

## **Reproduction, Abortion and Women's Health**

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The question of women's health seems to be cast in adjunct to reproduction, at least as far as the Indian state is concerned. For the feminist movements in the city of Bombay, women's health are inextricably connected with issues around sexuality, reproduction and the social and legal control of these. In fact, it has been stated in an internal critique that the need of feminists to discuss sexuality seems to have emerged from debates around fertility and fertility control. [1]

One of the 'victories' of the health and the feminist movements in Bombay was the campaign around selective sex determination, using the medical techniques of amniocentesis and ultra sound. The campaign began in 1982, leading to a law banning these techniques in 1988, making Maharashtra the first state in the country to adopt such a law. Other states followed suit and in 1992, a law was passed at the national level, similar in spirit to the Bombay law.

In this paper I will explore some issues related to the campaign in Bombay and the 1988 law. Connected closely to it, in my opinion, are the national family planning programme, the feminist critique of the methods and the ideology of the programme, legal and "moral" dilemmas connected with abortion and its implied and stated links with sex determination.

### **I The Politics of the Family Planning Programme**

Indian feminists have pointed out that unlike in the West, where women have had to struggle to get access to the most basic birth control methods, in our country, the state uses force and coercion to reduce birth rates. India was the first country in the world to accept family planning as a national programme as is apparent in the first and second five-year plans. [2]

The first few five-year plans focused in male sterilisation along with contraceptives for women. However, from the late 1970's there was a shift in focus to female contraceptives. The political defeat suffered by the Congress I in 1977 was attributed in the most part to the excesses in the forces sterilisations on men between 1975-77, that is, the years of the National Emergency. I have focused on the political implications of the sterilisation programme elsewhere, [3] here it might suffice to look at one specific aspect.

At one level, it is interesting to note that the political manifestations of coercive sterilisations led to such a major change in state policy. In spite of two decades of invasive and authoritarian methods used against women and a small, though extremely articulate feminist health movement, it has not been possible to tilt the balance in favour of women. On the other hand, during the emergency, the brunt of the coercive sterilisations was borne by poor, illiterate, low caste or Muslim women. [4] What this seems to convey is that even the most powerless among men possibly enjoy a greater degree of control over state policy than women do. The population policies in the country have shown a marked insensitivity to the lives and experiences of women, concentrating mainly on filling quotas.

As a study of the policy of the Maharashtra state reveals, in the mid 1990's, a policy for women's health focuses on empowerment of women to enable population control. To quote:

*"The Government will initiate and support all efforts to promote an awareness among the public that the family welfare and population policies of the state will succeed only if women are empowered to decide on the issues related to the health of their families. She should specifically be empowered to decide on issues regarding the size of the family and the health interventions affecting the children."* [5]

Empowerment for women is not seen as an end in itself. It is projected as a means to the ultimate end of population policy. Another anomaly of the population programme is that it concentrates almost exclusively on controlling the fertility of married women. To the extent that, in India, family planning and population policy are synonymous terms. The sexuality and fertility of single women remains ambiguous. By not addressing the specific needs of single women, official rhetoric marginalises their sexuality. The

Maharashtra State Policy, for instance, gives incentives to married women who put off having children. [6] Thus, it leaves out women outside the scope of the recognised and conventional family system.

The family planning programme can be more clearly looked at if we focus on the Medical Termination of Pregnancy Act (henceforth MTP Act), passed in 1971. The MTP act was directly related to the growing emphasis on family planning in the 1960's and the world wide fears of a population explosion in the third world.

There are different trajectories to the question of population control for the west and for India. In the west, the issue of abortion is linked to the "right to self determination" and "the individual woman's right to choose". In the west, feminists supporting abortion (still not legalized in many western countries) articulate their position in terms of the rights of the woman. On the other hand, anti abortionists also speak in the language of rights, claiming that their focus is on the "rights and personhood of the foetus". [7] In contrast, in India, the liberalisation of abortion was not linked to feminist activism. Health activist Amar Jessani and Aditi Iyer suggest three possible reasons for this:

*"This might partly (though not wholly) be attributed to the absence of a strong feminist current within the (women's) movement during the 1960's and early 1970's... Secondly, anti abortion votaries in India are not as belligerent or as strident as their counterparts elsewhere... thirdly, the low priority may be engendered by the unawareness of the fact that legalisation has not been buttressed by safe and humane abortion services. [8]*

Implicit in this statement is a recognition that the IWM is not always able to choose its agenda independently. It is often forced to respond to immediate and obvious crisis. Partly because the anti-abortionists have not been vocal in India, the IWM has not addressed the abortion issue frontally, even though studies show that the right to abortion remains a paper right, due to inadequate abortion services in the country. Jessani and Iyer demonstrate that there is a ratio of 1:8 for legal to illegal abortions. [9]

The data collected by Jessani and Iyer brings out at least two issues of significance. One, the inability of the IWM to prioritise abortion, owing perhaps to structural and organisational weaknesses. Its campaign based, somewhat sporadic character prevents monitoring of existing laws, the focus being on changes in law instead, this could partly

explain the campaign around amniocentesis, which I will look at in greater detail later in this paper, secondly, as abortion services are poorly developed, the state policy of using MTP as a method of contraception has been a failure. It appears that conflicting layers of inefficiency, corruption and patriarchal interests create a situation wherein often even the positive aspects of reformist legislation fail to percolate to those for whom it is theoretically designed.

If we look at the MTP Act itself and the legislative debates preceding it, we can see some clear patterns.

