CHAPTER 4

AN ANALYTICAL STUDY OF LAWS, POLICIES AND PROGRAMMES FOR THE PROTECTION OF REPRODUCTIVE RIGHTS

4.1. Introduction

There has been an International and National efforts for the protection of human rights. Over the years, International instruments have been working on various issues of women. However, women's life revolves around the reproduction and thus reproductive rights of women have invisibly occupied an important place in International and National legal framework.

A variety of rights were recognized at International level several times on the human rights of women. The United Nations ensures for the International co-operation in promoting and encouraging respect for human rights and fundamental freedom for all human beings without distinction as to race, sex, language and religion. The United Nation is firmly committed to gender equality and its charter is the first law-making treaty explicitly to mention the principle of equality between men and women. [1]

The recognition of the equality in dignity and human rights of men and women is a vital subject for the United Nation and its member states. The Preamble itself contains that people of United Nation "*to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women*".[2]

[1] Maja Kirilova Eriksson, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* 22 (1st edition 2000).

[2] *ibid*

An issue of human rights of women is incomplete without discussing reproductive rights of women. Today, with the advancement of women's role and status in the society, reproductive rights have become an integral part of women's struggle for her position in the society. Thus, different International Instruments has explicitly and implicitly shown their concern on the protection of reproductive rights of women.

4.2. International Concern on Reproductive Rights

In 1970s, there was an emphasis on the equality of opportunity by the United Nation. This effort was made prominent in the World Plan of Action agreed upon in Mexico City in 1975 at the First Women's World Conference, the government delegations agreed that:

> *" the world community has proclaimed that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women as well as men in all fields".*[3]

International Instruments has profoundly stressed on the treatment of man and woman as equal in value and dignity. This principle enshrined under the Universal Declaration of Human Rights, 1948 which makes explicit reference of equality for women and children. Here, the idea of equality as a significant human rights object was replicated.[4]

The International Convention on Civil and Political Rights (1966) contains several provisions relating to women's Rights, such as Article 6 which provides that *"every human being has the inherent right to life"*. It has also provided right to liberty and security under Article 9. Again, Article 17 provides for the right to privacy. Similarly, the International Convention on Economic, Social and Cultural Rights (1966) recognizes the right to health under Article 10.[5]

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[3] *Supranote.* 2 at pg. 50.

[4] Palok Basu, *Law Relating to Protection of Human Rights* 92 (1st edition 2002).

[5] *ibid* at pg.69.

The Women's Convention[6] under Article 12(1) compels states parties to ensure individual's access to health care services, including those related to family planning. The International Covenant on Economic, Social and Cultural Rights also under Article 12(1) recognizes the right of everyone to enjoy the highest attainable standard of physical and mental health.[7]

The Beijing Declaration highlighted on empowerment of women as primary need for gender equality. It was made more evident that by empowering women in taking decisions about their sexuality and fertility actually gives power to them in other domains, such as- household decision-making and participation in education and economic sphere.[8]

The Convention on the Rights of the Child, 1989 have a set of legal standards or norm for the protection of children. Every child has the right to survive, health, protection and developments. It stresses on the need for concerted efforts on specific problems, such as discrimination against girl child (among other discrimination) inheritance, early marriage, maternal health care, early pregnancies, family planning, education and services, the sale and trafficking of children, etc.

The Convention oblige the responsibility on the state parties to take effective measures to abolish traditional practices prejudicial to the health of children implicitly (including female circumcision) and to provide for rehabilitation to those children who are victims of neglect, abuse and exploitation (Article 28(3) and 39).[9]

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[6] The Convention on the Elimination of Discrimination Against Women, 1979 is called as Women's Convention as it deal only with discrimination against women where elaborate norms has been discussed for the causes of women.

[7] *Human Rights of Women National and International Perspective edited* by Rebecca J.Cook 528 (1st edition 1994).

[8] Maja Kirilova Eriksson, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* 54(1st edition 2000).

[9] Ashok K.Jain,, *The Saga of Female Foeticide in India* 77(1st edition 2006).

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979 is the most explicit United Nation documents on the rights of women. It requires state parties to eradicate all kinds of discrimination against women in all spheres of human life.

The Convention further provides that state parties shall take all appropriate measures to ensure for women, "the same right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to make possible for them to exercise these rights in all matters relating to marriage and family relations as held under Article 16".[10]

Thus, the Convention endow with an obligation on the state parties to eliminate discrimination against women in the area of health care in order to ensure "access to health care services" including those related to family planning (Article 12). Article 11(2) held that all state parties shall prevent discrimination against women on the grounds of marriage and ensure their effective right to work.[11]

It moreover, require the state parties to make sure that there are measures adopted for women to have access to specific educational information to help them ensure the health and well-being of families including an advice on the family planning as held under Article 10.The provision of Article 5 of the Convention provides that "family education includes proper understanding of maternity as a social function".[12]

However, the Convention also establishes a Committee on the Elimination of Discrimination against Women to monitor the progress made in its implementation that issued a General Recommendation No. 19 on Violence against Women. It provides that violence against women which is gender based violence which is intended against women because she is a woman and thus, invariably affects her fundamental human rights including right to be free from all forms of discrimination. It was found that

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[10] CEDAW, General Recommendation No.21&CEDAW/C/1995/7.

[11] *ibid*

[12] *Human Rights of Women National and International Perspective edited* by Rebecca J.Cook 517 (1st edition 1994).

violence against women in the form of coercion regarding fertility and reproduction places have led their health and lives at risk.[13]

In addition to these, there are number of key International policy documents relating to reproductive rights of women. For instances, the International Conference on Population and Development(ICPD) Programme of Action defines 'reproductive rights' as "..... *the right of all couples and individuals to decide freely and responsibility the number, spacing and timing of their children and to have information and means to do so and the right to attain the highest standard of sexual and reproductive health.....*".[14]It defines 'reproductive health' as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The International Conference on Population Development (ICPD) Programme of Action has identified various issues on reproductive and sexual health care such as family planning, pre-natal care, safe delivery and post natal care, infertility, abortion etc.

Besides, International law has also shown their concern on adolescents' reproductive rights. Adolescent means those who fall under the age group of 10 and 19 and are vulnerable segment of the population whose needs especially their reproductive health needs are largely neglected. It is seen that adolescents are increasingly becoming more sexually active consensually or not.

Thus, in 1990, Convention on the Rights of the Child for the first time gave the adolescents right to health, which includes reproductive health as well. The International Conference on Population and Development and Beijing Declaration establishes and declares the reproductive rights and concern on adolescent.[15]

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[13] *Supranote* 12.

[14] *Programme of Action of the International Conference on Population and Development*, Cairo Egypt, Para 7.3 Sept 5-13 (1994).

[15] www.reproductiverights.org

In many developing countries including India, a decrease in public health spending and in some cases, structural adjustment, contributes to the deterioration of public health systems. Especially, the system of privatization in health care without assurance of universal access to affordable health care reduces chances of universal health care system availability. This will directly hamper the health of girls and women as they do not receive enough social, economic and psychological support.[16]

The Programme of Action of the International Conference on Population and Development provides that in order to increase women's access to appropriate, affordable and quality health care, information and related services, the state parties are directed to take following actions[17]:

a) To implements the commitment made under CEDAW and other international instruments;

b) Reaffirm the right to the enjoyment, protection and promotion of the highest attainable standard of physical and mental health, and to incorporate it in national legislation and to review existing legislation;

c) Design and implement, in cooperation with women and community based organizations, health programmes so as to remove all barriers to women's health services and to provide a broad range of health care services;

d) Provide more accessible, available and affordable primary health care services of high quality including sexual and reproductive health care which includes family planning information and services;

e) Establish mechanisms to support and involve non-governmental organizations, particularly women's organizations, professional groups and other bodies working to improve the health of girls and women, in government policy making, programme design, as appropriate, and implementation within the health sectors and other related sectors;

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[16] *Beijing Platform for Action*. Chapter IV.C. Women and Health, Para 106. www.reproductiverights.org

[17] *ibid*

f) Allow women access to social security systems in equality with men throughout the whole life cycle, etc;

Taking into consideration above guidelines under International Instruments, India has also taken steps to constitute legal framework for implementing above discussed instruments.

4.3. National Concern on Reproductive Rights

The area of reproductive and sexual rights has not yet properly explored by the Indian government and has very few legislation on the subject. The judicial activism is also in its infancy stage. The Constitution of India also contains very few provisions relating to the protection of reproductive rights of women.

