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**HARMFUL PRACTICES AGAINST WOMEN IN INDIA:
AN EXAMINATION OF SELECTED LEGISLATIVE RESPONSES**

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Introduction

Violence against women, of which harmful practices against women is a part, has been acknowledged as “*one of the crucial social mechanisms by which women are forced into a subordinate position compared with men*”¹ and therefore a violation of women’s equality rights. Women face violence due to their position of inequality; their vulnerability to violence being exacerbated due to their positions of dependency as well as prevailing patriarchal attitudes.

The Indian Constitution guarantees women equality before the law and the equal protection of laws under Article 14 and prohibits discrimination on grounds of sex under Article 15. A unique feature of the Indian Constitution is Article 15(3), which empowers the State to take special measures for women and children. Despite these guarantees, the position of women in India remains unequal.²

The legal regime

The Indian State has, however, legislated on many issues relating to women’s equality rights. Currently, there are approximately 44 Central laws³ that have a direct impact on women’s rights.⁴ Some of these are- the 73rd and 74th amendments to the Constitution that mandates 33% representation of women in elected village (*Panchayat*) and municipal bodies, adoption of special laws⁵ and provisions⁶ in the employment sector to promote equality rights and to counter historical and social disadvantage.⁷ In 1997, the Supreme

¹ UN Declaration on Violence Against Women, 1993

² See Annexure I

³ Under Article 245 of the Constitution, a quasi-federal system of governance has been adopted, which means that legislative powers are divided between the Center and the states. Various matters of legislation have been enumerated in three lists contained in the VII Schedule of the Constitution- List I (Union or Central List), List II (State List), List III (Concurrent List, which includes subject matters over which both the Union and State Government can make laws on the understanding that a Central/Union law may override a state law in the event of conflict between the two). Hence there are many more laws that impact on women’s rights that have been promulgated by different state governments. This paper limits its scope to the analysis of developments on four issues legislated upon by the Center/Union Government.

⁴ See Annexure II

⁵ Including the Equal Remuneration Act, 1976- to ensure equality in remuneration between men and women workers and to prevent discrimination on grounds of sex by imposing duties on employers and providing for penalties in cases of breach, Maternity Benefit Act- applicable to all public/ government establishments, this law is aimed at “protecting dignity of motherhood” by imposing duties on employers to not employ a woman in the period of 6 weeks immediately following her pregnancy and to pay average daily rates for the period of her absence.

⁶ For a list of laws impacting on women’s rights, see Annexure II.

⁷ NB- these provisions primarily apply to the public and/or the organized sector, which represents less than 10% of the Indian workforce. Protection accorded by these laws is limited due to low coverage as 90% of women are employed in the unorganized sector as also due to ineffective implementation.

This paper is limited, due to the constraints of space, to the examination of legislative developments in the areas of sex selective abortions, dowry prohibition and prohibition of child marriages to illustrate the points made in the previous section. Additionally this paper shall examine experiences in implementing the PWDVA to the extent of the scope of this legislation in addressing harmful practices against women and in identifying strategies that allow for enhancing the effective implementation of laws.

Sex selective abortions

Declining sex ratios, particularly the alarming decline in juvenile sex ratios to the disadvantage of the girl child, as reported in the Census Report 2001,¹⁵ is the most telling indicator of women's devalued position in society. One of the reasons behind skewed juvenile sex ratios is the misuse of diagnostic techniques, such as widely available ultrasound tests, which are used to first determine sex of the fetus and thereafter abort female fetuses.

Sex determination and sex selective abortions are grave forms of discrimination against women.¹⁶ However, unlike other acts of discrimination, sex determination and sex selective abortions require active medical intervention in that, unless a medical professional reveals the sex of the fetus, neither of the discriminatory acts can take place. This issue brings to the fore concerns of using scientific technology as a tool of discrimination. Yet technology, diagnostic technology in this case, has legitimate uses such as the detection of abnormalities or in monitoring antenatal health of the mother, etc. The law therefore cannot, and indeed should not, prohibit the use of beneficial technology. However, it is essential that the State regulate the use of such technology to prevent its misuse.