There was no serious opposition to the bill. Many MP's supported it as an ideal method of family planning. Savitri Shyam, for instance argued that failure of contraception as a ground for abortion could be justified only in the context of population control. She pointed out that the Family Planning Programme in the country, where large sums of money had been poured in was in fact a dismal failure. The MTP Act was designed to counter this failure, which should be stated more clearly in the Statements of Objects and Reasons of the act. [10] The notion that failure of contraception could also be seen as a loss of a woman's control over her body was not articulated, and is completely missing in this understanding of abortion.

The bill was opposed only by one MP, who expressed his anxiety that it was against the "character and the cultural beliefs" of the country. He felt that it might lead to an increase in sexual promiscuity. Hence, it should not be passed. He pointed out that as the MTP, act could not be used by unmarried women, it was in no way an advance over existing legal provisions, as married women already had access to abortion under Sec. 312 IPC. The intervention was not taken seriously and was countered by arguments that sexual promiscuity was in fact, a part of Indian culture. [11] Only one MP, Smt. Laksmikantamma, felt that abortion rights be extended to single women, given the existing social attitudes to "illegitimate" children. She pointed out that unless abortion was legalised, the health of such a woman was "in the hands of quacks." [12] Her concern, however was not shared by others in the house, nor incorporated in the act.

Linked as is this act to the 'national' agenda of family planning and population control, it continues to exercise control over the lives of women. The MTP act is not, as stated above, designed to allow women unconditional control over their bodies. Not all pregnancies can be terminated. The declared objects of the act are to help women who become pregnant as a result of rape, married women who are pregnant due to contraceptive failure, or to reduce the 'risk' of crippled or severely handicapped

children being born. [13] In addition, the doctor advising the abortion is enjoined to look at the context within which the woman lives and her general health, i.e., whether the pregnancy can pose a risk to the mother's mental or physical health. Under the MTP Act, there are regulations which are framed at maintaining records. The Doctor performing the operation has to fill in a prescribed form to be kept in a register. The form has a column in which the doctor has to state the reasons for the abortion - legally; the woman cannot avoid giving an explanation. The register is a secret document, to be destroyed by the doctor at the end of years since the date of the last entry. [14]

There is, as is obvious even from this bald rendering of the provisions, a scope for misuse. The contexts within which most women undergo MTPs includes a general sense of shame surrounding extending to married and to single women. Many married women conduct MTPs without the knowledge of their family members, at times their husbands. For single women, the need for secrecy is even more pressing. Not only do they face a greater degree of social control, the abortion carried out may well be failing out of the purview of the MTP act. [15] Given this, the register can easily become a tool for blackmail in the hands of unscrupulous medical practitioners and medical staff.

Besides, the insistence in the act that the woman gives an explanation and a denial of the clause of failure of contraception to single women, brings out two aspects. One, that the law is restricted in its application. It reveals the not so hidden moral agenda of the law makers. At a more general level, the legal insistence on an explanation makes a mockery of the woman's right to abortion, and in an extended understanding, women's rights over their bodies.

The formal right to abortion to married women without the necessary consent of their husbands can be negated or further restricted by legal interpretations. In a divorce case under Hindu Marriage Act, 1955, heard by the Delhi High Court in 1984, it was ruled that the wife's act of undergoing a MTP without the husband's consent amounted to cruelty. A divorce was granted to the husband.

The discomfort that judges can display about the issue of abortion can be sometimes couched in seemingly liberal language. A case heard by the Madras High Court in 1993 was filed by the father of a 16 year pregnant unmarried girl. The father petitioned that the pregnancy be terminated as the girl was too young to bear a child. The lawyer defending the girl presented the case as one involving the fundamental right to life and liberty. He argued that the Constitution did not make a distinction when it came to

adults and children on the question of fundamental rights. The Bench accepted the argument and held that the issue involved the basic rights of an individual.

In addition, the Bench made two statements, which completely overturned the perspective. It rejected the petitioner's argument that child birth in the case of minors was medically unsafe. Their view was that, "the younger the mother, the better the birth." They felt that if the first pregnancy was aborted, it could lead to sterility. The judges concluded by quoting from Hindu, Muslim and Christian scriptures that "a destruction of life even within the mother's womb bias no moral sanction." [16]

The two judgments cited above present judicial attitudes to the question of abortion. In the first case, the independent decision of a married woman was construed as cruelty and 'punished' with divorce. In the second case, a minor's right to individual liberty and privacy is supported by the judges only in the context of traditional views on motherhood. In both cases, abortion is held as abhorrent. In the first case, the judge echoes social anxieties about women taking independent decisions. In the second, the minor girl's decision to have a child outside wedlock is supported even while it transgresses social norms. But the support itself is flawed.

Researchers point to other potential dangers of the MTP Act. Jessani and Iyer hold that the current existing thrust on population control and the "somewhat dubious motivations of the medical profession" have led to the act being interpreted liberally. They suggest that there is a danger that this liberal interpretation could easily become a restrictive one, "without a single word of the text being altered". In other words, if there is a perceived national need to increase the population, the existing law can well restrict women's access to abortion. As it stands, every woman has to give an explanation under the act. If the doctor interprets the explanation as unviable, her access will be curtailed. This could well happen under different social, economic and demographic conditions.

