

10-1-2007

Gender Discrimination Fuels Sex Selective Abortion: The Impact of the Indian Supreme Court on the Implementation and Enforcement Of The PNDT Act

Kristi Lemoine

John Tanagho

Follow this and additional works at: <https://repository.law.miami.edu/umiclrc>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Kristi Lemoine and John Tanagho, *Gender Discrimination Fuels Sex Selective Abortion: The Impact of the Indian Supreme Court on the Implementation and Enforcement Of The PNDT Act*, 15 U. Miami Int'l & Comp. L. Rev. 203 (2007)

Available at: <https://repository.law.miami.edu/umiclrc/vol15/iss2/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

GENDER DISCRIMINATION FUELS SEX SELECTIVE ABORTION: THE IMPACT OF THE INDIAN SUPREME COURT ON THE IMPLEMENTATION AND ENFORCEMENT OF THE PNDT ACT¹

By Kristi Lemoine* and John Tanagho**

I. Introduction	204
II. Background.....	207
A. Historical Discrimination against Girl Children in India....	207
B. Medical Technologies Antiquate Traditional Infanticide ...	209
C. Integral Actors in the Sex Selection Scheme	211
D. Sex Selection Touches All of India.....	215

¹ In 1994, the Indian parliament passed the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (PNDT) as the first national law against sex determination and sex selective abortion. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994; India Code (1994), *available at* <http://indiacode.nic.in/>. The Act was amended in 2003, changing its title to the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, No. 14 of 2003; India Code (2003), *available at* <http://indiacode.nic.in/> [hereinafter PNPD Act]; Shruti Bedi, *Save the Girl Child*, THE TRIBUNE (Chandigarh, India), May 23, 2004, *available at* <http://www.tribuneindia.com/2004/20040523/herworld.htm#2>.

* J.D., Loyola University Chicago, expected January 2009. I would like to thank the people we met with in New Delhi who gave generously of their time to explain this challenge their country faces. Along the way they communicated their passion for their country, their work, and the children of India. I thank Professor Diane Geraghty, who guided John and me on this project. And I thank God for loving children of all races and genders in all parts of the world.

** J.D., Loyola University Chicago, expected May 2008. I would like to thank the editorial board of the *University of Miami International and Comparative Law Review* for accepting this article for publication. I thank my loving wife, Wendy, for graciously supporting me throughout the article process, including our field research in India. I thank God who declares that women and men are of equal and inherent worth. And I thank all the people in India who passionately advocate for gender equality and justice for India's girl children.

E. Sex Determination Reaches Dangerous Levels.....	217
F. The Causes of Sex Determination in India.....	218
G. The Consequences of Sex Selective Abortion.....	222
III. Discussion.....	226
A. Legislation: The Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act.....	226
B. The Indian Supreme Court.....	231
1. Powers and Authority.....	232
2. History of the Court.....	235
3. Pertinent Rulings.....	238
4. Populace Response.....	240
IV. Analysis.....	242
A. The Supreme Court's Rulings on the PNNDT Act.....	242
B. The Impact of the Supreme Court's Rulings: The Resulting Implementation and Enforcement of the PNNDT Act.....	244
1. Impact on Societal Attitudes.....	246
2. Impact on High Courts.....	247
3. Impact on the Legislature.....	248
C. Limitations On the Court's Impact.....	248
D. Opportunities for Future Impact.....	249
V. Conclusion.....	251

“Son preference has become daughter hatred in India . . . [making] [t]he fetal stage . . . the riskiest time in a woman's life . . .”²

I. INTRODUCTION

She could have been the next Mother Teresa, Rosa Parks, or Sonia Gandhi. She might have discovered the cure for AIDS or forged new paths for women in business or become the first woman Supreme Court Justice in India. She could have experienced the gift of a human life; but we will never know because the collusion of the medical

² Sabu M. George, *Hidden Genocide*, TIMES OF INDIA, Mar. 8, 2007, at 18 [hereinafter *Hidden Genocide*]; Sabu M. George, *Millions of Missing Girls: From Fetal Sexing to High Technology Sex Selection in India*, 26 PRENATAL DIAGNOSIS 604, 606 (2006) [hereinafter George] (noting that “over one in seven girls is eliminated before birth *because they are female*”) (emphasis added).

industry, multinational corporations, individual families and an apathetic and corrupt government are exterminating her to the tune of half a million a year: *she* is the Indian girl child.³

In India, the low cost and widespread availability of prenatal medical technologies have led to pervasive sex determination followed by the sex selective abortion of healthy female fetuses.⁴ This practice, fueled by gender discrimination, has resulted in a dangerously skewed sex ratio in India—one that is progressively worsening as the number of girls per 1000 boys has gone from 962 in 1981, to 945 in 1991, to an all-time low of 927 in 2001.⁵ This is particularly disturbing because India, with a population of over one billion, is the largest democracy and second most populated country in the world.⁶ Because of the sheer size

³ George, *supra* note 2, at 604 (“[I]t is likely that within 5 years India will annually eliminate over a million girls before birth.”).

⁴ Kenan Farrell, *Where Have All the Young Girls Gone? Preconception Gender Selection in India and the United States*, 13 *IND. INT’L & COMP. L. REV.* 253, 259–60 (2002). Farhat Moazam, *Feminist Discourse on Sex Screening and Selective Abortion of Female Foetuses*, 18 *BIOETHICS* 205, 209 (2004) (discussing how the “simplicity of [ultrasonography and amniocentesis] procedures has made a burgeoning, lucrative business possible.”). The PNDT defines “sex selection” as “any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex.” PNDT Act, *supra* note 1, at Ch.I.2(o).

⁵ Jeremy Laurance, *Ten Million Girls Aborted As Indians Seek Male Heirs*, *THE INDEPENDENT* (London), Jan. 10, 2006, available at <http://www.countercurrents.org/gender-laurance100106.htm>; Census of India 2001: Provisional Population Totals: India, available at http://www.censusindia.net/results/prov_pop_main.html. The problem is even worse in states such as Punjab, where the 2001 census reported 793 girls to 1000 boys. Census of India 2001: Provisional Population Totals: India, available at http://www.censusindia.net/results/prov_india2.html. Moreover, the 2001 Indian census reports that the sex ratio will continue to decline, reaching 930 to 1000 males in 2026. Census of India 2001, Population Projections for India and States 2001–2026, at xi, available at http://www.censusindia.net/Projection_Report.pdf.

⁶Population Resource Center, Executive Summary: A Demographic Profile of India, <http://www.prcdc.org/summaries/india/india.html>. India is expected to surpass China by 2040 with 1.5 billion people. *Id.* 1 out of 6 people in the world lives in India. *Id.*

of India's populace, the consequences of the skewed sex ratio are astounding.

Indian society has responded to this societal development in several ways. Women's groups and health activists formed the Forum Against Sex Determination and Sex Pre-selection in the 1980s to raise awareness about the problem of the sex selective abortion of girl children.⁷ The campaign helped craft state legislation criminalizing sex selective abortion in 1988.⁸ Six years later, in 1994, the Indian parliament passed the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act as the first national law against sex determination and sex selective abortion.⁹ Yet the PNDT Act, in effect since 1996, was routinely ignored and the practice of sex selection remained widespread.¹⁰

That changed, however, when the issue reached the Indian Supreme Court. In response to the lack of PNDT implementation and enforcement, clearly documented in a 1998 Public Interest Litigation (PIL) petition,¹¹ the Indian Supreme Court issued clear and specific directives to the Central and state governments, ordering all government officials to implement and enforce the ban on sex selective abortion "with all vigour and zeal."¹² The Supreme Court's ruling thrust the issue of sex selective abortion into the collective conscious of the Indian public and spurred implementation and enforcement initiatives.

⁷Rupsa Mallik, *Negative Choice*, SEMINAR, Dec. 2003, available at <http://www.genderhealth.org/pubs/MallikNegativeChoiceSeminarDec2003.pdf>.

⁸ The Maharashtra Regulation of Use of Prenatal Diagnostic Techniques Act was the first state law against prenatal diagnosis for sex selection. Maharashtra Legislature Secretariat, L.C. Bill No. VIII of 1998.

⁹ PNDT Act, *supra* note 1.

¹⁰ Prabhat Jha et al., *Low Male-to-Female Sex Ratio of Children Born in India: National Survey of 1.1 Million Households*, THE LANCET, Vol. 367, Jan. 21, 2006, at 211.

¹¹ The NGOs CEHAT and, MASUM, and researcher Sabu M. George filed a PIL petition. CEHAT, Call for a Ban on Sex Selection, at 2, <http://www.cehat.org/pndt.html> [hereinafter CEHAT] (last visited Feb. 2, 2007). The purpose of the PIL was two-fold: 1) to cause the central and state governments to implement the PNDT Act and 2) to demand amendments to the PNDT Act. *Id.*

¹² Centre for Enquiry into Health and Allied Themes v. Union of India, (2001) 3 S.C.R. 534, 537.

This Article discusses the history and current status of sex selection in India and analyzes the role sex selective abortion plays in the sex ratio disparity. The Article then discusses the history and extensive authority of the Indian Supreme Court and examines the impact the Court's rulings have had on the implementation and enforcement of the PNDT Act. While the Court has positively impacted the Central and state governments' implementation and enforcement of the Act, the Court's role and effect on societal attitudes and continued enforcement of the PNDT Act are inherently limited.

II. BACKGROUND

Part II examines the long-standing practice of gender discrimination and sex determination in India, including historic methods of infanticide.¹³ This Part then explores how medical technology has impacted and altered the practice of sex selection, including the integral parties.¹⁴ It then discusses the most affected geographic regions and the magnitude of the problem.¹⁵ Finally, this Part notes the causes and societal consequences of the skewed sex ratio.¹⁶

A. Historical Discrimination against Girl Children in India

While systematic discrimination against girl children has existed in India for centuries, it was not until the late eighteenth century that British officials first documented it in the form of female infanticide.¹⁷ Female infanticide is the killing of a child in its early years because of the child's gender, including through purposeful neglect.¹⁸ Traditional

¹³ See *infra* Part II.A (discussing historical and contemporary infanticide).

¹⁴ See *infra* Part II.B–C (discussing the effect of medical advances and key actors).

¹⁵ See *infra* Part II.D–E (discussing geographic and educational disparities and severity of the problem).

¹⁶ See *infra* Part II.F–G (discussing the causes and consequences of sex selection).

¹⁷ Rita Patel, *The Practice of Sex Selective Abortion in India: May You Be the Mother of a Hundred Sons*, THE CENTER FOR GLOBAL INITIATIVES, at 2 (1996), available at <http://gi.unc.edu/research/pdf/abortion.pdf>.

¹⁸ Kirsten M. Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEO. WASH. J. INT'L L. & ECON. 541, 544 (1996–1997).

methods of infanticide take on a variety of forms, including poisoning, sedative overdose, strangulation, feeding the child paddy grain soaked in milk or juice extracted from tobacco leaves, and asphyxiation.¹⁹

Female infanticide also occurs through the deliberate neglect of girl children, which is sometimes referred to as "extended infanticide." Extended infanticide occurs when girls are given less food and health care than boys, causing them to die from disease or malnutrition.²⁰ Girls are often breast fed for shorter periods than boys and, when sick, taken for fewer medical appointments or none at all.²¹ Gender discrimination in health care provisions is easily seen in rural Punjab, where the medical expenditure for sons is 2.34 times higher than for daughters.²² In fact, in 1987, Punjab families spent double the money on health care for boy infants than for girls.²³

The 1871 Indian census provides empirical evidence of the effects of female infanticide revealed an abnormal sex ratio of 940 women to 1000 men.²⁴ The British attempted to address the problem by criminalizing infanticide through the Infanticide Act of 1870.²⁵ However, it was doubtful whether members of the public would feel morally obligated to report suspicious incidents because the practice was so widely accepted.²⁶ That concern was confirmed in the Kaira district when

¹⁹ Neelambar Hatti et al., *Lives at Risk: Declining Child Sex Ratios in India*, Lund Papers in Economic History, No. 93, 2004, at 28. Renuka Chowdhury, the minister of State for Women and Child Development in India, stated that "[t]he minute the child is born and she opens her mouth to cry, they put sand into her mouth and her nostrils so she chokes and dies. They bury infants into pots alive and bury the pots. They put tobacco into her mouth. They hang them upside down like a bunch of flowers to dry." Palash Kumar, *India Has Killed 10 Million Girls in 20 Years*, ABCNews (Dec 15, 2006), <http://abcnews.go.com/Health/story?id=2728976>.

²⁰ Hatti et al., *supra* note 19, at 10; Backstrom, *supra* note 18.

²¹ Hatti et al., *supra* note 19, at 10.

²² Geetanjali Misra et al., *Poor Reproductive Health and Environmental Degradation: Outcomes of Women's Low Status in India*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 273, 283 (1995).

²³ *Id.*

²⁴ Patel, *supra* note 17.

²⁵ *Id.*

²⁶ *Id.* at 3. A popular saying in India is, "[r]aising a girl is like watering a neighbour's tree." Moazam, *supra* note 3, at 206.

the 1872 census revealed that one peasant caste had only 39 to 53 girls for every 100 boys.²⁷ The absence of girl children was also seen in the Bedees, a branch of the Sikhs, who were known as the *koree mar*, or daughter butchers.²⁸ Among other castes, like the Rajputs and the Chouhans, the custom of female infanticide is supposed to have existed “since time immemorial.”²⁹ In one Indian community 20,000 girls were killed annually because of their sex,³⁰ while some villages lacked any girls at all.³¹

While infanticide is an ancient practice in India, recent medical developments have replaced it with an equally discriminatory variation: sex identification followed by sex selective abortion.³²

B. Medical Technologies Antiquate Traditional Infanticide

While infanticide sought to eliminate a girl child after birth, the development of ultrasonography and amniocentesis made it possible to prevent the birth of a girl child through sex selective abortion, thereby “quicken[ing] the pace of death of the female child from the born to the unborn stage.”³³ The two-step process involves first determining the sex of the fetus in one of three ways: amniocentesis, chorionic villus

²⁷ Hatti et al., *supra* note 19, at 27. Successive census returns of 1891, 1901, and 1911 confirmed the low proportion of females in this community. *Id.*

²⁸ JILL RADFORD AND DIANA RUSSELL, *FEMICIDE: THE POLITICS OF WOMAN KILLING* 69 (Twayne Publishers 1992).

