

Banning Pre-Natal Sex Determination: The Scope and the Limits of the Maharashtra Legislation. Jesani, Amar. In: Understanding Women's Health Issues: A Reader. Edited by Lakshmi Lingam. 1998. P.228. ISBN 81-85107-84-X.

Banning Pre-Natal Sex Determination: The Scope and the Limits of the Maharashtra Legislation.

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The Maharashtra government introduced a much-awaited and talked about bill in the state assembly: the Maharashtra Regulation of the Use of Pre-natal 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 Pre-selection, and is supported by women's organization's, doctors, health activists, democratic rights activists and even a research institution. These groups organized demonstrations, marches, 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 and sonography, which lead to female foeticide. Many sensitive journalists and other media people helped focus the campaign not only on the issue of the misuse of medical techniques, but also on the status of women in society. Several members of these organizations 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 independently.

Medical Council Indicted

Although the 'Objects and Reasons' given by the Minister of State in the bill does not explicitly criticize the Medical Council, it states that 'in breach of professional ethics, unscrupulous medical practitioner's do not hesitate to perform abortion's 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 is 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 illustrates that sex determination practices involve a breach of medical ethics. Therefore, it squarely indicts the Medical Council (MC). The MC in our country has made very little 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 has also, at times, attempted to provide justification and legal cover to such violation. This attitude was apparent in the specific case of sex determination, where it refused to shed its lethargy despite a very hot debate in the media over the last seven years. In addition, in private conversation, the President of the Maharashtra MC defended sex determination tests by doctors, saying that the medical profession must grant full autonomy to patients. It was also argued that it is difficult to prove, in individual cases, that sex determination was done to abort female foetuses.

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 their notice but the MC did not move. For instance, Dr Datta Pai, who runs an abortion clinic (Pearl Center) in Dadar, Bombay, and who was a member of the government's committee on this issue, has publicly admitted that his abortion center 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 center. Yet this was a fit case for the MC to seize his records of amniocentesis and MTPs in this period and scrutinize whether women who underwent 'amniocentesis in this center' were offered MTPS when the foetus was found to be female. And if this was the case, 'the MC' could have used two clauses of its code---'namely, no discrimination in medical practice, and 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 one). The rest of what constitutes medical technology and techniques is 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 only regulates 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, and are being, widely misused. Therefore stringent regulation on all medical technologies in general, and new technologies in particular, is urgently needed.

Second, the bill explicitly ban's the use of medical techniques and technologies for the purpose of pre-natal sex determination, leading to female foeticide. Third, it declares illegal any manner of advertisement regarding facilities available for the pre-natal prediction of sex at a center, laboratory or clinic. Fourth, it makes illegal the seeking of such facilities by a woman or any other person on her behalf, for the pre-natal determination of sex. Finally, it prohibits the indication of the 'the sex of a foetus with or without the possible object of female foeticide'. It prescribes rigorous punishment for those who indulge in prenatal sex determination activities.

Thus, the pressure generated by the efforts of the Forum, and other individuals and organizations, has helped make some breakthroughs in the present situation. But the gains are quite inadequate in many respects, and the 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, then at least as weak as the present Drugs and Cosmetics Act. In many ways it is a defeat in the victory of 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, as it is the private medical sector, which is primarily guilty of their misuse and not the public sector. In public institutions, the government issued a directive almost a decade ago to stop the use of such techniques.

However, with the talk of inefficiency and corruption in the public sector, the government is building a case for privatization (which is already under way). It has failed to pay even lip service to the nationalization of the private medical sector despite revelations of gross malpractices. It even fails to acknowledge that the 'liberalization' that prevails in the private medical sector, has done only harm to the people, and to women in particular.

Instead of abolishing all genetic laboratories and genetic clinics in the private sector, the bill only seeks to regulate them. As we know, such a regulation of the pharmaceutical industry under the Drugs and Cosmetics Act has not radically changed the drug scene, and its misuse continues, legally as well as illegally. The regulation of genetic laboratories, genetic centers, genetic clinics. and so on; will ultimately entail the creation of an administrative set-up, which will look like a mini FDA. The expenditure that the government will incur, and what people will pay for these services in these center's in the name of registration fees, will far offset in a few years the total government expenditure as 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 health bureaucrats who are already overloaded and proven to be inefficient in regulating their own departments. The Director and joint Director of Health Services, who will become ex-officio Chairman and Secretary of the Appropriate Authority respectively, have never made any serious attempts to curb the private practice of doctors in our rural health services. Further, they are in charge of an ever-expanding rural health infrastructure, which includes over 1,500 primary health centers and about 200 rural hospitals. In addition, they also manage cottage hospitals and district hospitals but are unable to efficiently regulate these establishments. One can only imagine with what efficiency they will be able to regulate the private medical profession and its ever-increasing laboratories.