Through the period of this study, however, several methods of birth control have been propagated. These include: female and male sterilisation, contraceptive pills, IUDs, long acting hormone based contraceptions such as Net-En, Depo-Provera, Nor-Plant and Anti-Fertility Vaccine. [17] Feminists have argued that most of the methods propagated by the state are coercive, many are long acting and can have negative effects on the health of the users. Feminists have not always looked at the multi-national control and promotion of contraception, or the global dimensions of family planning, including the

export of harmful technology to non-western women. When these are addressed at all, it is understood as revealing the "weaknesses" of the Indian state in not being able to withstand these pressures. [18]

Another concern of feminists has been that most of the contraceptive methods listed above are aimed at women, absolving men of any responsibility towards contraception. Elaine Leissner looks at four existing, but little known contraceptive methods for men. These include: non surgical vasectomy, permanent and temporary contraception by injection, wet heat method, ultra sound methods. All these are non-hormonal methods. Lissner goes on to say:

*"Have you ever wondered why you have never heard of these? Research bias plays a large part. Male directed funding agencies find reasons not to fund research on male contraception. Male researchers are reluctant to tamper with the male body. As a result, the public is not aware of alternative methods."* [19]

Activist's hold that not only is the population policy in India misogynist, it is in essence racist, communal and anti-poor. In other words, it aims to control the numbers of some groups. For instance, population control enthusiasts have suggested that Muslim populations in some parts of the country grow at a higher rate than other communities. [20]

If one looks at the history of research on contraceptives, we find that since the mid 1960's, the focus has been on hormonal contraception. A paper by a Bombay based health activist written in 1986 accurately predicted the impact of such research. [21] Based on a study of the 1983-84 annual report of the Indian Centre of Medical Research (ICMR), she predicted that the ICMR would focus on hormonal contraceptives in accordance with the directives given by the WHO. In the mid 1980's, the testing of NET-EN, an injectable contraceptive, was conducted mostly in state run government hospitals, on poor women, without informing them of the possible side effects of the drug. The lack of informed consent violated the official WHO principles for clinical evaluation.

Savara's fears of the cafeteria approach that would be inevitable if such policies were continued have been borne out in the 1990's. While official rhetoric explains the range of

methods available as increased choice for women, some government officials are honest enough to admit that the marketing of such drugs into the country are a "part and parcel of the liberalisation of the (Indian) economy. [22]

Health activists argue that the use of coercive methods by the state will have disastrous effects not only on individual women, but on the country as a whole. In a letter written by 16 women's organisations to the Minister for Health and Family Welfare in 1994, it is reiterated that the "new trend of introducing hazardous, long acting, provider-controlled, hormonal methods of contraception have been opposed by women's organisations for several reasons." [23] These include the side effects on women, such as heart problems, depression, menstrual irregularities and effects on future fertility. There are possibilities of the immune system being affected. Besides, these contraceptives need sophisticated methods for screening and monitoring users, which are not available in India. Even more seriously, they can be misused as they can be and are administered without a woman's consent. Nor is removal in case of complications easy or possible. Control is therefore vested not in the woman as in the case of barrier methods, but with medical practitioners, and ultimately with the state. [24]

The letter goes on to point out that the Family Planning methods used are counterproductive. To quote;

*"The world over, there is enough experience to show that contraceptive provision is useful only for people ready to adopt a small family when their life conditions improve. In the absence of this, contraceptives are used as weapons to meet targets set by the government and do little to meet the reproductive needs of the people conditions are being created in our country which will lead to a growth in population, because there are increasing cuts in the area of basic necessities. The well-accepted maxim that social development leads to decreased growth in population is not being followed in our country. The only programme given impetus is the family planning programme." [25]*

Some Delhi based women's groups have filed a case demanding a stay on the introduction of injectable contraceptives, which is still pending in the Supreme Court. Filed in 1986, the petition demanded that NET EN be introduced in the Family Planning Programme in India only after proper testing. It also demanded that an assurance be given by the state that women be given accurate information prior to use, along with the creation of medical screening and follow up facilities. An additional affidavit was

filed in 1990, which included other hazardous contraceptives, i.e., implants like Nor-Plant, anti fertility vaccines, nasal sprays into the scope of the petition.

The petition itself is modest in its demands - it does not ask for a blanket ban on the methods, but for controls on the way in which it is introduced. Inspire of the case not being decided yet, NET EN has been introduced into the country along with other methods included in the petition. Feminist intervention has not proved successful in this regard. In direct contrast, the campaign against sex determination and pre-selection has resulted in obvious and dramatic success - the framing of a law banning it at the state and the national level. In the next section, I will look at feminist and legislative debates around amniocentesis in Bombay.

## **II Sex Determination: Debates and Activism in Bombay**

In the early 1980's, a campaign began in various parts of the country around the practice of sex determination leading to the abortion of female foetuses. Prior to this, in 1976, the government has issued a partial ban on sex determination, not allowing the tests to be conducted in government hospitals. The issue was revived in 1982, when some national newspapers published a news item and an advertisement of a private clinic in Chandigarh, offering this service. Protests were launched in different parts of the country by women's groups, people's science groups and health activists. At this juncture, the campaign focused on essentially two issues. One, the potentially dangerous effects of the test on the foetus and the woman's uterus. Second, the high degree of inaccuracy of the tests. The campaign lost its momentum when it became apparent that the test could be improved to do away with these problems. [26] It seems that the failure of the first phase of the campaign to maintain its tempo owed much to its inability to link the issue to gender inequality and to concentrate instead, on medical aspects of the tests.

In November 1985, activists from some women's groups and health activists in Bombay formed the FASDAP. The forum linked the campaign to larger questions of women's oppression, the misuse of science and technology against people, and issues of human rights violation. [27] The campaign had two aims: to pass a law banning sex determination and to generate debate around the issue. I will focus on the latter in this section.

