance stage i.e.32 weeks, however, having regard to the danger to life of the petitioner and expert opinion that the foetus may not survive to extra uterine life, the court deem it appropriate to grant permission to the petitioner to terminate the pregnancy.

Rajasthan High Court in ***Dr.Pramod Inderjeet Singh Bedi v. State of Raj & others***[23] , held that Rule-8 of PC & PNDT Rules 1996 prescribes the procedure for renewal of registration in normal course or it can be said that it is a general provision regarding the renewal of registration, however with the insertion of Rule-18A(4)(ii),legislature has made a specific provision or carved out an exception to general rule,directing the appropriate authorities including State,Districts and sub-districts not to accept the application for fresh registration or renewal of registration of those applicants against whom case is pending in any court for violation of provisionof PC&PNDT Act 1994 and Rules of 1996. With the insertion of R-18A(4)(ii) in the statute book, a classification is created among existing ultrasound clinics firstly,where a criminal case is pending and secondly,where other irregularities in compliance of Act of 1994 and Rules of 1996 exist.Further the court held that as statute contains both a general as well as specific provision, later must prevail.The court also clarified that the word pending used in Rule-18A(4)(ii) of Rules 1996 does not mean that charges have actually been framed or trial commenced.

Hon'ble Supreme Court in ***UOI v. Indian Radiological & Imaging Association & others*** [24], held that Parliament has conferred upon Central Govt. the rule making authority to specify the minimum qualification for persons to be employed at genetic counseling centres, laboratories and clinics. Specification of qualifications should be read in purposive sense which will fulfill the object of law.Even on plain and natural construction of the words used by Parliament, specification of qualification must necessarily comprehend the power to prescribe training.Rationale for this is that training would sensitize the person concerned to salutary object and purpose of the legislation which has been enacted by the Parliament to deal with serious social evil and be conscious of misuse of sex selection tests. Pre-natal diagnostic procedures are susceptible to grave misuse. Parliament having unquestioned authority and legislative competence to frame the law, considered it necessary to empower the central govt.to frame rules. Wisdom of legislature in adopting the policy can't be substituted by court in exercise of the power of judicial review.Prima facie, judgment of Delhi High Court in AIR 2016 Del 78 has trenched upon the area of legislative policy. Judicial review can't extend to

[23] AIR 2018 Raj 100
[24] AIR 2018 SC 1422

reappreciating efficacy of legislative policy adopted in law which has been enacted by competent legislature. Both Medical Council Act 1956 and PC&PNDT Act 1994, are enacted by Parliament which has the legislative competence to do so. Training Rules 2014 made by central govt. in exercise of power conferred by Parliament. Prima facie rules are neither ultra vires the parent legislation nor do they suffer from manifest arbitrariness. Judgment of Delhi HC needs to be stayed during pendency of proceedings. Judgment of HC squarely impinges upon directions issued by SC in AIR 2016 SC 5122 which shall be strictly enforced by all states and UTs untrammeled by any order of any HC or any other court.

In ***Pankaj Kumar Singh v. State of Bihar and another***[25] , the petitioner moved the court for quashing of the order dated 23-5-2013 directing for closing of ultrasound centre being run by petitioner in the name of 'Radio Diagnostic Point'. The court held that petitioner being a holder of B.A.M.S. degree, is not a person qualified to make a report of an ultra sound test. The same can done through a person who is qualified to give such a report.Thus, the very initial grant of licence to petitioner was clearly illegal and could not have been without connivance of the officers concerned. Further, from the admission of ld. Counsel for the petitioner that the required persons were not available, coupled with the fact that nothing has been shown with regard to a person having B.A.M.S.degree being entitled to run such a clinic without employing a person who is qualified to report on the ultrasound tests conducted,the writ petition stands dismissed. Further ,the Principle Secretary,Dept.of Health,Govt. of Bihar,Patna is directed to take appropriate action against the person(s) responsible for issuance of such licence and also to take appropriate steps so that such grave illegality, which directly affects the citizens at large,doesn't recur.

In ***Minor Rathod Ravinaben v. State of Gujarat & others*** [26]**,** the medical practioner was of the opinion that the termination of pregnancy which was less than 20 weeks was involving slight risk. But this risk was comparatively lesser than the mental agony and physical risk of continuing pregnancy till full term and delivery. So the permission to terminate the pregnancy was granted to minor rape victim.

In ***Dr.T.Rajakumari & others v. Govt.of Tamilnadu,Chennai & others*** [27], Delhi High Court struck down S-2(p) of PC&PNDT Act 1994 by order dt 17-2-2016 and consequently Rule 3(3)(1)(b) of PNDT Rules also been struck down as ultravires the Act.SC held that once a High Court has struck down the provisions of the central govt.,it can't be said that it would be selectively applied in other states.Thus there is no question of applicability of provisions struck down by the High Court as of now ,until and unless the Hon'ble SC upsets the judgment or stays the operation of the judgment.