4.3.1. Constitution:

The Constitution is the guardian of a country, provides serious concern for the protection of the rights of women. A reproductive right of women is governed by the various outstanding provisions of the Constitution of India. The framers of the Indian Constitution were very much influenced by the Human Rights Instruments and have incorporated those provisions in the Constitution.[18] Health has been acknowledged as fundamental rights of the people. So, in various cases judges has decided cases taking the plea of various provisions of the Constitution for instance- fundamental rights, fundamental duties, directive principles of state policy etc.

Fundamental Rights:

The Constitution of India guarantees various rights under part III of the constitution such as; right to equality under Article 14-16 as fundamental rights. It prohibits discrimination among citizens on the ground of religion, race, caste, sex or place of birth (Article 15) and equal opportunity to them in matter of public employment (Article 16).Article 14 provides for equality before the law. Thus, the

[18] Lina Gonsalves, *Women and Human Rights* 22 (1st edition 2001).

constitution says that the state may make special provisions for the benefit of women and children.[19]

It guarantees right to life under Article 21 which lays down, "No person shall be deprived of his life or personal liberty except according to the procedure established by law." Right to life means right to live with human dignity and freedom from all kinds of exploitation.

With the liberal interpretation being given to the right to life, with passage of time, various new rights such as right to privacy, right to health etc which are basic human rights under international instruments hitherto not specifically granted under the constitution, were included in the plethora of rights available under Article 21 of the Indian Constitution. Since right to life includes right to enjoy life with all the limbs and faculties, it implies therefore that right to procreation and right to have control over reproductive organs are included in the broader concept of right to life. Every person including a girl has a right to marry and thereby to conceive a child which is absolute.[20]

Right to procreation and to have control over one's reproductive organs gives birth to another right i.e. right to abortion. This raises another peculiar problem of balancing the life and liberty of born and unborn more. So, in the present day social structure female- male sex ratio has deteriorated.[21]

By referring the term 'life' the Supreme Court has expounded that it means more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed as held in the case of *Munn* v. *Illinois*.[22]

The judicial activism has led to the emergence of one of the essential human right i.e., right to privacy under Indian Constitution. Justice Subba Rao, J held that right to

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[19] *Supranote* 18 at pg. 23.

[20] Manoj Sharma "*Right to Life vis-à-vis Right to Abortion: An Analytical Study*" 18 (3&4) Central India Law Quarterly 412(2005).

[21] *ibid.*

[22] 94 US 113 (1877).

privacy is an essential ingredient of personal liberty.[23] This has result in an enrichment of the status of women.

Directive Principles of State Policy:

Similarly, the Directive Principles of State Policy in part IV of the Constitution provides provision directing the government to eliminate inequalities in status, facilities and opportunities to ensure that the legal system promotes justice on the basis of equal opportunities, to secure a just and human condition of work and maternity relief and to regard the improving of nutrition, standard of living and public health as among its primary duties.[24]

Article 39 of Directive Principles of State Policy provides that "the state shall direct its policy towards securing[25]

1. That the men and women equally have the right to an adequate means to livelihood;
2. That there is equal pay for equal work for both men and women; and
3. That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not guided by economic necessity unsuited to their age and strength.

Fundamental Duties:

The fundamental duties under Article 51 (A) include that every citizen has duty inter-alia by the Constitution to renounce practices derogatory to the dignity of women.[26] Also, Article 42 refers to just and human conditions of work and maternity relief.

By referring to the above Articles of the Constitution that is fundamental rights, Directive Principles of State Policy and Fundamental duties, judiciary has time and again filled the vacuum of inadequate laws on reproductive rights. In the case of

[23] *Kharak Singh* v.*State of U.P* (AIR 1963 SC 1295).

[24] Article 38(2), 39(A), 42 and 47 of the Constitution.

[25] *Supranote* 16 at pg 24.

[26] Article 51(A) (e)

Govind v. *State of Madhya Pradesh*,[27] the Court held that any right to privacy must include and protect the personal intimacies of the home, the family, marriage, **motherhood, procreation and child rearing.** In many cases, Supreme Court has also recognized an individual right to medical treatment.[28]

Conversely, despite equal rights as given by the Constitution women in India remain constantly a disadvantaged group .The reason for this is mainly social and cultural attitude of the society. Health is a fundamental human right and also guaranteed by the constitution to the citizens of India but its achievement is trivial only.

Not only this, the Constitution of India also made emphasis on prohibition of gender discrimination and enjoins upon every citizen, a duty to renounce practices that are against the dignity of women. With this liberal mind-set India has ratified the United Nations Convention on the Rights of the Child, 1989, and the Convention on the Elimination of All Forms of Discrimination against Women, 1979 etc.[29]

4.3.2. Indian Panel Code Provisions:

Indian Panel Code (herein after called as IPC) contains certain provisions relating to the reproductive rights though not so specifically. Section 312-318 of the Indian Panel Code, 1860 deals with miscarriage, injuries to unborn children, exposure of infants and concealment of births.

Section 312 makes the causing of miscarriage with the consent of the women and section 313 causing miscarriage without the woman's consent, punishable. Section 312 reads "as any one causing a miscarriage of pregnant woman except for the purpose of saving the life of the mother is guilty of causing miscarriage." In case of woman with child and woman quick with child, the punishment increases.[30] The legal interpretation is that a moment of conception which begins with the woman is

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[27] 3 S.C.R .946 at Para 24

[28] *Parmanand Katara* v.*Union of India* (1989) S.C.R.997, PARA 4.

[29] Ashok K. Jain, *The Saga Female Foeticide in India* 77 (1st edition 2006).

[30] K.D. Gaur, *The Indian Panel* 464 (2nd edition 1998).

considered in the former situation whereas quickening refers to an advanced stage of pregnancy.[31]

IPC has not defined the term miscarriage. However, it is commonly understood as expulsion of immature foetus at any time before it reaches full growth. In common parlance, miscarriage refers to abortion.

Section 312 allows abortion in such cases where it is necessary to save the life of the mother on medical grounds. The unborn child would be destroyed for the purpose of preserving the precious life of the mother.

If the act is done in good faith, the person is entitled to the protection of law. But good faith is ambiguous enough to protect most of the abortion whether therapeutic (medical) abortions or not. So long they are conducted ostensibly to preserve the mother's life but it is not punishable under Indian Panel Code. The good faith is to be decided on the basis of facts and circumstances of the case and not on the basis of law.[32]

Further, one who aids and facilitates a miscarriage is also liable for the abetment of the offence of miscarriage under section 312 read with section 109 IPC. Even though the abortion did not take place, a person is still liable for attempt to commit a criminal abortion under section 312 read with section 511 IPC even if he fails to succeed.[33]

Under section 313 it does not matter that the woman is quick with child or not. It provides for enhanced punishment in case of aggravating nature of the offence of miscarriage. Section 313 provides for the miscarriage without the consent of woman. So, section 312 held woman also liable for punishment whereas under section 313 women will not be held liable.

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[31] *Supranote* 30

[32] K.D. Gaur, *The Indian Panel* 464 (2nd edition 1998).

[33] *ibid* at pg.465.

Section 314 punishes when the death of a woman has occurred in causing miscarriage. It is not essential for the offender to know that the act is likely to cause death. He should have intent to cause the miscarriage of a woman with child and does any act which causes the death of such woman.[34]

Section 315 lays down that whoever before the birth of any child does any act with intent to prevent a child from being born alive or to cause it to die after birth and does so, be punishable unless the act is done in good faith for the purpose of saving the mother's life.[35]

Section 316 punishes the causing of death of a quick unborn child by an act amounting to culpable homicide. The punishment prescribed is imprisonment upto 10 years and fine. The offence is cognizable, non-bailable, and non-compoundable and is triable by a session's court.[36]

According to section 317 exposures and abandonment of a child under 12 years in any place by parents or persons having the care of the child with the intention of wholly abandoning such a child, is an offence. If the child dies in consequence of the exposure, the offender will also be guilty of murder or culpable homicide as the case may be (explanation to section 317).[37]

This section however covers the cases of female infanticide. In India, abandonment of a girl child is not unusual. Similarly, intentional concealment of the birth of a child by secretly buying or otherwise disposing of the dead body of the child, whether a child dies before, after or during the birth is an offence under section 318.[38]

It seems that an IPC provision is gender neutral making women equally liable for abortion. In a country like India, where woman has hardly any say in decision

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[34] *Supranote* 32 at pg. 468.

[35] *Supranote* 32 at pg.469.

[36] K.D. Gaur, *The Indian Panel* 469 (2nd ed.1998).

[37] *ibid* at pg. 370.