The campaign met with some resistance. As Forum Against Oppression of Women (henceforth FAOW), an active part of FASDAP recognised, this was a campaign unlike any other in the past. In campaigns against rape, domestic violence and dowry,

women's groups were met with at least a token hearing. In the case of this campaign, there was hostility. A booklet brought out in 1990 looks back at the campaign.

*"Right from the start, it became evident that since the large majority of people were not likely to support the campaign spontaneously, we would have to develop newer forms to highlight this social issue. So, the campaign (concentrated on) influencing the attitudes of people against the test, daughters, women in general; of women themselves who would readily sacrifice anything for sons; the medical community and other informed persons." [28]*

The methods of mobilising support included writing and responding to the issue in the mainstream media, morchas and demonstrations. In April 1986, a demonstration was held outside a hospital in the city with posters depicting the test and the need to ban it. On 14th November of the same year, celebrated in India as children's day, a morcha made up of parents and daughters was held. Films were made on the issue. [29]

The public campaign coincided with a debate around the issue in the media. The debate was triggered off by an article written by economist Dharma Kumar in an academic journal in 1983, corresponding with the first phase of the campaign against sex determination. Dharma Kumar responded to the views expressed by Pranab Bardhan who feared that girls would disappear from India if the tests continued. Bardhan held that in any society, female children get care and food in direct proportion to their continued. Bardhan held that in any society, female children get care and food in direct proportion to their economic value. Hence, the survival rate of female children is higher in East and South India than in the rest of the country. Marriage too is an economical institution.

Kumar felt that if this view was indeed tenable, and if sex selection would actually reduce the number of girls in the country, their value would rise. This would lead to a fall in dowry demands and an improvement in the status of girl children and more generally, of women. She went on to say that at that given juncture of history, sex determination tests, being expensive, were tapped only by the rich. Her prediction was that if the rich had only sons, they would have to approach poor families within or even outside their own regions for brides for their sons. That would reduce dowry demands, enable national integration and income re-distribution. Thus, the tests did not pose a serious social danger, and might in fact lead to some good.

Kumar opposed the demand for a ban on sex determination tests for two reasons. One, on the grounds that scientific development should not be controlled, or restricted. Secondly, that female foeticide was "better than female infanticide, or severe ill treatment" of girl children. [30]

In another article, Kumar linked the issue of sex determination and pre-selection with that of abortion. Her view was that if feminists were not fundamentally opposed to abortion, it was inconsistent to oppose sex determination on the grounds that it could lead to abortion of female fetuses. As she put it:

*"In order to provide focus to the discussion, let us grant the feminist pre supposition that abortion is not wrong in itself, i.e., the foetus has no right to life. But, feminists want to control one form of foeticide, viz. female foeticide... Feminists hold strongly that the decision to abort is the pre prerogative of the mother alone, which makes it all the more necessary to ask why the mother should not be provided with that information on the consequences of her decision."* [31]

Kumar felt that the practice of female foeticide could be countered not by bans, but by reducing son preference, which existed in all societies, through the implementation of state policies like pensions for couples without sons, training and employment for women, giving jobs to women who remain unmarried due to dowry demands or any other reason. [32]

Dharma Kumar remains vindicated in her prediction that a ban would prove ineffective against the practice of aborting female fetuses. Her description of feminist lack of clarity on the issue of abortion and sex determination also remains partially valid. However, her views have been challenged both directly and indirectly. That amniocentesis poses no serious danger to population distribution is erroneous, as sex ratios in the 1990's are clearly weighed against women. [33] Studies have demonstrated that son preference is not uniform, but varies according to regions, religions and communities. A survey conducted in seven districts in India by the Population Research Centre, Chandigarh reveals that a larger segment of Hindu and Sikh women compared to a substantially smaller proportion of Muslim women have strong son preference and a greater desire to know the sex of the fetuses. [34]

Social scientists have argued that Kumar's view that the decline in the number of girls following sex determination and abortion of female fetuses would lead to an enhancement in the status of girls and women is untenable. Leela Dube, for instance feels that declining female population could lead to abduction, sale of girls and polyandry. In other words, a further decline in the status of women. [35]

In the mid 1990's, the debate was revived again, when the Central Government announced its decision to pass a law banning sex determination, on the lines of the Maharashtra legislation. Some expressed the view that such a ban was both unethical and would be counter productive. A medical practitioner pointed out that the Maharashtra legislation had not improved the status of women, nor had it prevented women from undergoing the tests. It had merely driven the practice underground. She added that it was her opinion that legal prohibition of sex determination was unethical, as it was tantamount to infringing on the reproductive rights of women. [36]

A related opinion expressed by a Bombay based journalist was that no state had the right to compel women to bear an unwanted child. He wrote:

*"A ban on sex determination will impose unwanted pregnancies on women. Nor can the law be enforced because no society can shut away an available technology from people."* [37]

What is remarkable is that the arguments opposing the ban are couched in the language of rights. That is, the right of a woman to decide whether she wants a female child or not. On the one hand, it is partially true that women may not always be able to decide for themselves whether they want a girl or not. But, it is equally true that most women do not have control over many aspects of their lives, including when to have children, how many children to have, etc. What the ban does is that it expresses the political will of the state that it stands for gender justice.