²⁹ *Id.*

³⁰ Hatti et al., *supra* note 19, at 26 (noting that the “British Resident at Baroda, in March 1808, reported that annually 20,000 girls were killed mercilessly in Jadeja Rajput households.”).

³¹ *Id.* at 27. One village in eastern Uttar Pradesh had no daughters at all. *Id.* One household had no grown daughters for over 100 years. *Id.* In Kathiawad there were only 63 females under 15 years old. *Id.*

³² *Id.* at 7. While the Medical Termination of Pregnancy Act of 1971 created a statutory right for a woman to have an abortion, there is no constitutional right to an abortion in India. Interview with Madan B. Lokur, Judge, High Court of Delhi, in New Delhi, India (Mar. 8, 2007).

³³ ASHA BAJPAI, *CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE* 386 (Oxford Univ. Press 2d ed. 2006) (2003).

sampling, or ultrasound.³⁴ The second step consists of the sex selective abortion.³⁵

Of the three prenatal sex determination options, ultrasound is the most popular because ultrasound machines are widely available throughout India in both urban and rural areas.³⁶ Government data shows that the manufacture of ultrasound machines in India increased thirty-three times between 1988 and 2003.³⁷ In 1994, just over 1,000 ultrasound machines were produced in India. In 2000–2003, that number increased to almost 20,000.³⁸ By May 2001, the registration of clinics eligible to purchase ultrasound machines climbed to 30,000.³⁹

Where a proliferation of ultrasound machines occurs in India, sex selective abortion and skewed birth ratios soon follow.⁴⁰ While ultrasound machines have many uses, in India they are disproportionately used for sex determination.⁴¹ Research shows that the most plausible reason for the staggering sex disparity in India is the widespread accessibility of ultrasound tests, allowing parents to learn their child's gender before birth.⁴² The aggressive marketing of ultrasound machines coupled with easy availability of cheap credit for the purchase of the machines have made prenatal scanning accessible in most parts of the country.⁴³

As a case in point, a study of hospitals in the city of Pune found that between June 1976 and June 1977, 700 women used sex-determination procedures in a given hospital.⁴⁴ Four hundred fifty of those women were told they would have a daughter and 430 of those 450 elected for an abortion.⁴⁵ Yet, the 250 women who were told they were

³⁴ Patel, *supra* note 17, at 4.

³⁵ *Id.*

³⁶ Jha et al., *supra* note 10.

³⁷ Sabu M. George, *Sex Ratio in India*, 367 LANCET (2006).

³⁸ *Id.* (1,314 in 1994, with 19,581 in 2000–2003).

³⁹ *Hidden Genocide*, *supra* note 2.

⁴⁰ *Id.*

⁴¹ Sabu M. George, *Sex Selection/Determination in India: Contemporary Developments*, REPRODUCTIVE HEALTH MATTERS, 2002, at 190.

⁴² Laurance, *supra* note 4; Jha et al., *supra* note 9.

⁴³ *Hidden Genocide*, *supra* note 2.

⁴⁴ Lakshmi Lingman, *Sex Detection Tests and Female Foeticide: Discrimination Before Birth*, INDIAN J. S.W. (1991), available at <http://www.hsph.harvard.edu/grhf-asia/forums/foeticide/articles/detection.html> (last visited Feb. 2, 2007).

⁴⁵ *Id.*

carrying a boy all continued their pregnancies.⁴⁶ Moreover, of the 8,000 abortions preceded by amniocentesis in six Mumbai clinics in 1986, 7,999 were of female fetuses.⁴⁷

As medical technology has advanced, so too have the methods available to prospective parents seeking to determine the sex of their fetus. Through recent developments in pre-conceptual technologies, the sex of a child can now be determined before conception.⁴⁸ By enabling prospective parents to “pre-select” the sex of the child, pre-conception technologies prevent the “wrong sex” fetus from being created in the first place.⁴⁹ Two of these methods are pre-implantation genetic diagnosis of embryos and sperm-sorting through flow cytometry.⁵⁰ One form of sperm sorting, called MicroSort, can shift the ratio to either eighty-eight percent female or seventy-three percent male.⁵¹ These medical technology developments have decreased the prevalence of the earlier more unsophisticated and observable forms of eliminating girl children, such as choking infants on rice husks, and replaced the unsophisticated methods with technology that selects sperm carrying the Y chromosome in order to facilitate conception of a male child.⁵²

C. Integral Actors in the Sex Selection Scheme

The Medical Industry is perhaps the biggest player in the field of sex selective abortion, a practice which has grown into a business worth at least \$100 million.⁵³ Some doctors even post advertisements to

⁴⁶ *Id.*

⁴⁷ Moazam, *supra* note 4.

⁴⁸ Vineet Chander, “It’s (Still) a Boy...”: Making the Pre-Natal Diagnostic Techniques Act an Effective Weapon in India’s Struggle to Stamp Out Female Feticide, 36 GEO. WASH. INT’L L. REV. 453, 469 (2004). See also Interview with A.R. Nanda, Executive Dir., Population Found. of India, in New Delhi, India (Mar. 6, 2007) (noting that marketing firms have advertised preconception determination services through the internet and marketing agents).

⁴⁹ Chander, *supra* note 48.

⁵⁰ Rachel E. Remaley, “The Original Sexist Sin”: Regulating Preconception Sex Selection Technology, 10 HEALTH MATRIX 249, 250 (2000).

⁵¹ Denise Grady, *Girl or Boy? As Fertility Technology Advances, So Does an Ethical Debate*, N.Y. TIMES, Feb. 6, 2007, at F5.

⁵² CEHAT, *supra* note 11.

⁵³ George, *supra* note 2, at 607. See also Interview with A.R. Nanda, *supra* note 46 (nothing that doctors and medical associations, described as the “big vested

promote ultrasound as a method of sex determination that read, "Pay Rs. 500 now rather than Rs. 500,000 later," referring to the high cost of dowry.⁵⁴ Other doctors drive through rural communities offering sex determination ultrasounds from machines in their cars.⁵⁵

While the PNDT Act made it illegal for doctors to reveal the sex of the unborn child to the parents, many doctors have found other methods for communicating the information, such as using pink and blue pens to write prescriptions, smiling brightly if it is a boy, or letting an assistant walk out with parents and tell them the sex of the baby rather than having the doctor disclose the information.⁵⁶

Additionally, manufacturers like General Electric (GE) and others exploit Indian society's preference for sons by aggressively marketing and selling their ultrasound machines.⁵⁷ GE is by far the "market leader" in producing and selling ultrasound machines to India.⁵⁸ While GE does not report sales figures specifically for ultrasound machines, its overall sales in India (including ultrasound machines and other diagnostic equipment) were \$250 million in 2006, up from \$30 million in 1995.⁵⁹

GE's enormous profits exist in part because GE markets its ultrasound machines as "essential pregnancy tool[s]," while obstetricians like Dr. Puneet Bedi say such machines are not even "necessary for mothers in low risk groups."⁶⁰ Additionally, GE targets so-called "big mouth"

interests," simply have a lot of money at stake and thus, despite their resolutions to the contrary, may not want doctors to get caught).

⁵⁴ Hatti et al., *supra* note 19, at 20.

⁵⁵ *Id.* at 21.

⁵⁶ Interview with Sanchita Sharma, Health Editor, Hindustan Times, in New Delhi, India (Mar. 8, 2007).

⁵⁷ Peter Wonacott, *Medical Quandry: India's Skewed Sex Ratio Puts GE Sales in Spotlight—Are Ultrasounds Used to Abort Selectively? A Clinic's Violations*, WALL ST. J., Apr. 18, 2007, at A1. Other companies include Toshiba, Siemens AG, Philips Electronics NV and Mindray International Medical Ltd. *Id.*

⁵⁸ *Id.* Due to GE's large sales, small towns with no drinking water, electricity, or paved roads somehow manage to have ultrasound machines. *Id.* Additionally, GE has specifically targeted small-town doctors, marketing "laptop machines to doctors who traveled frequently, including to rural areas." *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

customers, offering them discounts to encourage their boasting.⁶¹ While GE claims they stress to buyers that they should not use their machines for sex selection, in April 2007 prosecutors in the central Indian city of Hyderabad charged GE in criminal court with knowingly supplying ultrasound machines to unregistered clinics that were illegally performing sex selection tests.⁶²

Members of the medical profession argue that doctors are not to blame, saying that doctors are an easy target because they have access to medical technology.⁶³ Chief executive of GE Healthcare South Asia, V. Raja, says ultrasounds are “not the root cause of female feticide in India.”⁶⁴ Dr. Narendra Saini, Joint Secretary of the Indian Medical Association, explained that doctors and ultrasounds are not to blame, and cited a string of other reasons for disproportionate birth ratios, including improved nutritional status in women which leads to more male children, the practice of not counting females in the census because they are considered unimportant in families, the prevalence of stillbirths among male fetuses, which have recently decreased, leading to more male births than before, and finally, natural selection.⁶⁵

Contrary to such statements of denial by the medical community and GE, health editor for the *Hindustan Times*, Sanchita Sharma, who has investigated and reported on the use of ultrasounds for sex determination for ten years, said that doctors strongly promote sex determination and make sure they get clients.⁶⁶ Ms. Sharma emphasized that feticide is possible mainly because of the technology and the doctors

⁶¹ *Id.*

⁶² *Id.*

⁶³ Interview with Dr. Narendra Saini, Joint Sec’y Indian Med. Ass’n, in New Delhi, India (Mar. 8, 2007).

⁶⁴ Wonacott, *supra* note 57.

⁶⁵ Interview with Dr. Narendra Saini, *supra* note 63.

⁶⁶ Interview with Sanchita Sharma, *supra* note 55. *See also*, George, *supra* note 2, at 605. Additionally, doctors with top positions in fertility clinics are reinforcing sex discrimination as morally sound and culturally entrenched. *Id.* The Director of the Malpani Infertility Clinic justified pre-implantation sex selection by saying: “I do not understand why some Indians are ashamed that most Indians want to have boys. The preference for sons is based on traditions which are centuries old, and these preferences are not going to change quickly.” *Id.* The director’s comment is itself one reason why the mindset of son preference is very slow to die away.

performing the procedures.⁶⁷ Ms. Sharma noted that, while infanticide would still exist but for the technology and doctors, the sex ratio would not be so skewed because it is much harder to kill a baby than to get an abortion.⁶⁸ As to the problem of girls going unreported in the census, in Delhi, a city with a birth registration system online covering approximately 95% of births, the sex ratio in 2004 was 818 girls to 1000 boys.⁶⁹

While doctors and ultrasound manufacturers play a significant role in sex determination and sex selection, parents and extended family do as well. Husbands and family members pressure women to end a pregnancy if the baby is a girl.⁷⁰ Because of traditional and religious beliefs in India, families want at least one son.⁷¹ As a result, women who already have one or two daughters are under the most pressure to give birth to a boy.⁷² For second births, with one preceding girl, the ratio of girls to boys is 132, and for third births, with two previous girls, the ratio is 139.⁷³ It should be noted, however, that sex ratios for second or third births where the previous children were boys were about equal.⁷⁴

The pressure on women is not just external. Pregnant women sometimes choose to abort rather than give birth to a daughter who will live a life of oppression and hardship similar to her own.⁷⁵ The problem

⁶⁷ Interview with Sanchita Sharma, *supra* note 56.

⁶⁸ *Id.*

⁶⁹ George, *supra* note 2, at 606.

⁷⁰ See Farrell, *supra* note 4, at 258–59.

⁷¹ See *infra* Part II.F (discussing the causes of son preference, including Hindu religious beliefs).

⁷² Jha et al., *supra* note 10, at 211.

⁷³ Therese Hesketh & Zhu Wei Xing, *Abnormal Sex Ratios in Human Populations: Causes and Consequences*, 103 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. 13261, 13273 (2006). See also Jha et al., *supra* note 8, at 211 (reporting comparable numbers of 759 girls for 1000 boys for one previous girl and 719 girls for 1000 boys for two previous girls).

⁷⁴ Jha et al., *supra* note 10.

⁷⁵ Farrell, *supra* note 4, at 258–59. “What women have seen of their own experience and of their mothers’ lives gives them an aversion to producing another potential sufferer. Many women are not able to envision their daughters having a better life than they themselves have experienced.” *Id.* One extreme example of the mistreatment of women in India is the “2.3 million women and underage girls forced into [India’s] sex industry.” Holly Burkhalter, *The Politics of AIDS: Engaging Conservative Activists*, 83 FOREIGN AFFAIRS (Jan/Feb.2004)

is not limited to mothers with little education, as women with grade ten educations or higher have significantly lower sex ratios than illiterate mothers.⁷⁶

Indian law enforcement officials also play a role in this pervasive practice primarily through their inaction.⁷⁷ Although the PNDT Act has been in effect for over a decade, only two doctors have been convicted for sex determination violations.⁷⁸ By failing to enforce the only Central government law on sex selection, law enforcement officials have tacitly approved of the practice, thus securing impunity for would-be offenders.

