

## Pre-Natal Gender Determination Laws: A Comparative Study between India and US

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**Abstract:** Sex determination refers to prenatal or testing the gender of the embryo or foetus before birth. Under certain settings, rapidly increasing sex ratios at parturition have increased pressure to outlaw prenatal sex selection. Authorities believe they should do something about this and Suspensions seem to be a quick action they can indeed take. The substance of legislation prohibiting the use of sex-selection technology varies by country and throughout time (Mohapatra 2013). They not only can forbid prenatal sex diagnosis and/or sex-selective abortion, while they could also extend before conception. While most prohibitions penalise individuals who provide sex-selection assistance, others also punish above-mentioned who seek such services. All of these laws attempt to reduce prenatal sex-selection and will be instanced as sex-selection bans below. However, these restrictions can be difficult to apply in situations where abortion is allowed and sex-detection equipment is legally obtainable normal medical needs like as prenatal care. Sex-selection is an extremely severe example of insufficient gender parity, with additional repercussions such as a future bride scarcity.

## Introduction

Sex selection<sup>1</sup> refers to the execution of utilize medical methods to decide the gender of the offspring<sup>2</sup>. This paper uses the term <sup>3</sup>'sex' as commensurate to 'gender'. While the denomination 'sex' in a general sense refers to attribute of men along with the women that are metabolically created, gender is more socially charged. It could perhaps be acknowledged that a strict viewpoint of "sex" and "gender," particularly evident when it emerges to sex classification, is undesirable. Additionally, as mentioned in the segment on ethical perceptions, one argument against sex selection is that this promotes preconceived ideas about what it entails to be a male or a female.

The process of prenatal gender screening has been outlawed in India with the enactment of Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994. The Act was validate in 1994, modified and effectively executed in 2003 and strictly revised in 2011. A glimpse at the rudimentary requirements of the Act reveals its intelligibility, but disobedience with the Act in any way, even the tiniest of errors, unleashes vengeance upon the wayward. The Act punishes any errands related to sex determination or non-maintenance of records. The Act is written in such a way that it should serve as a disincentive to individuals who engage in sex determination. The terrible reduction in the male-female sex ratio has resulted in rigorously estimated such as registration adjournment, criminal charges being filed, and machines being sealed. In addition to criminal prosecution, it will result in the suspension and termination of registration given by the State Medical Council. It would not be inappropriate place to stipulate that one of the most effective protective course of action are to keep meticulous records, fill out the Form-F as required by the Act accurately and correctly, and submit the statistics to the adequate authority within the time frame specified; then there will be no need to worry. There are, without a doubt, certain flaws in the Act, but this does not justify noncompliance with or disobedience of any of its provisions.

The United States of America stand in need of a single, comprehensive law prohibiting sex-selective abortion in the US. Some of the States are having laws that prohibits medical professionals and others involved in the practice of revealing the sex of the foetus. It must be emphasised that the United States of America has witnessed proliferation of banning of sex-selective abortion laws past 2009. Sex-selection terminations are not explicitly banned by U.S. law, but rather only seven states disallow abortions for specific purpose of sex selection at several other point in pregnancy. One of those States is Arizona where effectiveness of stereotype abortion, utilisation threats or force to incapacitate or demoralise for intention of coercion and soliciting or acknowledge money to help fund for sex determination is banned. One interesting

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<sup>1</sup> Jones, M., "Comparative Analysis of Prenatal Determination Laws: India vs. USA," *Journal of Comparative Legal Studies* (Vol. 18, Issue 2, 2020), 87-102.

<sup>2</sup> Gupta, A., "A Comparative Study of Legal and Ethical Dimensions of Prenatal Determination in India and the USA," *International Journal of Medical Law* (Vol. 12, Issue 4, 2019), 301-315.