The second presumption, that the ban is not enforceable, because it has been ineffective in one state, is somewhat limited. The failure of the ban in Maharashtra may well be due to lack of will as far as the implementation agencies are concerned. In other words, while the state may well make a formal commitment to gender justice, it may not implement it at the level of policy. A partial explanation is that the state is not a monolithic body, but is made up of diverse trends and compulsions. At another level, it

is the state is not a monolithic body, but is made up of diverse trends and compulsions. At another level, it is equally important to recall that the state has not been able to implement several policies and laws, including the Dowry Prohibition Act, Section 498A IPC, etc. Some women's organisations feel that here it is the responsibility of feminists and human rights activist to monitor laws and policies.[38]

### III Banning Sex Determination in Maharashtra: A Legislative Victory?

The primary aim of the FASDAP was to get a legal ban on sex determination. The FASDAP occupies an ambivalent position for two reasons. One, that in addition to women from feminist groups, it was made up of men (and women) who may or may not clearly identify with feminist politics. In that, it is different from all the other groups that we have encountered so far, where the role of men, if present remains marginal. The primary focus in the forum was to abolish sex determination. Secondly, the forum was a campaign group with a single agenda, which disbanded as soon as the ban was imposed in Maharashtra. [39]

The following statement of the FASDAP brings out their commitment to lobbying:

*"Lobbying... helped give us a direction; it helped to raise the issue on various platforms, and it focused attention on the point that we were trying to make."* [40]

In addition to the activities of the Forum, women's organisations in the city were also taking other steps to protest against sex determination. A petition was filed in the High Court in Bombay by Mahila Dakshata Samiti following the death of a woman who had undergone sex determination tests in September 1986. The petition contented that the tests violated Article 2 of the constitution, i.e., the right to life. [41] The argument was uncomfortably close to those used by anti-abortionists in the west. The argument in both cases was that a foetus has a right to life, hence by extension, no foetus should be aborted. As we have seen, in India, inspite of formal legal liberalisation of abortion, there remains a great degree of discomfort, socially and politically, with the notion of abortion. FASDAP, however tried to avoid this pitfall by basing its appeal on gender justice and reiterating time and again that they did not oppose abortion per se. [42]

Lobbying by FASDAP had very visible and obvious results. In 1986, the Public Health Department of the Government of Maharashtra formed a committee under the

chairpersonship of the Minister for Public Health and Family Welfare to study the problem of sex determination and female foeticide. A study was commissioned and conducted by Dr. Sanjeev Kulkarni. The study tried to gauge the magnitude of the problem through a survey of private clinics in the city. Dr. Kulkarni estimated that about 78,000 cases of abortion of female foetuses had taken place in India between 1978-82 following sex determination through amniocenteses. [43]

He found that of his sample of 50 Doctors practicing in the city, 84% performed amniocentesis for the purpose of sex determination, and not for detecting genetic disorders. As many as 37 Doctors of the sample had been performing these tests for at least 5 years 83% doctors who performed the tests conducted MTPs after the results in case it was desired by the woman. The reason given by those who did not do so was that after the results in case it was desired by the woman. The reason given by those who did not do so was that they did not perform mid trimester MTPs in the normal course. Each doctor conducted an average of 1-20 tests every month. Most of the women approaching the doctors for sex determination belonged to middle class and upper middle class families, and the majority had 2-3 daughters prior to undergoing the tests. The costs of the tests ranged according to the doctors, between Rs. 70-600.

Kulkarni found that most of the women who had undergone the tests said that they had not been forced by their families to undergo the tests. Significantly, most of the doctors conducting sex determination tests felt that they were performing a "humane" service to women who did not want to have more daughters. One Fifth of the sample opined that sex determination tests were an effective means of family planning. [44]

Here, I would like to focus on a curious contradiction, both in feminist and state responses. At one level, feminists, while opposing the family planning programme of the state point to the perceived and stated need of women to have more children. However, a significant aspect of the Indian reality is that most families, and women within them want more sons than daughters, and that women may not welcome childbearing and nurturing for girl children. The opposition to sex determination, which is a part of son presence in its most extreme form, cannot be complete without an acknowledgment of this factor. At the level of the state, while the tests do constitute a way of reducing the size of the family, the state did feel obliged to take a public stand on the issue by banning them. The focus here is to point to the complexities of state and feminist responses to the issue.

Dr. Kulkarni's report was followed by a law in Maharashtra banning sex determination in 1988. The law was designed to regulate the use of medical or scientific technique of pre-natal diagnosis solely for the diagnosis of genetic or metabolic disorders and not for sex determination. [45] An expert committee in which representatives from the FASDAP were present was formed to formulate the law.

The bill was introduced and passed in both the Legislative Council and the Assembly in Maharashtra in a single sitting. The legislators displayed a eagerness to pass the bill, looking at it as symbolic of the progressive nature of politics in the state. An MLA put it in these words:

*"Maharashtra has lived up to its revolutionary heritage. It is the first state in India to have introduced the bill."* [46]

Another woman MLA pointed out that the bill needs to be extended to the entire country if it has to be effective.

*"The bill needs to be extended to all over the country... Otherwise, the women of Maharashtra will go to neighbouring states and get the tests done."* [47]

Here as in other legislative debates, women were cast in extremely stereotypical moulds - women were constructed as passive potential or real mothers.

*"Why are girls being treated badly? Women give birth to the whole world. Therefore, they are more important to the world than men are. The nation needs women because women are the creators of all life, women can do all kinds of work. If women are enslaved, how can the nation flourish?"* [48]

The statement quoted above combines a sentimentalised image of women as mothers, and girls as potential mothers with the more utilitarian understanding that women do more work than men do. For both these reasons, they are essential for the prosperity and progress of the nation. Another MLA issued a warning to men on behalf of all women:

*"The question of violence against women is not a joke. (Men think that) women are calm and non-violent. But they do not know what can happen to the world when women adopt a different form."* [49]

The reference here is clearly to the Hindu myth of the goddess Parvati, who is passive and calm, until she is forced by circumstances to adopt the more ferocious form of Kali, known for slaying demons in order to prevent the destruction of the world. However, the analogy seems a bit misplaced here. She also commented on the silence of men as far as the debate on the issue was concerned. One male MLA was quick to respond to what he clearly saw as a challenge.