[38] *ibid at pg. 370.*

making process and there is cultural preference of son, such provision is very impractical. Sometimes pregnancy of a woman and child bearing is beyond the control and wishes of woman. So in such socio-cultural scenario, these provisions can hardly achieve the objects for which it has been enacted.

The IPC provision under section 312-316 have now become subject to the provisions contained in the Medical Termination of Pregnancy Act (MTPA), 1971. Till now, IPC provisions relating to miscarriage have not been amended or redrafted or repealed. However, abortion is now permissible under Medical Termination of Pregnancy ACT, 1971 in certain circumstances.

4.3.3. The Medical Termination of Pregnancy Act, 1971

In 1971, India saw a sea- change in abortion law by liberalizing the provision of section 312 of the Indian Penal Code, 1860 which sets rules for obtaining a legal abortion. With the enactment of the new abortion law, Medical Termination of Pregnancy Act, 1971 (herein after called as MTP), the features of the abortion law have change. The MTP Act has been modeled on the English Abortion Act of 1967.[39] This new abortion law was enacted on recommendation of a Committee appointed by the Central Government, known as *Shantilal Shah Committee* which is obliged under the Central Family Planning Board. The Medical Termination Pregnancy, Act was enacted in 1971 and enforced in 1972.[40]

Section 3 of the said Act provides for the termination of pregnancy by a registered medical practitioner in good faith under the following circumstances:-

a) *Therapeutics*: In case the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical and mental health.

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[39] Madhava Menon *"A Socio-Legal Inquiry into the Implementation of the Abortion Law in India"* 16 Journal of Indian Law Institute 626 (1974).

[40] B.B.L.Mathur *"Constitutional Limitations on Abortion Laws: A Study of the American and the Indian Law"* II The Indian Journal of Legal Studies 117 (1979).

b) *Pregnancy caused by rape*: In case the pregnancy results from rape or intercourse with a lunatic woman etc.[41]

c) *Failure of Contraceptive device*: In case the pregnancy has occurred as a result of the failure of a contraceptive device or method.[42]

d) Eugenic: In case there is substantial risk that the child born would suffer from physical or mental deformities or diseases.

The Act intended to eliminate the high incidence of illegal abortion, rather than to confer woman the right to decide about her own body. In fact, the main target was to control population explosion in India by allowing termination of an unwanted pregnancy in such situation where contraceptive device has failed.[43]

Here, by the enactment of the Medical Termination of Pregnancy, Act on certain conditions a woman can obtain a legal abortion. The Act provides under section 3(a) that pregnancy can be terminated by a registered medical practitioner where the pregnancy does not exceed 12 weeks and with the opinion of atleast two medical practitioners in case the pregnancy exceeds 12 weeks but not exceeding 20 weeks as under section 3(2) (b).[44]

At this point, one of the features is that there has been child marriage even after the enforcement of Child Marriage Restraint Act. In situation, where there is a need for the termination of pregnancy of a minor, the Act says, consent of woman is enough. But legally consent of minor is no consent at all. So in such cases along with the consent of minor girl, the consent of the guardian will also be taken. There is an apprehension that the Act may be misused if the consent of guardian only is made

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[41] Section 3 Explanation I MTP Act.

[42] Section 3Explanation II MTP Act.

[43] Madhava Menon *"A Socio-Legal Inquiry into the Implementation of the Abortion Law in India"* 16 Journal of Indian Law Institute 626 (1974).

[44] B.B.L.Mathur *"Constitutional Limitations on Abortion Laws: A Study of the American and the Indian Law"* II The Indian Journal of Legal Studies 121 (1979).

mandatory. If the right to take decision regarding termination of pregnancy is exercised by a woman exclusively than it could prevent her husband from having children always.[45]

Thus, it is only with the consent of pregnant woman that her pregnancy will be terminated. The Medical Termination of Pregnancy, Act has made a woman competent to give her consent to have her unwanted pregnancy being terminated. In case if she is below eighteen years of age or a lunatic, abortion can be done only with the written consent of her guardian. Here, the consent of a husband is not necessary. Only the consent of pregnant woman is made mandatory by the Act.

In *Sushil Kumar Verma* versus *Usha,*[46] the husband got divorce on the ground of cruelty within the meaning of sec 13 (1)(b) of the Hindu Marriage Act, 1955 for aborting the foetus at the very first pregnancy by a wife without the consent of the husband.[47]

This judgment has contradicted the Medical Termination of Pregnancy, Act and the purpose for which it has been enacted. As after this case woman are in constant threat of being divorced by her husband if she go for termination of pregnancy without her husband's consent. This has depreciated the decision making power of women in executing their reproductive rights (to limit their family and to protect themselves from any mental or physical health because of pregnancy). There is a need to rethink about the abortion laws taking into consideration present social and cultural development of the society and a new perspective of reproductive rights.

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[45] Abdel Rahman Tageldin Medani *"Right to Privacy and Abortion: Comparative study of Islamic and Western Jurisprudence"* XII Aligarh Law Journal 133-156 (1997).

[46] AIR 1987 Delhi 86.

[47] Abdel Rahman Tageldin Medani *"Right to Privacy and Abortion: Comparative study of Islamic and Western Jurisprudence"* XII Aligarh Law Journal 133-156 (1997).

The Act consists of eight sections which aims to confer on women the right to privacy, which includes the right to (1) space and limit pregnancies(i.e., whether or not to bear children) and (2) to decide about her own body.

Section 3 of the Medical Termination of Pregnancy, Act has liberated the strict provisions of abortion under section 312 of Indian Penal Code by permitting abortion in a number of situations. Above all, the Act has not clearly laid down whether foetus is a person or nor. It has been challenged on this ground in court of law several times.[48]

Section 5 of the Act deals with the situation where immediate urgency arises to save the life of the pregnant woman by the registered medical practitioner. Thus, section 5 makes exception to section 3 and 4 where termination shall be conducted only in Governmental hospitals or such places approved for the purpose of the Act by the Government on the grounds mentioned under section 3.[49] So, in case of urgency to save the life of pregnant woman abortion can be conducted in any other place also.

Section 7 of the Act empowers the Government to take necessary steps for its implementation. Section 7 provides for the provision of punishment with fine which may extend to one thousand rupees in case of contravention of the provision of the Act.[50]

Similarly, section 8 contains a provision where a registered medical practitioner absolve from any liability for any damage caused or likely to be caused by anything which in good faith done or intended to be done by him. The Act makes violation of the regulations framed under it by the States a panel offence.[51]

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[48] K.D. Gaur *"Abortion and the Law in Countries of Indian Subcontinent, Asian Region, United Kingdom, Ireland and United States of America"* 37 Journal of the Indian Law Institute (1995).

[49] Medical Termination of Pregnancy Act, 1971.

[50] *ibid*

[51] B.B.L.Mathur *"Constitutional Limitations on Abortion Laws: A Study of the American and the Indian Law"* II The Indian Journal of Legal Studies 121 (1979).

The Act highlighted that legally pregnant woman can abort whether she is married, single or widow. But however, illegal and unsafe abortion are performed due to lack of information about Medical Termination of Pregnancy, Act and the services available for the purpose.Nearly,21.7 per 1000 illegal abortion has done in Uttar Pradesh in 1995-96.[52]

No doubt, the Act has played a significant role in the modernization of the Indian society through the instrument of law. It has a direct impact on population control and in realizing social and economic development. On the other hand, the Act is a landmark in empowerment of women from the age old fear of abortion the same as considered as a sinful and criminal act.[53]

4.3.4. Pre-natal Diagnostic Techniques Act 1994:

In 1994, the Parliament passed the legislation banning sex- determination test except for certain purposes. The government has enacted The Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter called as PNDT Act).

The Pre-Natal Diagnostic Techniques, (PNDT) Act provides for regulation of genetic counseling centers, genetic laboratories and genetic clinics and also regulates pre-natal diagnostic procedures. The medical professional running the genetic centre has to be registered under the Pre-Natal Diagnostic Techniques, Act.[54]

It allows the use of prenatal diagnostic techniques for the purpose of specific genetic abnormalities or disorders only and put down a prohibition on the use of these techniques for determining the sex of the foetus by any such person under the Act.[55]

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[52] Azim A. Khan Sherwani "*Illegal Abortion and Women's Reproductive Health*" 3 Supreme Court Cases Journal 120 (1997).

[53] K.D Gaur "*Abortion and the law in Countries of Indian Subcontinent, Asean Region, United Kingdom, Ireland and America*" 37:2 Journal of Indian Law Institute 306 (1995).

[54] Section 3, Pre-Natal Diagnostic Techniques, Act.

[55] Section 3A, inserted after amendment of the Act on 2003.

