

WORKSHOP ON PC & PNDT ACT



RAPPORTEUR FOR  
WORKSHOP ON PC AND PNDT ACT  
30<sup>TH</sup> APRIL TO 1<sup>ST</sup> MAY

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SUBMITTED TO:

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## WORKSHOP ON PC & PNDT ACT

### **Introduction:**

National Judicial Academy organized a workshop on PC and PNDT Act from 30<sup>th</sup> April to first May, judicial magistrates and metropolitan magistrates from across the country participated in the workshop. The two day workshop was divided into 6 sessions, on the first day there were 4 sessions along with a film screening and on the second day 3 sessions were there.

Dr. Sabu M. George, Ms. Anuja Gulati, Justice Dr. Shalini S. Phansalkar Joshi, Dr. Neelam Singh and Mr. Sanjay Parikh participated as resource person in various session held in this 2 day program and guided participants on various topics.

### **Program coordinator:**

Mr. Rajesh Suman (Assistant Professor) National Judicial Academy.

Ms. Shruti Jane Eusebius (Law Associate), National Judicial Academy.

**DAY 1**

**Session 1**

**Cultural, Social and Economic Factors that Promote Gender**

**Bias: Context of the PC and PNDT Act in India.**

**Dr. Sahu M. George**

**Ms. Anuja Gulati**

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A welcome note was given by Mr. Rajesh Suman, Assistant Professor to all the participants as well as to the speaker. Then Mr. Sabu M. George started the workshop by highlighting the contribution of judiciary for 19 years in the implementation of PC and PNDT Act. He pointed out that sex selection and termination of pregnancy based on sex is the extreme form of discrimination against girls, they are not even allowed to be born and this is not an ordinary crime. He pointed out that one out of every three girls in Madhya Pradesh, Bihar and Uttar Pradesh is not allowed to be born. He mentioned that sex selection and termination of pregnancy based on sex is not seen as crime but service and matter of choice by many in the country. The technology is promoting crime in these cases and the Constitution is very clear on the matter of discrimination of women and technology cannot be used to discriminate women in the society. He also pointed out that discrepancies that are taking place in registration of the hospitals where illegal PNDT tests are being done and it makes hard to inspect and track the offences.

He said that the Act is making powerful impact and significant changes in the sex ratio, as convictions are happening under the Act and when few doctors have gone to jail other doctors also stopped doing sex determination, first conviction in Haryana took place in 2006 under the Act and after that Haryana & Punjab have seen change in the sex ratio of the state which was very low earlier. Although Maharashtra was the first state to enact the law in 1987. He also said that this discrimination is the most brutal crime which the history has seen and it is worse than

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war of independence. With the Britishers and the partition of India and Pakistan. The violence if compared in this way too large than the number of girls which have been killed or not have been allowed to be born with respect to who have died in partition or war of independence, and the tragedy is it is never been realized to be so. Until 1978 sex determination was advertised in public in newspapers openly and was seen as a method to control population. Sex selection was promoted in many clinics and hospitals and they use to advertise it as well. The Act however came in 1994 but till 2000 the practice of advertising was prevalent and was not seen as a crime. In 2000 after the amendments in the laws the Act was actually taken seriously and registration and regulations were seen by hospitals and clinics under the Act.

Judiciary has very important role in the prohibition of sex selection and termination of pregnancy after determination of sex, as the process is profitable for medical profession. In India the medical profession is highly credible and less-questionable by the common man there are very few regulations to regulate the medical profession, hospitals etc. In western countries however the hospitals and medical resources are highly regulated and every treatment is covered under health insurance of a person. So the patients, regular treatments are regulated in the western countries, unlike in India where many non-registered hospitals also work smoothly in many cities. Because of this the technology, which is supposed to be a boon is used for wrong purposes to discriminate. Further he also mentioned privatization of medical education and hospitals which has only increased the problem. Many unethical practices is being followed in these private hospitals, it's like pay money and become doctors and those doctors will rarely be into ethical practice and they also undergo less training programs and are inefficient in performing their roles. The doctors also sometimes give their name tags to unauthorized persons for doing PNDDT test and determination of sex of the fetus. The ultra sound machine sellers also many a times sell to unauthorized doctors or anybody for that matter which is illegal.