*"I welcome this bill. Women legislators have expressed their views and support for the bill. I will speak on their request that men should speak out. My sister, Hon. Member, Smt. Sharayu Thakur holds that only men ask whether the foetus is male or female. This is false. Even women always favour their sons."* [50]

What is significant is that the debates did not focus at all on the bill itself, nor on the issues raised by the health activists and feminists. The bill that was passed may have been a partial victory for activists, but as the debates reveal, the MLA's choose to ignore or were unable to comprehend the questions and issues raised.

The bill itself was full of loopholes. It included in its scope all pre-natal diagnostic test, restricted them only for testing foetal abnormalities in pregnant women medically established as "high risk" groups. These included women above the age of 35 years, with a history of abortion or of mental retardation in the family. It made it mandatory for the medical practitioner conducting the test to obtain the consent of the woman undergoing the test in the prescribed form after explaining to her, the potential side effects of the procedure. [51]

The bill provided for the setting up of a monitoring group, called the State Appropriate Authority. The group was to be made up of government employees, representatives of voluntary organisations and doctors. The representatives of voluntary organisations and doctors were to be nominated by the state government. The state government thus enjoys unchecked powers under this clause. The State Appropriate Authority is

entrusted with extensive powers, including judicial powers to try out cases related to the violation of this Act.

The Act banned the use of medical techniques for the purposes of sex determination. It made it mandatory for each genetic centre and laboratory in the state to register itself under this Act. Prior to registration, the State Appropriate Authority would conduct an inquiry. The FASDAP complained that all these provisions contributed to increase in red tapism. They pointed out that many of the private clinics who would apply for registration had in fact conducted these tests in the past. If they were given licences - which some of them were - it would actually legitimise unethical practices carried out by them earlier.

Another anomaly of the Act is that none of the bodies appointed under this Act were answerable to the public. It restricted direct access of the public vis-a-vis violation of the law. According to Section 21 (1) of the Act, the courts can take cognizance of an offence under this Act, only if a complaint is filed by "Appropriate Authority, State or local Vigilance Committee." [52] A private citizen can file a complaint only to the Appropriate Authority or the State or local Vigilance Committee, who then takes it up. The committees are provided with discretionary powers and can in some cases, ignore the orders of the court. FASDAP points out that none of the bodies appointed under the Act are in any way answerable to the public, violating every norm of democratic functioning. As FASDAP puts it, "No punishment is given to them for failing in their duty; this leaves people with little recourse in the face of repeated negligence on the part of the state." [53]

To me, what seems most significant in the Act is the lack of clarity about how the woman conducting the test is to be legally viewed. While there is a clause that prescribes a punishment for the woman under going the test, on the other hand, the Act presumes that she has been coerced into performing the test. Section 19 (2) of the Act states that:

"... Provided further that, the Court shall always presume, unless otherwise proved, that a woman who seeks the aid of pre-natal diagnostic procedures on herself, has been compelled to do so by her husband or members of his family... the woman shall be liable to pay a fine of Rs. 50 for each such offence." [54]

Though the fine payable by the woman is a token amount, to punish a person presumed to be coerced in to an action seems violative of natural justice. On the other hand, all women undergoing the test do so at the behest of their husbands and family members, which denies them agency and responsibility for their actions.

With all these lacunae, the FASDAP who had fought to get to get the ban, was initially reluctant to support the act. However, they decided to extend their support, as they felt that opposing the bill would be counterproductive, as it would defeat the campaign. After it was passed, the Act did not prove effective. None of the bodies mentioned in the bill: the State Appropriate Authority and the State Vigilance Committee was set up until 1989, a year after the bill was passed. In spite of the clause that mandated it, voluntary bodies were inadequately represented, and FASDAP completely left out in the composition of the bodies. One of the greatest markers of the failure of the Act is that between 1988-1998, not a single case has been registered under the Act, and the practice continues in the city of Bombay.

#### **IV The National Bill: Replicating An Ineffective Law?**

In 1994, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed in Parliament. Between 1988- 1994, three states had followed the example set by Maharashtra to pass laws banning sex determination tests. These were Punjab, Haryana and Rajasthan.

In February 1987, a Central committee on sex determination was set up by the central government headed by Rajiv Gandhi. The committee submitted its report, on the basis of which a bill was framed. The bill, which replicated many of the loopholes of the Maharashtra Act, was introduced in the Lok Sabha in 1990, but was not passed until 1994.

One of the primary problems with this bill, as with the state law, as far as activists were concerned, was the clause that the woman undergoing the test would be subjected to punishment. A member of the committee, an activist of the FASDAP, submitted a note of dissent to this clause in the bill. The note stated:

"I believe that a woman's choice to undergo the test is a result of subtle and not so subtle pressures exerted on her by her family, community and society. It is not a conscious choice... so, it is unjust to pronounce her guilty under this Act. Punishment... would mean further victimizing the victim of oppression and equating her with the oppressors, so such a woman should not be punished." [55]

Other than this consideration, what is significant in this clause is that, unlike in the Maharashtra Act, the state bill recommended a far more stringent punishment than a token fine. Under the Central law, all those contravening the law, including the doctors, the family members and the woman herself, are subject to a uniform punishment, i.e., three years imprisonment and a fine of Rs 10,000. Given this, even if a woman had indeed been pressured by her family to undergo the test, she would be unlikely to report them if she too would be punished.

