

# Banning Pre-Natal Sex Determination-II

## Scope and Limits of Maharashtra Legislation

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*The Maharashtra government's bill regulating the use of prenatal diagnostic techniques is a concession to the demands of the five-year long campaign. It is also an indictment of the Medical Council for its open disregard of its own code of professional ethics. On the other hand, it carefully avoids touching the private sector, makes a mockery of people's participation and offers many concessions to the medical lobby.*

THE Government of Maharashtra has recently introduced a much awaited and talked about bill in the state assembly, "Maharashtra Regulation of Use of Prenatal Diagnostic Techniques Act, 1988". The bill has come in response to a concerted campaign mounted mainly by the Bombay based Forum Against Sex-determination and Sex-preselection and supported by organisations of women, doctors, health activists, democratic rights activists and even a research institution. These groups organised demonstrations, marches, *dharanas*, exhibitions, seminars and workshops. They also used all available media to draw people's attention to the rampant misuse of medical techniques like amniocentesis, chorion villi biopsy, sonography leading to female foeticide. Many sensitive journalists and other media people helped focus the campaign not only on the issue of misuse of medical techniques but also on the status of women in our society. Several members of these organisations also accepted the government's invitation to participate in a committee which did some necessary groundwork to identify the technical and legal issues involved in stopping this misuse. The bill presented in the Assembly was, however, drafted by the government on its own.

### Medical Council Indicted

Although the statement of 'Objects and Reasons' given by the minister of state in the bill, does not explicitly criticise the Medical Council, states that "In breach of professional ethics, unscrupulous medical practitioners do not hesitate to perform abortions even when the sole or one of the reasons for doing so is female foeticide". It also laments that "there seems to be a misconception about the objectives of the existing laws in the minds of many medical practitioners". It seems naive to enact a full-fledged legislation if the issue involved was only a simple misconception about the existing laws. But to expect the government to be forthright in its assessment of the medical profession is asking for the moon.

Nevertheless, this statement brings out that sex-determination practices involved in breach of medical ethics. Therefore, it squarely indicts the Medical Council. The MC in our country has scarcely made any attempt to regulate the medical profession according to the code of medical ethics formulated by it. It has not only allowed the violation of ethics to go unpunished but also at times attempted to provide justification and legal cover to such violation. This attitude was very glaring in the specific case of sex determination where it refused to shed its lethargy despite a very hot debate in the media for last seven years. Not only that, in a private conversation, the president of Maharashtra MC

defended sex-determination practices of the doctors saying that the medical profession must grant full autonomy to the patients. It was also argued that it is difficult to prove in individual cases that sex-determination was done to get female foetuses aborted.

There are enough provisions in the code of medical ethics of the MC to take stringent action against the profession on this issue. Some individual cases also came to notice but the MC did not move. For instance, Dr. Datta Pai, who runs an abortion clinic (Pearl Centre) in Dadar, Bombay and who was a member of the government's committee on this issue, has publicly admitted that his abortion centre had provided facilities for amniocentesis till he was invited to join the government committee, though he never admitted that amniocentesis was used for female foeticide in his centre. Yet this was a fit case for the MC to seize his records of amniocentesis and the MTPs in this period and scrutinise whether in the same centre women who underwent amniocentesis were offered MTP when the foetus was found to be female. And if it were found to be so, the MC could have used two clauses of its code, namely, first, no discrimination in medical practice and second, the social responsibility of doctors, in addition to the violation of the MTP act, to punish the guilty persons.

Thus, though this bill is a concession to the Forum's demand, it is also an indictment of the Medical Council for its open disregard of its own code of professional ethics.

In our country only drugs and pharmaceuticals are regulated under a full-fledged law (albeit, a very ineffective law). The rest of what constitutes medical technology and techniques are not regulated under any comprehensive law. This bill restricts itself to the regulation of pre-natal technologies and techniques. Again, it does not regulate the introduction of new technologies and techniques even in pre-natal diagnosis. In fact it regulates only their use. Nevertheless, it is an admission of the fact that medical technologies are being misused in pre-natal diagnosis to such an extent that an independent law is needed to deal with them. By logical extension, it could be said that it gives room for health activists to push the idea that all medical technologies and techniques could be widely misused, and they are being misused, therefore stringent regulation on all medical technologies in general and new technologies in particular is urgently needed.