The Act also prohibits any kind of advertisements on pre-conception and pre-natal sex determination of foetus or sex selection of foetus is prohibited. The Act provides for upto three years imprisonment and fine upto ten thousand rupees as punishment in contravention of the Act.[56]

The Act further provides for the creation of a Central Supervisory Board consisting of concerned ministers, officials representing various ministries, departments, medical professionals and representatives of women's welfare organization to exercise the power and performs the functions conferred on the board under the Act.[57]

The Act was amended in 2002 and called as the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act. The amended Act confers a broader aspect so as to protect female foeticide in India which is seriously impairing the socio-cultural fabric of India. Section 3A of the Act prohibits sex determination test. This section has been inserted by Amended Act of 2002, provided that no person including a specialist or a team of specialists in the field of infertility shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluids or gametes derived from either or both of them.[58]

Likewise, section 3B has also been inserted under the Pre-Natal Diagonostic Techniques Act(Regulation and Prevention of Misuse) Act, 1994 which came into force on 1-1-1996.and the Act was renamed and amended in 2002 by the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002. The said Act came into force on 14-2-2003. The Act amended to prohibit sale of ultrasound machine etc, to persons laboratories, clinics etc, which are not registered under the Act.[59]

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[56] Section 22, the Pre-Natal Diagnostic Techniques, Act.

[57] Section 7, the Pre-Natal Diagnotic Techniques, Act.

[58] The Pre-Natal Diagnostic Techniques, Act.

[59] *ibid*

The object of the Act is mainly to prohibit the pre-natal sex determination test of a feotus so that the pre-natal diagnostic technique may not be misused for obtaining sex-selective abortion. It also aims to regulate pre-natal diagnostic technique for the useful purpose for which it has been intended, such as:-

(a) Where the age of the pregnant women is above 35 years (advance maternal age).
(b) Where the pregnant woman has undergone two or more spontaneous abortions or foetal loss.
(c) Where the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals.
(d) Where the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or other genetic diseases.
(e) The Central Supervisory Board may specify any other conditions as required.

The Act as well provides to set up of the State Level Supervisory Bodies to look after the proper implementation of the Act at all levels. The Board shall meet at least once in four months. There has been provision on the constitution of the appropriate authority which includes efficient women member and a Legal expert.[60] The officers to be appointed under Appropriate Authority are as follows:

i) Joint Director of Health and Family Welfare as the chairperson.
ii) Eminent woman representing women's organization and
iii) Eminent legal expert.

The following functions are entrusted to the Appropriate Authority:

1) To create public awareness against the practice of pre-conception sex selection and pre-natal sex determination.
2) To supervise the implementation of the provision of the Act and Rules.

[60] Section 16A, amended Act of 2003.

3) To recommend to the Central Supervisory Board modification required in the Act or Rules in accordance with changes in technology or social conditions.

4) To send such reports to the State Board regarding the activities undertaken in the State under the Act.

The Act also provides for the punishment to any such medical geneticists, gynecologists, registered medical practitioners or any person who owns a Genetic clinic, Center or Laboratory or employed in it or renders his professional or technical services on an honorary basis or otherwise and who contravenes any of the provisions of the Act or rules made thereunder shall be punishable with imprisonment for a term upto 3 years and with fine upto Rs. 10,000/ and in case of subsequent conviction with imprisonment upto 5 years and fine upto Rs. 50,000/. Besides, name of the registered Medical Practitioner convicted by the court shall be reported to the State Medical Council for temporary cancellation of medical registration for a period of 2 years for the first time and permanently for the subsequent offence.[61]

Similarly, if any person like a husband or any other relatives compel pre-natal diagnostic on any pregnant women for the purpose other than those mentioned above shall also be punishable with similar punishment and fine.[62]

The court shall presume, unless, the contrary is proved that the pregnant woman has been compelled by her husband or relatives to undergo Pre Natal Diagnostic Technique and such person shall be liable for abetment of offence. Every offence under this Act shall be non-bailable, cognizable and non-compoundable under section 23.[63]

Though, the Act has been enacted by the government but there is no proper implementation of the Act. This has been shown from the "*declining sex- ratio of female child.*" There are as many as 50,000 female foetuses aborted every year after

[61] Section 23.

[62] Section 24, shall also be liable for abetment of offence.

[63] Dr.Snehal Fadnavis "*Right of a female child to be born vis-à-vis –the sex determination tests*" 6(2) Journal of the Institute of Human Rights 32 (2003).

pre-natal test. It is a saddest truth that this life saving techniques of ultrasonography and amniocentesis is more used to take life of an unborn child only because she is "*female*". India has a ratio of 927 females to 1000 males.[64]

Thousands of centers have grown up in all the parts of a country. This has increased the number of female foeticide in India. The Medical Termination Pregnancy, Act has been enacted over more than twenty years before even than it has not curbed the illegal abortions. In the same manner, even if the Pre-Natal Diagnostic Techniques, Act has been enacted and enforced from 1994 but, there are more and more cases coming up in regard to the sex determination abortion. The reason for the increase in the number of abortion is mainly because of the availability of sex determination and sex selection centers. If there is no strict implementation of the Pre-Natal Diagnostic Techniques, Act, it will be futile to have this Act. So there is a need for the proper implementation of the Act.[65]

To spell out the object of the Act was to (a) regulate pre-natal diagnostic technology and to restrict the detection of genetic or metabolic disorders, chromosomal abnormalities, congenital malformations or sex linked disorders. (b) To prevent misuse of technology for the purpose of pre-natal sex selection this led to sex selective abortions.[66]

It has been found from the survey conducted in 1992 in metropolitan city of Bombay that 7,999 out of 8,000 aborted fetuses were female. It has been reported in a national daily that as many as 50,000 female foetuses are aborted every year after determining the sex of the foetus. In Delhi 70 percent of abortion was to abort female foetuses only.[67]

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[64] Shakeel Ahmad "*Legalised Abortion: A Gender Sensitive Foeticide*" 31 Civil and Military Law Journal 235 (1995).

[65] *Supranote* 63.

[66] Asmita Basu "*Sex Selective Abortions*" November The Lawyers Collective 20 (2003).

[67] Shakeel Ahmad "*Legalised Abortion: A Gender Sensitive Foeticide*" 31 Civil and Military Law Journal 233 (1995).

In *CEHAT* v.*Union of India,*[68] public interest litigation was filed for the implementation of the Act. The Supreme Court issued an interim order in May 2001 to the Center and the State to take necessary steps to implement this law.[69]

The complexities lying for reasons of declining female sex ratio are many .The Pre-Natal Diagonoistic Technique Act has added fuel to the existing trend by providing sophisticated techniques to those who wants to get ride of burden of a female child. A lower sex ratio is said to be indicative of a lower status for women in the society.

4.3.5. Maternity Benefit Act, 1961:

The remarkable feature of the status of women in the society has its co-relation with the economic contribution that women made to the family through her participation in the workforce.[70]*Miller* finds that where female labour participation is high, there is always a high preservation of female life and where female participation is low, the status of women is low.

Since, women has always put into disadvantageous position because of her capacity to procreate. Earlier women labour/workers were paid less than that of men because of their physical incapacity. Constitution has now provided equal pay for equal work and women are paid equally for equal work.[71]

Again, in workplace women used to be thrown out of the work in case she becomes pregnant or if she happens to be married. This gender discrimination was checked by the Constitution in various cases. Earlier, she was forced to leave her job in case she becomes pregnant. This misfortune is today ensuring by the Maternity Benefit Act, 1961.

Here, any woman employee gets three months maternity leave with pay in case of delivery of child. This Act is the relief to all the working women. Again, after

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[68] AIR 2001 SC 2007.

[69] *Asmita Basu "Sex Selective Abortions"* November The Lawyers Collective 20-21 (2003).

[70] Ashok K. Jain, *The Saga of Female Foeticide in India* 33(1st ed.2006).

[71] Constitution of India Article 39(d).

amendment even father/ husband are also entitled paternity leave of one month to look after the wife during her delivery.

Recently, the Centre has increased maternity leave from three to six months, besides, introducing paid leave for two years to take care of their children. As per the notification which is yet to come into force (comes into force from 2009 September)where the concerned department ensured that women employee will now enjoy 180 days of Maternity leave as against the existing term of three months. The Child Care Leave shall also be provided as a paid leave period of maximum two years during the entire service of woman for taking care of upto two children(the child care leave can be taken for children upto the age of 18) whether for rearing or to look after any of their needs like examination, sickness etc.[72]

The Maternity Benefit Act aims to regulate the employment of women in certain periods before and after child-birth and to provide for maternity benefits including bonus, nursing breaks etc.