The participants shared their experience and raised queries regarding the conditions in their district or state related to sex ratio and the Act. It was discussed that Maharashtra is a state which is using the Act actively and many judgments and convictions have been given in Maharashtra. In Karnataka and Tamil Nadu the impact of the Act is not that big. Few participants raised question regarding the non-awareness about the Act among the police officers, but the police

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officers don't have much role in the implementation of the Act and they don't have to register it neither they have to file FIR nor charge sheet.

Further participants also asked about the interpretation of Section 28 and posed question that it restricts the power of the court to take cognizance, and about the right of general public to file complains under the Act, in which notice has to be given. Few questions were also related to Section 27 about the judicial cognizance and powers of police, what is appropriate authority and what are the roles of the authority. The questions were directed to the second speaker of the session Ms. Anuja Gulati. She explained that there is no power of police under the Act and Section 28 gives power to appropriate authority or any person appointed and authorized by appropriate authority, central government or state government and NGO with a notice of 15 days.

She explained in detail that State Appropriate Authority (AA) consists of three member team which has to be notified in official gazette, namely:

- Officer of rank of Joint Director or above of Department of Health and Family Welfare, Eminent women from NGO, Officer of Law and Judiciary Department.
- District AA – Civil Surgeon
- Corporation AA – Medical officer of Health.

She then explained the difference between sex selection and sex determination. Sex selection is a process which happens pre conception of the fetus whereas sex determination is another process which is mainly done by sonographic machines during the pregnancy of the women. She showed data and details related to the sex ratio in various states. From the population of the India around four lakh girls are missing due to human intervention using technology. Naturally and biologically more boys are born than that of girls but due to such practices the balance has been disturbed on unspeakable levels. Sex ratio of 950 to 960 women per 1000 men is normal but the actual ratio is 909 per 1000 men on an average of the country, which clearly means the amount of missing girls is around three to four lakhs from the country. Although after awareness among the people and deterrence of punishment under the PC & PNDDT Act the number of missing girls have come down to 3.7 lakhs from 4.5 lakhs a year.

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Ms. Anuja showed the data suggesting that the practice of sex selection and determination is predominant in urban areas as they have easy access to resources and technology. The more money they have the more they indulge in determination of sex of the fetus. Women with less education do not go for sex selection or determination. If they need a boy they give birth to many children as they have less access to contraceptives as well whereas women with some education have access to sex determination techniques and they opt this option, both ways are wrong though. It has also been observed that where the women have more role in the economy the sex ratio of that place is better than that of others. There is also data which suggest that if the first child is a girl the ratio of sex determination and sex selection goes up and if the first two children are girls then it goes further up and so the sex ratio goes down. If we look into the reasons Ms. Anuja suggested that it happens because of the evil practices taking place in the society like dowry, etc. Gender- roles in India are so specifically defined that it creates problem for a women to survive in the country, women have to do reproductive roles in the society, there is subordination of women and women face discrimination in every aspect of life, the society is patriarchal and the roles of women are defined as less to that of man or a boy. These mind –sets of the people and society directly impacts the unborn girl and parents are tempted to kill them in the fetus itself and avoid the burden of having a girl child.

The participants posed question to Ms. Anuja regarding Section 20 and 28 of the PC & PNDDT Act, and about the role of the police in the Act. The police is not given power because the offence is related to surgeon and technology, devices etc. Only appropriate authority can decide the offence under the Act, although this rule is creating confusion and problem in implementation of the Act. Further another question was raised related to the fertility clinics which promise that only boys will born. Answering the question Ms. Anuja explained that the Act covers all these things, this is a process of sex selection, where before conception the sex of the child is chosen. The preamble of the Act itself suggest the prohibition of sex selection before and after conception of fetus, the Act covers all the kind of techniques and labs but the question is how in practicality bring them under the ambit of implementation of the Act. She also said that nuclear families are more indulged in the this process as more small the family the greater chances are there to have a family of chosen members, a girl, a boy or two boys or only one boy.