The demand for a law to regulate diagnostic technology was first articulated by the women's movement in the late 80s in response to the misuse to genetic tests, such as amniocentesis intended for the detection of sex linked genetic abnormalities in fetuses, for the sole purpose of sex determination.¹⁷ The PC&PNDT Act was therefore enacted¹⁸

¹⁵ The Census 2001 reports that juvenile sex ratio (0-6 year age group) has steadily declined from 945 in 1991 to 927 in 2001. Alarming, in some states sex ratios are in below 900 females to a 1000 males, such as of Union Territory of Chandigarh (773), New Delhi (821), Haryana (861), Punjab(874) and Uttar Pradesh(898).

¹⁶ The incidence of sex selective abortion is not a pro-life or a pro-choice issue. The right to abortion for women is needed as a historical necessity, given that women bear disproportionate biological and sociological burdens associated with delivery and childcare. A woman should therefore, have the right to abort *any* fetus as the birth of a child of any gender imposes identical burdens. On the other hand sex determination followed by sex selective abortions, when a fetus is aborted for the sole reason that it is female, are acts of discrimination against women as a social class because girl children or women are not wanted due to their devalued status in society.

¹⁷ The demand for a separate law was a thought out strategy to guard against placing impediments to women's access to abortion services. The reason for this being that the Medical Termination of Pregnancies Act, 1971 (MTP Act) that regulates the provision of abortion services does not recognize a woman's right to abortion but legalizes the conduct of abortions by registered medical practitioners (RMP) on liberal

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with the dual objective of regulating pre-natal diagnostic techniques¹⁹ and to prohibit the use of pre-conception methods for sex selection.²⁰ The PC&PNDT Act therefore allows the conduct of pre-natal diagnostic techniques only for purposes and under conditions specified in the Act.²¹ It also prohibits the disclosure of the sex of the fetus to the pregnant woman or any other persons to prevent sex selective abortions.

However, prohibition of disclosure is difficult to enforce as it takes place behind closed doors and can be done verbally. Hence the PC & PNDT Act puts in place a system of registration and monitoring. All units engaged in either advising or conducting pre-natal diagnostic techniques are to be registered under the law. Once registered, the units are mandated to self-monitor by maintaining records of all pregnancy related services rendered. These records are then subjected to the scrutiny of state agencies to check veracity and ensure statutory compliance. The records also put in place a ‘paper trail’ of referrals that can be monitored by state agencies. This is essential as there are various professionals and units associated in the conduct of these techniques, such as the doctor advising the test, the professional conducting the test, etc. and information on the sex of the fetus may be disclosed by any of these professionals or any person rendering services in such units. It is therefore, essential to link the practice of all such entities through a paper trail that is amenable to monitoring by State agencies. The law is based on a presumption that a woman will follow a particular route that is can be monitored in this manner.²²

At the time of its enactment in the early 90s, ‘genetic’ tests such as amniocentesis were primarily being misused for sex determination. Hence the PC & PNDT Act was designed to regulate genetic tests, defined broadly as “pre-natal diagnostic techniques”, used for the detection of abnormalities in fetuses. Units requiring registration under the

grounds stipulated therein. A woman who does not meet the stipulations under the MTP Act, can therefore, face potential penal consequences under the Indian Penal Code (IPC). An illustration- a woman availing of abortion services in clinics not recognized under the MTP Act or receiving such services from a person who is not an RMP can be penalized under the IPC even if she meets the conditions stipulated under the MTP Act. State sponsored health services are highly inadequate in India, hence it is likely that many women, particularly in rural and impoverished areas, are not in a position to access recognized clinics or registered RMPs as they are simply not available in their areas.

¹⁸ The PC&PNDT Act was enacted in 1994 and brought into force in 1996. However, there was no implementation of the law until the Supreme Court, in 2001, passed directives for its implementation in a public interest litigation filed by concerned health groups. Pursuant to Supreme Court directives, the law was amended in 2003.

¹⁹ The term “pre-natal diagnostic technology” includes both pre-natal diagnostic tests and procedures.