The existing ceiling of 90 days maternity leave provided under Rule 43(1) shall be enhanced to 135 days. All government employees with less than two surviving children may be granted paternity leave for a period of 15 days during the delivery of his wife on paid.

The Maternity Benefit Amendment Bill, 2007 provides that working women shall get more maternity benefits. The medical bonus paid to women as maternity benefit shall be increased if no pre-natal and post-natal care is provided by the employer free of charge.

It can also be available against a woman employee having just one child and can take in addition to the extended maternity leave and will in no way affect the seniority. Child care leave can be taken only for children upto the age of 18 years.

[72] Sikkim Express pg 6 Wednesday, 17 September, 2008 Gangtok.

The order stated that 'Child Care Leave' may also be allowed from the 3rd year as leave not due (without production of medical certificate). It may be combined with leave of the kind due and admissible.

The Maternity Benefit Act 1961 regulates the maternity benefit available to women in factories, mines, the circus..... plantation and shops on establishments employing 10 or more persons. It does not cover/ employees who are covered under the Employees State Insurance (ESI) for certain period before and after child birth.[73]

But, most women in rural areas and in urban in formal sector do not get this benefit. Even after the Recommendation of the National Commission on Rural Labour, an empowered governmental body has not acted upon in pursuance of the authority.[74]

4.3.6. Five Year Plan:

It is imperative to study how a human rights instrument has been implemented in India. It is seen that concern about population growth in India began late in the nineteenth century. But an effort towards policy and programme was made early. As a result, National planning Commission (NPC) was established in 1938. When no nation in the world sponsored a family planning programme, it was at that time Lakshmibai Rajwade forcefully argued for the inclusion of birth control provision of goods, instruments, demonstrations and consultations in maternal and child health services.[75]

During late 1980s and early 1990s, the concern about family planning contoured health sector development. India saw a reconsideration of its population policies starting from the first Five Year Plan (1951-56) till the last Ninth Five Year Plan (1997- 2002). A number of committees were formed to give reports and suggestions about the implementation of five year plan date back from the first Health Survey and development Committee, commonly known as Bhore Committee (1943) following

[73] Maternity Benefit September 2,1994 by Jonathon Porritt

[74] Lina Gonsalves, *Women and Human Rights* 25 (1st edition 2001).

[75] Mohan Rao, *From Population Control to Reproductive Health-Malthusian Arithmetic* 19(1st edition 2004).

Health Survey and Planning Committee popularly referred as the Mudaliar Committee report. Each of this committee gave their suggestions and recommendations.[76]

In the first year plan, health was recognized as a right of all citizens. In the second plan, allocation for family planning increased remarkably even a health sector expenditure declined. In the third plan, the Mudaliar Committee recommended that family planning should be an essential part of the activity of all health agencies. The primary health care system is extricably linked with the family planning rather than with the health of the people. The fourth plan held the programme of family planning as national importance. This plan proposed to set up the target of sterilization and IUCD insertions and to widen the acceptance of oral and injectable contraceptives. Various programmes, such as the All India Hospital Post – partum Programme, the intensive District Programme in collaboration with USAID were launched (especially for vasectomy). The fifth five year plan accorded the same priority as to fourth five year plan.

With the recommendation of the kartar Singh Committee, family planning was included in the Twenty Point programme devised by Prime Minister Indira Gandhi and the five point programme of her son Mr. Sanjay Gandhi. The working group on population policy was established by the planning commission, asserted in its report that population policy and general development strategy dealt with the same subject matter, the programme thus centered on women.[77]

The sixth Five year plan adopted the long term demographic goal of reducing the net reproduction rate to one by 1996 for the country as a whole and by 2001 in all states. The said plan emphasized on the problems of public health and proper co-ordination of activities of different department bearing family planning such as maternal and child care.[78]

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[76] *Supranote* 75 at pg 24.

[77] Mohan Rao, *From Population Control to Reproductive Health-Malthusian Arithmetic* 51(1st edition 2004)

[78] *ibid* at pg. 53.

The seventh plan reviewed the progress of the family – planning programme where it was found that the target was not fully achieved. Among many other factors, the main factors are underlying as follows: - lack of infrastructural facilities, the high infant mortality rates and high levels of maternal and child mortality. In view of the performances in the sixth plan, a goal of reaching a net reproductive rate of one was pushed forward from 2006 to 2011.

During eighth plan period, there was internal disturbance (demolition of Babri Masjid) because of which the plan took place only in 1992. In the health sector, there was a commitment not towards the health for all but health for the underprivileged. The plan noted that the death rates and disease rates were still unacceptably high and that the rural health services were still not fully operationalised. The plan further noted that containment of population is not merely a function of couple protection or contraception but is directly correlated, with female literacy, age at marriage of girls, status of women in community, the IMR quality and outreach of health and family planning services and other socio-economic dimensions.[79]

However in 1994, India committed itself to Reproductive and Child Health (RCH) approach at Cairo. In preparation for the Cairo conference the Central Government unveiled a draft National Population Policy which raised a storm.

The Ninth plan document, noted various factors responsible for health scenario, including lack of infrastructure, critical lack of manpower of equipment and drugs and so on. The plan announces the two important policy- National Population Policy (NPP) and National Health Policy.[80]

The National Population Policy has committed towards voluntary and informed choice and consent of citizens while availing of reproductive health care services and continuation of the target free approach in administering family planning services. It also acknowledges issues of child survival, maternal health and contraception etc.

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[79] Mohan Rao, *From Population Control to Reproductive Health-Malthusian Arithmetic* 65 (1st edition 2004).

[80] *ibid*

Various measures of National Population Policy are- empowerment of women for population stabilization, child health and survival, for the promotion of policies, measures such as rewarding of Panchyats and Zilla Parishad from exemplary performance in family welfare, maternity benefits for mother, family welfare linked social insurances to be given to couples with two or less children who undergo sterilization etc.

4.3.7. National Population Policy 2000(NPP):

The National Population Policy 2000 (NPP) was constituted under the chairmanship of the than Prime Minister on July 22nd 2000. The main purpose of the policy is to attain a stable population by 2045 at the level consistent with the requirement of sustainable economic growth, social development and environmental protection. This purpose has to be pursued in immediate terms by addressing the unmet needs for contraception, health care infrastructure and personnel including provision for integrated service delivery for basic reproductive and child health care by 2010.[81]

The numbers in the reproductive age groups has been expanded as (estimated) 58 percent, high infant mortality rate generate high "*wanted fertility*" which contribute 20 percent and high fertility rate due to unmet need for contraception contributes an equal percentage to high population growth.[82]

The National Population Policy is the affirmation and articulation of the India's commitment towards the International Conference on Population and Development (ICPD), 1994 which is the blueprint for population and development programmes in the country. The ICPD has successfully grown concern on population issue.[83]

The main goals of the said policy are improving people's quality of health, enhancing well being and providing opportunities for population stabilization. It aims at

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[81] Government of India, *National Population Policy*, 2000; http:/inotifw.nic.in Para 9.

[82] *ibid*

[83] A.R. Nanda "Indian Population Policy:An Overview" in Shruti Pandey, Abhijit Das, Shravanti Reddy and Binamrata Rani (eds.) *Coercion versus Empowerment* 14 (2006).

providing accessible and affordable reproductive health; widespread of primary and secondary education; availability of basic amenities like sanitation, safe drinking water and housing; access to education and employment to women for their empowerment. It further aims at achieving promotion of open information, awareness, empowerment and development based approach. It unequivocally rejects the target approach and calls for target free approach.[84]

This policy is a gender sensitive policy and incorporates within a comprehensive approach to the health needs of women, female adolescents and the girl child as a whole. The main purpose of this policy is to provide quality services and supplies choices in services: to enable women access to quality health care, informed choice and measures for fertility regulation that suits women.[85]

The Preamble of the NPP significantly states as follows:
"The National Population Policy, 2000(NPP) affirms the commitment of government towards voluntary and informed choice and consent of citizens while availing of reproductive health care services, and continuation of the target free approach in administering family planning services."[86]

The NPP has been stressing on the importance of empowerment of women for improving health and nutrition, promoting child health and survival, and meeting the unmet needs for family planning services which are also helpful in achieving population stabilization.[87]

The immediate objects of the National Population Policy is to address unmet needs in the field of contraceptive, health infrastructure and integrated service delivery for basic reproductive and child health care. Its long term objective is to stabilize population by

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[84] *Supranote* 83.

[85] A.R. Nanda "Indian Population Policy:An Overview" in Shruti Pandey, Abhijit Das, Shravanti Reddy and Binamrata Rani (eds.) *Coercion versus Empowerment* 14 (2006).