A similar problem can be seen in China, which also has a disproportionate birth ratio.⁷⁹ In China, weak law enforcement reinforces sex selection, leaving most doctors and families to conclude that there is nothing wrong with sex determination.⁸⁰ Chinese law enforcement officials reinforce the societal belief that daughter discrimination is wholly legitimate by failing to investigate and prosecute cases of sex selective abortion.⁸¹

D. Sex Selection Touches All of India

The practice of sex selective abortion occurs throughout the country of India.⁸² Birth ratios, however, are not consistent across India,

(citing the U.S. State Department), *available at* <http://www.foreignaffairs.org/20040101facomment83102-p20/holly-burkhalter/the-politics-of-aids-engaging-conservative-activists.html>. Burkhalter is Director of U.S. Policy and of the Health Action AIDS campaign at Physicians for Human Rights. *Id.*

⁷⁶ Jha et al., *supra* note 10 (683 to 869 sex ratio).

⁷⁷ Interview with A.R. Nanda, *supra* note 48 (noting that state government officials and appropriate authorities failed to enforce the PNDT Act).

⁷⁸ *Id.*

⁷⁹ Lesley Wexler, *Legal Implications of a Rising China: Allowing Girls to Hold Up Half the Sky: Combining Norm Promotion and Economic Incentives to Combat Daughter Discrimination in China*, 7 *CHI. J. INT'L L.* 79, 80 (2006).

⁸⁰ *See id.* at 92.

⁸¹ *Id.* at 93. Even though “Chinese law dictates harsh punishment for sex selective abortions and female infanticide, . . . governmental officials fail to investigate and prosecute because they believe the law is too strict, [and] the government ultimately reinforces people’s belief that daughter discrimination is legitimate.” *Id.*

⁸² Interview with Dr. Sabu M. George, Consultant, Center for Women’s Development Studies, in New Delhi, India (Mar. 6, 2007).

but are most disproportionate in wealthier states in the north and west, where ultrasound clinics were first available.⁸³ The child sex ratio is much more skewed in the economically developed states of Punjab (82), Haryana (59), Gujarat (50), Maharashtra (29), and Delhi (50), as well as the union territory of Chandigarh (54).⁸⁴ These land-rich states in the northwest have so few girls, they are commonly known as the “Bermuda Triangle” for girls.⁸⁵ A comparison of 1991 and 2001 census figures reveals that the situation in Punjab has worsened, as none of the districts recorded more than 850 girls per 1000 boys.⁸⁶

Geographic location is not the only indicator of disproportionate sex ratios. The decline in child sex ratios is twice as high in urban areas as in rural areas,⁸⁷ such as in Delhi, where 23,000 female fetuses were aborted in 2005.⁸⁸ This is likely due to increased access to and utilization of medical services in urban areas.⁸⁹ Slum areas have more girl children than wealthier areas in cities where sex selection services are widespread.⁹⁰ Additionally, sex selective abortion is stronger among certain sub groups, such as urban women, women with higher education, and women in households with a higher standard of living.⁹¹

⁸³ Vir Singh, *India's Gender 'Holocaust' Warning*, BBC News, Feb. 19, 2002, http://news.bbc.co.uk/2/hi/south_asia/18929892.stm; George, *supra* note 38, at 191.

⁸⁴ A.R. Nanda, *Not Just a Numbers Game*, 511 SEMINAR: BEYOND NUMBERS: A SYMPOSIUM ON POPULATION PLANNING AND ADVOCACY, 2002, *available at* <http://www.india-seminar.com/2002/511/511%20a.r.%20nanda.htm>.

⁸⁵ Chander, *supra* note 48, at 459.

⁸⁶ United Nations Population Fund, *Missing ... Mapping the Adverse Child Sex Ratio on India*, June 2003, at 5. Ten of the seventeen districts in Punjab recorded a stark reduction in the child sex ratio to less than 800 girls for every 1000 boys. *Id.* “Fatehgarh Sahib has the lowest child sex ratio with merely 754 girls to 1000 boys. What was observed as a trend in 1991 has become a disturbing reality in 2001.” *Id.*

⁸⁷ Hatti et al., *supra* note , 19 at 13.

⁸⁸ Delhi Accounts for 23,000 Female Fetus Abortions Last Year, *Indian Health News*, June 29, 2006, http://www.medindia.net/news/view_news_main.asp?x=11844.

⁸⁹ See George, *supra* note 2.

⁹⁰ See *id.*

⁹¹ Hatti et al., *supra* note 19, at 19.

E. Sex Determination Reaches Dangerous Levels

India's 2001 census revealed that, nationally, there are 927 girls for every 1000 boys from birth to age six, a sex ratio down from 945 in 1991.⁹² In the Indian population as a whole, there are 36 million fewer women than men, making it among the countries with the worst male to female ratios in the world.⁹³

While the number of sex selective abortions occurring in India annually is hard to pinpoint and estimates vary, it is likely that at least half a million healthy girl fetuses are aborted annually.⁹⁴ A study in the January 21, 2006 issue of *The Lancet*, reported that India was "missing" half a million female births yearly.⁹⁵ The article also speculated that this number, if consistent over the past two decades, would translate into some ten million abortions of girl fetuses.⁹⁶

This last number, while widely publicized, is subject to criticism. Dr. Sabu George of the Center for Women's Development Studies responded in *The Lancet* and said, "the claim that 10 million female feticides have been committed in India is highly unlikely because the quality of the data is suspect and the interpretation incorrect."⁹⁷ Dr. George stated, however, that in the next four years, India would likely eliminate over a million girls before birth annually.⁹⁸ Dr. George emphasized that irresponsible estimates such as Jha's actually hurt the fight

⁹² Singh, *supra* note 83. This sex ratio is "among the worst in the world." Tackling Sex Selective Abortion in India, BBC News, Nov. 8, 2006, http://www.bbc.co.uk/worldservice/trust/researchlearning/story/2006/11/061108_sex_selective_abortion.stm [hereinafter Tackling Sex Selective Abortion]

⁹³ Tackling Sex Selective Abortion, *supra* note 92.

⁹⁴ George, *supra* note 3, at 604; *but see* Satish Jacob, Campaign to Save Girl Babies, BBC News, Nov. 16, 1999, http://news.bbc.co.uk/2hi/south_asia/522944/stm ("Estimates of the number of female foetuses being destroyed every year in India vary from two million to five million.").

⁹⁵ Jha et al., *supra* note 10.

⁹⁶ *Id.*

⁹⁷ George, *supra* note 37, at 1725.

⁹⁸ George, *supra* note 2.

against sex determination and sex selective abortion by undermining the integrity of the social campaign.⁹⁹

Whatever the exact number, the evidence of sex selective abortion is felt and seen throughout India as “reports of female fetuses found in drains or dug from dry wells or floating in lakes or eaten by dogs are headline news.”¹⁰⁰

F. The Causes of Sex Determination in India

There are many factors in Indian society that contribute to the prevalence of sex selective abortion. Some key causes are the dominant patriarchal family structure, the religious preference for sons,¹⁰¹ the high cost of dowries, the economic limitations on women, and various population control measures.¹⁰² Sons are preferred to daughters in India for numerous reasons.¹⁰³ Sons have a higher wage-earning capacity, especially in Indian agrarian economies, while girls are perceived as an economic burden because of the still-pervasive dowry system and its attendant high costs.¹⁰⁴

Yet, the overarching societal reason for the high rate of sex selective abortion in India is the patriarchal structure of Indian society.¹⁰⁵ In India, sons carry on the family name, receive the family inheritance, and are responsible for supporting their parents in old age.¹⁰⁶ Parents will often live as extended families with their sons, daughters-in-law, and grandchildren.¹⁰⁷ In contrast, daughters generally join their husband's

⁹⁹ Interview with Dr. Sabu M. George, *supra* note 82 (“When we actually reach ten million, no one will pay attention. We are in a public campaign. We cannot afford to take chances with the truth.”).

¹⁰⁰ *Hidden Genocide*, *supra* note 2.

¹⁰¹ S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA* xlii (Oxford University Press 2002). Sathe notes that son preference is directly related to the “religious conviction that only the son can perform the last rites of a person after” death. *Id.*

¹⁰² For a general overview of these issues, see KATHERINE S. NEWELL ET AL., *DISCRIMINATION AGAINST THE GIRL CHILD: FEMALE INFANTICIDE, FEMALE GENITAL CUTTING AND HONOR* 6–7 (Youth Advocate Program International 2000).

¹⁰³ Hesketh & Xing, *supra* note 73, at 13272.

¹⁰⁴ *Id.*

¹⁰⁵ Patel, *supra* note 17, at 6.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

family after marriage and are not expected to support their birth parents financially.¹⁰⁸ Son preference is so strong in some parts of India that daughters logically suffer in order that families' perceived and culturally mandated needs are fulfilled.¹⁰⁹ Son preference is so ingrained in society that even girls are subject to it. A girl will often value her brothers more than her sisters because her sisters will leave the family upon marriage, while her brothers remain in the household and generally support their sisters in some way.¹¹⁰

Religion is also a key factor in the prevalence of sex selective abortion. In Hinduism, males are responsible for the funeral rites of their parents and only males can light the funeral pyre.¹¹¹ Thus, if a father has no sons, he cannot properly enter the afterlife.¹¹² There is also a belief that *moksha* (transcending reincarnation through the performance of good deeds) can only be achieved through sons.¹¹³

Moreover, the high cost of dowries is another factor in parents' decision to choose sex selective abortion. While the Dowry Prohibition Act of 1961 banned dowries, the law has not been implemented and the practice remains in use.¹¹⁴ Originally only given by wealthy families, dowries are now commonplace due to lower castes' desires to emulate the behavior of higher castes.¹¹⁵ Dowries frequently cost a family two to three times their yearly income¹¹⁶ and are so routine that electronics stores advertise a "dowry package" for parents who buy a television, refrigerator, and other appliances at the same time.¹¹⁷ Originally, dowries may have started as an alternative to the family property because a bride could not legally receive through inheritance, which went only to sons.¹¹⁸ What started as a benefit to the daughter has degenerated into an often

¹⁰⁸ *Id.*

¹⁰⁹ Hatti et al., *supra* note 19, at 6.

¹¹⁰ Misra et al., *supra* note 22, at 281.

¹¹¹ Patel, *supra* note 17, at 7.

¹¹² *Id.* Interview with Swami Agnivesh, Hindu social activist and founder and chairperson of the Bandhua Muktii Morcha, in New Delhi, India (Mar. 4, 2007).

¹¹³ Patel, *supra* note 17, at 7.

¹¹⁴ Interview with Tenzing Choesang, Research and Advocacy Officer, Lawyer's Collective, in New Delhi, India (Mar. 7, 2007).

¹¹⁵ Patel, *supra* note 17, at 7.

¹¹⁶ *Id.*

¹¹⁷ Interview with Tenzing Choesang, *supra* note 114.

¹¹⁸ *Id.*

violent practice.¹¹⁹ If a family fails to deliver the offered dowry, the groom's family may kill or burn the bride so that the groom can remarry and bring in a larger dowry.¹²⁰ Clearly, because of the high cost of dowries, daughters are regarded as an unwelcome liability.¹²¹

Swami Agnivesh, a social activist in India, cited dowries and other economic concerns as two of the reasons for sex selective abortion.¹²² Mr. Agnivesh noted that beyond dowries, women in Indian society simply lack true freedom and economic mobility.¹²³ Even educated women often lack a separate source of income and must financially depend on their brother, husband, or father.¹²⁴ Economic prospects for women in India are discouraging. Women spend sixty-five percent of their time on non-market activities, compared to eight percent for men.¹²⁵ The work participation rate in 2004–2005 was twenty-one percent for women and fifty-four percent for men.¹²⁶ Purchasing power for women in 2004 was \$1,471, while the number for men was \$4,723.¹²⁷ Literacy, another factor in determining economic viability, was fifty-four percent for women and seventy-six percent for men in 2001.¹²⁸ Because women are often undereducated and illiterate, they are generally unable to obtain high-paying work and are thus financially dependent on men in their family. Consequently, families find it economically wise to minimize the number of daughters.¹²⁹

Population control measures are yet another factor fueling sex selective abortion and India's disproportionate sex ratio. As the populations in India and China approached one billion, both countries initiated

¹¹⁹ *Id.*

¹²⁰ Patel, *supra* note 17, at 7.

¹²¹ Laurance, *supra* note 5 (quoting Shirish Seth of Breach Candy Hospital, Mumbai).

¹²² Interview with Swami Agnivesh, *supra* note 112.

¹²³ *Id.*

¹²⁴ Swami said that for some women, even the income they receive goes to their husbands. *Id.*

¹²⁵ Mohammed Ilyas, *Force of Nature: All About Eve*, THE TIMES OF INDIA, Mar. 8, 2007, at 1.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Patel, *supra* note 17, at 8.

population control measures.¹³⁰ China instituted a “one child policy.”¹³¹ India, however, rejected the one child method and instead employed a more subtle method to ensure families had sons—selective abortion.¹³² The Indian government originally pioneered selective abortion as part of a family planning program¹³³ and promoted sex selection as a population control method.¹³⁴ Additionally, according to a study in Mumbai, a majority of doctors who performed sex-selective abortions said that they did so to control population growth.¹³⁵

As a result of population concerns, it has become “increasingly unfashionable” to have a large family in India.¹³⁶ Families at high socio-economic levels seem to view two children as ideal.¹³⁷ Yet, due to the religious requirement to have at least one son, families with two girls become increasingly anxious about the sex of a third child. Research demonstrates that sex selective abortions occur with the greatest frequency in families with two or more daughters.¹³⁸

While sex selective abortion may be an effective method of controlling population growth, it is not a socially beneficial one because it results in a disproportionate number of males.¹³⁹ A.R. Nanda, Executive Director of the Population Foundation of India emphasized that population stabilization, more than a question of raw numbers, must be considered in the context of wider socioeconomic development.¹⁴⁰ Mr. Nanda noted that what is more important than India’s population growth stabilizing over the next thirty years is the question of *how* India approaches the critical issue of population stabilization.¹⁴¹

¹³⁰ Interview with Dr. Puneet Bedi, Obstetrician, Gynecologist & specialist in fetal medicine, in New Delhi, India (Mar. 9, 2007).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ George, *supra* note 2.