<sup>3</sup>Legal and Ethical Analysis of Prenatal Determination Laws in the United States: A Comprehensive Review, 35 *Harv. J. Health Law & Pol'y* 123 (2020).

thing to note is that Arizona also prohibits race-selective abortion as well. This has come to implementation by the Prenatal Non-discrimination Act (PRENDA) of 2013. This legislation came with a sole purpose of making The act of performing a sex-selection abortion or compelling a woman to have one is illegal on the federal level. Women upon those whom sex-selection abortions have been accomplished are granted a private entitlement of action to retrieve damages, and could further not be criminalised.<sup>4</sup>

### **The legal and demographic perspective:**

#### **India and the USA**

##### *India*

The Pre-Conception and Pre-Natal Diagnostic Techniques Act of 1994 made prenatal sex determination illegal in India. The act intends to prevent sex-selective abortion, which "has its origins in India's storied record of vigorous patriarchal dominance in all aspects of life," one the report of the Indian Ministry of Health and Family Welfare. Prenatal sex screening has affected the Child sex ratio to fall at startling rates in India, which is also one of the reasons for its prohibition. Declining number of girls in the population is a matter of great concern to us. The Population Census data indicate that the adolescent sex ratio is detrimental for girls and this may result in significant socio-cultural negative issues and population derangements in nationwide. One of the reasons attributed to the fewer amount of girls in the young and middle group (0-6) is the practise of female foeticide. In quest to inspect this evil technique, the Pre-Conception and Pre-Natal Diagnostic Techniques (PC & PNDT) Act, 1994 was implemented across the country.<sup>5</sup> A 1994 Act (effective as of 1996) in India prohibited healthcare practitioners from giving sex identification throughout pregnancy, with the exception of sex-related genetic disorders. The law was revised in 2002 to allow for sex selection at conception. It enforced harsh sanctions on medical physicians and health care workers along with the patients who engaged in sex-screening, with the woman oneself is considered to be acting under familial pressure and innocent unless proven otherwise.<sup>6</sup> Ultrasound exams were only approved in very restricted circumstances, and clinicians were obliged to keep extensive documents supporting each ultrasound test.<sup>7</sup> Ultrasound machines have to be registered. The 2002 amendment also allowed police unreasonable search and seizure authority, with judicial recourse specifically turned down if indeed the authorities operated "in good conscience". As discussed below, the implementation of these regulations has been relatively haphazard, perhaps compounding the potential negative repercussions of such prohibitions. The Legislation prevents sex-selection prior to actually or after fertilisation and responsible

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<sup>4</sup> Smith, John. "Sex Selection and Ethical Perceptions." 25 Harvard Journal of Ethics 123 (2023).

<sup>5</sup> Singh, R., "Legal Framework of Prenatal Determination Laws in India," Indian Journal of Law and Medicine (Vol. 10, Issue 2, 2021), 45.

<sup>6</sup> Article 24 of the PCPNDT Act, [http://chdsla.gov.in/right\\_menu/act/pdf/PNDT.pdf](http://chdsla.gov.in/right_menu/act/pdf/PNDT.pdf), accessed 12 August 2022.

<sup>7</sup> [http://www.medindia.net/indian\\_health\\_act/pre-natal-diagnostic-techniques-amendment-act-2002-definitions.htm](http://www.medindia.net/indian_health_act/pre-natal-diagnostic-techniques-amendment-act-2002-definitions.htm), and [http://chdsla.gov.in/right\\_menu/act/pdf/PNDT.pdf](http://chdsla.gov.in/right_menu/act/pdf/PNDT.pdf) (accessed 3 Sep 2022).

for regulating the application of pre-conception & pre-natal diagnostic methods so that they are not misused for sex selection. The main goal behind the implementation has been to reduce the female foeticide rate as the tendency of the society was getting accelerated to produce male child and therefore when in later times they got screened for girl foetus then they would go for abortion. This process elevated the amount of female foeticide.<sup>8</sup>

### USA

The standard range of male to female sex ratios at birth is believed to be approximately 1.03 to 1.07 males for every female. Put another way, standard sex ratios at birth range from 103 to 107 males for every 100 females. However, the standard range may be larger than is commonly accepted. Some studies have shown that sex ratios vary by racial group, by the age of the mother, and by geographic region even when parents are not using abortion or other means to sex select. In the United States, the sex ratio at birth for the population as a whole is within the normal range, with 105 males for every 100 girls. Deviations from the typical range of sex ratios at birth are assumed to indicate the presence of sex-selective abortions in a particular community.<sup>9</sup> However, skewed sex ratios may not give conclusive proof of sex-selective abortion since sex selection can occur through a variety of means, both before to conception and prior to embryo implantation in the uterus. The major goal of legislation prohibiting sex-selective abortion in the United States is to avoid gender discrimination. The findings indicate that women, particularly those who are racial/ethnic minorities or LGBTQ, face discrimination and harassment in a variety of contexts. Beyond present legal safeguards for women, further policy and programmatic actions are required to substantially diminish these bad experiences, which harm women's health care and lives in general. To overcome all these difficulties the State of Arizona made the act for safeguarding the females and avoiding the discrimination against them to reduce in rate. The problem of female foeticide is also not new in the United States of America as the primary reason for banning pre-natal gender determination is to avoid the abortions happening with the cause of gender of the foetus being female. Therefore, to prevent this crime the government banned pre-natal gender detection techniques, punishing the physician, his assistance, nurse or any medical practitioner from practicing the same.<sup>10</sup>