[86] Shruti Pandey "Introduction" in Shruti Pandey, Abhijit Das, Shravanti Reddy and Binamrata Rani (eds.) *Coercion versus Empowerment* xxvi (2006).

[87] *ibid*

2045 and at the same time fulfilling the requirement of sustainable economic growth, social development and environmental protection. There are some specific goals also for which National Population Policy is working which are as follows:[88]

- Access to information, counseling and services for fertility;
- Registration of births, deaths, marriages and pregnancies;
- Promotion of National AIDS Control Organization (NACO);
- Managing reproductive tract infections (RTI) and sexually transmitted infections (STI);
- Promoting small family norm which is not necessarily two child norm but on the basis f requirement of the family;
- Implementation of family planning measures for the lager welfare of the people.

The National Population Policy proposes for the constitution of a National and State Commission on population to implement the policy, to co-ordinate cell in the Planning Commission and a technology mission in the Department of Family Welfare. Broadly speaking, the National Population Policy provides for new directions in accordance with the Cairo and Bejing consensus.

The National Population Policy appears sensitive towards issues of reproductive health which fully addresses "*accessible affordable health- care*". Along with these, it also provides for the provision of primary and secondary education, provision for basic facilities such as sanitation, safe drinking water and housing ..... transport and communications.[89]

The most remarkable feature of the said policy is that it has regarded family planning as a people's affair and not the realm of sovereign control which is perhaps the most important characteristic of reproductive rights as well. As already discussed,

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[88] A.R. Nanda "Indian Population Policy:An Overview" in Shruti Pandey, Abhijit Das,Shravanti Reddy and Binamrata Rani(eds.) *Coercion versus Empowerment* 15 (2006).

[89] "*The Rights Framework in Reproductive Health Advocacy*" 8 Hastings Women's Law Journal 313.

India was the first country to launch a national program emphasizing on the family planning to stabilize the population in relation to the national economy (1952).

It was realized that there was no or delay in adoption of 'small family norm' which resulted into 48 percent of population increase. This can be controlled through voluntary and informed choice and consent of citizens and by the target free approach in administering family planning services. But in fact, state policy on family planning was always coercive.

The National Population Policy does not even once mention reproductive rights. There is no mention of the obligations assumed by India under human rights covenants (ICCPD and ICESC or the CEDAW). There is, however, no mention of reference even to fundamental Rights and Directive Principle of State policy. Although the language at times articulate the spirit of Cairo and Bejing Convention but there is no express reference to commitments arising from there or of the role of India in shaping reproductive rights of women.[90]

The vital zone of people's life such as – sexual relations, health and family planning should be taken seriously by the Government. The policy is silent on the Constitutional and legal changes necessary for achieving these strategic goals. There is a need for a suitable legislative framework.[91]

Above all, the National Population Policy is silence on the violence against women. As the Cairo and Bijing Conference recognized human rights to reproductive choice and health require determined efforts to combat organized state/ social violence against women. On the whole, violence against women is on the rise and thus, there is a need for the proper law, policy and programmes for the protection of women's rights as well as reproductive rights.

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[90] Government of India, *National Population Policy*, 2000; http:/inotifw,nic.in Para 9.

[91] *The Rights Framework in Reproductive Health Advocacy* 8 Hastings Women's Law Journal 313.

4.4. Implementation of International Instruments

The government of India is a signatory to the most of the International Instruments, such as International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),etc and has tried its best to give effect to those provisions under national legal framework.

The government of India reports on CEDAW has highlighted that there is intention and sincere efforts to implement the provisions of international human rights instruments through various mechanism.

Article 2 of CEDAW i.e. obligation to eliminate discrimination is under the Constitution of India itself. The right to equality under Article 14 and 16 (No distinction on the basis of caste, creed, colour, sex, language etc.) stated no discrimination on the basis of gender. Equality before Law means that amongst equals the law should be equal and should be treated alike. Various women organizations have been formed in pursuance of international instruments which campaign the cause of women who are ill treated by husbands solely for not producing son. It is now, scientifically proved that it is not the women who are responsible for giving birth to the female child but the male.[92] This information has been widely spread by the Government and by other Non governmental organizations.

Right to life which is basic human rights and also provides by the Constitution of India which implies right to live with human dignity under article 21. Many laws have also been enacted to enable women enjoy their fundamental rights fully. The Department of Women and Child Development and the National Commission for Women have reviewed these laws and suggested amendments to the discriminatory provisions, some of which have been accepted and some others are still pending and some are under the process of consideration.

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[92] H.L.Kapoor "*Foeticide an Inhuman and Brutal Act*" Oct- Dec The PRP Journal OF Human Rights 21(1997).

There is National Commission for Women which pursue its mandate through various activities viz, investigating individual complaints on atrocities, denial of rights, sexual harassment of women at work place etc, conducting parivarik/ Mahila Lok Adalat (alternate dispute resolutions), legal awareness programme etc. There is constitution of National Human Rights Commission and State Human Rights Commission for better protection of human rights and its enforcement as provided by the Protection of Human Rights Act, 1993. These commissions added to the protection of human rights by providing remedies and encouraging non-governmental organizations and institutions. It also helps women to protect their rights.

In furtherance to the implementation of the provision of Article 12 of CEDAW, India is committed to achieving the goal of Health for all by 2010 . A large network of institutions for health care has been established in both rural and urban areas. It was reported that there are total of 137,271 sub health centers, 22,975 primary health centers and 2,935 community health centres in rural areas. Several policies, programmes and schemes have been initiated and implemented.[93]

There are various policies and programs that has been implemented so far which are as follows:-

1) *National Health policy* 2002:- which stresses on the funding and an organizational restructuring of the National public health initiatives to facilitate equitable access to health care. It also provides for establishment of a network of primary health care service, extension and health education programme and encouraging private initiative for health care facilities.

2) *Reproductive and Child Health (RCH) Programmes*:- (first phase 1997-03, second phase from 2003 and ongoing) aims at reduction of maternal and infant mortality, creation of awareness on rights of population in health care and improvement in the health care

[93] *The unheard Scream-Reproductive Health and Women's lives in India* Mohan Rao (ed) (2004).

delivery systems. Interventions for reducing maternal mortality and morbidity include the promotion of safe deliveries in institutions and at home. The birth attendants are being trained for conducting clean deliveries under RCH. Along with this, efforts have been increased to address women's health issues and concerns related to HIV/AIDS, TB, Malaria, Leprosy and other communicable diseases. Visibility for men is also sought in the RCH programmes.

The Reproductive & Child Health Project was launched in the ninth plan which was funded by the World Bank. The project contains three components:[94]

a) Decentralised Participatory Planning,
b) Institutional Strengthening, and
c) Programme implementation enhancing.

3) *Integrated Child Development Services* (ICDS):- There has been a nation-wide program for the overall development of children below 6 years of age and expectant and nursing mothers. On March 2004, there were 5,267 projects in the country. It has large machinery for delivery of services. They includes 6, 36,105 anganwadi workers, 22,013 supervisors and 5,258 CDPOs/ ACDPOs. Supplementary nutrition for 21 days in a month has been provided by these anganwadi centers benefiting 16,798,824 children below 3 years, 17352,353 children between 3-6 years and 7,357,501 pregnant and nursing mothers. The education to 10, 1461 boys and 9,976,572 girls in the 3-6 years age group, thus making an average attendance of 17 boys and 16 girls per center.

4) *Family Welfare Programme*:- has adopted a Community Needs Assessment Approach (CNAA) since 1997, through a decentralized participatory planning strategy. The department of family Welfare

[94] Reema Bhatia "Health Policy, Plan and Implementation" in Tulsi Patel (ed) *Sex Selective Abortion in India* 208 (2007).

has taken several new initiatives in the Ninth and Tenth plan periods to shift the focus from individualized vertical intervention to a holistic and life cycle approach giving priority to reproductive health care. The program as a part of the RCH and maternal mortality rate to 100 per 100,000 live births by 2010. The major interventions reiterated in the 10th five year plan include 100 percent registration of pregnant woman received at least one antenatal checkup, 24 hour delivery services at PHCs and CHCs, screening for anemia, promotion of safe delivery by trained personal etc. Also efforts are being made for establishing male reproductive health centers to motivate men to accept family planning. No scalpel vasectomy project was launched in January 1998 to promote male participation in the family welfare programmes, due to which male sterilizations have gradually increased from 1.8 percent in 1997 to 2.46 percent in 2002. The project has been implemented in 20 states.[95]

This programme is sponsored by the Centre. It aims at establishing the growth of population and for that purpose the goals have been made to curtail both fertility and mortality to achieve an Net Reproductive Rate of unity. The government of India has implemented target free approach for famiy planning. There are programmes set to motivate the couples for family planning through spacing and the use of terminal methods in the age group of 20-29 years with low parity.[96]

5) *20-Point Programme*:- Despite five year plans and programmes, the government of India ,in 1975 initiated a special twenty –point programme. The main object of this programme is to eradicate poverty, to raise productivity, to reduce inequalities, to remove

[95] Mohan Rao "*The Unheard – Reproductive Health and Women's lives in India*" (2nd edition, 2004).