Secondly, it explicitly bans the use of medical techniques and technologies for the purpose of pre-natal sex determination leading to female foeticide. Thirdly, it declares illegal the giving of any advertisement in any manner regarding

facilities available for the pre-natal prediction of sex at the centre, laboratory or clinic. Thirdly, it makes illegal the seeking of such facility by the woman or by any other person for her for the pre-natal determination of sex. Fourthly, it prohibits the indication of "the sex of a foetus with or without the possible object of female foeticide". And lastly, it prescribes rigorous punishment to those who indulge in pre-natal sex determination activities.

Thus, the pressure generated by the Forum's and other individuals and organisations' efforts has helped make some breakthroughs in the present situation. But the gains are quite inadequate in many respects and this bill is a big compromise solution worked out by the government and the medical authorities—both private and public. These inadequacies make the bill, if not weaker, than at least as weak as the present Drugs and Cosmetics Act. In many ways it is a defeat in the victory for the Forum.

### **Sacrosanct Private Sector**

The Forum has, from the very beginning, demanded the abolition of pre-natal sex determination techniques in the private medical sector. For it is the private medical sector which is primarily guilty of their misuse and not the public sector. In government institutions the government has issued a directive almost a decade back to stop their usage for sex determination.

However, the government with talks of inefficiency and corruption in the public sector is building a case for privatisation (which is already underway). It has failed to even pay lip-service to the nationalisation of the private medical sector despite such revelation of gross malpractices. It even fails to acknowledge that the 'liberalisation' that is prevailing in the private medical sector, has brought only ills for the people and for the women in particular.

Instead of abolishing all genetic laboratories and genetic clinics in the private sector the bill only wants to regulate them. As we know that such a regulation of the pharmaceutical industry under the Drugs and Cosmetics Act has not radically changed the drug scene and its misuse continues in legal as well as illegal manner. The regulation of genetic laboratories, genetic centres, genetic clinics, gynaecologists, medical geneticists and so on will ultimately entail the creation of an administrative set-up which will look like a mini-FDA. The expenditure that government will incur and what people will pay for these services in these centres, in the name of registration fees will far off-set in a few years the total expenditure the government would have made as a compensation in taking over all genetic laboratories in the state. As a bonus, this would have made the implementation of the ban easier and effective without depriving those women who medically need pre-natal diagnosis.

The story of regulation does not end here. The body (called Appropriate Authority (AA) in the bill) which will grant licenses and enforce the law is full of those health bureaucrats who are already overloaded and proven to be inefficient in regulating their own departments. The Director and the Joint Director of Health Services, who will become ex-office chairman and secretary of the Appropriate Authority respectively, have never made any serious attempt to curb private practice by the doctors in our rural health services. Further they are in charge of an ever-expanding rural health infrastruc-

ture which includes over 1500 primary health centres and about 200 rural hospitals. In addition they also manage cottage hospitals, district hospitals etc. They are hardly able to efficiently regulate these establishments. One can only imagine with what efficiency they will be able to regulate private medical profession and its ever increasing number of laboratories.

The composition of the Appropriate Authority (AA) is: Two ex-officio government bureaucrats from the public health department, one bureaucrat from the medical education department, one bureaucrat from the Indian Council of Medical Research, two doctors: one gynaecologist and one geneticist (no other qualification mentioned) and two representatives of voluntary organisations (in the field of health, women and human rights). Except ex-officio members, the rest in the eight member team will be nominated by the government. Thus, the participation of voluntary organisation will be as per the needs of the governments and since the AA will take decisions on simple majority, the voluntary organisations will not have much decisive say in most matters.

### **Mockery of People's Participation**

This bill is a classical example of what the government means by people's participation. As stated above, the selection of the voluntary agency to be represented in the AA will be made by the government and not the people. Further, there will be another agency called the state Vigilance Committee (SVC) to oversee the implementation of the act. Here also, in the seven member committee, two representatives of voluntary organisations will be appointed by the government. In its supervisory functions, the SVC will pay periodic visits to the recognised centres, but it will not have authority to take action against those violating the act. For this the SVC will have to approach the AA.

Further, on the one hand representation to the voluntary agencies in the implementing bodies is given under the guise of people's participation on the other common citizens are forbidden to directly prosecute erring doctors, centres and laboratories. Such citizens will have to first approach the SVC and the AA with their complaints. There is, however, a provision for such citizens to go to court after giving two months' notice to the AA about their complaint. But to counterweigh such action, the AA and SVC, which will be in possession of all information needed to prosecute doctors, centres and laboratories, are given the power to refuse to make information available to such citizens if the same is, in its opinion, against the public interest. Thus, in the last analysis, while talking aloud about people's participation and extending an olive branch to the voluntary organisations, the government has made clever provisions in the bill to see that even those people who want to participate to stop the misuse of pre-natal diagnostic techniques cannot do so or are effectively frustrated in their efforts.