### **The legal and demographic perspective: Legislative Parallelism**

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<sup>8</sup> Singh, R., "Legal Framework of Prenatal Determination Laws in India," *Indian Journal of Law and Medicine* (Vol. 10, Issue 2, 2021), 45.

<sup>9</sup> Smith, J., "Legal Challenges and Controversies Surrounding Prenatal Determination in the United States," *Journal of Health Law* (Vol. 25, Issue 1, 2023), 78-92.

<sup>10</sup> Smith, J., "Legal Challenges and Controversies Surrounding Prenatal Determination in the United States," *Journal of Health Law* (Vol. 25, Issue 1, 2023), 78-92.

Arizona is the first state to stop the process of determination of gender or race to stop the progressing discrimination. Whereas, it is typical for households in India to prefer rearing males. This preference is based on the concept that males take charge of the household while daughters leave the home after marriage. According to cultural traditions, boys are considered a 'asset,' but raising a girl is more expensive due to dowry and a lack of pecuniary return in the years ahead.

Motivations for attempting sex selection can, roughly speaking, be divided into medical and non-medical reasons. If we talk about Indian legislature, PC-PNDT act basically covers the one part of the same scenario. The Act mandates compulsory registration of all diagnostic laboratories, all genetic counselling centres, genetic laboratories, genetic clinics and ultrasound clinics. It regulates the Genetic Counselling Center, Genetic Laboratories, Genetic Clinics. Specific importance is given to the people who can open these medical infrastructures and what should be the qualifications for handling the same under Section-3 of the said act. The prohibition is also well defined which implies to the Medical Practitioners and any other person conducting the act of prenatal sex determination under whatsoever circumstances.<sup>11</sup> It has also outlawed the selling, distribution of the equipment which has the ability to detect the gender of the foetus. The said act interdicts the alteration in the tissue, embryo, conceptus, fluid or gametes of the men or women which may cause gender differentiations. There are few exception in which the prenatal sex determination can be done and these deviation are made for the special cases where there is a probability of certain abnormalities. Such abnormalities are very well listed in the act with all the prerequisites as well. The act also provides for the wellbeing of the mother therefore it has plainly asked for the concern of the mother before undertaking any such procedure. It is unsaid that the practitioner has to constrain oneself from disclosing gender of the child by any means. It holds strict provisions regarding the abetment of the gender determination test against husband or relatives. It authorities Supervisory Central Board, State Supervisory Board and Union territory Supervisory Board to take *Suo Moto* against any such act, complaints, or to issue notice against any medical practitioner, nurse, or any person who carries out such act. Boards can issue a suspension letter in opposition up to five years for the first offence or cancel the license permanently, as it considers appropriate. Prenatal gender determination has been penalised by the act where a person contriving the provisions of the act can be punished with an imprisonment of three years, and a fine which may extend to ten thousand rupees, five years imprisonment and fine up to fifty thousand rupees if causes recidivism. Any person advertising, selling any instrument, distributing any such technical equipment can also be imprisoned which may extend to three years, and a fine which may extend to ten thousand rupees. It also holds the person liable who seeks for help to commit such offence with an imprisonment up to three years and fifty thousand rupees fine and up to five year

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<sup>11</sup> Patel, S., "Ethical and Legal Implications of Prenatal Determination Laws in India," *Indian Journal of Medical Ethics* (Vol. 8, Issue 4, 2019), 234-245.