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PC&PNDT Act were “genetic counseling center”²³, “genetic clinics”²⁴ and “genetic laboratories”²⁵. The law monitored the provision of pre-natal diagnostic services by tracing the trajectory followed by a woman in accessing such tests. Ultrasound tests were included within the ambit of the law only to the extent of its being used as an aid in the conduct of pre-natal diagnostic tests.²⁶

However, with the development of medical technology, ultrasound technology gained acceptance as an integral part of antenatal²⁷ care used to monitor normal pregnancies. It is this technology that is being misused for the purposes of sex determination, as it is widely and cheaply available, non-invasive and has no documented adverse side effects. On the other hand, only a limited number require tests for the detection of genetic abnormalities in fetuses. Further, with advancements in technology, pre-conception techniques were beginning to be used for sex selection prior to conception.

Pursuant to the directions of the Supreme Court in 2001, amendments were effected in the law to specifically bring ultrasound tests within the regulatory ambit. However, instead of recognizing the shift in paradigm in the use of technology i.e. from the detection of abnormalities to its use in monitoring normal pregnancies, the regulation of

²⁸ This meant, for example, any

test does not consider

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and receiving diagnostic test results do not consider themselves bound by the PC&PNDT Act. Persons conducting ultrasound tests do not insist on referrals, as such tests are a standard component of managing all pregnancies. This leads to a complete break down in the paper trail. Secondly, the PC&PNDT Act provides for the registration of units as a whole, and not of individual practitioners. However, with advancements in technology an individual practitioner can carry mobile ultrasound machines to various places that need not be registered, to conduct tests.²⁹ Monitoring the use of technology in the context of such ambiguities is therefore, next to impossible. Added to this is the fact that implementing authorities under this law are existing government medical officers who are already overburdened and therefore, are unable to spare adequate time for monitoring compliance with the law.

It is perhaps needless to state that without monitoring the PC&PNDT Act is rendered infructuous, but this is particularly true in these circumstances as there is no immediately affected complainant since the fetus is done away, and both the parties i.e. those accessing sex determination and those providing it, are deemed to be culpable under the law. To remedy this situation requires a complete overhaul of the PC&PNDT Act by bringing in definitional changes to shift the focus from monitoring tests conducted for the detection of abnormalities to antenatal tests conducted for monitoring normal pregnancies in the interest of preserving the well-being of the woman and the fetus.

On the whole, the legal regime should be rationalized to take cognizance of advancing technology and to provide a framework to regulate all medical professionals and the provision of medical services, which can be used in guarding against the misuse of any form of technology or unethical medical practices that act to the detriment of women's rights. For instance, due to lack of regulation increasing numbers of Indian women are entering into surrogacy arrangements for monetary benefits. Commercial surrogacy arrangements raise concerns that go beyond issues of sex selection, although the issue of sex selection is implicated. The Indian government is currently in the process of preparing yet another law for the regulation of assisted reproductive techniques, which covers surrogacy arrangements. The promulgation of a separate legislation on assisted reproductive technologies shall lead to fragmentation and competing interests as discussed in the introductory paragraphs. Hence instead of enacting more laws, it is perhaps time to consider a move towards a comprehensive legislation to regulate medical professionals and the provision of medical services.

The practice of dowry

Another significant indicator of the devalued status of women in Indian society is the practice of dowry. The term "dowry" alludes to gifts in cash or kind given to the husband and his relatives by the wife and her relatives in connection with marriage. To prevent this practice, Tc0 TD.fir Tcg into s1hi8(giTJ1desiT1 iage. To p Twm)8.0 TD06 reg.>

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pressures as there is a high level of cultural acceptance of this practice. Additionally, as in the case of disclosure of the sex of fetuses, if both parties are deemed culpable, it is unlikely that either of the parties shall complain of the offence.³⁵

Finally, DPOs vested with the responsibility of ensuring compliance with the Act have not been functioning in an effective manner. A major reason for this is overburdening of public /government personnel, as existing public officers have been vested with additional duties instead of creating a new cadre for the implementation of this law.