¹³⁵ Mohan Rao, *Female Sex Selective Abortion*, LAWYER’S COLLECTIVE, Nov. 2004, at 6.

¹³⁶ Patel, *supra* note 17, at 9.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Nanda, *supra* note 84.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

G. The Consequences of Sex Selective Abortion

As a result of widespread sex selective abortion, there will be a twelve to fifteen percent excess of young men in India.¹⁴² If sex selective abortion continues at its current rate, India will have a surplus of twenty-eight to thirty-two million young men in twenty years.¹⁴³ These men, who will be unable to marry, will mainly come from the lowest socio-economic classes, will be un- or underemployed, will live rather nomadically, will generally reside and socialize with other bachelors, and will be ostracized by Indian society because of their inability to marry and have families.¹⁴⁴

Like the problem in China, the scarcity of females in India has led to a shortage of women for men to marry.¹⁴⁵ In China, the shortage of marrying-age women has led to an increase in the abducting and trafficking of women and girls for sale as brides in China's bridal market and as prostitutes.¹⁴⁶ The negative consequences of the shortage of marrying-age women in India have already been documented and will only get worse in the coming years. Like in China, the shortage of women in India has already caused an increase in the trafficking of women and child brides.¹⁴⁷ As marriageable women become scarce, men will marry younger women.¹⁴⁸ This will in turn lead to an increase in the

¹⁴² Hesketh & Xing, *supra* note 73, at 13273.

¹⁴³ Valerie M. Hudson & Andrea Den Boer, *A Surplus of Men, A Deficit of Peace: Security and Sex Ratios in Asia's Largest States*, 26 INT'L SECURITY 5, 11 (Spring 2002).

¹⁴⁴ *Id.* at 12.

¹⁴⁵ Patel, *supra* note 17, at 11.

¹⁴⁶ CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 109th CONGRESS, ANNUAL REPORT 68 (2005) (noting "the skewed sex ratios growing out of China's population control policy" has caused this increase, and specifically that "China's gender imbalance has created a flow of women from ethnic areas into Han areas to meet the demand for women.").

¹⁴⁷ Interview with A.R. Nanda, *supra* note 48. Mr. Nanda reported that in Punjab and other areas in India, girls from poorer areas are trafficked and sold as "wives" but really end up living as slaves. *Id.* If the woman produces a son, she is kept, but if she produces a girl she is sold as a prostitute. *Id.*

¹⁴⁸ Patel, *supra* note 15, at 11–12 (discussing child brides, sexual violence against women and polygamy); see also Alison Wood Manhoff, *Banned and Enforced: The Immediate Answer to a Problem Without an Immediate Solution—How India Can Prevent Another Generation of 'Missing Girls'*, 38 VAND.

numbers of child brides, further contributing to the poor status of women because child brides are less likely to finish school or develop job skills before marriage.¹⁴⁹ Young brides and their resultant children are also more likely to suffer from increased morbidity and mortality associated with early childbirth.¹⁵⁰ Men in search of wives may also resort to sharing wives. In Haryana, there is one case where four brothers married one woman.¹⁵¹

The low numbers of women available for marriage have also resulted in an increase in the number of commercial sex workers, which has the potential to lead to a rise in sexually transmitted diseases and HIV.¹⁵² When large numbers of young males cannot find brides to marry,

J. TRANSNAT'L L. 889, 897–98 (2005). Jill McGivering, *India's Lost Girls*, BBC NEWS, Feb. 4, 2003, http://news.bbc.co.uk/2/hi/south_asia/2723513.stm (discussing the marriage crisis among Indian bachelors and bride purchasing). Not everyone agrees, however, on emphasizing the lack of brides when discussing the problem of sex selection:

To argue that people should not murder their baby girls because they will create a future shortage of wives not only reflects a conservative vision of limited future rules for any girl babies who survive, but such an 'argument' also reinforces the devaluation of female life except as it is valuable in relation to men.

Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An) Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 270 (1992).

¹⁴⁹ Patel, *supra* note 17, at 11–12 (discussing child brides, sexual violence against women, and polygamy).

¹⁵⁰ *Id.*

¹⁵¹ Isha Khan, *India Has Killed 10 Million Girls in 20 Years*, Reuters, Dec. 18, 2006, <http://civillibertarianblogspot.com/2006/12/india-has-killed-10-million-girls-in.html>.

Although polygamy is officially illegal in India and the woman is technically married to only one man, her brother-in-laws [sic] share the household and are cared for by her. No data exist as to whether this type of family structure exists in present-day India, but it would seem to be a logical social change in the setting of a low sex ratio.

Patel, *supra* note 17, at 12.

¹⁵² Therese Hesketh et al., *The Effect of China's One-Child Family Policy After 25 Years*, 353 NEW. ENG. J. MED. 1171, 173 (Sept. 15, 2005).

they are more likely to purchase sex and engage in riskier sex, which in turn tends to increase the spread of HIV.¹⁵³

Another consequence of an abundance of men who are unable to find wives is an increase in violence, and particularly sexual violence against women.¹⁵⁴ The potential for increased organized aggression is likely to substantially increase where single young men congregate.¹⁵⁵ Sexual violence toward women is already a problem, especially in cities where men have migrated from villages without their wives and families and are in search of employment.¹⁵⁶ Violence towards women in the form of rapes and harassment occurs more frequently in areas where men outnumber women.¹⁵⁷ Perhaps this explains the fact that the north and northwest states of India, where men greatly outnumber women, are referred to as India's "Wild West."¹⁵⁸

While it might be assumed that a scarcity of women would lead to their increased value in society, as of yet nothing indicates that the worsening sex ratio over the past decades has enhanced the position of women in Indian society.¹⁵⁹ In fact, the converse is likely true, for despite the lowest sex ratio in the past century, the status of women in India has arguably never been lower.¹⁶⁰

To illustrate this point, consider the 1992 program by the Tamil Nadu government. The government placed cradles at health centers, hospitals, orphanages, and childrens' homes in order to encourage mothers who did not want their girl babies to leave them in the cradles.¹⁶¹ During the year in which the program was operational, fifty-one girl babies were

¹⁵³ Interview by Norman Swan with Prabhat Jha, Professor of Health and Dev., Univ. of Toronto Can. (ABC Radio National Feb. 6, 2006), available at <http://www.abc.net.au/rn/healthreport/stories/2006/1560763.htm>. India is second only to South Africa, with at least 4.5 million people living with HIV/AIDS in India. USAID, HIV/AIDS: INDIA, http://www.usaid.gov/our_work/global_health/aids/Countries/ane/india.html.

¹⁵⁴ Hesketh & Xing, *supra* note 73, at 13273.

¹⁵⁵ *Id.*

¹⁵⁶ Patel, *supra* note 17, at 11–12.

¹⁵⁷ Singh, *supra* note 83.

¹⁵⁸ Hudson & Den Boer, *supra* note 143, at 34. For a recounting of crime statistics in China *see id.* at 32.

¹⁵⁹ Patel, *supra* note 17, at 11.

¹⁶⁰ *Id.*

¹⁶¹ Hatti et al., *supra* note 19, at 29.

left in the cradles.¹⁶² In the end, thirty-nine babies were given to voluntary agencies and twelve were left in government care.¹⁶³ Of the twelve infants left in government care, eleven died of neglect and one was taken back into custody by her parents, who feared a similar fate for their child.¹⁶⁴ Programs like this are unlikely to work because son preference is not limited to biological children.¹⁶⁵

A society so entrenched in its bias against women is unlikely to treat women in a more humane way simply because they are scarce in supply. The logic of supply and demand simply does not apply to complex social forces where patriarchy controls sexuality, fertility, and the labor of women without any respect for a woman's bodily integrity.¹⁶⁶ This is true not only in India, but in China, where population statistics are similar. A societal preference for sons, abortions, infanticide, and abandonment of daughters exposes the odd truth that Chinese females are not valued any more now even though the nation has experienced the negative consequences of son preference.¹⁶⁷ Instead of raising the value

¹⁶² Manhoff, *supra* note 158, at 910–11.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Adoption also may not be a viable option to solve the problem of unwanted infant girls. Consider the argument posed by David Smolin:

[T]he cultural burdens of raising a girl in India make it particularly unlikely that one could place female children within the country. [F]rom India's perspective intercountry adoption is not a solution to any of those problems. [A]lthough efforts to save female children are sometimes seen as a positive purpose of intercountry adoption, the significance of moving approximately six hundred to seven hundred girls a year out of the country is hardly a way to remedy the problem of India's female population.

David Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. R. 403, 452, 484 (2005).

¹⁶⁶ Vibhuti Patel, *Use of New Reproductive Technologies: Social Compulsions and Legal Restrictions*, INDRAPRASTHA TECH. L.J., Vol 1 (Summer) 2006, at 69.

¹⁶⁷ Mary H. Hansel, *China's One-Child Policy's Effects on Women and the Paradox of Persecution and Trafficking*, 11 S. CAL. REV. L. & WOMEN'S STUD. 369, 386 (2002).

of women, skewed sex ratios only increase the frequency of rape, prostitution, and violence against women.¹⁶⁸

III. DISCUSSION

Part III discusses the contours and reach of the PNDT Act, including the Act's implementation provisions as well as relevant penalties.¹⁶⁹ This Part also discusses the subsequent lack of implementation and enforcement of the PNDT Act and amendments to the language.¹⁷⁰ This Part further examines the power and role of the Indian Supreme Court in Indian society, including the phenomena of judicial activism and public interest litigation, best seen in cases dealing with human rights, the environment, and property rights.¹⁷¹ Finally, this Part ends by discussing the Indian public's response to the Court's active role in society.¹⁷²

A. Legislation: The Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act

In 1994, the Indian parliament passed the PNDT Act as the first national law against sex determination.¹⁷³ The goal of the PNDT Act is to prohibit sex selection, both before and after conception, by preventing the misuse of medical diagnostic technology for the purpose of sex

¹⁶⁸ Lakshmi Lingam, *Sex Detection Tests and Female Foeticide: Discrimination Before Birth*, FORUMS, available at <http://web.archive.org/web/20070216135821/http://www.hsph.harvard.edu/grhf-asia/forums/foeticide/articles/detection.html>.

¹⁶⁹ See *infra* Part III.A (explaining key provisions and sentencing regime).

¹⁷⁰ See *infra* Part III.A (noting the Indian and state governments' failure to enforce the law or effectuate its provision).

¹⁷¹ See *infra* Part III.B.1–3 (discussing the power and history of the Court, including the impact of its judicial activism and public interest litigation, best seen in key environmental and property cases).

¹⁷² See *infra* Part IV (noting the positive response of the Indian public to the Court's activity).

¹⁷³ The Act was partly the result of a parliament sub-committee which took recommendations from women's and civil rights groups. THE LAWYER'S COLLECTIVE: WOMEN'S RIGHTS INITIATIVE, PRE-CONCEPTION & PRE-NATAL DIAGNOSTIC TECHNIQUES ACT: A USERS GUIDE TO THE LAW 1–2 (Indira Jaisingh, ed., 2004) [hereinafter Jaisingh].

determination and selection.¹⁷⁴ The PNDT Act seeks to achieve this goal through a multi-layered approach.

The Act explicitly prohibits and criminalizes communicating the sex of a fetus to any person, including parents and relatives.¹⁷⁵ The Act prohibits conducting prenatal diagnostic exams for the purpose of determining the sex of the fetus.¹⁷⁶ The Act is unique because, instead of requiring the police to implement the law, it empowers medical officers appointed by the Central and state governments to implement the law.¹⁷⁷

The Act creates a registration mechanism to ensure only registered clinics can lawfully provide genetic counseling and prenatal diagnostic tests and procedures.¹⁷⁸ The Act further requires all clinics, centers, and laboratories to maintain records of all prenatal diagnostic tests they conduct in order to monitor their use.¹⁷⁹ Additionally, the Act prohibits anyone from selling ultrasound machines to unregistered clinics or laboratories.¹⁸⁰ Likewise, the Act prohibits any kind of advertising of pre-conception or prenatal sex determination.¹⁸¹

The Act also mandates that Central and state governments appoint Appropriate Authorities who are empowered and obligated by the Act to implement and enforce the Act's provisions.¹⁸² The

¹⁷⁴ The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, preamble, No. 9 of 1994, India Cde, *available at* <http://indiacode.nic.in/>. The Act allows pre-natal diagnostic techniques to be conducted only to detect chromosomal abnormalities, genetic metabolic diseases, hemoglobinopathies, sex-linked genetic disorders, congenital anomalies and any other abnormality or disease that may be specified by the Central Supervisory Board (CSB). *Id.* § 4(2). Additionally, certain medical conditions must be satisfied before such tests can be performed on a pregnant woman. *See id.* § 4(3); *see also* the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996, Form F [hereinafter PNDT Rules].

¹⁷⁵ PNDT Act, *supra* note 1, at § 5(2).

¹⁷⁶ *Id.* § 6.

¹⁷⁷ Jaisingh, *supra* note 173, at Ch.I.

¹⁷⁸ PNDT Act, *supra* note 1, §§ 3, 18. Under the amendment in 2003, a vehicle capable of providing pre-natal diagnostic tests and procedures can be registered as well. Jaisingh, *supra* note 173, at 15.

¹⁷⁹ PNDT Act, *supra* note 1, § 29.

¹⁸⁰ *Id.* § 3(b); *see also* PNDT Rules, *supra* note 172, at 3(a).

¹⁸¹ PNDT Act, *supra* note 1, § 22.

¹⁸² *Id.* § 17(1–4).

