



THE PRE—NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) BILL 1991 : A CRITIQUE

AMNIOCENTESIS IS a medical technology which was developed a few decades ago to detect genetic abnormalities in the foetus. This technology, incidentally, could also reveal the sex of the foetus. It is unfortunate that this advancement in medicine is being misused for the selective elimination of the female child. The decline in the number of girls as compared to boys, as shown in the census reports, is a pointer to this. In 1981 the census showed the male female ratio as 1000 : 934 and in 1991 there is a further fall and the sex ratio is 929 females per 1000 males.

Sex determination has become a lucrative business for many doctors and clinics for over a decade now. It was in 1977 that a leading hospital in Bombay, the Harkisondas Hospital, inaugurated its pre-natal sex determination clinic and advertised it through a circular which referred to the “humane and beneficial test.” This circular, however, added that “abortion, if necessary, will not be performed in this hospital.” This, in any case was no problem as there were several other clinics to do the job. The problem caught media attention when a doctor in Amritsar advertised his ante-natal sex determination clinic in 1979. It was in 1982 that a wrong diagnosis leading to the abortion of a male child created a lot of hue and cry.

There were angry protests and agitations by women’s organisations and activists, and surveys were conducted which revealed that sex determination tests have become a lucrative business in several parts of the country. There are many clinics in Bombay and in smaller towns of Maharashtra. There are clinics with sex determination services in various other states also. It is believed that in some states there are courier services to carry samples of the amniotic fluid of pregnant women from rural health centres to big towns and cities. In Haryana there are said to be mobile vans which conduct sonography as the latest sex-determination technique in villages.

A determined campaign against the misuse of amniocentesis and other such tests was launched by a group of activists in Bombay, known as the Forum Against Sex Determination and Pre-selection. This group collected a lot of information on the use of this test and the consequent abortion on discovering that it is a female fetus. According to one report, between 1978 and 1983, 78,000 female foetuses have been aborted after a sex determination test. Many doctors openly justify this practice. They feel that in several parts of the country, if a woman gives birth only to female babies, the husband will either get married again or he, along with his parents, will totally neglect her and the children.



In view of the strong agitations and protests, the Govt. of Maharashtra decided to enact a law against this practice. Surprisingly, there was a lot of opposition to such a law from certain quarters. For those people who had flourishing business out of the practice, it was a question of "bread and butter". Ban on the tests would mean loss of business.

It was also argued that the government's policy of family planning would be adversely affected. A couple wishing to have a son would end up with many girls and with more females, there would be growth in population. On the other hand, reduction in the number of girls would further decrease the growth of population. These people looked at women as "baby producing machines."

Another argument which was given by the opponents of the Act was that the Medical Termination of Pregnancy Act 1971 legalises abortion and the same is being resorted to as a family planning measure. Since abortion is legal female foeticide is legal too according to them.

The law was also opposed on the ground that those who want to go in for the test would in any case find a way out and go ahead. The legal ban would only give a boost to private clinics who would raise their charges for the service. The result will be that the poor will suffer. Either they will spend a lot of money for the test which they can ill afford or have a large family in the hope of getting a son, which again, they are not in a position to bring up.

The fundamental right argument was also advanced. It was argued that it was a woman's right to choose her offspring and so a ban on the test would be a violation of her fundamental right.

Despite all opposition, however, there was a tremendous pressure on the Government of Maharashtra to pass the law. Consequently the Maharashtra Regulation of Pre-natal Diagnostic Techniques Act 1988 was passed. Though the law has been passed it has not helped in solving the problem. This is because of the government's lack of determination and political will. The anti-law lobby also succeeded in getting its provisions diluted. For example the initial proposal was that private clinics and laboratories should not be given licenses for any pre-natal tests as it would be difficult to exercise control over them but this was opposed and under the Act now, even private clinics and laboratories can get a licence. Besides, the very nature of the test is such that control is not easy. The test is simple and does not require sophisticated equipment etc. All that it requires is a qualified doctor to remove the amniotic fluid which can be tested by a geneticist in any pathological laboratory.

Besides, the Bill is applicable only to the State of Maharashtra and so anyone who wants to have the test done can go to another nearby state and get the test as well as abortion performed, in case of need, without any legal problem.

The net result was that the tests continued, clinics flourished and female



fetuses aborted thereby bringing down the female population. The need for a central legislation with stringent provisions was strongly felt. Because of the various pressures on the Union government, an expert committee was set up to look into the matter and submit a report. After a lot of deliberations, the committee submitted its report and the present Bill is an outcome of that report. As the very title shows, the Bill has two aspects viz., regulatory and preventive. It seeks to regulate the use of prenatal diagnostic techniques for legal or medical purposes¹ and prevent misuse for illegal purposes.²

In order to look into various policy and implementational matters the Bill provides for the setting up of various bodies along with their composition powers and functions. These are the Central Supervisory Board,³ Appropriate Authorities⁴ and advisory committees.⁵

Under the Bill, registration is mandatory for every genetic clinic. Without registration, it cannot conduct nor even associate in any activities relating to pre-natal diagnostic techniques. Also no person can be employed in these centres unless he possesses the prescribed qualification. It is also prescribed that no pre-natal diagnostic tests shall be performed at any place other than a place registered under this Act.