However, the recently enacted Protection of Women from Domestic Violence Act (PWDVA) brings cause for hope. Unlike the DPA the PWDVA is a civil law.³⁶ Derived from the UN Model Code on legislation to prevent violence against women, definitions contained in the PWDVA have been indigenized to include some harmful practices that are relevant to India as civil offences, dowry related harassment being one of them.³⁷ Women in matrimonial relationships have been the primary users of this law and have been successful in obtaining protection orders from courts to address dowry related harassment. Further, Protection Officers, appointed under the PWDVA, who unlike DPOs, function under the direct supervision of criminal courts, have proven effective in retrieving dowry items for women from their matrimonial homes.³⁸

However, a civil law cannot substitute the deterrent effect of a criminal law. Hence the DPA is still required, albeit with improvements, to dissuade people from engaging in the practice of giving and taking dowry. A step toward

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(PCMA).³⁹ The PCMA, in continuance of provisions contained in the CMRA, prohibits the marriage of woman under the age of 18 and a man under the age of 21. However, according to the National Family and Health Survey III, 2007 (NFHS III), child marriages in India are fairly widespread.⁴⁰ Child marriages are contracted primarily for reasons of poverty coupled with prevalent traditional and cultural practices and mores.⁴¹ All child marriages are forced, as a person is not capable of giving full and informed consent before attaining the age of majority.⁴² Child marriages also result in denial of childhood and adolescence as well as adverse health consequences, particularly for women. However, despite the existence of the CMRA, a UNICEF report showed that prosecutions under this Act did not exceed 89 in any given year.⁴³

The issue of child marriages poses a continuing conundrum vis-à-vis the age of the contracting parties. The CMRA and now the PCMA, penalizes those entering into or in any way associated with child marriages. Under this law, as mentioned earlier, the age prescribed for entering into a valid marriage is 18 for women and 21 for men. On the other hand, the IPC under Section 375 exempts marital rape from the purview of penalties and sets 15 as the age of consent for sex within marriages.⁴⁴ This creates obvious anomalies in the standards set in the two laws and impacts on prosecutions under child marriage laws.

The other issue raised in child marriages is the validity of such marriages. Previously,

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legal age for marriage.⁴⁵ To avoid destitution of women entering into child marriages, the PCMA includes provisions on maintenance and residence to be provided to the woman until her remarriage, by the male contracting party. In cases, where the male contracting party is also under the legal age of marriage, maintenance is to be provided by his parents. Additionally, the PCMA includes provisions for granting appropriate custody orders of children born out of a child marriage. Although a positive development, many civil society groups feel the law should deem all child marriages as void *ab initio* to act as an effective deterrent. The Law Commission of India, however, recommends that marriages below the age of 16 should be deemed as being void *ab initio*, whereas marriages between the ages of 16-18 should be treated as being voidable at the option of the contracting parties. All provisions on maintenance, residence and child custody are to apply to both void and voidable marriages. The Law Commission's recommendation appears to be the most logical solution to this issue. It is hoped that the State shall take on board on these recommendations and effect appropriate amendments to the PCMA.

A reason for the ineffective implementation of the CMRA was the insubstantial penalties prescribed for those entering into child marriages and those involved with arranging or engaged in the conduct of such marriages. Further, injunctions to prevent marriages provided for under the CMRA proved ineffective as such injunctions could be obtained only after notice was served on the offending parties. Another significant reason for its ineffectiveness was that the CMRA set a time limit and did not allow complaints to be filed after the completion of 1 year of the marriage. These issues have been addressed and dealt with in the PCMA. The PCMA provides rigorous penalties for those entering into child marriages and broadens its scope by specifically penalizing those either performing, abetting, or directing child marriages or involved in solemnizing, promoting, permitting or failing to prevent child marriages. It also guards against further victimization of child brides by exempting women entering into child marriages, from penal liability. Moreover, the PCMA bestows additional powers on district level judicial officers to grant timely injunctions to prevent child marriages. It also does away with the time limit for filing complaints under the law. The content of the PCMA is a vast improvement over the CMRA. Additionally, it provides for the appointment of Child Marriage Prohibition Officers and statutory duties to create awareness on the issue of child marriages and its adverse consequences. However, much of its effectiveness will depend on financial and budgetary allocations made for its enforcement.

Another important factor to essential to ensure the effectiveness of the PCMA is the registration of marriages. Religious family laws govern marriages in India. Most of these laws do not provide for the compulsory registration of marriages. Although some state

⁴⁵ This would mean that women are to present a petition for declaring a marriage void before completing 20 years and men have to present a petition before reaching the age of 23. This allows men an additional 2 years in bringing such petitions when compared to women. This aspect has been critiqued by the Law Commission of India, which advocates for setting the age of marriage at 18 for both men and women. Law Commission Report, see *supra* n-42.