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She mentioned that the Act was amended in 2002 to add all the possible methods of pre-natal determination of the sex of the fetus and sex selection process before conception in three types of centers namely the genetic counseling center, genetic laboratory or clinic and centers having ultra sound machines. A hypothetical question was then asked that if I advertise in a fertility clinic that 90% of the children born here are male, whether any offence has been committed. To this Mr. Sabu explained that there are 3 types of the selection procedure namely:

- Embryo sex selection
- Elimination of fetus after sex determination through ultra-sonographic technique.
- Blood test

The embryo sex selection is very expensive technique and so is the blood test, mainly sonographic test is done in most of the cases to eliminate girls from fetus itself. He said that the PC & PNDT Act cover all the about mentioned methods but the only problem is implementation hasn't started yet because of the specific nature of the actions. Section 22 of the Act covers advertisements which are related to either sex selection or determination, the provision prohibits advertisements relating to pre-conception and pre-natal determination of sex in any scenario or circumstances. The advertisements which says that conceive on a particular day the child conceived will be a boy is also covered under the Act. There is no scientific basis for such advertisement but the Act covers all of them. The ambit of the Section is very large it includes print media, web, internet everything. Ms. Anuja also gave example of Ram Dev Baba's Putra Jivak, the parliament has raised objection about it and the medicine was ultimately banned.

Further the powers, duties of appropriate authority were discussed under Section 28 of the Act. The function of AA is as follows:

- Grant, suspend and cancel registration of clinics.
- Ensure standards prescribed for clinics.
- Investigate complaints of breach of provision of Act.
- Seek advice of advisory committee for registration of clinics or suspension or cancellation of registration and take action.
- Take appropriate legal action against use of any sex selection technique by any person.
- Create public awareness.



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- Recommend to State Supervisory Board modifications required in rules of Act based on technological developments.

If the authority is not acting then Section 18-A provides a code of conduct for the AA and the authority can also be made accused. She also mentioned that it is within the doctor and the client and there is no real aggrieved party in this crime. The appropriate authority only has to be proactive to take actions for the implementation of the Act which prohibits and regulates the PNDT. The gathering also discussed that India and china are the Asian countries with highest level of population and the most imbalance in the sex ratio due to sex selection and as the economy of both the countries is growing at a good pace the western countries look forward to India and China.

Session 2

**Jurisprudence on Implementation of the PC & PNDT Act**

**Hon'ble Justice Shalini S. Phansalkar Joshi**

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The speaker started with explaining that no law can be read in isolation and is part of other law and provisions existing around it. The Constitution of India promote gender equality, Article 14 promotes equality and Article 15 talks about formation of laws and legislation for benefit of women and children. The PC & PNDT is one such legislation made under Article 15 of the Constitution. Further the speaker asked the gathering about other such enactments, legislations and provisions which are made under article 15 of the Constitution , there are many which were suggested by the magistrates from across the country like article 39, 51 etc. The speaker explained how these legislations play a part in changing the mindset of the society like by sati prohibition Act, right to education Act, child labor Act and many more, this legislation is also one such law which aims at bringing a change in the mind set of people, which is running because of many reasons like only by being buried by a boy will provide moksha to the parents, boy will provide support in old age, girls are someone else's property, dowry, girls are abused which will derogate the reputation of family, two child norm, grandparents need grandson etc. Sex selection is derogatory to a women under article 51(e) and hence killing a girl child due to any of the reason is unjustified.

The speaker mentioned that there is an unholy nexus between doctor and client as Ms. Anuja has also said there is no aggrieved party in the sex selection or sex determination process, one party needs boy the other party determines whether you are having a boy or not. The aggrieved party is the society which is not having the adequate number of girls, as there is no aggrieved party there are less number of complainants and due to this reason only the implementation of the Act is problematic. She also said that the law also has to be competent with the pace of technology and that the Act was not notified till 1996 whereas it was passed in 1994 and it started showing effects post 2001.