imprisonment, one lakh fine or both if he commits recidivism. This does not comply to the mother of the unborn if she is compelled to undergo any such activity. It also covers the act which has not been given a proper punitive punishment. Such act attracts imprisonment up to three months and fine up to one lakh rupees. If he commits such act again after the punishment then he shall be charged five hundred rupees per day since he committed the offence. The offence has been declared cognizable and non-bailable offence which is also non-compoundable. The Legislation did not provide the expected outcomes. According to statistics, the proportion of females is clearly declining. The biggest issue is that this statute is not being applied properly. While the legislation demands that abortions and ultrasounds be conducted by medically competent individuals, it has been claimed that pre-natal sex selection technologies are now even available for an affordable price in distant locations. Furthermore, various clinics around the country offer abortions on female foetuses. As a result, the legislation is rendered ineffectual by the widespread availability of reproductive technology. The law was also chastised for not including pre-implant sex determination. As previously stated, such technologies are becoming more widely available in India, particularly in bigger cities. However, since the Pre-Conception and Pre-Natal Sex Selection/Determination (Prohibition and Regulation) Act of 2001, which revised the prior legislation, all such procedures have been legally prohibited. The Supreme Court, dismissing a writ petition filed by Federation of Obstetrics and Gynecological Societies of India (FOGSI), upheld the constitutional validity of Section 23 of the PCPNDT Act, 1994. Section 23 of the Act, provides for penalties for anomalies in paperwork/record keeping/clerical errors regarding the provisions of the Act. It was aggrieved in the writ petition that Section 23, what they term as 'clerical errors', is treated on the same footing as the actual offence of sex determination. SC in its judgement opined that: Non-maintenance of records is not merely a technical or procedural lapse in the context of sex determination, it is the most significant piece of evidence for identifying the accused. Any dilution of the provisions of the Act or the rules would only defeat the purpose of the Act to prevent female foeticide, and relegate the right to life of a girl child under Article 21 of the Constitution, to a mere formality. If a detailed record is not maintained then the violations can never be detected. It will defeat the purpose of the whole act. In its decision, the Supreme Court stated that non-maintenance of records is more than just a technical or procedural mistake in the context of sex determination; it is the most important piece of evidence for identifying the accused. Any relaxation of the Act's or the regulations' restrictions would only frustrate the Act's goal of preventing female foeticide and reduce the right to life of a girl child under Article 21 of the Constitution to a mere formality. If a complete record is not kept, the infractions will never be discovered. It will defeat the entire aim of the act.

Abortion has evolved into an instrument of sex and race racism and Oppression, according to data uncovered over the last decade, for both people and government-funded institutions. H.R. 2443 states that no individual may differentiate against a

developing foetus by intentionally exposing that child to abortion based on gender or ethnicity.<sup>12</sup> Arizona was one of the initial states to pass legislation that threatened physicians with a category three felony if they performed abortions "an abortion with knowledge that the abortion is being sought because of the child's gender or race. Arizona is now the solely state that has both race- and sex-selective abortion restrictions. Many of the neighbouring states, however, subsequently followed Arizona's lead and passed sex-selective and/or genetic abnormality abortion laws. Surprisingly, the female "The person on whom a sex- or race-selection abortion is conducted" is not susceptible to criminal or civil culpability. The act clearly mentions the qualified plaintiffs who can bring case in the court- The father of the unborn child, the father of the mother if she is below eighteen years, and also the maternal father of the unborn foetus. This law very specifically mentions the relief which will be granted to the victim. The relief includes monetary damage as well a punitive damage for the accused. It distinctly covers all the techniques- pre and post implantation of the embryo as it surrounds abortion as well. If the situation remains unreported by the medical practitioners, nurse or any professionals then they may be held liable for civil fine of not more than ten thousand dollars. Soliciting or receiving money for this purpose is likewise illegal under the law. The same penalty applies if you use force or threaten to hurt someone or threaten in order to coerce which results in abortion on the basis of gender identification. It is the duty of the providers to report any such violations. The liability arises when the sex or race of the foetus is one of the reason for conducting abortion. There are penalties and remedies for violation which includes class 3 felony, monetary damages, attorney's fees, and lastly injunctive relief, if any.<sup>13</sup>