Appropriate Authorities are required to initiate investigations *sua sponte* or in response to allegations of violations of the Act, to take proper legal action against any person engaging in any sex selection technique, and to act in accordance with the recommendations of the Advisory Committee after any investigation.¹⁸³ The Appropriate Authorities are also responsible for granting, suspending, or canceling the registration of any clinic, center, or laboratory.¹⁸⁴

The Act lays out specific penalties and fines for violations of its provisions. Any person who violates any provision of the Act may be sentenced to a maximum term of three years imprisonment and a fine of 10,000 rupees.¹⁸⁵ If convicted for a second time, the person faces up to five years imprisonment and a fine of 50,000 rupees.¹⁸⁶ Additionally, anyone who seeks the aid of any clinic or person to conduct sex selection can receive up to three years imprisonment and a fine of 10,000 rupees, with imprisonment of five years and 50,000 rupees for any subsequent offense.¹⁸⁷ However, while the Act does prohibit companies from engaging in the behaviors delineated by the Act, it fails to prescribe any specific penalties, providing only that offending companies “shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.”¹⁸⁸

The Act contains two additional important provisions regarding sentencing. First, the Act specifies that the provision that outlaws seeking aid to commit sex selection does not apply to any woman compelled to undergo pre-natal sex selection or diagnostic tests.¹⁸⁹ Second, the Act creates a rebuttable presumption that any pregnant woman implicated by the Act “was compelled by her husband or any other relative” to undergo

¹⁸³ *Id.* § 17(4). The Appropriate Authorities are also empowered to “create public awareness against the practice of sex selection or pre-natal” sex determination, and to “recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions.” *Id.*

¹⁸⁴ *Id.* § 17(4)(a).

¹⁸⁵ *Id.* § 23.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 23(3).

¹⁸⁸ *Id.* § 26(1). Presumably, “punished accordingly” refers to the same three years and 10,000 rupee fine other violators receive. *Id.*

¹⁸⁹ *Id.* § 24.

prenatal diagnostic procedures for the purposes of sex selection.¹⁹⁰ Through these special provisions, the Act accounts for the general coercive social, cultural, and familial atmosphere within which sex selection is pursued by pregnant couples.¹⁹¹

The Act also provides for “minor penalties” for unspecified violations.¹⁹² It is likely that such penalties apply to the non-maintenance of records and the non-compliance with standards for maintaining ultrasound units.¹⁹³ The penalty for such a violation is a maximum of three months imprisonment and/or a maximum fine of 1,000 rupees, with a 500 rupee fine per day for continuing violations.¹⁹⁴ Finally, the Act provides that the Appropriate Authorities shall send the names of all medical personnel guilty of violations of the Act to the State Medical Council for necessary action.¹⁹⁵ The offending doctor or other medical personnel’s registration should be suspended until any criminal case is disposed of, and if convicted, the registration should be suspended for five years for the first offense and permanently for any subsequent offense.¹⁹⁶

In addition to prohibiting and criminalizing the aforementioned activities, the PNDT Act also requires that the Central government establish a Central Supervisory Board (the “Board”)¹⁹⁷ and empowers the Board with many responsibilities, including advising the Central government on policy decisions regarding the misuse of prenatal diagnostic and sex selection techniques.¹⁹⁸ The Board is also entrusted with reviewing and monitoring the implementation of the Act, its rules, and any necessary changes in addition to several other supervisory functions.¹⁹⁹ Members from relevant Central Government Departments

¹⁹⁰ *Id.*

¹⁹¹ Indian women are among the most likely to be forced to abort female fetuses. AVANI MEHTA & CENTER FOR REPRODUCTIVE RIGHTS, LITIGATING REPRODUCTIVE RIGHTS: USING PUBLIC INTEREST LITIGATION AND INTERNATIONAL LAW TO PROMOTE GENDER JUSTICE IN INDIA 19 (2006).

¹⁹² PNDT Act, *supra* note 1, § 25.

¹⁹³ Jaisingh, *supra* note 173, at 38.

¹⁹⁴ PNDT Act, *supra* note 1, § 25.

¹⁹⁵ *Id.* § 23(2).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* § 7.

¹⁹⁸ *Id.* § 16(i).

¹⁹⁹ *Id.* § 16(ii–v).

such as Family Welfare, Law and Justice, and the Ministry of Women and Child Development must comprise the Board.²⁰⁰ The Act mandates that the Board meet at least once every six months.²⁰¹

In addition to the Board, the PNDT Act mandates that each State or Union territory create a State or Union Supervisory Board, tasked with, *inter alia*, creating public awareness against sex determination and sex selection practices, reviewing the actions of the Appropriate Authorities, and monitoring local compliance with implementation of the Act.²⁰²

Despite the many monitoring provisions in the Act, in 2001, the Supreme Court found that it was obvious that the Central and state governments had totally failed to take "appropriate actions" to implement the PNDT Act.²⁰³ By 1998, the Appropriate Authorities responsible for implementing the PNDT Act were yet to be appointed.²⁰⁴ Clinics continued to provide and advertise for sex determination tests.²⁰⁵ Even though prenatal sex determination had been illegal since 1994, the law was routinely ignored and the practice widespread.²⁰⁶ As one lawyer put it, the Act was passed in 1994, came into effect in 1996, and very little was done after that.²⁰⁷

The reality is that, despite the existence of the PNDT Act for more than a decade the risk of someone being caught violating the law has remained basically non-existent.²⁰⁸ The district Appropriate Authorities, who were often former doctors, were afraid and unmotivated

²⁰⁰ *Id.* § 7(2). Furthermore, the Act outlines several situations that disqualify someone from appointment to the Board. *Id.* § 14. Disqualifying factors include a conflict of pecuniary or other interest, or any previous or current involvement with the misuse of pre-natal diagnostic techniques or the promotion of sex determination for the purposes of sex selection. *Id.* § 14(e)(f).

²⁰¹ *Id.* §§ 7–15.

²⁰² *Id.* § 16.

²⁰³ *Centre for Enquiry into Health and Allied Themes v. Union of India*, 2001 3 I.L.R. (Cal.) 394.

²⁰⁴ *Jaising*, *supra* note 173, at v.

²⁰⁵ *Id.* Medical clinics routinely advertise pre-natal sex selection, including PGD, with complete impunity. CEHAT, *supra* note 10.

²⁰⁶ *Jha et al.*, *supra* note 10, at 211.

²⁰⁷ Interview with Asmita Basu, Project Coordinator for Women's Right's Initiative of the Lawyer's Collective, in New Delhi, India (Mar. 9, 2007).

²⁰⁸ *George*, *supra* note 2, at 606.

to investigate and prosecute cases against fellow doctors.²⁰⁹ Relying on cultural excuses, the Authorities failed to buy into the argument that sex selection was not just a cultural issue but a crime, and refused to acknowledge that the PNDA Act must be enforced.²¹⁰

In response to the failure to implement the PNDA Act, the Supreme Court ordered the Central and state governments and all government officials to implement and enforce the ban on sex selective abortion.²¹¹ To fully understand the role of the Court's rulings and their impact, it is important to know the history and power of the Indian Supreme Court.²¹²

B. The Indian Supreme Court

The Indian Supreme Court has been called the most powerful apex court in the world.²¹³ The Court has both constitutional powers as well as what some might call self-created powers. Article 141 of the Indian Constitution says the law the Supreme Court declares is the law of the land,²¹⁴ while the U.S. Constitution says the Constitution, treaties, and federal law constitute the supreme law of the land.²¹⁵ Thus, on its face, the Indian Constitution arguably grants its highest court more authority than the U.S. Constitution grants the U.S. Supreme Court.²¹⁶

²⁰⁹ Interview with A.R. Nanda, *supra* note 47. The authorities rationalized that the issue was one of supply and demand, so that if one doctor refuses parents will simply go to another. *Id.*

²¹⁰ *Id.*

²¹¹ Centre for Enquiry into Health and Allied Themes v. Union of India, 2001 3 I.L.R. (Cal.) 394.

²¹² See *infra* Part III.B (discussing the history and power of the Court, including judicial activism and the advent of public interest litigation).

²¹³ Telephone Interview with Marc Galanter, the John and Rylla Bosshard Professor of Law and South Asian Studies, Univ. of Wis., in Chi., Ill. (Feb. 2, 2007). Professor Galanter pointed to the Court's enormous jurisdiction, including original jurisdiction under Article 32 and PILs, as well as the fact that "it basically appoints its own members." *Id.*

²¹⁴ See INDIA CONST. art. 141 ("The law declared by the Supreme Court shall be binding on all courts within the territory of India.").

²¹⁵ See U.S. CONST., art. VI, cl. 2.

²¹⁶ Compare INDIA CONST. art. 141 (declaring the law of the Supreme Court to be binding on all courts), with U.S. CONST. art. VI, cl. 2 (binding the Supreme Court to the Constitution, the laws of the United States and treaties).

Central to the Court's authority and functioning is the notion of an independent judiciary, a foundation of the Indian Constitution.²¹⁷ Unlike the elected members of the executive and legislative branches, Supreme Court Justices are appointed by current justices of the Court with the President's approval.²¹⁸

1. Powers and Authority

The Indian Supreme Court's first act of judicial activism may have been its most important. In the 1950 case of *A.K. Gopalan v. Madras*, the Court declared its inherent power of judicial review, describing it as intrinsic to the very nature of a written constitution.²¹⁹ Although the Court's power has often been challenged by the other branches,²²⁰ the Court's legal authority is now more solidified than ever.²²¹ Accordingly, although the Indian parliament has repeatedly acted

²¹⁷ P.M. BAKSHI, *THE CONSTITUTION OF INDIA* 1 (Universal Law Publishing Co. 8th ed. 2007) (1991) (“[T]he fundamental concept of an independent judiciary [was] elevated to the level of basic structure of the Constitution.”) (citing *State of Bihar v. Bal Mukund Sah*, A.I.R. 2000 S.C. 1296). *See generally* INDIA CONST. art. 124; INDIA CONST. art. 125 (detailing the appointment procedures and qualifications for Supreme Court judges, as well as their salaries and tenure).

²¹⁸ *See* Supreme Court Advocates-on-Record Assoc. v. Union of India, (1993) Supp. 2 S.C.R. 659. (interpreting Article 124, clause 2 of the Indian Constitution giving the Chief Justice the final say).

²¹⁹ *See* A.I.R. 1950 S.C. 34. The Court noted that even in the absence of Article 13, clauses 1 and 2 of the Constitution, “if any of the fundamental rights was infringed by any legislative enactment, the Court has always had the power to declare the enactment, to the extent it transgresses the limits, invalid.” *Id.*

²²⁰ SATHE, *supra* note 101, at lxiii. When the Supreme Court defined “compensation” as fair value of the property acquired by the government, parliament amended the Constitution for the fourth time, declaring that laws cannot be challenged for inadequate compensation. *Id.* When the Court found that *ryotwari* estates were not within the ambit of Article 31-A, parliament amended the Constitution for the seventeenth time, explicitly mentioning *ryotwari* estates in the language. *Id.*

²²¹ Interview with P. Puneeth, Assistant Research Professor (Mar. 8, 2007). Professor Puneeth also noted that the Indian Supreme Court has broader review than the U.S. Supreme Court because it can review the constitutionality of amendments *sua sponte*, or on its own. *Id.* Though the Indian Supreme Court has

in contravention to the Court's legal interpretations,²²² the Court held that Parliament can only override the Court's constitutional interpretations through constitutional amendment.²²³ Additionally, the Court held that Parliament could not amend the Constitution in a way that takes away or abridges any fundamental right.²²⁴

The Indian Supreme Court maintains the vital power to interpret the Constitution and declare its meaning.²²⁵ As it stands today, the Court gets the final word on constitutional decisions, including deciding what qualifies as the basic structure of the Constitution and striking down any law repugnant to the Constitution.²²⁶ The Court also has the broad and undefined ability to issue any order or direction to do complete justice in any case pending before it.²²⁷ Moreover, under Article 144, the Court can compel any government department to comply with its orders.²²⁸ The Court also has broad constitutional and statutory contempt power, which allows it to hold someone in civil and criminal contempt.²²⁹

acted *sua sponte* in many cases, it has not yet done so with regard to constitutional amendments. *Id.*

²²² See SATHE, *supra* note 220 and accompanying text (noting that the other branches of government have challenged the Court's power).

²²³ See SATHE, *supra* note 101, at lxiii.

²²⁴ See *Golak Nath v. State of Punjab*, A.I.R. 1967 SC 1669.

²²⁵ See *id.*

²²⁶ SATHE, *supra* note 101, at 8. In the famous *Indira Gandhi v. Raj Narain* case challenging the constitutional amendment validating Indira Gandhi's controversial election, the Court struck down the amendment as violating the basic structure of the Constitution, although it upheld her election on the merits. See A.I.R. 1975 S.C. 2355. Of course for the doctrine of basic structure to survive, the Court must not be seen as "the defender of the status quo and vested interests." SATHE, *supra* note 101, at 10.

²²⁷ See INDIA CONST. art. 142, cl. 1.

²²⁸ See *id.* at art. 144. The Article requires all authorities to act in aid of the Supreme Court. See *id.*

²²⁹ See *id.* at art. 129. Some say the Court has overused its contempt power to "stifle criticism of itself." SATHE, *supra* note 101, at xxxviii (citing *In re Arundhati Roy* (2002) 3 S.C.R. 213; *J.R. Prashar v. Prasant Bushan* (2002) Supp. 2 S.C.R. 239).