[96] Reema Bhatia Health Policy, Plan and Implementation in Tulsi Patel (ed) *Sex Selective Abortion in India* 206 (2007).

social and economic disparities and to improve quality of life. The three main programme relating to the health are:

a) Health for all;

b) Two child norm;

c) Expansion of education.

So, various programmes of twenty point id directly or indirectly related to health of women.

Other Such Programmes are- Janani Suraksha Yojana Scheme, the National Nutrition Policy (1993) and the National Plan of Action on Nutrition (1995), the National Nutritional Mission (2003), the National AIDS Control and Prevention policy (2002), Universal Health Insurance Scheme (2003) etc. which dealt with the maternal mortality, nutrition, problem of malnourishment, mass awareness programs, reimbursement of hospital expenses, protection of rights of HIV positive women in making decision and regarding pregnancy and child birth etc.

There are various health care programmes that has been carried out at all levels of the health care delivery system. The Centre and State government both are making efforts through various plans, programmes and policies to improve the health care delivery syctem. The establishment of various planning and advisory bodies, the allocation of resources, the setting of priorities and goalsare all articulated at the natinl and state level and than articulated to the district level.But unless and untill, these programme reached the people in the large scale , they are meaninglees. The people at the grass root level are the main beneficiary of these programme and thus make efforts to ensure that the programme is impleming for those people especially.The health care services are to be delivered through the network of Community Health Centres(chc), Primary Health Centres (PHC), Subsidairy Health Centres(SHC), and Sub-Centres(SC).The intention of the government is reflected through these programmes which aims at achieving all round health development of all women.[97]

[97] Reema Bhatia Health Policy, Plan and Implementation in Tulsi Patel (ed) *Sex Selective Abortion in India* 210 (2007).

4.5. Reasons for Lack of Implementation

However, inspite of all the plans, programs and policies on the women health, the health issues of women still remains to be an alarming concern to the nation. Giving importance at national level is not enough, the manner in which these programmes are implemented is also equally important .Is the implementation of these programmes are in the spirit of the noble intention of promoting equality of both sexes? Such an analysis is necessary to find out the causes for the lack of implementation of these programmes. Various reasons for lack of implantation of these programmes are as follows:

4.5.1. Gender Discrimination

The girl child is the most disadvantaged groups; she is more vulnerable to human rights abuses.[98] There has been decline in sex-ratio both in rural and urban areas because strong son preference, widespread prevalence of pre-natal sex determination and selection practices and existence of socio-cultural practices and low status of women in decision making are the main hurdles for the proper implementation of the human rights instruments.

The socio-economic status of women in society and household is predominantly affected by patriarchal set up.[99]A patriarchal set up means the consideration of males as superior to females. Medical Health services are not untouched by this gender biased value system which makes women victim of gender discrimination. Women and girls get a lesser share in the intra household distribution of health, goods and services as compared to men and boys. Women have lesser access to goods which causes various problems during pregnancy like anemia, low birth weight babies, miscarriage etc.

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[98] Preeti Misra "*Female Foeticide: A Violation of Human Rights*" 21&22 Law Review 71 (2001).

[99] Sunita Bandewar "*Abortion Services and Providers Perceptions: Gender Dimensions*" May Economic and Political Weekly 2075 (2003).

In India, the Maternal Mortality Rate (MMR) has been estimated as 340 per 1, 00,000 births which are very high, further 15 percent of death among women in the reproductive age group (13-44 years) are maternal deaths. Maternal deaths due to complications in pregnancy and childbirth are the main causes of death among women in India. It is estimated that for every maternal death, 73 to 100 women face severe life threatening complications. The cause of maternal deaths include- hemorrhage (both anti and post parton) sepsis, obstructed/prolonged labour, puerpal sepsis, unsafe abortion, anemia etc. The factors responsible are poor health care facilities, lack of access to health care units, limited access to family planning services and safe abortion services, poor nutrition, early marriage, frequent and closely spacing pregnancies etc. These problems are not yet checked by the government even after various programs and policies.[100]

There are various National Nutritional Policies missions and action plans but the incidence of malnourishment among women and children continues to be widespread. The NFMs-II survey shows in 1997-98 shows that more than 50 percent of married women and 75 percent of children suffered from anemia. Women still lack access to the daily per-capita requirement of the recommended minimum nutrition. Nearly 60 percent of the women particularly pregnant and lactating women suffer from anemia.[101]

Another reason for the lack of acknowledgement of the reproductive rights and implementation of the legal instrument is the socio-cultural practices in the country. Women have to work outside the household and at the same time managed the household work also. This has resulted into competing demands on their time and energy and thus results into neglect to their health. Various social and cultural practices in the society has made women subordinate member in the household and thus lacks decision- making powers which includes decision-making in limiting and spacing children, bearing and not bearing of child and to conceive or not to conceive etc.

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[100] *CEDAW Committee Report-Government of India*;www.reproductiverights.org

[101] *ibid*

Despite various efforts made by the government and non-governmental organizations there are striking disparities in the health status of women and children, particularly girl children.

There seems that government is more interested in controlling population growth than in general health of the people (especially of women and children). There are many incidences in various states of India like Utter Pradesh, Rajasthan and Bihar where targeted sterilization was adopted. The existing growth rate of population was expected to cross 1,000 million by the end of the twentieth century. It is increasing by about 17 million per year.[102] India is a signatory to the Cairo Conference on Population and development (ICPD) which put emphasis on target- free family planning which is oppose to Indian government targeting sterilization which put population control before development.

Above all, lack of education of women also affects the health policy as this not only led woman to live in poverty with no income but also makes them ignorant of their own personal needs such as health needs.

Though, government has taken all the possible steps to address the challenges of these disadvantages but the result of such approach is still unsatisfactory. The Tenth plan- which envisages erecting of an enabling environment by adopting various affirmative policies and programmes for development of women and facilitating their easy and equal access to all minimum basic services of privacy, health care and family welfare with a special focus on the underserved and under-privileged segment of population through universalizing *Reproductive and Child Health Services* is yet to see the light of the day.

4.5.2. Failure of Pre-Conception and Pre-Natal Diagnostic Techniques Act

The Pre-Conception and Pre-Natal Diagnostic Techniques Act (PNDT), 1994 has failed to achieve its objectives because of many reasons. The machinery required to enforce the Act at the State and District levels was not taken seriously by the governing bodies entrusted to enforce it. Not a single pre-natal Diagnostic Center had been

[102] K.D.Gaur "*Abortion and the Law*" 37:2 Journal of the Indian Law Institute 299 (1995).

registered until 2001 in Punjab even though it was the first State to provide sex selection facilities as early as in the 1970s and the sex ratio in the age group of 0-6 years has been on the deadline. A warning was issued to the general people for the prohibition of the use of sex selection of unborn to stop female foeticide.[103] It was difficult to identify the purpose for which an ultra-sound test has been done due to non-maintenance of adequate records by clinics. Further the insistence of family planning programmes on the small family norm coupled with the son-preference bias in India added pressure on families to look at sex- selection as a via media for their desired family composition. That is before amendment of 2002 Pre-natal Diagnostic Technique Act.

Section 4 (2) of the Act provides that no pre-natal diagnostic technique shall be conducted except for the purpose of detection of any of the following abnormalities:

1) Chromosomal abnormalities.
2) Genetic metabolic disease.
3) Haemoglobinopalties.
4) Sex linked genetic diseases
5) Congenital abnormalities and
6) Any other, abnormalities or diseases as may be specified.

But the purpose of these life saving technique is sometimes used for denial of life to an unborn person only on the basis of gender.Nearly, 50,000 female foetuses are aborted every year after such test. As amniocentesis is an important clinical procedure and it is not desirable to ban it but what is required is the ban on sex determination and sex selective abortion.[104]

[103] Preeti Mishra "*Female foeticide :A Violation of Human Right*" 21&22 Law Review 76 (2001).

[104] Shakeel Ahmad "*Legalised Abortion: A Gender Selective Foeticide*" 31 Civil and Military Law Journal 234(1995).