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her will, denial of basic economic entitlements including shelter and maintenance, etc.⁴⁷ The law includes within its ambit aggrieved women in all forms of domestic relationships and is not limited to those in matrimonial relationships. This means that the law is not limited for the use of those facing domestic violence or subjected to harmful practices in matrimonial relationships.⁴⁸ Although the married women are the primary users of the law, other women in domestic relationships have been successful in obtaining orders from the court. For instance, widows have been able to get residence orders to prevent dispossession from the deceased husband's house. In Rajasthan, activists have used this law to prevent forced marriages. There are also reported cases of sisters and mothers obtaining protection orders to address violence within the home. This indicates that the PWDVA may prove to be a useful tool in addressing harmful practices perpetrated by those in a domestic relationship with the aggrieved woman.

In the first 9 months of its enactment, approximately 8000 applications were filed under this law in 2007.⁴⁹ Although comprehensive filing statistics were not available in the second year of its implementation, data collected by some courts indicates that filing rates have almost tripled in some states.⁵⁰ One of the reasons for the high reportage could be the fact that the PWDVA allows an aggrieved person to approach the court directly. In 2007, the highest number of cases was reportedly filed in the state of Rajasthan⁵¹ even though the state had not put in place any statutory mechanism to ensure the enforcement of this law. This demonstrates that direct access to court enables higher rates of reportage.

By the second year of its enforcement, Protection Officers had been appointed in all states in the country. The Lawyers Collective: 2nd Monitoring and Evaluation Report 2008⁵² showed that women, particularly belonging to lower economic classes, were able to benefit from the services of the Protection Officers in bringing applications before the court, which they were previously unable to do due to the lack of a supportive state agency. This Report also documented the increased role of Protection Officers at the pre-litigation stage wherein they provided or facilitated access to support services for women seeking legal remedies.⁵³ It is to be noted here that appointment of Protection Officers have been done by vesting additional responsibilities on existing government officials. However, they seem to function better than what has been the experience of appointing implementing officers under other laws. A reason for this could be that they work under the direct supervision of criminal courts and hence are compelled to take action on receiving

⁴⁷ The Rules under this Act contain formats for recording complaints of domestic violence. These forms mention various different forms of conduct that amount to domestic violence such as forced marriages.

⁴⁸ Other relationships include those related by marriage, consanguinity, adoption, or in a relationship in the nature of marriage, and family members living together in a shared household.

⁴⁹ See *supra* N-39

⁵⁰ 2nd Monitoring and Evaluation Report 2008 on the PWDVA. *Supra* N-39 at P69

⁵¹ 3440 of 7913 cases filed were in Rajasthan. 1st Monitoring and Evaluation Report 2007. See *Supra* N-39

⁵² *Supra* N-52

⁵³ Data for the 2nd Monitoring and Evaluation Report 2008 was collected from urban centers hence this report has an urban bias. However, given that a new law is most likely to be implemented in the urban areas before reaching the rural, this Report is useful in understanding the potential

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complaints of domestic violence. Perhaps it is the awareness that if they do not take action, a woman could approach the courts directly and the courts would then issue orders to them, which they would have to comply with or face penal consequences. The PWDVA also provides for penalties to be imposed on Protection Officers for dereliction of duties. Another reason could be that the office of the Protection Officer is rooted in the practices followed by the women's movement in assisting women in distress. The lessons learnt have been translated into the law, by the manner in which the Rules have been drafted. This aspect not only ensures the effective functioning of the Protection Officer but also to hold Protection Officers accountable to their statutory role.

Protocols for coordinated service delivery are yet to be put in place. It is expected that these will evolve with the added experience of implementing this law. However, some states have taken the initiative of putting in place mechanisms for coordination, Andhra Pradesh being a case in point. The fact that the PWDVA obligates various state agencies to, at a minimum, provide information to aggrieved women has galvanized some of these agencies to take action. For instance, in the case of Andhra Pradesh- it was the police who took the initiative to enforce this law.