In addition to the aforementioned powers, the Court has used the engine of Social Action Litigation²³⁰ (SAL) or “Public Interest Litigation” (PIL) to engage in a broad array of social and political issues. PIL has filled the gap created by an impotent political process in an often insensitive and inert civil society.²³¹ Through the use of PIL, the Supreme Court has become the main engine by which human rights goals are advanced in India.²³² Former Chief Justice Kirpal said the goal of PIL is “to protect [the] basic human rights of the weak and the disadvantaged”²³³ Ideally, an individual or agency would file a PIL on behalf of those who, due to their poverty and other social disabilities, were unable to approach the Court for legal relief.²³⁴ Article 32 of the Indian Constitution grants the Court jurisdiction over such actions by guaranteeing individuals the right to approach the Court to enforce any fundamental constitutional right.²³⁵

The main role that PIL plays in Indian society is protecting those fundamental individual rights which, if violated, would negatively affect the whole community.²³⁶ PIL has thus far been a powerful sword in the battle against official lawlessness.²³⁷ In fact, most PIL, and human rights

²³⁰ See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 THIRD WORLD LEGAL STUD. 107, 108–10 (1985). Baxi argues that SAL is a more appropriate name because of the many differences between SAL and Public Interest Litigation in the United States, where the PIL name was adopted. *See id.*

²³¹ See SATHE, *supra* note 101, at xl.

²³² See CENTER FOR REPRODUCTIVE RIGHTS, *supra* note 191, at 20.

²³³ See *Balco Employees Union (Regd.) v. India*, A.I.R. 2002 S.C. 378.

²³⁴ *See id.*

²³⁵ See INDIA CONST. art. 32, cl. 1. The Court also has the power to subpoena information or persons necessary to adjudicating PILs, and all the civil and judicial authorities are mandated to assist the Court in its efforts. *See id.* at art. 142, cl. 2.

²³⁶ SATHE, *supra* note 101, at lxxvii. (“An untouchable may agree to be treated as an untouchable but his being treated so is a disgrace to others and so they have legitimate locus standi to invoke the Court’s jurisdiction against such barbarism.”).

²³⁷ See, e.g., *Padma v. Hiralal Motilal Desarda*, A.I.R. 2002 S.C. 3252 (invalidating a sale by a special planning authority in the state of Mahashatra).

litigation in general, is filed as a response to bad governance by the Central and state governments.²³⁸

Through PIL, the Court has strong control over its docket, seeing as it can choose to turn simple letters it receives into full-blown petitions.²³⁹ By expanding the notion of *locus standi*, the Court facilitated the reality of access to justice for the under-educated, poor masses.²⁴⁰ In one such case, the Court found standing where a prisoner sent a letter to the Court informing it that prison authorities were torturing another inmate.²⁴¹

Through its judicial creativity and openness, the Court transformed the judicial process in India, making it more democratic and participatory.²⁴²

2. History of the Court

The Indian Supreme Court has undergone a metamorphosis over the last fifty years. In general, the Court has gone from a court for the powerful to a court of the powerless.²⁴³

The Supreme Court has been described as the main safeguard of democracy and the rule of law in India, in part due to the failure of the

²³⁸ SATHE, *supra* note 101, at lxxiv. As Justice Yatindra Singh of the Allahabad High Court noted, “PILs are like alarm clocks. They tell the government: don’t sleep, please get up.” CENTER FOR REPRODUCTIVE RIGHTS, *supra* note 191, at 24 (quoting Interview with Justice Yatindra Singh, former Chief Justice, Supreme Court of India and former Chair, National Human Rights Commission, in New Delhi, India (Apr. 15, 2006)).

²³⁹ SATHE, *supra* note 101, at 17.

²⁴⁰ *Id.*

²⁴¹ Sunil Batra v. Delhi Admin., A.I.R. 1978 S.C. 1675.

²⁴² SATHE, *supra* note 101, at 17. Justice Iyer in referring to the freeing effect of PIL, quoted Henry Peter Brougham:

[Let the] sovereign[] boast . . . that he found law dear and left it cheap; found it sealed in a book and left it a living letter; found it the patrimony of the rich and left in the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.

Fertilizer Corp. Kamagar Union (Regd.) v. Union of India, (1981) 2 S.C.R. 52.

²⁴³ SATHE, *supra* note 101, at 21.

other government branches.²⁴⁴ Some suggest that the Central and state governments lack the confidence to enforce the law and are thus helped by Supreme Court decisions that are on point.²⁴⁵ Regardless of the reasons, India desperately needs a competent and powerful judiciary to further its democratic ideals.²⁴⁶

Unlike the sometimes pejorative connotations associated with the term “judicial activism” in the United States, Indian judicial activism has been perceived in large part as a safe haven for the oppressed.²⁴⁷ The Court has mainly interpreted the Constitution liberally so as to expand rights of equality and personal liberty.²⁴⁸ This has led some to compare its activism to that of the U.S. Supreme Court in the days of Chief Justice Earl Warren,²⁴⁹ best known for the landmark opinion *Brown v. Board of Education*.²⁵⁰

Notwithstanding the positive effects of the Court’s activity, members of the executive and legislative branches have criticized its judicial activism.²⁵¹ Yet, the very people who complain about the Court’s

²⁴⁴ *Id.* at xxxviii–xxxix. The other branches have at times frustrated the power of the Court. *Id.* at xlvi. This can be seen in the legislatively prompted amendment to Article 329A (4) of the Constitution declaring that “Mrs. Indira Gandhi’s election to the Lok Sabha was valid notwithstanding any order made by any court,” while the issue was still pending in the Supreme Court. *Id.* The Court, however, responded by striking down this amendment as unconstitutional for violating the basic structure of the Constitution. *Id.* See also Rajeev Dhavan, *Ayodhya Solutions*, THE HINDU, July 11, 2003, at 10.

²⁴⁵ SATHE, *supra* note 101, at lxxv.

²⁴⁶ *Id.* at lxxvi.

²⁴⁷ *Id.* at 5–6. (“A judicial interpretation that furthers the rights of the disadvantaged sections or imposes curbs on absolute power of the State, or facilitates access to justice is a positive activism.”).

²⁴⁸ *Id.* at 12.

²⁴⁹ *Id.* at 5, 19.

²⁵⁰ 347 U.S. 483 (1954) (declaring the prevailing notion of separate but equal school facilities based on race unconstitutional).

²⁵¹ Most of the criticism revolves around the Court overstepping its bounds as the only unelected branch of government. Interview with Manish Arora, Dir. and Assoc. Professor, Amity Law School, in New Delhi, India (Mar. 7, 2007). However, when an elected representative only receives 40% of the popular vote, or less, the argument that he or she represents the will of the people is weakened. *Id.*

judicial activism are the ones who create the gap which the Court's activism fills.²⁵² For example, when there was no Indian law to regulate foreign adoptions, the Court intervened to protect children from the risk of exploitation created by this legal void.²⁵³ The Court responded by promulgating regulations for inter-country adoptions, which are still in effect today.²⁵⁴ When women's groups petitioned the Court to create sexual harassment guidelines for the workplace, the Court responded by doing just that and declaring that the guidelines had the full force of law.²⁵⁵

In these examples, the Court truly did legislate from the bench. Judicial directions, however, are generally intended only to provide temporary legal relief.²⁵⁶ When the executive and legislative branches fail to deliver on the promises of democracy and a written constitution, it is the province and duty of the Indian Supreme Court, as the third branch, to remind them of their mandate and even to compel them to fulfill it.²⁵⁷ For, while judicial activism is not a substitute for good governance, it at least keeps the nation moving forward until the other branches straighten out.²⁵⁸

In line with the Constitution and its activism, the Court has incorporated international law into its decisions, and at times done so to

²⁵² D. Banerjea, *Judicial Activism: A Need for a National Debate*, in JUDICIAL ACTIVISM: DIMENSIONS AND DIRECTIONS 3, 4 (D. Banerjea et al. eds., 2002).

²⁵³ *Laxmi Kant Pandey v. Union of India*, A.I.R. 1987 S.C. 232.

²⁵⁴ *Id.* See also Sarah Womack, *India Opens Way to More Adoptions by Couples from Britain*, DAILY TELEGRAPH, April 9, 2007 ("The Indian government intends to increase the number of children available to overseas families and place thousands more in homes in Europe and the United States. Such adoption usually drags on for more than a year but New Delhi's proposals call for a maximum wait of 45 days. Ministers say the process must be accelerated so homes can be found for the babies before they become institutionalised.").

²⁵⁵ *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011.

²⁵⁶ *SATHE*, *supra* note 101, at 14. Nevertheless, such directions often take on the force of law. *Id.*

²⁵⁷ See P. Leelarkrishnan, *Judicial Activism and Environmental Law*, in JUDICIAL ACTIVISM: DIMENSIONS AND DIRECTIONS, 272 (2002).

²⁵⁸ See Banerjea, *supra* note 252, at 7.

further women's rights.²⁵⁹ In this vein, the Court held that Articles 14, 21, and 19(1)(g) of the Constitution would be interpreted in line with the principles of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²⁶⁰

The Court, however, has not always been a bastion for fundamental rights. In one case, the Court left untouched major restrictions on personal liberty because it determined it lacked power to do otherwise due to presidential orders.²⁶¹ Additionally, in 1994, the Court held that denying affirmative action benefits to members of the Scheduled Castes (Dalits, etc.) who convert from Hinduism to Christianity was constitutional and did not violate Article 14 or 19.²⁶²

3. *Pertinent Rulings*

The impact of the Court's decision-making can be clearly seen in the arenas of environmental and property rights. The Indian judiciary, including the Supreme Court, has proactively dealt with environmental cases, mainly through PIL instituted by public interest groups, lawyers, or individuals.²⁶³ The Court has held that the right to life guaranteed in Article 21 of the Constitution includes the right to enjoy unpolluted water and air.²⁶⁴ In another landmark case, the Court held that, regardless of financial constraints, local government bodies must respect basic human rights and thus provide public sanitation facilities in their locale.²⁶⁵ The case injected environmental awareness into public nuisance law, as residents no longer had to face the constant stench pouring from open sewage drains.²⁶⁶

²⁵⁹ See *Chairman, Ry. Bd. v. Das*, A.I.R. 2000 S.C. 988 (stating that the Universal Declaration of Human Rights "may have to read . . . into domestic jurisprudence").

²⁶⁰ See *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011.

²⁶¹ See *Jabalpur v. Shukla*, A.I.R. 1976 S.C. 1207.

²⁶² See *Maharashtra v. Union of India*, 4 S.C.R. 423 (1994); see also *Indian Supreme Court Delays Dalit Christians' Equal Rights Case*, Christian Newswire, May 1, 2007, available at <http://www.christiannewswire.com/news/28349224.html>.

²⁶³ Leelarkrishnan, *supra* note 257.

²⁶⁴ See *Subhashkumar v. State of Bihar*, A.I.R. 1991 S.C. 420, 424.

²⁶⁵ See *Mun. Council, Ratlam v. Vardhichand*, A.I.R. 1980 S.C. 1622.

²⁶⁶ See Leelarkrishnan, *supra* note 257, at 259.

On more than one occasion, the Court has ordered businesses to shut down because they were causing too much harm to the environment. In one case, the Court ordered a limestone mining operation to close when quarrying led to an ecological imbalance in the nearby valley.²⁶⁷ Two years later the Court ordered certain polluting industries to close if they failed to establish treatment plants.²⁶⁸

Oftentimes, the immobility of government officials regarding their environmental duties to the people has prompted the Court's action. In one such case, a whole village was exposed to stagnant toxic sludge, resulting in the spread of disease and death.²⁶⁹ The Court emphasized that when it "finds that the said authorities have not taken the action required of them by law and that their inaction is jeopardizing the right to life of [Indian] citizens . . . it is the duty of this Court to intervene."²⁷⁰

The Court has also acted as a voice for the people in property disputes. In the case of *B.L. Wadhera v. India*, the Court quashed illicit gifts of land given to the trust of the former Prime Minister of India, Mr. Chandrashekhar.²⁷¹ The 600 acres of land in question were donated for the purpose of constructing a hospital and a polytechnic for women, but instead were used as a vacation spot for the prime minister.²⁷² The Court elaborated on the reasons for its decision by saying that it could not "remain a silent spectator where peoples' property is being usurped for

²⁶⁷ See *Rural Litig. Kendra v. Uttar Pradesh*, A.I.R. 1985 S.C. 652.

²⁶⁸ See *Mehta v. Union of India*, A.I.R. 1987 S.C. 965; *Mehta v. Union of India*, A.I.R. 1987 S.C. 1088; *Mehta v. Union of India*, A.I.R. 1988 S.C. 1115.

²⁶⁹ See *Indian Council for Enviro-legal Action v. Union of India*, A.I.R. 1996 S.C. 1446, 1460–61.

²⁷⁰ *Id.* The Court has not always, however, ruled on the side of the environment, as seen in the *Silent Valley* case where the Court approved of clearing a forest rich in bio-diversity to make way for a hydroelectric project, even though the government had failed to examine the issue fully. ROSENCRANZ ET AL., *ENVIRONMENTAL LAW AND POLICY IN INDIA* 285–87 (Oxford University Press 1991). The Court has also supported the establishment of a five-star hotel in a zoological garden and approved a railway line on an ecologically frail region. See *Pandey v. W. Bengal*, 1987 (1) S.C.A.L.E. 311, 315; *Goa Found. v. Konkan Ry. Corp.*, A.I.R. 1992 Bom. 471, 474.

²⁷¹ A.I.R. 2002 S.C. 1913.

²⁷² SATHE, *supra* note 101, at lxvii.

the personal leisure and pleasure of some individuals under the self-created" umbrella of a trust.²⁷³

The Court has also declared that when the government exercises its eminent domain power, it must pay fair market value to the property owner.²⁷⁴ While this decision and its progeny were criticized as being pro-landlord and anti-socialism, the Court has defended itself by arguing it was simply seeking to secure fair and just compensation for private property acquired by the government.²⁷⁵ One noted Supreme Court Justice explained that his property decisions were not due to a pro-rich stance or a desire to shield vested interests, but rather were based on a desire to protect the rule of law and ensure that any "social engineering" was accomplished lawfully.²⁷⁶

In general, the decisions and directions of the Court are followed because there is a sense that obedience is necessary and obligatory.²⁷⁷ In the past, the Supreme Court's rulings have impacted Indian society positively. When the Court ordered that all buses in New Delhi, notorious for filling the streets with pollution, had to switch to compressed natural gas, the authorities came in and did it.²⁷⁸

4. *Populace Response*

The Indian public places great confidence in its judiciary and considers the judicial branch, especially the Supreme Court, to be the ultimate protector of its rights and liberties.²⁷⁹ This is due in large part to the Court's activism in the human rights arena, including occasionally standing up to corrupt government officials.²⁸⁰ The Indian public thinks more highly of the Supreme Court than any other court in India—and

²⁷³ A.I.R. 2002 S.C. 1933 (The Court "was anguished over the fact that about two-thirds of the rural population . . . possessed hardly 15 to 20 per cent of the total available land.").