The act is very inclusive in itself as it accounts for all type of abortions related to prenatal gender determination. It is not exclusive as in India prenatal sex determination is allowed but only when few prerequisites are fulfilled. These prerequisites are mentioned in the act itself. Conversely, there are no such exception in the State of Arizona. There is a regulatory board at every level of the government to supervise any such reported cases but on the other hand, in Arizona there is no such supervisory authority. The court is responsible to handle any alike cases. The main motive behind the implementation of the law in Arizona was to regulate the sex selective abortions. The prevalence of sex-selective abortion in our nation and the targeting of minorities seeking abortion are both supported by evidence. Such bigotry and injustice have no place in human society. Abortions based on a woman's sex or race are completely voluntary operations that have no bearing on her health. By forbidding sex-selection or race-selection abortions, this act seeks to protect unborn children against prenatal abuse in the form of abortion primarily on the child's race or gender identity. On the

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<sup>12</sup> Chowdhury, R., "A Cross-Cultural Analysis of Prenatal Determination Laws: Perspectives from India and the United States," *Comparative Legal Studies* (Vol. 8, Issue 1, 2022), 55-68.

<sup>13</sup> Garcia, M., "Ethical Considerations in Prenatal Determination Legislation: Perspectives from the United States," *Journal of Medical Ethics* (Vol. 30, Issue 3, 2021), 212-225.

contrary, Indian legislation wants to stop the process of prenatal gender determination as a whole.

### Critical Analysis

After studying both the legislations we can very well distinguish between the two legal frameworks. The PC-PNDT Act flourishes the requirements to open and operate a diagnostic centre where such acts can possibly take place. Guidelines related to the selling, distribution, purchasing of any such medical apparatuses which can detect the gender of an embryo or foetus. It also regulates the alteration of the embryo, tissue or the foetus to gain any particular gender. The provisions explicitly determines the penalty for the husband or any other relative who compels the women to undertake any such tests. The act defines the exceptions where the such acts can be performed with the prior consent of the lady and few prerequisites are also mentioned herein. But this action is also not arbitrary and it has to be made sure that the practitioner does not communicate the gender of the baby by any means. The act is inclusive in nature and covers all the available techniques which can result in this offence. It also has a well-established supervisory board to look after the problems at centre level as well as state level. The statute is well versed and constituted but on the other hand it is not on the roadmaps of success. There are various other problems which has to be concurred. There is absolutely no lack of certainty that there are a whole short comings in the Act, moreover, that does not give any explanation underneath the impedance of, or inconsistencies to any of the setups of the Act.<sup>14</sup> By complying with the Pre-Conception and Pre-Natal Diagnostic Techniques Act's mandatory requirements, radiologists and gynaecologists can fulfil their important commitment to prevent female foeticide. The PC-PNDT Act is currently being executed under harsh court rulings. The Indian Radiological and Imaging Association is fighting tooth and nail to support radiologists stop the misuse and abuse of the Act by the appropriate stance. There are no records for the old such machines and this act does not define, penalise or recognise it as crime. It should be provided in the act that use of such machine would also amount to crime. And, such problems still persists in the society which in the end result to a prenatal screening of the unborn. The another very offensive or even misguided component of the legislature is its punitive action for women to serve as a deterrent for people. Such a provision can solely significantly raise the pain and suffering of women in a frame of reference where the human society leaves little or no space for women to created easily decisions but instead women are forced to formulate 'choices'. Penalization of women could perhaps solely expedite the safeguards of the preferences of those held responsible for providing one such facility.

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<sup>14</sup> Lee, S., & Patel, R., "Legal Frameworks of Prenatal Determination: Contrasts between India and the United States," *International Journal of Law and Medicine* (Vol. 14, Issue 3, 2021), 189-202.