The Appropriate Authority comprises 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 gynecologist and one Geneticist (no other qualification mentioned), and two representatives of voluntary organizations (in the field of health, women and human rights). Except for the ex-officio members, the rest of the eight-member team will be nominated by the government. Thus, the participation of voluntary organizations will be as per the needs of the government, and since the AA will take decisions on the basis of a simple majority, voluntary organizations will not have much say in most matters.

A Mockery of People's Participation

This bill is a classic 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 by the people. Further, there will be another agency, the State Vigilance Committee (SVC), to oversee the implementation of the Act. Here, also, in the seven-member committee, two representatives of voluntary organizations will be appointed by the government. Amongst its supervisory functions, the SVC will pay periodic visits to recognized centers, but it will not have the 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 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, centers 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 complaints. But to counter-weigh, such action, the AA and SVC, which will be in possession of all the information needed to prosecute doctors, centers and laboratories, are given the power to refuse to make information available to such Citizens if the same is, in its opinion, against public interest. Thus, in the final analysis, while talking about people's participation and extending an olive branch to voluntary organizations, the government has made clever provisions in the bill to ensure that even those who want to participate to stop the misuse of prenatal diagnostic techniques cannot do so, or are effectively frustrated in their efforts.

Concessions to the 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 the Maharashtra MC and Dr Datta Pai are close advisors to the government health department.

In the defining indications and conditions for, which prenatal, diagnostic techniques should be used, they have ensured that the Forum's proposal of getting the written opinion, of three concerned specialists has been completely excluded in the bill. In the absence of such a provision, the private gynecologist will be the sole decision-maker for whether to offer any prenatal diagnostic facility to the woman or not. However, vague indications (like a history of two or more abortions or foetal loss) could be misused in the same way as the failure of contraception is used as an indication for MTP. Just as the failure of contraception as an indication for MTP has rightly made abortion facilities legally available to women, indications like foetal loss will wrongly make available sex tests to women who want to go in 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, centers 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 up to three Years and a fine up to Rs 5,000. To demonstrate that the government is going to be very strict with offending doctors, centers and laboratories, the bill has a clause that the minimum penalty for these people should be at least, one-year imprisonment and a fine of Rs1,000. But the hollowness of this provision becomes evident when 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 that 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 minimum punishment.

The second type of offender includes 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 abatement of the offence, with rigorous imprisonment up to three years and a fine upto Rs 3,000. The bill says, 'The court shall always assume, unless otherwise proved, that a woman who seeks such aid of pre-natal diagnostic procedures can 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 are 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 up to 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 call it formal equality. But not so in this bill. There is no equality between doctors, centers and laboratories on the one hand, and the victim woman and her husband or in-laws on the other. The bill says that the offence committed by type two and type three offenders 'shall be cognizable, 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 and arrest them. Once arrested, only the court can give bail. The non-compoundability makes it difficult to get any compromise settlement.

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

This shows that our government considers the offences committed by doctors less criminal than those committed by the victims (who paid the doctor an

exorbitant amount). 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 socioeconomic compulsions.

Some Lessons and Future Plans

This bill has once again emphasized that mere good intentions of individuals, groups and some bureaucrats do not add up to 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 up to the time it needs them. Thus, the government will also be found responding to certain demands for establishing the rules of the game in the field where such irregularities are rampant. Only such an approach can keep up the credibility of the system before the masses.

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

Therefore, the groups, which campaigned against female foeticide cannot remain complacent. They must continue to raise their original demands, like the abolition of pre-natal diagnosis in the private sector and absolute protection to the woman victim. They must, while going to the masses with these demands, also demand amendments in the bill. If the bill is made a law without changes, the campaign must be continued. At the same time, the groups should utilize 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 forth a law, which can partially keep female foeticide above ground, within the purview of the law. There is no alternative but to continue the struggle against the medical practice of female foeticide.*

The Maharashtra government's bill regulating the use of prenatal diagnostic techniques is a concession to the demands of the five-year campaign. It is also an indictment of the Medical Council for, its open dis-regard of its own code of

professional ethics.' The bill carefully avoids touching the private sector, makes a mockery of people participation and offers many concessions to the medical lobby.