The 2001 judgment was discussed by the speaker, it was held in the case that those centers which are not registered they are required to be prosecuted by authorities under the Act, the case

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suggested implementation of the Act on better scale. The case was *CEHAT v. Union of India* (2001)5 SCC 577 in this P.I.L., the Supreme Court has passed several orders & directions from time to time for proper and effective implementation of the Act. Supreme Court also gave directions:

- For appointment of Appropriate Authorities,
- For amendment of the Act in view emerging technology.
- To review & monitor the implementation of the Act.
- To create public awareness against the practice of sex-determination & sex-selection.

Another case discussed was *Hemant Rath v. Union of India* AIR 2008 Ori 71 the facts of the case was similar to that of the above case. A public interest litigation was filed regarding non-implementation of the Act and the High Courts, after referring to the Act, its broader perspective and human rights & Constitutional Principles and stressed on Constitutional obligation of the State to implement the Act. It was held that the object and purpose of the Act is to stop the misuse of the technology. Then the speaker discussed the case of *S.K. Gupta v. Union of India* [Law (Raj) 2012 (5) 72]. In this case a P.I.L. was filed and the Division Bench upheld the decision taken by the State Government of filing of Form “F” online on the Government Website “hamaribeti.nic.in”. Directions for effective compliance was given and it was also held that violation of the direction would amount to violation of the High Court order under Article 215 of Constitution of India as well as under the Contempt of Courts Act.

In a very recent *Voluntary Health Association of Punjab v. Union of India* (2013)4SCC1, various directions issued to Central and State Supervisory Boards and Advisory Committees to maintain all the records and forms in accordance with Rule 9 of the 1996, mapping of registered and unregistered clinics within three months, Special Cell to monitor progress of various cases pending in the Court and to take steps for their early disposal, to seize, confiscate and sell Sonography Machines used illegally and contrary to the provisions of the Act, courts to take steps to dispose of all pending cases within six months, to take steps to educate people on the necessity of implementing provisions of the Act, to conduct workshops and awareness camp focusing on the empowerment of women and to realize ultimate aim of having gender equality.

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The speaker further discussed the matter of Constitutional validity of the Act. The questions raised were first of liberty to choose family and second the right to determine sex of the child or the conditions are not pro-girl child, like Dowry, domestic violence etc., two child norms, and right to decide family and its size and hence there should not be any blanket ban and reasonable differentia or classification should be there. The speaker asked the participants to frame arguments in favor of the Act. Participants argued that this liberty nature doesn't provide and we have to see the larger interest of public and that the purpose of the Act is to change the mindset of the people if such classifications will be made then the Act will fail in its object and purpose. In *Vijay Sharma v. Union of India* AIR 2008 BOM 29 the constitutional validity was challenged on the ground that it violates Article 14 of the Constitution, whereas the High Court rejected the challenge holding that:

- Sex –selection is against the spirit of Law & Constitution.
- It affects the dignity of Women and undermines their importance.
- It insults & humiliates womanhood.
- It violates woman's right to life

She further explained the important Sections of the Act i.e. Section 2(o), 2(j), 2(i), 3, 4, 5, 6, prohibition on determination of sex and communication either directly or indirectly, of the sex of the fetus, and Section 5 also mentions that written consent of the women is needed for conducting PNDT. No women who has under gone such test or termination of pregnancy after the test will be prosecuted, under Section 24 it will be presumed that she was forced by relatives or husband to do so she is the best witness for what has happened and hence cannot be made accused.

She also mentioned Section 22 and said that all kinds of advertisements are included under the Act but the advertisements on internet are hard to track and a proper mechanism for that is needed. For such advertisements a doctor of Maharashtra has been punished for 3 years which is the maximum punishment under the Act.

Session 3

**Medical Termination of Pregnancy and Sex Selection: Grey Area**

**Dr. Neelam Singh**

**Ms. Anuja Gulati**

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As the topic was MTP and sex selection grey areas in both the Acts, the speaker started by informing the gathering that abortions can be natural or artificial and can be legal and illegal and can be safe and unsafe. The MTP Act is formed for promotion of safe abortions in India as 10 women die because of unsafe abortion every day. The objective of MTP Act is:

- To liberalize certain existing provisions relating to termination of pregnancy.
- To provide for the delivery of safe MTP services to women on the fulfillment of the following grounds:
  - i. Health – danger to life, risk to physical or mental health of woman.
  - ii. Humanitarian – sex crimes, intercourse with mentally ill woman.
  - iii. Eugenic – substantial risk that child will suffer deformities or diseases.