4.5.3. Reproductive and Child Health Policy

Women bear their health problems in a cultural norm of silence and do not seek timely health care, they often cannot travel beyond the area of their normal activities to obtain services, they cannot usually approach male health providers; in general, families, including women themselves, spend less time, effort and money seeking health care for women and girls than for men.

The delivery system that views women primarily as reproducers which means two things (i) the health delivery system tended to ignore the provision of general health care for women and (ii) the system tended to overlook women who did not fall into the reproductive age category for instance, adolescent girls, unmarried women, post menopausal and infertile women.

The documents recognize that the knowledge and use of reproductive health services is in extricably tied to the level of social development within a community and therefore gives importance to issues of women's empowerment especially through education.

The programme has extended its services from family planning and maternal health to include the treatment of women specific diseases like RTIs. The programme further recognizes that the Indian Family Welfare Programmes have focused on women in reproduction to the extent of exclusion of male responsibility. Therefore a key project under the programme has been to en-gender the reproduction process that is to make men visible in the process of reproductive decision making and contraceptive use.

Over and above this provision, under the decentralized participatory planning there is an emphasis on enhancing the process of participation between Auxiliary Nurse Midwives (ANMS) and individuals and the community respectively.

4.5.4. Health Programmes and its implementation

The sphere of health has been intervened through health programme especially for the women under Maternal and Child Health Services, Reproductive and Child Health Project (RCH) and the Family welfare programme. The said programmes aim at

providing complete and adequate care to women in terms of their reproductive health. Similarly, the Universal Immunisation Programme (UIP) aims at achieving Universal immunization and reducing the mortality and morbidity resulting from vaccine preventable diseases. From 1992 the child survival and safe motherhood programme, with the assistance of World Bank and UNICEF has been introduced to supplement the gains of the UIP. Iron and folic acid tablets are being regularly supplied to mothers and children. The World Bank Project aided to improve the quality of Family services.[105] The RCH project looks after the reproductive health of women and encouraging the women to participate for planning their own health has taken various steps.

An initiative was also taken to provide health education to the people under the programme called the Information, Education and communication Activities (IEC). The programme aims to intervene in improving the status of women in the sphere of family planning and maternal and reproductive health.[106]

An analysis of the programme shows that in India, the Programme gets implemented in the field of Family Welfare programme. The other programme that gets implemented are those for which target has been set. The entire structure of health services is confined to the achievement of targets- targets of family planning, immunization and malaria slides. The entire effort is made towards meeting target at the cost of rest of the health services.[107]

The health of women is not of any concern to anyone, including women themselves. Only in one situation woman's health was taken care of and that is in case of son bearing. If suppose, a daughter is born, she starts her chores the very next day may be out of guilt of having borne a daughter. It is only after bearing son she can rest physically as well as mentally.[108]

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[105] Reema Bhatia "Health Policy and Implementation" in Tulsi Patel (ed.) *Sex –selective Abortion in India* 205 (2007).

[106] *ibid.*

[107] M.K.Premi *"The Missing Girl Child"* 36(21) Economic and Political Weekly 1875-1880 (2001).

[108] Mohan Rao, *The Unheard Screa-Reproductive Health and Women's Lives in India* (2nd edition 2004).

In a way the only programme that actually gets materialized is the Family Planning programme. For the government, it means controlling fertility by limiting the number of children to two, irrespective of the sex of the children. For the people and the workers too it means planning families, but in a different way.

Initiatives and efforts taken to address women issues have been inadequate, distorted, vertical and top down and have rarely emerged out of concern for women's health. The only solution being offered for women's health is for maternal health. This too is extremely limited and is restricted to the distribution of iron and folic acid tablets and to tetanus toxoid injections.

There is a lack of support system to empower women. That can only be materialized through cooperation of government and different departments and the involvement of the people themselves. Reproductive health should be the prime concern to empower women.[109]

Besides, approaches to the small family norm as an ideal family, has been propogated from 1951 onwards and several measures adopted by the Family Planning Programme (FPP), sponsored by the government of India through the means of mass media and the widespread network of the country's health care programme. This has lead to the increase in the adoption of family planning measures such as- use of contraceptive, abortion of unwanted foetus or sterilization, etc. Many times these measures have affected the health of women immensely. The leaders of a country and an official of a country saw population as a problem and wanted a policy to control population immediately to solve the country's problem.[110]

4.5.5. Inadequacy of Law to Protect Illegal Abortion

One of the difficulties, rather factors that has been resulted into lack of prosecution and successful convictions of abortion offences, has been the obtaining of adequate evidence to prove the fact of pregnancy and its termination in a court of law.

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[109] *Supranote* 108.

[110] Tulsi Patel "Foeticide,Family Planning & State-Society Intersection" in Tulsi Patel (ed) *Sex Selective Abortion in India* 325 (2007).

It is only a medical examination soon after the termination of pregnancy that can reveal the fact of pregnancy and its termination. As per the criminal procedure code of 1898 which was in vague till 1973, an accused could not be compelled to submit to a medical examination. And a woman who happened to be an accused would never submit to it. However, under the code of 1973 the prosecuting agency can compel a woman suspected of an offence to undergo medical examination.[111]

Another factor is lack of adequate and proper law enforcement authorities in such cases in the non-cognizable nature of offences relating to illegal abortions. A police officer can neither arrest an accused without a warrant, nor investigate the alleged offence of miscarriage without the order of an authorized Magistrate. Such a complicated procedure involves a lot of exercise on the part of the police which generally they would avoid due to obvious reason.[112]

On humanitarian ground also abortion are generally pregnant unmarried girls or widows caught in a difficult situation. Any procedure would mean more harassment, torture and agency to the unfortunate woman rather than give her relief.[113]

Therefore, to liberalise abortion laws Government of India constituted Medical Termination of Pregnancy Act, 1971.The object of the Act is to eliminate the high incidence of illegal abortions, which perhaps confer on women right to privacy which also include the right to space and limit pregnancies and the right to decide about her own body. Another silent feature of the Act is to encourage a reduction of population growth by permitting termination of unwanted pregnancy of a woman on the ground of failure of contraceptive device.[114]Similarly, abortion is permitted if the pregnancy is caused by rape.

However, abortion is not conducted on demand except under certain condition. The reason for not allowing abortion on demand is because of subservient status of

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[111] K.D.Gaur "*Abortion and the Law in India*" March Cochin University Law Review 129 (1991).

[112] *ibid*

[113] *ibid*

[114] Ashok K.Jain, *The Saga of Female Foeticide in India* 101(1st edition 2006).

women in the society where she may be forced to abort against her will and the health of the women. Abortion policies are made with the intention to safeguard the women's life from the consequence of unsafe abortion.[115]

Another major concern for the country as a result of legal abortion is that it has lead to the large number of female foeticide in India. There are evidences which show that termination of pregnancy was resorted not for the reason stated under MTP Act but because there is strong preference for son leading to female – selective abortions. The gender bias nature of the society was aided with by the medical technology that can detect the sex of the foetus in womb and further liberal abortion law that helped the couples to abort foetus if it is found as female foetus. Though, PNDT Act, 1994 is there but it still fails to curb the problem because of non implementation of the Act.[116]

There is no doubt that there is demand for pre-natal test and apperantly it leads to female foeticide. But with the enforcement of PNDT Act the demand for such test is done secretly and the practice of foeticide is still going on.

4.6. Conclusion

Despite all the laws, policies, programmes and measures adopted as well as efforts made by the government the problems of women are still remain as they are. The majority of the women are still denied freedom to control their fertility because of ignorance, religious prohibition or husband's desire. The serious implication of this denial is on her health and life expectancy. Denial of sexual and reproductive rights including free choice with regard to pregnancy and child bearing added to the widespread discrimination and violence of human rights against women.

However, the government is unable to enforce laws especially in area where culture is deeply rooted. In reality, there is a visible gap between the law as it stands

[115] *Supranote* 114 at pg.105.

[116] Leela Visaria "Deficit of Girls in India" in Tulsi Patel (ed) *Sex Selective Abortion in India* 70 (2007).

and the law as it operates, which is regularly marred by incidents of overwhelming injustice.

In analyzing the legal basis for the protection of reproductive rights and keeping pace with the advanced reproductive technologies, there is a need to enact and enforce legal structure on the basis of the women's needs. The existing legislative framework is very encouraging, while the difficulty lies with the pragmatic use of the law and making it reachable to the mass population. Though, only law cannot guarantee protection of reproductive rights of women, proper implementing machinery and proper environment for the implementation is also very important.