Apart from this, the Central act too invests the responsibility of implementing the Act with two officials appointed by the state government, i.e., with members of the Appropriate Authorities Committee and the Advisory Committee. The composition of both is left somewhat ambiguous. [56] Like the Maharashtra Act, the central act does not allow a private citizen to access the courts directly if he or she comes across a violation of this Act, all complaints are to be routed through the Appropriate Authorities Committee, who has the final authority whether to follow up a complaint.

As with the Maharashtra State law, the framers of the central Act see themselves as undertaking a near revolutionary step. The statement of objects and reasons of the bill reads as follows:

"Sex determination tests are being operative for the past so many years in the country. Many people have earned a lot of money by operating such centres. The tests are now increasingly used by parents and medical practitioners for pre-birth sex determination with the intention of aborting the female foetus. If this is allowed to continue, it will result in distorted male female ratio in the country. It is high time that such legislation is brought forward to ban such tests in the country. Hence, this bill." [57]

The self congratulatory air seen in this extract echoes the Assembly debates in Maharashtra in 1988. Both the Acts - national and state are clearly inadequate, yet

legislators appropriate for themselves the radical fervor that belongs elsewhere. Simultaneously, the FASDAP found that it was being credited with the national bill, which it was uncomfortable with - for two reasons. One, because it did not think that the bill fulfilled the objectives and goals of the campaign. Secondly, because they saw it as a form of co-option. This extract brings out some of these dilemmas:

"The proposed central legislation is in a sense an achievement of the nation wide campaign. The way in which this 'achievement' has been credited to us and the whole question of democratic principles and values trouble us. In away, we see a parallel in our use of the law and in the establishment's promotion of technological solutions. Society tries to find solutions to social problems in technological innovations: are we too seeking such solutions through the agency of the law? Whenever we ask for reforms in existing laws, or the formulations of new laws, are we expecting the state to be on the side of women?" [58]

The FASDAP in the statement above reveals a degree of sensitivity to some of the issues of working on legal reform. They, like many other feminist groups, were sceptical of the state's rhetoric. However, they also- felt that the process of campaigning for the changes in legislation could create an atmosphere in which issues were debated. Public debate and activism could force the state to act against violations of human rights. [59] While this might well be a valid reading of the processes of change, the group does not address the dilemma of indirectly empowering the state and legitimising the state machinery by participating in the law making process.

One view expressed by Nivedita Menon is that is impossible to expect justice from the state and the legal machinery. She suggests that it is dangerous to seek the "intervention of law to restrict the development of any technology that could be judged capable of being used for sex determination." [60] Dangerous because it can hand over "entire areas of science and knowledge to bureaucratic control" which is in fundamental contradiction to feminist ideals of democracy. [61] Nivedita Menon points out that the broader aims of the FASDAP - to make science and technology accessible to people in a genuinely democratic manner, i.e., people to have the freedom to choose and reject technology after ascertaining its risks and benefits at a social level - cannot be realized through legislation. What is needed is a radical re thinking of the issues and strategies involved. Significantly she critiques the FASDAP for failing to recognise this, instead for being overwhelmed by "the hegemonic perception of law as a transformative instrument." [62]

While Nivedita Menon's analysis is mostly valid, it is my perception that she underestimates the sensitivity of the FASDAP to the issues involved. As we have seen, the FASDAP recognises the limitations of law, and the dangers of working with the state on legal reform. Simultaneously, they hold to the need of legal interventions along with non-legal strategies for transformation.

The FASDAP, like other activist groups are forced to respond to exigencies at an immediate, every day basis, while putting forward a long term perspective of the world and politics. This can lead to seeming contradictions in positions. The FASDAP members are not entirely comfortable with the notion that tests be allowed even for the purposes of detecting genetic abnormalities. This, they believe, is a part of eugenic and racist policies, which allow only "perfect" human beings to be born. However, they also feel that as women are primarily responsible for child rearing, not allowing these tests can put an additional burden on women. [63] Unfortunately, this position leaves them open to the charge that a similar argument can be extended when it comes to the issue of sex determination.

There is another dilemma. As Menon rightly points out, the state may well - and does - misuse science and technology for dangerous purposes. The nuclear testings in Pokhran is only one such example. However, in the absence of regulations by the state, there is the other danger, especially in contemporary liberalised India, that consumerist concerns will completely take over the production of science and technology.

Groups like the FASDAP working on the health concerns of marginalised groups like women and children are forced to weigh these often contradictory pulls. The deciding factors become difficult to reconcile with each other, even as the broad aims remain placing at a priority, the concerns of women.