A very important and significant provision⁶ of the Bill is that these techniques can be conducted only for a specified purpose viz., detection of certain abnormalities in the fetus. These are:

(i) Chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) haemoglobinopathies; (iv) sex linked genetic diseases; (v) congenital abnormalities; (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board.

The conditions to be fulfilled before the test can be conducted to detect the above mentioned abnormalities are: *firstly*, the age of the woman is 35 years; *secondly*, that the pregnant woman has undergone two or more spontaneous abortions or foetal loss, *thirdly*, that the woman had been exposed to harmful drugs or hazardous substances and *fourthly*, that there is a history of mental retardation or physical deformity such as spasticity or any other genetic disease, in the family of the pregnant woman. Apart from these, the Central Supervisory Board may specify any other condition also.

It is essential that the woman who seeks the test should be informed

1. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill 1991, cls. 4 and 5.

2. *Id.*, cl. 6.

3. *Id.*, ch. IV, cls. 7 to 16.

4. *Id.*, ch. V, cl. 17.

5. *Id.*, cl. 17(5).

6. *Id.*, cl. 4.



of the after and side effects of the procedure and also that her written consent should be obtained.⁷

The Bill seeks to prevent the practice of female foeticide by putting a total ban on sex determination tests;⁸ including ultra sonography. Even advertisement in any form of facilities for pre-natal determination of sex is prohibited.⁹

The various provisions of the Act are sought to be enforced by providing punishments for contravention of its provisions.¹⁰ The punishments vary from imprisonment of three to four years and a fine of Rs. 10,000/- to Rs. 50,000/-. The Medical Council can also take action against a registered medical practitioner on receiving a report from the appropriate authority.

For the first offence, his name can be removed from the register for two years. If the offence is repeated, his name may be permanently struck down.¹¹

There is also a provision providing for punishment for offences by companies.¹² It is important to note that even a woman who undergoes the test for finding out the sex of the child, is liable to punishment. There is however, a presumption that she had gone in for the test under pressure or compulsion by her husband or relations. This presumption is rebuttable.¹³ In this context, a mention may be made of a provision in the Maharashtra Act.¹⁴ Under that provision "the court shall always presume, 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... and in that case the woman shall be liable to pay a fine of rupees fifty for each such offence." This clause seems to be anomalous. Why should a woman, who is presumed to be innocent be made liable for any punishment? If she is guilty of the offence, she should be given the proper punishment as provided viz. rigorous imprisonment for a term which may be extend to three years and a fine which may extend to Rs. 3,000/-. The minimum punishment in such a case is imprisonment for one year and fine of Rs. 1000/-. However, in case she is not guilty because she has been forced into the act by her husband and relatives then there is no justification in penalising her at all howsoever small the amount of fine may be.

Cognizance of offences under the Act can be taken on a complaint made by the appropriate authority concerned or by a person who has given

7. *Id.* cl. 4(3).

8. *Id.* cl. 6.

9. *Id.* cl. 22.

10. *Id.*, chapter VII, cls. 22 to 26.

11. *Id.*, cl. 23(2), proviso.

12. *Id.*, cl. 26.

13. *Id.*, cls. 23(3) and 24.

14. S. 19(2), proviso of the Maharashtra Act.



notice of at least sixty days to the Appropriate Authority of the alleged offence and of his intention to make a complaint to the court.¹⁵

Offences under the Act are cognisable, non-bailable and non-compoundable.¹⁶

All said, the law is a welcome step which seeks to put an end to an atrocious practice of foeticide consequent to a sex determination test. This practice, as is well known has arisen out of the social conditions in our country, under which a woman has a comparatively very low status. So much so that parents are reluctant even to give birth to a female child. Often, a woman who gives birth to daughters only is faced with a risk of being divorced or tortured. In this situation she has a difficult choice to make-either she puts her own life in peril or she puts an end to a female child whom she is about to give birth. Where such are the conditions, one wonders how far a de-jure ban on such test would really de facto put an end to the tests. There are more chances of the practice being pushed underground and raising the price of the test. There has to be a very strong political will and honesty in the enforcement of such a law. The institutions which are given licenses for pre-natal diagnostic tests should be closely monitored and those who violate the law, stringently dealt with. Needless to say that more than anything, what is needed is change in the attitudes of the society towards the female species, awareness and education. This, along with legislation can go a long way in curbing the evil sought to be protected by the Law.

*Kusum**

15. *Id.*, cl. 28(1).

16. *Id.*, cl. 27.

*M.A., LL.M. Associate Research Professor, Indian Law Institute, New Delhi.