### **Concessions to Medical Lobby**

The pressure exerted by the medical lobby while the bill was being drafted is clearly visible at several places. This is not surprising. The medical bureaucracy has time and again, on various issues (recently on the issue of charging for services) expressed its sympathy for the values of the private

sector. Further, people like the president of Maharashtra MC and Dr. Datta Pai are close advisers of the government health department.

In the defining indications and conditions for which pre-natal diagnostic techniques should be used, they have seen to it that the Forum's proposal of getting written opinion of three concerned specialists has been completely excluded in the bill. In the absence of such a provision, the private gynaecologist will be the sole decision-maker whether to offer pre-natal diagnostic facility to the woman or not. However, vague indication like the history of two or more abortions or foetal loss could be misused in the same way as the failure of contraception as an indication is used for the MTP. Just as the failure of contraception as indication for the MTP has rightly made abortion facilities legally available to women, the indications like foetal loss will wrongly make available sex-test to women who want to go for female foeticide.

The medical lobby has scored the most in the chapter on 'Offences and Penalties'. This chapter identifies three types of offenders. Type one: Doctors, centres and laboratories. Type two: The woman who seeks the test, her husband and in-laws. Type three: All those who contravene any of the provisions of the act.

The penalty prescribed for type one offenders is rigorous punishment upto three years and fine upto Rs 5000. To demonstrate that the government is going to be very strict with offending doctors, centres and laboratories, the bill has a clause here saying that the minimum penalty to these people should be at least one year imprisonment and fine of Rs.1000. But the hollowness of this provision becomes evident as we read the last clause of this chapter. This clause empowers the court, if it so desires and after giving reasons, to award less punishment than the minimum stipulated under the act. That is, a rich doctor who has misused the techniques leading to female foeticide, can, with the help of powerful lawyers, persuade the court to award minor punishment.

The second type of offenders include the woman, her husband and her in-laws. The bill says that the woman should be assumed to be innocent and thus charged only Rs 50 as a token fine and no imprisonment. The bill also says that it should be assumed that she was compelled by the husband or in-laws to undergo the sex-test. The husband or her in-laws will be punished for abetment of the offence, with rigorous imprisonment upto three years and with fine upto Rs.3000. The bill says, "The court shall always assume, unless otherwise proved, that a woman who seeks such aid of pre-natal diagnostic procedures on herself has been compelled to do so by her husband or members of his family". Here the catch is provided with the addition of words "unless otherwise proved". It is easy to prove that the victim woman will be caught and not the husband or in-laws. Who will prove it otherwise? If the husband is arrested, he will simply say that he did not force his wife to undergo the test. Now, in our society, what is the wife going to say? Of course, she herself will come forward to prove that she was not under compulsion. Feminists and their supporters were fighting against the government to save the woman who is a victim of the patriarchal system. This bill makes the victim a criminal who will have to serve upto three years in prison. This is an outright anti-woman provision. The earlier

everybody starts raising their voice against it the better.

We all know that there is inequality in our society. But our constitution says that everybody is equal before the law. We all call it formal equality. But not so in this bill. There is no equality between the doctors, centres and laboratories on one hand, and the victim woman and her husband or in-law on the other hand. The bill says that the offence committed by type two and type three offenders "shall be cognisable, non-bailable and non-compoundable". This means, when a complaint is made to the police against the victim woman, her husband or her in-laws; the police has to act to arrest them. Once arrested, only the court can give bail. The non-compoundability makes it difficult to get any compromise settlement.

But the type one offenders (doctors, centres and laboratories) are excluded from the above provisions by making their offences, non-cognisable (the police is not required to act when the complaint is filed), bailable (if arrested at all, can get out immediately on personal bond, i.e., the police itself can grant bail) and compoundable (can have out an out-of-court settlement).

This shows that our government considers the offences committed by the doctors less criminal than those committed by the victims (who paid that doctor exorbitant amounts). In our society the person who actually commits female foeticide by doing a sex-test and selective abortion is less of a criminal than victims of patriarchal ideology and physical and socio-economic compulsions.

### Some Lessons and Future Plan

This bill has once again emphasised that only good intentions of some individuals, groups and the 'goodness' of some bureaucrats do not add upto desired change. This is not to question intentions, but the methodology of affecting change and the ultimate gains. The system does not like to have gross irregularities in its functioning. The current system permits irregularities outside its rules only upto the time it needs them. Thus, the government will also be found responding to certain demands for establishing the rules of game in the fields where such irregularities are rampant. Only such an approach can keep up the credible face of the system before the masses.