In conclusion

Although one cannot predict the future of the PWDVA, its current workings provide some ideas on rationalizing drafting and implementation processes. Aspects of comprehensive definitions, coordinated responses and in-built accountability mechanisms indicate successful strategies that may be used in the formulation of other laws on harmful practices. The limitations of this law with regard to its use in preventing harmful practices is that it recognizes civil wrongs whereas the gravity of harmful practices require a response in criminal law. Secondly, it applies only to practices that are perpetrated by those in a domestic relationship, whereas other entities might be involved in perpetrating harmful practices.

The way forward is to advocate for comprehensive laws on key issues such as a statutory equality code, a criminal law on violence against women, a comprehensive legislation to regulate medical practice, etc. Each of these laws should be co-related both in terms of defining its ambit and in the mode in which implementation is envisaged. Statutory mechanisms for enforcement should be provided for in the law and also provisions to ensure accountability. Efforts should be made to translate lessons learnt by the women's movement into the methods adopted for the implementation of laws.

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7. National Crimes Research Bureau; Crime in India Report 2005; Ministry of Home Affairs; New Delhi

Annexure I

Women's Status in India	
Juvenile Sex Ratio	927 female /1000 males
Maternal Mortality	540 per 100,000 live births
Female Literacy	47.8% literacy rate (compared to 73.4% male literacy rate)
Political Participation	9.2% of Members of Parliament are female
Ratio of female to male earned income, female income	26%

(Compiled from Census 2001 and Human Development Report 2006)⁵⁴

⁵⁴ Lawyers Collective (Women's Rights Initiative); Staying Alive: 1st Monitoring and Evaluation Report 2007 on the Protection of Women from Domestic Violence Act, 2006; New Delhi; 2007

Annexure II

List of Central Laws and Legal Provisions Applicable to Women in India⁵⁵

Employment and labor

1. Bonded Labour System (Abolition) Act, 1976
2. Contract Labour (Regulation & Abolition) Act, 1979
3. Employees State Insurance Act, 1948
4. Equal Remuneration Act, 1976
5. Factories Act, 1948
6. Inter-state Migrant Workmen (Regulation of Employment & Conditions of Service) Act, 1979
7. Legal Practitioners (Women) Act, 1923
8. Maternity Benefit Act, 1961
9. Minimum Wages Act, 1948
10. Child Labour (Prohibition and Regulation) Act, 1986
11. Payment of Wages Act, 1936
12. Plantations Labour Act, 1951
13. Workmen's Compensation Act, 1923
14. Beedi & Cigar Workers (Conditions of Employment) Act, 1966
15. Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981
16. Mines Act, 1952
17. Supreme Court guidelines on addressing sexual harassment at the workplace

Laws on violence against women

1. Relevant provisions of Indian Penal Code, 1860 including provisions on dowry deaths, cruelty within marriage, rape, molestation, etc.
2. Relevant provisions of Code of Criminal Procedure, including procedure to obtain maintenance.
3. Relevant provisions of the Indian Evidence Act
4. Immoral Traffic (Prevention) Act, 1956
5. Dowry Prohibition Act 1961
6. Commission of Sati (Prevention) Act, 1987
7. Protection of Women from Domestic Violence Act, 2005
8. Prohibition of Child Marriages Act, 2006

Family laws

⁵⁵ Compiled from <http://wcd.nic.in/>

1. Foreign Marriage Act, 1969
2. Guardians and Wards Act, 1890
3. Indian Succession Act, 1925
4. Married Women's Property Act, 1874
5. Hindu Marriage Act, 1955
6. Hindu Succession Act, 1956
7. Indian Divorce Act, 1869
8. Hindu Minority & Guardianship Act, 1956
9. Hindu Adoption & Maintenance Act, 1956
10. Special Marriage Act, 1954
11. Muslim Personal Law (Shariat) Application Act, 1937
12. Converts Marriage Dissolution Act, 1966
13. Christian Marriage Act, 1872
14. Family Courts Act, 1984

Health Laws

1. Medical Termination of Pregnancy Act, 1971
2. Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994
3. Mental Health Act, 1987

General Laws

1. National Commission for Women Act, 1990
2. Indecent Representation of Women Act, 1986