[25] AIR 2017 Pat 43
[26] AIR 2017(NOC)1121(Guj
[27] AIR 2016 Mad 177

In ***Ms. 'X' v. UOI and others*** [28], petitioner was a rape victim and seeking termination of 24 weeks pregnancy.The findings of the Medical Board made it clear that the risk to the petitioner of continuation of her pregnancy,can gravely endanger her physical and mental health,as foetus is having severe multiple congenital anomalies.A perusal of S-5 of MTP Act 1971 reveals that the termination of pregnancy,which is necessary to save the life of pregnant woman,is permissible.Thus the SC allowed the petitioner to terminate the pregnancy.

In ***Saksham Foundation Charitable Society v. UOI***[29], the court held that S-5(2)(a)(b) &6 of PC&PNDT Act 1994 are not violative of A-14&21 of Constitution. Having regard to the social evil, relating to sex determination of unborn child which Parliament sought to remedy by enactment of the provisions of Act of 1994,it can't be said that provisions are unconstitutional. Parliament had the legislative competence to enact the law, in any event, under E-97of List-I of 7th Schedule. The provisions are not either arbitrary or violative of A-21 of Constitution or for that matter, violative of A-14 of Constitution.On the contrary, the Act is designed to ensure that the fundamental human right of a mother and unborn foetus is not violated by the misuse of sex selection diagnostic procedure, resulting in female foeticide. Court can't interfere with the wisdom of Parliament in implementing legislative policy in a particular manner. Whether any alternate means would better implement the legislative policy, is for Parliament to determine. Thus the court held that the constitutional validity of the Act can't be struck down on that ground.

In ***Janaki Ultra Sound Centre,Bhokardan v. The Appropriate Authority under PC&PNDT Act and Naib Tehsildar Bhokardan,Distt.Jalna & others***[30] , sonography machine was sealed u/s 30 of PC&PNDT Act 1994 and Rule-12 of PNDT Rules 1996.In the report of the committee merely it was observed that doctor had violated the Act,hence sonography machine was sealed.Nothing to show that committee had arrived at conclusion that machine was used for committing the offence or that committee had reason to believe or had formed reasonable belief about any offence committed with the use of machine or that there was high possibility of said machine being used for committing offences in future.So the requisite ingredients of R-12 were missing from the report,on the basis of which the court directed the sonography machine to be desealed.

In ***Haryana Integrated Sonologist Association(HISA) & another v. State of Haryana & others*** [31], the writ petition was filed against the judgment of Division Bench relating to the issues covered under S-2(g)(m) of PC&PNDT Act 1994, A-19(1)(g) of the Constitution and S-17(3)(d) of Medical Council Act 1956. The High Court held that it is abundantly clear that only aspect which was really urged and examined by the division bench was qua the definition

[28] AIR 2016 SC 3525
[29] AIR 2015(NOC)513(All)
[30] AIR 2015(NOC)1040(Bom)
[31] AIR 2014 P&H 7

of registered medical practitioner and exclusion of ayurvedic doctors from the ambit of the Act. The division bench has clearly opined that to include the doctors like petitioner, herein would amount to re-writing the definition of 'registered medical practitioners' under the PC&PNDT Act.This issue, as observed ,is best left to the experts and the legislature. The HC further noticed that PNDT Act is a special Act dealing with the particular aspect enacted with the object of prohibiting pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide.The learned counsel for the petitioner contended that he can own a machine but can't operate it, which is liable to be struck down as ultra vires the right under Constitution of India to carry on his business,profession and trade under A-19(1)(g).The counsel further argued that so long as those aids can be used for the purposes of practicing in their own system of medicine, ther can be no prohibition.But this contention of the petitioner was rejected by the court by laying emphasis on the point that the very objective with which the PNDT Act has been enacted would show that the aim is to be subserved by putting restrictions on the category of persons who can operate the machine in question.This is done by definition clauses (g) and (m) of S-2 of PC&PNDT Act 1994.So the petition was dismissed by the court.

In ***Bashir Khan v. State of Punjab and another***[32] , the petitioner approached the SDM Balachaur through an application u/s 3 of MTP Act 1971 for the termination of her pregnancy which resulted due to rape. The SDM, however was of the view that the application was not maintainable before a judicial magistrate, since there was no specific provision empowering the judicial magistrate to pass an order granting permission to terminate the pregnancy. When the matter came before the High Court, it observed that, it should have been possible for either the state or the parties themselves to have approached the District Medical Officer and who should have given directions for the constitution of two member committee of doctors to give opinion on the fact that the continuance of pregnancy would have involved risk to the life of woman and there was grave injury of physical or mental health of the petitioner. The court further said that the State need not have applied to the Magistrate, a procedure which was adopted in this case. On the other hand, if the investigating officer comes by information that the offence of rape has resulted in pregnancy and victim had expressed that she didn't want to retain the foetus, the state could have assisted the victim to secure the necessary certification and admitted her in a govt. hospital or a recognized institution for carrying out the other medical procedure necessary for such termination. The magistrate was justified in holding that he didn't have the competency, but here again, a alittle more resourcefulness on his part would have helped the party to secure what was redressible through the procedures that were in conformity with law, namely of a direction to the competent head of medical institution to examine the petitioner by two medical practitioners in the manner contemplated u/s 3(2) of the

[32] AIR 2014 P&H 150

MTP Act 1971.To ensure that the victim of rape who becomes pregnant does not lose time by applying from court to court, there shall be general instructions given by the Director General of Police to all the police stations to render all the assistance to secure appropriate medical opinions and also provide assistance for admission in govt. hospitals and render medical assistance as a measure of support to the traumatized victim. The need to apply to the court for permission would arise only in a situation where there is a conflict of whether the pregnancy must be terminated or not or when the opinion of two medical practitioners themselves differ. It is hardly necessary in a situation where there is no contest and victim gives her own consent and guardian also gives consent and there is proof of such pregnancy was resultant of rape. The court at last said that this instruction shall also be circulated to all the station inspectors manning police stations in the state of Punjab.