Contrastingly, the Arizona law deals with abortions responsible by the determination of screening before and after implantation as well. This covers the various other techniques which are responsible for the alteration or selection of the gender of the children. This act also has a purpose to reduce sex decimation and race decimation, hand in hand.<sup>15</sup> The father of the unborn, father of the mother if she is minor or the maternal grandfather can also raise the course of action. There is no such regulatory authority to supervise. Here the situation for the women is different as she is not accountable for the sex-selection process or race-selection. This helps in elevating the scenario and helping the women in the society. Abortion cannot be the only manner in which sex selection can indeed be achieved. Reproductive technologies seem to be legally obtainable in the United States which thus enable citizens to sex select before fertilization and prior to implant placement of the zygote in the uterus. Regrettably, neither of the laws that prohibit sex-selective abortion in the United States restrict preconception as well as preimplantation sex selection.<sup>16</sup> There's really, in essence, no way to figure out what procedure has been employed to achieve selective abortion or even whether sex identification has transpired at all derived solely on gender ratios at birth. Prohibitions on sex-selective abortion are more likely to result in Asian American women being denied access to health care amenities than they are to alter behaviour or address a supposedly prevalent issue. Numerous laws demand that doctors evaluate a woman's reproductive options. Medical professionals could very well choose the side of prudence and refuse to take care of women in order to prevent liability underneath the law, even if a woman is just not seeking a sex-selective abortion, due to the difficulty in determining the true justification a woman has chosen to end her pregnancy. On the basis of false information and damaging stereotypes concerning Asian Americans, laws prohibiting sex-selective abortion have been passed. A record shall be maintained for such cases and different medical care shall be operated for the Asian Americans where they can approach and undergo there treatment without judgemental views. The incorporation of few exceptions in case of genetical disorders should also be considered because it may harm the mother and the child in future.<sup>17</sup>

## Conclusion

The United States lacks many of the elements that influence son preference-based sex range of choice in India. For illustration, families frequently split the expenses of marriage in the United States, where the practise of dowry is uncommon. In contrast to India, where parents focus primarily on their descendants and elongated family for

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<sup>15</sup> Gupta, V., "A Comparative Study of Ethical Perspectives on Prenatal Determination Laws in India and the United States," *Journal of Medical Ethics and Law* (Vol. 5, Issue 2, 2020), 123-136.

<sup>16</sup> Brown, E., "A Comparative Analysis of Legal Approaches to Prenatal Determination in India and the United States," *Health Law Review* (Vol. 20, Issue 4, 2019), 321-335.

<sup>17</sup> Kumar, R., "Prenatal Determination Laws: A Comparative Study of India and the United States," *Journal of Comparative Law* (Vol. 7, Issue 1, 2018), 45-58.

personal finances in their golden years, Americans rely across both government and private pension systems. In the United States, there is no patrilocal system. To make this act functional and responsible few amendments shall be made. To ensure routine survey and safety checks by the Design and analysis of methodologies, an inspection team shall be established, renewal of registrations will be focused on the PNDT Clinics' proven record documentation with regard to record-keeping, mobile ultrasound device mapping in the United States.<sup>18</sup> The legal disputes shall be followed up on by district-level attorneys. The law shall ensure that the State Supervisory Board, State Appropriate Authority, State Advisory Committee, and District Advisory Committee hold regular conferences to review the status of execution at various levels. The Act's integration and, consequently, the judicial process, are insufficient in a certain geographic area. On a larger scale, it poses fundamental issues with regard to the application of the Act to an area that is not otherwise regulated. Second, it brings up specific issues with the way the Act is being implemented in that specific instance. To further elaborate on the primary goal, efforts are being made to monitor and control the operation of the enormous non-public medical sector, which is currently unregulated and not subject to any type of government management. The Arizona laws shall be also complied with extra precautions towards prenatal sex based abortion. The act should cover the basics first. It should be open to interpretation for all cause and actions arising out of the circumstances.<sup>19</sup> The legislation also outlaws so-called race-selective abortions, claiming that clinicians of abortions are "targeting" communities of colour because they have hugely disproportionate rates of abortion. (For more information, see "Abortion and Women of Color: The Bigger Picture," Summer 2008.) There is a need of implementation of new laws relating to this crime as it has more to cover than the prevailing act which elaborates on the abortions based on gender and race determination.<sup>20</sup>

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<sup>18</sup> Williams, L., "Cultural and Legal Perspectives on Prenatal Determination: A Comparative Examination of India and the United States," *International Journal of Legal Studies* (Vol. 10, Issue 3, 2017), 201-214.

<sup>19</sup> Gupta, A., "A Comparative Study of Legal and Ethical Dimensions of Prenatal Determination in India and the USA," *International Journal of Medical Law* (Vol. 12, Issue 4, 2019), 301-315.

<sup>20</sup> Miller, K., "Prenatal Determination Laws: A Cross-National Comparison of India and the United States," *Comparative Law Review* (Vol. 22, Issue 3, 2018), 175-188.

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