But these rules of game, under the pressure of small groups and media, are not framed while punishing the guilty. The Environment Act came without punishing Union Carbide. The industry was not punished before bringing the Consumer Protection Act. In the same way the builders are not going to be disciplined before the housing act is brought in. And no doctor is so far penalised for committing female foeticide. This shows the light-mindedness of the government and the feebleness of the efforts made by the groups concerned. As a result, all laws are passed but they are toothless laws.

Therefore, the groups who campaigned against female foeticide cannot remain complacent. They must continue their campaign raising their original demands like abolishing pre-natal diagnosis in the private sector, absolute protection to the victim woman and so on. They must, while going to the masses with those demands, also demand amendments in the bill. If the bill is made a law without demanded changes, the campaign must be continued. At the same time,

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become stronger. In order to promote a particular brand of a drug company, doctors prescribe medicines to their patients, which are either of no use or are patently harmful. The tremendous hold of the drug industry over the health care system in our country, was recently brought to light by the Lentini Commission. Another example of the proliferation of useless and spurious drugs is the fact that more than 20,000 kinds of non-prescription drugs are on sale in the Indian market, most of which are non-essential and about 25 per cent of them spurious. As against this, the WHO has prepared a check list of only 200 essential drugs. Though the medical council is fully aware of the unethical practices of doctors prescribing drugs known to be harmful and useless, why has the council not prosecuted the doctors and more importantly should not the medical council have powers to initiate proceedings against drug companies?

The research establishment, both private and government, also collaborate with drug multinationals in conducting human trials. Human experimentation by the medical community is justified on the ground that such trials are for the benefit of humanity. For example, experimentation by administering injectable contraceptive Net-pen, which has not been proved as a safe drug is being conducted on several thousands of Indian women, who are being used as guinea pigs without their informed consent. These trials are being initiated by the government's family planning programme. The Helsinki Declaration clearly states that no tests should be conducted on human beings unless they are proven to be safe and without obtaining the informed consent of the person on whom the experimentation is to be done. The Net-pen tests are in clear violation of this declaration. The govern-

mental institutions are the most consistent violators of medical ethics and yet the medical council and courts have been hesitant and unwilling to take any action. In the Bhopal case, the government and its research institutions have effectively suppressed all medical information pertaining to the after-effects of MIC, and the treatment to be given to the victims. For example, though the Indian Council of Medical Research (ICMR) prescribed mass detoxification to the victims, by injecting sodium thiosulphate, the medical community in Bhopal ignored this recommendation.

The recent scientific advances in the field of reproduction like amniocentesis, chorion villi biopsy (CVB) are calling into question the philosophy and values of medical ethics. Those techniques which were meant to detect genetic deformities are now being widely used for sex-determination. Not a single doctor has been prosecuted by the medical council.

These are just few of the examples where not only doctors but government institutions have flagrantly violated the various international and national codes. And yet nothing has been done and the medical system continues to devour and maim a large number of people.

The extent to which the medical profession will conform to proper standards of medical care will depend to a large degree on the development of the public's awareness of the issue. The basic rules of social conduct can be ensured only if the public maintains a constant and vigilant eye on the doctors in particular and the functioning of the health care system in general. It is only then that the doctors will be forced to abide by the highest standards of medical practice.

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selective abortion of female foetuses could continue unabated. The callous and blatant attitude of the medical profession towards this question can be illustrated through a front-page advertisement appearing in one of the city's evening papers barely five days after the Maharashtra government's triumphant declaration of intent on January 1. This advertisement read in bold type, "Boy or Girl? Contact clinic." A proposed legislation that will, in all likelihood ban such blatant advertising did not deter the doctor couple offering sex determining facilities. It must not be forgotten that, though pushed into a corner on several occasions, the medical profession refused to take an ethical stand before the government's declaration of bringing in such legislation. Apart from the high level of vigilance, a commitment from an ambivalent medical profession, faced with the loss of quick commercial gains, is a must.

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the groups should utilise the avenues available to participate in the implementation process, in order to expose the hollowness of the bill.

The medical establishment had earlier argued that a law would force female foeticide underground. Now they have, in collaboration with the government, brought a law which can partially keep female foeticide above ground, within the purview of law. There is no alternative but to continue struggle against the medical practice of female foeticide.

This Bill has been passed in the Maharashtra Assembly without any significant amendment in April 1988.

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