²⁷⁴ See *W. Bengal v. Bannerji*, A.I.R. 1954 S.C. 170.

²⁷⁵ SATHE, *supra* note 101, at 49.

²⁷⁶ *Id.* at 50 (discussing his interview with Justice K. Subba Rao, considered a pro-property judge due to his decisions).

²⁷⁷ *Id.* at 20–21; see also Interview with Judge Lokur, *supra* note 32.

²⁷⁸ Telephone Interview with Marc Galanter, *supra* note 213.

²⁷⁹ B.R. SHARMA, *CONSTITUTIONAL LAW AND JUDICIAL ACTIVISM* 216 (1990); see also Interview with Professor Arora, *supra* note 249.

²⁸⁰ SATHE, *supra* note 99, at 21 (noting its "coming down heavily against abuse of powers by ministers or other administrative authorities").

more than any other branch of government—as politicians are perceived as corrupt.²⁸¹

The Court's activism in general has been very well received by the public precisely because the Court has exhibited courage in addressing controversial social issues.²⁸² Even Prime Minister Manmohan Singh has acknowledged the great faith the Indian people have in the Supreme Court, calling it the “protector from the arbitrary exercise of power and . . . a custodian of fundamental rights.”²⁸³

The Court, however, has not been without its critics.²⁸⁴ Advocate Prashant Bhushan noted in an affidavit to the Court that some of the Court's judgments reflect a disconnect between it and the realities for people on the ground.²⁸⁵ This was in response to the Court's decision allowing the height of a dam to be raised despite fervent claims by prospectively displaced people that the state had made no plans for rehabilitation.²⁸⁶ Additionally, the Supreme Court admits that the documented backlog of cases undermines the public's confidence in the judicial system as a whole.²⁸⁷ For the Court to maintain legitimacy in the eyes of the people, it must remain independent and impartial while pronouncing fair and principled judgments.²⁸⁸

²⁸¹ Telephone Interview with Marc Galanter, *supra* note 211.

²⁸² *Id.* at 213.

²⁸³ Manmohan Singh, Prime Minister of India, Address at the Conference of Chief Ministers & Chief Justices of High Courts (Mar. 11, 2006).

²⁸⁴ *See, e.g.,* SHARMA, *supra* note 279, at 216–31 (A survey taken in the late 1980s of 310 practicing Supreme Court lawyers revealed that two-thirds of the lawyers “expressed their popular dissatisfaction with the administration of justice,” alleging that some judicial judgments are shaped by political beliefs and the class background of judges) (citing THE INDIAN EXPRESS, Dec. 16, 1997).

²⁸⁵ *See* S.P. Sathe, *NBA Contempt of Court Case*, 36 ECON. POL. WKLY. 4338, 4341 (2001).

²⁸⁶ *N.B.A. v. Union of India* (1998) 5 S.C.C. 586; (1999) 8 S.C.C. 308.

²⁸⁷ SHARMA, *supra* note 279, at 223 (“Justice delayed is justice denied”). Currently there is a 25 million case backlog in India's civil court system. 2005–2006 SUP. CT. INDIA ANN. REP. at 7, available at <http://www.Supremecourtofindia.nic.in/sciannualreport/annualreport2005-2006/Supreme%20Court%20Chapt%201-2.pdf>.

²⁸⁸ *See* SATHE, *supra* note 101, at 22.

IV. ANALYSIS

Part IV examines in depth the Indian Supreme Court's rulings regarding the PNDT Act.²⁸⁹ It then discusses the impact of the Court's rulings on the implementation and enforcement of the Act by public and private actors.²⁹⁰ Part IV next discusses the impact of the Court's rulings on societal attitudes of son preference, Indian high courts, and the legislature.²⁹¹ Finally, it concludes by discussing some limitations of the Court's rulings and subsequent impact, as well as opportunities the Court and the rest of the Indian judiciary have for future impact.²⁹²

A. The Supreme Court's Rulings on the PNDT Act

In opinions issued in 2001 and 2003, the Supreme Court responded to the lack of implementation and enforcement of the PNDT Act by giving the issue the importance it deserved.²⁹³ In response to the 1998 PIL, the Supreme Court took on the role of ordering and monitoring compliance with the PNDT, issuing five rulings in total.²⁹⁴

In a May 4, 2001, interim opinion, Justice M.B. Shah began by noting the prevalence of female infanticide in India.²⁹⁵ The Justice characterized and denounced the practice of sex selective abortion, using the normative terms "immoral" and "unethical."²⁹⁶ The Justice also acknowledged that this "unfortunate" unabated practice had led to skewed sex ratios in India.²⁹⁷ From August 1, 2001, the Court held

²⁸⁹ See *infra* Part IV.A (discussing the Court's orders and directions, including its analysis of causes).

²⁹⁰ See *infra* Part IV.B (examining the myriad of ways the Court's rulings effectuated implementation and enforcement of the PNDT Act).

²⁹¹ See *infra* Part IV.B (discussing the Court's impact on society, high courts, and the legislature).

²⁹² See *infra* Part IV.C–D (noting the limitations of the Court's rulings and opportunities for future impact).

²⁹³ Interview with Asmita Basu, *supra* note 205.

²⁹⁴ Jaisingh, *supra* note 173, at v.

²⁹⁵ Centre for Enquiry into Health and Allied Themes v. Union of India, (2001) 5 S.C.C. 577.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

hearings almost every month to follow up with Public Interest Litigation.²⁹⁸

The Court did more than simply condemn the practice by directing the Central government, state governments, and union territories to file regular reports on the progress of the Act's implementation, create public awareness against the practice of sex selective abortion, and appoint and publish a list of the Appropriate Authorities.²⁹⁹ The Court also ordered the Central Supervisory Board to meet at least every six months, as required by the Act, to review and monitor the implementation of the Act and to examine whether the Act needed amendments to keep pace with emerging technologies.³⁰⁰ Further, the Court ordered the Appropriate Authorities to take swift action against any violators of the PNDA Act and to provide regular reports to the Central Supervisory Board on the implementation and enforcement of the Act.³⁰¹

The fact that the Secretary of the Ministry of Health and Family Welfare agreed with the petitioners regarding the need for PNDA enforcement made issuing directions to the Central government easier for the Court.³⁰² The Supreme Court, through the directions it issued, sent an initial strong message to the Indian people that this was a critical problem that needed to be solved.³⁰³

In a later 2001 opinion, the Court observed that there was a "total slackness by the administration in implementing the Act."³⁰⁴ The Court lamented the fact that unregistered clinics simply received warnings and emphasized that the authorities must prosecute those clinics.³⁰⁵ The Court also found that its May 2001 directions had not been complied with and reiterated that they must be obeyed.³⁰⁶ The Court ordered the

²⁹⁸ See George, *supra* note 41, at 191.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Interview with A.R. Nanda, *supra* note 46. (Mr. Nanda said that the Ministry of Health and Family Welfare was committed to fighting the practice of sex-selective abortion during his tenure as Ministry Secretary from 1999 to 2002).

³⁰³ Interview with Asmita Basu, *supra* note 207.

³⁰⁴ Centre for Enquiry into Health and Allied Themes v. Union of India, 2001 SOL Case No. 340, Sept. 19, 2001.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

establishment of a National Inspection and Monitoring Committee (NIMC) to ensure implementation of the Act.³⁰⁷ Finally, the Court ordered ultrasound manufacturers to provide information on all the customers they had sold machines to over the previous five years.³⁰⁸

In another 2003 opinion authored by Justice Shah, the Court reiterated that the scourge of discrimination against girl children and prenatal sex selection prevails in India, especially amongst the wealthier segments of society.³⁰⁹ This time, Justice Shah noted some potential causes, such as the lack of enforcement of the Dowry Prohibition Act, the prevailing Indian mindset of son preference, insufficient education, and the tradition of women remaining in the home.³¹⁰ The Court issued new directions to the Central and state governments to continue public advertisements until all the public was aware that such gender discrimination must stop.³¹¹ Finally, the Court ordered the NIMC to continue functioning until the Act was fully implemented and reiterated its commitment to enforcing previous orders and directions.³¹²

B. The Impact of the Supreme Court's Rulings: The Resulting Implementation and Enforcement of the PNDT Act

The Indian Supreme Court's rulings regarding the PNDT Act have had a meaningful impact on the implementation and enforcement of the Act.³¹³ During the five years since the Court's first directive regarding the Act, state governments initiated awareness campaigns;³¹⁴ the media began closely covering the Court proceedings;³¹⁵ the registration of clinics increased; Appropriate Authorities were appointed in Indian states, districts, and sub-districts; pre-conception techniques

³⁰⁷ *Id.*

³⁰⁸ *See* George, *supra* note 41, at 191.

³⁰⁹ Centre for Enquiry into Health and Allied Themes v. Union of India, 2003 4 L.R.I. 107.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Interview with Asmita Basu, *supra* note 207.

³¹⁴ *See* George, *supra* note 41, at 191.

³¹⁵ *Id.*

became regulated under the PNDT amendment; and a system for evaluating compliance was instituted.³¹⁶

After the Court's interim judgment of May 4, 2001, the Department of Family Welfare issued advertisements reminding the public that sex selection is a crime.³¹⁷ The Department later called a meeting of the Central Supervisory Board, thus awakening the Board from its dormant state.³¹⁸ The Court's rulings also impacted the response of the medical community, including the Indian Medical Association (IMA). The IMA issued a warning to all of its members and the Federation of Obstetricians and Gynecologist Societies of India showed concern in a newsletter.³¹⁹ In fact, the Malpani Infertility Clinic only removed its internet advertising for pre-implantation genetic diagnosis sex selection in the middle of 2003 due to the Supreme Court's intervention.³²⁰ Additionally, as a result of the Court's ban on the sale of ultrasound machines to unlicensed clinics in December 2001, the expected rise in sales over the last six years has not occurred, causing manufacturers to raise their prices.³²¹

More importantly, since the Court's decisions, several doctors have been held accountable for violating PNDT Act provisions.³²² Dr. Anil Sabhani and Kartar Singh were caught in a government run sting operation in Haryana.³²³ Both audio and video evidence captured the doctor telling a woman that she was carrying a "female fetus and it would be taken care of."³²⁴ A Faridabad Court sentenced Dr. Sabhani and his assistant Singh to two years imprisonment and a 5,000 rupee fine

³¹⁶ Jaisingh, *supra* note 173, at v; *see also* George, *supra* note 2, at 605.

³¹⁷ *See, e.g.*, CEHAT, *supra* note 11, at 5.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ George, *supra* note 2, at 605. The Clinic performed PGD sex selection for thirty-six couples between April 1996 and April 2001. *Id.* All thirty-six couples desired a boy. *Id.*

³²¹ *Id.* at 606.

³²² BBC News, India Sex Selection Doctor Jailed, Mar. 29, 2006, http://news.bbc.co.uk/2/hi/south_asia/4855682.stm (last visited Sept. 4, 2007).

³²³ *Id.*

³²⁴ *Id.*

each.³²⁵ In April 2007, the Court's impact on PNDT enforcement reached the manufacturer level as prosecutors in the central Indian city of Hyderabad charged General Electric in criminal court with knowingly supplying ultrasound machines to unregistered clinics that were illegally performing sex selection tests.³²⁶

Additionally, in 2005, the Punjab Medical Council suspended the licenses of four doctors for conducting sex selective abortions.³²⁷ Thus far, two doctors have been convicted on substantive violations of the Act.³²⁸ And in one district in Punjab, the Chief District Magistrate has caused so much fear that the numbers of girl births are on the rise.³²⁹

1. Impact on Societal Attitudes

In the past, some Supreme Court decisions have impacted the mindset of Indian society, such as when the Court generated public opinion against authoritarian-based parliamentary decisions by upholding the dismissal of three state governments run by India's largest political party, the Bharathya Janatha Party, for their inability to govern secularly.³³⁰ It is difficult, however, to gauge whether the Supreme Court's rulings on the PNDT Act have impacted social attitudes of son preference and sex-selection.

In general, the Court's rulings appear to have minimally affected Indian society's dominant attitude of son preference.³³¹ The unchanged mindset, however, may have resulted less from the Court's failure and

³²⁵ Rita Dutta, *Giving PC & PNDT Act a Boost*, EXPRESS HEALTHCARE MANAGEMENT, May 2006, available at <http://www.expresshealthcaremgmt.com/200605/focus01.shtml>.

³²⁶ Wonacott, *supra* note 57, at A14.

³²⁷ George, *supra* note 2, at 607.

³²⁸ Interview with A.R. Nanda, *supra* note 48 (discussing the Haryana and Punjab convictions). Mr. Nanda noted that there have been other convictions for not following recording procedures, but not on what he called "substantive" grounds such as actually informing parents of the sex of the fetus or performing a sex selective abortion. *Id.*

³²⁹ *Id.*

³³⁰ SATHE, *supra* note 101, at 10 (citing S.R. Bommai v. India, A.I.R. 1994 S.C. 1918, (1994) 3 S.C.C. 1). The Court's pronouncement granting individual rights and liberties has created increased awareness among the people regarding these rights and motivated them to agitate the authorities to achieve these rights. *Id.* at 14.