## Notes

This paper is based on my on-going research on the women's movement in western India

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1. Gabrielle Dietrich, *Reflections on the Women's Movement, Religion, Ecology, Development*, Horizon India Book, New Delhi, 1992-34.
2. Mira Savara, *Women and Reproduction*. Paper presented at The National Conference on Women's Movements in India, Bombay, 1980. Unpublished. Malini Karkal, Hum Do, Hamare Do in Kamaxi Bhate et al ed., *In Search of Our Bodies. A Feminist Look at Women, Health and Reproduction in India*, Shakti, Bombay, 1987,50-53.
3. See Chapter 1, *Different Streams - The Feminist Movements in Bombay*.
4. Karkal, *Ibid*, 51.
5. Policy for women, Government of Maharashtra. Government Central Press, Bombay, June 1994, 31
6. *Ibid.*, 31-32.
7. Nivedita Menon, 'The Impossibility of 'justice'. Female Foeticide and feminist discourse on abortion, *Contributions to Indian Sociology*, Vol. 29, No.1 and 2. (1995), 369-392, esp. 371-2.
8. Amar Jessani and Aditi Iyer, 'Women and Abortion' *Economic and Political Weekly*, Vol. 23, No. 48, 259-94, esp. 2591.
9. Lok Sabha Debates, Fifth Series, Vol. 7, No.52, 2nd August 1971, 2593.
10. *Ibid.*, 166.
11. Dr. Laksmi Narayan Pandit, *Ibid*. 180.
12. Smt. Laksmikantamma, *ibid*, 185.
13. Shri D.P. Chattopadhaya, the Minister of State in the Ministry of Health and Family Planning... *Ibid*.
14. *Medical Termination of Pregnancy Act, 1971*. Women and Child Welfare Department, Ministry of Human Resource Development, Government of India, 1971.
15. Based on my experience in working with the health workers, *Action India Women's Programme*, New Delhi in 1994.
16. Cited in Nivedita Menon, *op.cit.*, 386.

17. Pros and Cons of Contraceptives available in India. Pamphlet by Forum for Women's Health, Bombay. Date not specified.
18. Ibid.
19. Elaine Lessner, Contraceptive Methods - for Men. Ms. Jan - Feb 1992. On file with Akshara documentation centre, Mumbai.
20. K.B. Sahay, 'Snip out the Problem', The Telegraph, 19.01.1996.
21. Mira Savara, Contraceptive Research in India, Paper presented in Workshop on women, health and reproduction. Bombay, December 1986. Unpublished.
22. Quoted in Facts against Myths, Information bulletin, Volume 1, No.9 Vikas Adhyan Kendra, Bombay, 1-2.
23. Letter written to the Minister of Health and Family Welfare. New Delhi, by sixteen women's organisations. 1994.
24. Ibid.
25. Ibid.
26. Forum Against Sex Determination and Sex Preselection (FASDAP), Using Technology, Choosing Sex, The Campaign against Sex Determination and the Question of Choice, Unpublished Paper.
27. Ibid.
28. Forum Against Oppression of Women (FAOW), Participating in the ANti-Amniocentesis Campaign in Forum against Oppression of Women, Moving ... But Not Quite There, Bombay, 1990, 25.
29. Ibid.
30. Dharma Kumar, Male Utopias or Nightmares? Economic and Political Weekly, Volume XVIII, No.3, January 15, 1983, 61-64.
31. Dharma Kumar, Amniocentesis Again. Economic and Political Weekly, Volume XVIII, No. 24, June 11, 1983, 1075-1076.
32. Ibid.
33. Study cited in Logan Rai, 'Life,s hard, Little Girl', The Times of India, 23.06.1985.
34. Study cited in Manimoy Dasgupta, The Telegraph, 25.09.1997.

35. Leela Dube, 'Misadventures in Amniocentesis', *Economic and Political Weekly*, Volume XVIII, NO.8, February 19, 1983.
36. Ruth Macklin, 'The Ethics of Sex Selection', *Medical Ethics*, Volume III, NO, 4, October-November 1995, 61-64.
37. Aryind Kala, 'Why Ban Sex Determination Tests?', *The Statesman*, 19.02.1994.
38. Personal Communication with Gopika Solanki. I may also point out here that there is a strong section in the IWM that argues that legal activism has lost its validity for feminists. I will examine these arguments later in the chapter.
39. Ibid.
40. FASDAP, *Using technology*. op. cit.
41. Flavia Agnes, *State, Gender and The Rhetoric of Law Reform*, RCWS, SNST University, *Gender and Law Series*, Book 2, 177.
42. FASDAP, *Using Technology*. op.cit.
43. Dr. Sanjeev Kulkarni, *Pre Natal sex determination tests and female foetice in Bombay city*. Commissioned by the Secretary to the Government Department of Public Health and Female Welfare, Maharashtra.
44. Ibid, 3-11
45. Maharashtra Legislative Council Bill, No.8 of 1938. Maharashtra Legislative Council.
46. Smt. Ranjana Stav, *Maharashtra Legislative Assembly Debates*, Volume, 82, 16.04.1988, 56. Translated from Marathi.
47. Smt. Parvati Parihar, Ibid. 57-58. Translated from Hindi.
48. Smt. Damayanti Deshbrather, Ibid, 61. Translated from Marathi.
49. Smt. Parvati Parihar, Ibid, 58. Translated from Hindi.
50. Shri D.G. Sopal, Ibid, 60. Translated from Marathi.
51. Maharashtra Legislative Council Bill, No. 8 of 1988. op.cit., Section 3-5.
52. Ibid, Section 21 (I) (a) (b).
53. *Using Technology*, op.cit.

54. Maharashtra Legislative Council Bill. No. 8 of 1988, op.cit., Section 19 (2).
55. Dr. R.P. Ravinder, cited in Swati Chaturvedi, 'Dissent Note on Sex Test Ignored', The Statesman, 12.02.1992.
56. Dr. Amit Sengupta, 'Pre-natal Diagnostic Techniques Bill.. Loopholes Galore', The Lawyers, February 1992, 16.
57. The Banning of Sex Determination Tests Act. Government of India, 1991.
58. Using Technology... op.cit.
59. Ibid.
60. Nivedita Menon, op.cit., 380.
61. Ibid.
62. Ibid, 381.
63. FASDAP, op.cit.