In ***Jashmina Dilip Devda v. State,Appropriate Authority,Dept.of Health & Family Welfare,New Sachivalay & another***[33]**,** the petition was filed challenging the order passed by the State Appropriate Authority dt.17th March 2011.The court held that as required under the law and procedure, necessary form/writing for the consent of patient for the undergoing operation/surgery has been filled in. If the patient and/or her relatives were not willing, the pregnancy could not have been terminated, meaning thereby, the complainant and the family members of the patient have not accepted the medical advise and shown willingness for the surgery and thereafter can't be heard to say that there is violation of provision of PC&PNDT Act. This issue is also required to be considered in background of medical science. The diagnosis of foetus having Hydrocephalus at the time of sonography may have led to such a decision. Therefore, considering the underlying object of the Act that termination of pregnancy of the female foetus is required to be curbed and to achieve object in public interest, such Act has been made. However, it can't be stretched that even after medical opinion or medical diagnosis, when there is possibility of either risk to the life or whether child to be born may have abnormality, such termination of pregnancy is not allowed or permitted. In fact on the basis of right to privacy as well as human rights, patient, who is expected mother would be a best judge or a person to have such decision guided by the medical science or opinion. The DAA was legally required to record the reasons and then to pass the appropriate order and that the DAA had to specify the period of suspension of the registration. This would clearly suggest that the procedure as required u/s 20(1)(2) of the Act have not been followed with regard to the issuance of notice or the show cause notice and the order of DAA could have been set aside in appeal. Thus the appeal was dismissed by the court.

[33] AIR 2014 Guj 28

In ***Dwarika Prasad v. State of UP,Dept. of Health & Family Welfare and others***[34], the issue which came before the court was regarding S-4(3),20,29,32 of PC&PNDT Act 1994 and R-9,10(1A) of PNDT Rules 1996.It was contended by the state that though equipments were shown but registration certificate was not produced. Maintenance of records was not found in accordance with Rules as records were not furnished on prescribed Form-F. As sex determination was being carried in the clinic, so the licence to run the ultrasound test centre was cancelled by the court.

## E. CONCLUSION

Though very few cases have come before the court for taking cognizance of the provisions relating female foeticide, yet the Court has played an important role. The judiciary under our Constitutional scheme has been performing positive and creative function in securing and promoting human rights of the people. The latest judicial trend reveals that the courts are quite enthusiastic in using the law as a tool of social revolution. Judicial activism owes much of its scope to the loopholes in the legislation and necessity for implementation of legal provisions. The examination of judicial activism from feminist perspective would reveal the stark realism of its effect-adverse or positive, on Indian woman. The desirability has to be seen with a view to correct the imbalances and injustices perpetrated on her, by the orthodox and outdated laws and related interpretations. With this objective the judiciary has played a very important role in eradicating the evil practice of female foeticide. And to start with, it is only due to the interference of the judiciary, that amendment has been made in the PNDT Act 1994. Besides this, judiciary has given a very important decisions regarding the interpretation of the provisions of PC and PNDT Act 1994 and IPC 1860. Like under PC & PNDT Act 1994, one conviction has been made for sex determination for the first time in 2006. Under the provisions of Indian Penal Code 1860, Court has emphasized that there must be a nexus between the act of causing miscarriage and the death of a person, then only accused can be held guilty, if circumstantial evidence has been produced before the court, then it must be proved beyond reasonable doubt. Under IPC 1860, liability for causing miscarriage can arise on woman also i.e. woman who herself causes her miscarriage, by considering this point, court has granted a conviction. Hence, in the climate of exploitation, conflict and violence, Judges are not justified in invoking the doctrines of self-restraint and passive attitude. The judiciary is to innovate new procedures to meet the challenges of modern times, and this has been shown by the amendment in the PNDT Act, 1994.

[34] AIR 2014(NOC) 160(All)

The analysis of the discussed cases reveals that the Indian judiciary is playing a very important role for effective implementation of the female foeticide Statutes .Only after several directions were issued by the Supreme Court and the various High Courts, that Government took upon itself the task of creating general awareness, sensitization and also prosecuting doctors and clinics which were found violating the provisions of the Act. Judicial decisions do have a tremendous impact on the formulation and implementation of national policies and which has happened in the present case also. So, we can say that judiciary has done a commendable job in improving the position of women by granting convictions to persons who are indulged in sex determination leading to female foeticide and unlawful miscarriage.