³³¹ Interview with Dr. Sabu M. George, *supra* note 82.

more from the fact it chose not to explain in detail why the practice of sex selection must stop.³³² Even Justice Shah stated that the Court was “not in a position to change” the Indian attitude of son preference.³³³

The Court’s rulings have, however, raised the awareness level amongst the Indian public regarding the scourge of sex-selection.³³⁴ Additionally, the Court’s rulings communicated to the Indian public that the problem of sex selective abortion could no longer go ignored by government officials without accountability.³³⁵

2. Impact on High Courts

The Supreme Court’s ruling has impacted at least one state high court. In 2005, the Bombay High Court dismissed a petition challenging the constitutionality of the PNDT Act.³³⁶ The petitioner argued that the “right to life” clause of Article 21 of the Indian Constitution included the right to sex selection.³³⁷ The Court rejected the petitioner’s argument and responded by saying that “[t]he right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence . . . [the] [r]ight to bring into existence a life in [the] future with a choice to determine the sex of that life cannot in itself be a right.”³³⁸

This decision by the Bombay High Court, including its clear reasoning, indicates that the Court’s rulings have influenced the legal stance of other high courts in the area of sex selective abortion and

³³² Interview with P. Puneeth, *supra* note 221. Professor Puneeth noted that in the past the Court has written very persuasively in an attempt to convince the public, but in this case the Court just failed to really give cogent reasons. *Id.* It’s important to note, however, that while the Court’s opinions would be examined by the legal community, it is unclear whether they would ever be read by the general public. *Id.*

³³³ Centre for Enquiry into Health and Allied Themes v. Union of India, 2003 4 L.R.I. 107.

³³⁴ Interview with Professor Arora, *supra* note 251.

³³⁵ *Id.*

³³⁶ Vinod Soni v. Union of India, (2005 High Court of Bombay), *available at* http://mohfw.nic.in/dofw%20website/acts%20&%20rules/Judgment_Vinod%20Soni%20Vs%5B1%5D.%20UOI_Mumbai%20High%20Court.htm.

³³⁷ *Id.*

³³⁸ *Id.*

PNDT interpretation.³³⁹ This is crucial because challenges to the PNDT Act have been filed in the High Courts of Calcutta, Karnataka, Rajasthan, and Kerala.³⁴⁰

3. *Impact on the Legislature*

In 2003, the Indian parliament amended the PNDT Act to prohibit pre-conception and embryo sex selection, resulting in the Act's new name.³⁴¹ This amendment was a direct response to the Court's prompting in its 2001 ruling.³⁴² An additional positive step was the transfer of the role of Appropriate Authority from doctors to district magistrates.³⁴³ The legislature expects district magistrates to be less affected by bias and influence than doctors, whose professional camaraderie and allegiance to other doctors influence their position.³⁴⁴

C. Limitations On the Court's Impact

Despite much positive change in enforcement, prenatal diagnostic techniques are still not completely regulated in India.³⁴⁵ The 2004 Delhi census is proof of the continued slow enforcement of the PNDT Act, as the birth data showed greater decline in the sex ratio.³⁴⁶ Even Justice Shah in his 2003 ruling acknowledged that the PNDT Act was still not fully implemented and enforced.³⁴⁷

As long as Indian state governments remain indifferent and immobile to PNDT implementation, the Court's powerful pronouncements will lack reliable enforcement mechanisms.³⁴⁸ Unscrupulous doctors have started charging higher rates to perform illegal sex determination and sex selection procedures, due to the heightened risk.³⁴⁹ Additionally, in spite of the Court's rulings, the medical councils have

³³⁹ *Id.*

³⁴⁰ George, *supra* note 41, at 191.

³⁴¹ PNDT Act, *supra* note 1.

³⁴² Interview with A.R. Nanda, *supra* note 48.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ George, *supra* note 2, at 606.

³⁴⁶ *Id.* (818 girls per 1000 boys).

³⁴⁷ Centre for Enquiry into Health and Allied Themes v. Union of India, 2003 4 L.R.I. 107.

³⁴⁸ Interview with A.R. Nanda, *supra* note 48.

³⁴⁹ *Id.*

failed to punish their members harshly enough precisely because they are members of the same profession.³⁵⁰

For all the power it has, the Supreme Court is inherently limited in ensuring the full implementation of its rulings.³⁵¹ Although the Court has declared that the Indian people have concrete rights, like the right to education,³⁵² shelter,³⁵³ and childhood,³⁵⁴ the Court lacks the mechanisms to effectively enforce those rights via the judicial process.³⁵⁵ Despite the fairly positive effect of the Court's directives to the Central and state governments regarding the PNDA Act, some still doubt the effectiveness of such court directions.³⁵⁶

D. Opportunities for Future Impact

Yet, there remain many opportunities for the Supreme Court and other courts to continue positively impacting the implementation and

³⁵⁰ Interview with Professor Arora, *supra* note 251.

³⁵¹ SATHE, *supra* note 101, at lxxiv. The author implies that this may be one reason why cases against human rights have decreased. *Id.* In *P.U.C.L v. India*, the Court could do little more than give directions to the state governments to enforce the Famine Code and provide food from its surplus to starving poor people when the governments all swore there was no problem. SATHE, *supra* note 101, at lxxi.

³⁵² *Unni Krishman v. State of A.P.*, A.I.R. 1993 S.C. 2178, 2231; 1 S.C.C. 645.

³⁵³ *See Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180, (1985) 3 S.C.C. 545.

³⁵⁴ *See M.C. Mehta v. State of T.N.*, A.I.R. 1997 S.C. 699, (1996) 6 S.C.C. 756; *see also M.C. Mehta v. State of T.N.*, A.I.R. 1991 S.C. 417, (1991) 1 S.C.C. 283.

³⁵⁵ SATHE, *supra* note 101, at 13. These rights require executive and legislative action. *Id.* Another example of the Court's inability to enforce its rulings is in the area of child bonded labor. Although the Supreme Court instituted complex guidelines for child labor in *M.C. Mehta v. State of Tamil Nadu*, A.I.R. 1997 S.C. 699, (1996) 6 S.C.C. 756, and despite the constitutional prohibition on forced labor in Article 23 of the Indian Constitution, "[m]illions of children in India toil as virtual slaves" or bonded laborers, and spend their childhood "picking rags, making bricks, polishing gemstones, rolling beedi cigarettes, packaging firecrackers, working as domestics, and weaving silk saris and carpets." *India: Small Change: Bonded Child Labor in India's Silk Industry*, 15 HUMAN RIGHTS WATCH, No.2, Jan. 2003, at 6, available at <http://www.hrw.org/reports/2003/india/>.

³⁵⁶ SATHE, *supra* note 101, at lxxiv.

enforcement of the PNDT Act. The Supreme Court has the power to enforce its rulings by holding an individual or party in contempt of court and has used its contempt power in the past.³⁵⁷ Specifically, any intentional non-compliance with a Court order based in Article 32 is considered contempt of court.³⁵⁸ The Court should hold in contempt any Central or state government official who persists in disobeying the Court's directions to implement and enforce the PNDT Act.³⁵⁹ Only by directly holding government officials accountable for their failure to obey legislative and judicial directives will the Court truly effectuate compliance with its orders regarding the implementation and enforcement of the PNDT Act.³⁶⁰

The Court has, however, come under scrutiny for its perceived misuse of its contempt power in the past to stifle and punish criticism of its judgments.³⁶¹ The Court has the opportunity to redirect its powerful contempt power at those individuals and parties who refuse to obey the Court's directions regarding implementation and enforcement of the PNDT Act. By doing so, the Court would not only further the important goal of PNDT enforcement, but would also reinvigorate faith in its use of the contempt power as a legitimate judicial enforcement mechanism.

The Court also has the ability to order the Central government to allocate more financial resources towards combating the problem of sex selective abortion.³⁶² Additionally, if need be, the Supreme Court or any other court can direct local police stations to implement and enforce the law at their level.³⁶³ Furthermore, the Supreme Court or any other court that deals with the issue of sex selection can take the time to explain why sex selection is harmful to Indian society and to the status of women.³⁶⁴

³⁵⁷ INDIA CONST. art. 129; *see also* Interview with Professor Arora, *supra* note 251.

³⁵⁸ *Sachdev v. Union of India*, A.I.R. 1991 S.C. 311, (1991) 1 S.C.C. 605.

³⁵⁹ *SATHE*, *supra* note 101, at 23; *see also* Interview with P. Puneeth, *supra* note 221. Some courts are reluctant to hold a government official in contempt because that official could likely lose his job if imprisoned in a work-related matter. Interview with Judge Lokur, *supra* note 32.

³⁶⁰ Interview with Judge Lokur, *supra* note 32.

³⁶¹ *SATHE*, *supra* note 101, at lxxviii–lxxxii.

³⁶² Interview with Professor Arora, *supra* note 251.

³⁶³ *Id.*

³⁶⁴ Interview with Judge Lokur, *supra* note 32.

By giving strong reasoning for their decisions, Indian courts may be able to persuade a portion of the Indian public to end this practice.³⁶⁵

While the aforementioned avenues allow the Court to continue its positive involvement in PNDT implementation and enforcement, some argue that the Court should issue future directions cautiously to avoid disillusionment with the Court.³⁶⁶ If the Court's directions are slowly obeyed or simply unenforced, then the Court will become delegitimized in the public eye, which would be a tragedy for Indian Democracy.³⁶⁷ Thus, whether the Court can enforce its judgments regarding the implementation of the PNDT Act may impact more than the discrete matter at hand; the Court's very authority in India society is at stake.³⁶⁸

Additionally, the courts which are likely have the greatest role to play from here on out are the lower courts.³⁶⁹ Lower court judges must become sensitive to the issue of sex selection and furthermore become educated about the PNDT Act, as many judges may not know about the Act because it is not a part of their daily routine on the bench.³⁷⁰

V. CONCLUSION

The only way to prevent sex determination and sex selective abortion in India is through a multi-faceted response that transforms society's mindset from one that systematically devalues women to one that considers women equal stakeholders in society.³⁷¹ As a practical

³⁶⁵ *Id.*

³⁶⁶ SATHE, *supra* note 101, at lxxiv.

³⁶⁷ *Id.* at lxxxiv. "There is fear that the courts will get delegitimized if their decisions continue to be ignored or treated as mere academic exhortations." *Id.* at lxxv.

³⁶⁸ Telephone Interview with Professor Marc Galanter, *supra* note 213.

³⁶⁹ Interview with Professor Arora, *supra* note 334; *see also* iInterview with Dr. Sabu M. George, *supra* note 80.

³⁷⁰ Interview with Professor Arora, *supra* note 334.

³⁷¹ Jaising, *supra* note 173, at vi. Vibha Parthasarathy, president of India's National Commission for Women, recommends a long-term education strategy aimed at changing the mindset of young boys and girls. Newell et al, *supra* note 102, at 28.

The most important tool for change is improving the status of women through education. Education at the primary school level is

matter, this comprehensive response hinges on whether law enforcement consistently enforces the laws against sex determination and sex selection.³⁷²

The legislative and executive branches must address critical issues directly related to son preference and sex selective abortion, such as the continued persistence of the Dowry tradition due to the unenforcement of the Dowry Prohibition Act.³⁷³ The lower courts must also engage the issue of sex selection as fervently and thoughtfully as the Supreme Court.³⁷⁴ By implementing the ban on sex selection, the government can send the unequivocal message that feticide is socially, morally, and legally reprehensible.³⁷⁵

Lawyers, social and political activists, and law enforcement officials must collaborate at every level of PNDT investigations and prosecutions.³⁷⁶ NGOs must continue to play an active role in both monitoring clinics and educating the population of the harmful effects of the resulting skewed sex ratio. Religious leaders should seek to incorporate women more actively in religious ceremonies such as the lighting of the funeral pyre and emphasize their value in religious society as a whole. The medical community must determine to enforce the PNDT Act even at the cost of sacrificing the lucrative profits associated with

focused on women's rights and building girls' self esteem increased programs for literacy and job training, more opportunities for higher education for women, and public education campaigns about women's issues are the only way to begin to effect true reform.

Patel, *supra* note 17, at 15.

³⁷² Jaising, *supra* note 173, at vi.

³⁷³ Interview with Tenzing Choesang, *supra* note 114.

³⁷⁴ *Id.* Choesang notes that the crime of sex selective abortion is hidden, making it difficult to find evidence and convict violators. *Id.* The Indian Supreme Court has issued orders regarding sex selective abortion, but magistrates have heard and decided the cases that have been brought under the PNDT Act. *Id.*

³⁷⁵ Singh, *supra* note 81 (quoting midwife Satwant Kaur, stating that "instead of spending money on seminars and public meetings, the government should post a reward of Rs 5,000 for anyone who helps to catch offenders. This is the only way to stop this illegal practice.").

³⁷⁶ Interview with A.R. Nanda, *supra* note 46; *see also* George, *supra* note 39, at 191 (emphasizing that "[p]rogressive lawyers must keep a constant watch so that those who make money from sex selective abortion do not use the lower courts to subvert the enforcement of the PNDT Act").

sex selection practices. The medical community should also foster an environment of openness regarding sex selection rather than one of secrecy and denial. Mass media could also meaningfully address the issue by presenting positive and healthy images of Indian women in commercials, advertising, feature films, and television. Any mass media campaign, however, must be sensitive to prevailing negative connotations of modernity like the perceived loss of cultural identity.³⁷⁷ Finally, individual families must recognize the devastating macro-impact that their individual decisions to engage in sex selection have on Indian society.³⁷⁸

A problem as deep-seated and pervasive as sex selective abortion requires a comprehensive and determined response by every public and private actor involved. Only with all these players working in concert can the plague of sex selective abortion be eliminated and the sex ratio returned to a healthy and stable balance.

³⁷⁷ *Tackling Sex Selective Abortion*, *supra* note 91.

³⁷⁸ Interview with A.R. Nanda, *supra* note 48 (noting that educating people about the social consequences is one way to awaken a sense of responsibility).