The speaker explained that termination of pregnancy is not illegal per se rather there are laws which promote safe abortion. Only the abortions which are based on sex of the fetus or which are done after determination of the sex of the fetus are illegal and are governed by PC and PNDDT Act. But due to lack of awareness this is not known and many women end up doing unsafe abortions by non-trained people or quacks. She also mentioned that these people who illegally do ultra-sound are not qualified for the job and every time they say it's a girl to earn money which results in unsafe abortions every time. The abortion service in India is influenced by many factors which are social, economic, policy and physical. But the major impact is due to poverty and lack of awareness that abortion is legal and women has a right to terminate her pregnancy.

She discussed and explains when pregnancy can be terminated:

- Continuation of pregnancy is a risk to the life or of grave injury to the physical or mental health of woman.

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- Substantial risk of physical or mental abnormalities in the fetus as to be seriously handicapped.
- Pregnancy caused by rape (presumed to constitute grave injury to mental health)
- Contraceptive failure in married couple (presumed to constitute grave injury to mental health)

The Spouse consent is not mandatory in such cases but in practice the signature of the spouse is asked for, which also give rise to unsafe abortions. Under the Act a Registered Medical Practitioner (RMP) who possess a recognized medical qualification as defined in the Indian Medical Council Act, 1956 and have her/his name entered in the state medical register and who has such experience or training in gynecology and obstetrics as per the MTP Rules can terminate the pregnancy of a women. Further the period up till when pregnancy can be terminated is up to 20 weeks gestation with the consent of the women. If the women is below 18 years or is mentally ill with consent of guardian and with the opinion of registered medical practitioner, formed in good faith, under defined circumstances, opinion of one RMP is needed for termination up to 12 weeks, whereas for termination of pregnancy between 12 to 20 weeks, opinion of two RMPs is required. She said that legal abortions are those abortions in which termination is done by a medical practitioner approved under the Act, in a place which is approved by the government under the Act and the termination is done for conditions, gestation prescribed by the Act and all other requirements of the rules & regulations are complied with.

The speaker mentioned that in India no records of abortion are made and no data is available related to the number of abortions done in India only through studies, records of pregnant women are rarely shown. The MTP Act however only regulates the safe abortion of a pregnant women whereas the PC & PNDDT Act is for a different object altogether, the Act regulates the nexus between ultra sound and abortion, PNDDT is not a social evil but is a technology which is a boon the Act only regulates the misuse of the technology for discriminating girl child based on gender roles. MTP Act provides reproductive rights to a women and PC & PNDDT Act provides protection to unborn girl child both the Acts are for the benefit of women. As the market is aggressive doctors use unethical practices to survive and cause illegal abortion based on sex of the fetus.

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Dr. Neelam then closed the session and welcomed Ms. Anuja to speak on the matter. She started with explaining the nexus between the MTP Act and PC & PNNDT Act. The confusion between the two have made unsafe abortions prevalent in India. There is not a complete ban on abortion it has been regulated. The violation of MTP and PC & PNNDT Act is only amounts to illegal abortion that is abortion due to sex determination or noncompliance with provisions of MTP Act like abortion by any person who is not a registered medical practitioner as under the MTP Act. Terminating a pregnancy at a place which is not approved, mandatory documentation of consent, opinion, case recording and monthly reporting are not adhered to, terminating a pregnancy beyond the conditions described in the Act.

She mentioned an example of a village in Punjab which was also shown in Satyamev Jayate in which sex selective abortions were reduced because the village started tracking pregnant women. The speaker explained that this is a wrong approach in dealing with the issue of sex selective abortions as this tracking of a pregnant women takes away her right of reproduction. She can abort due to many reasons which are legally available to her, and moreover a women can abort the foetus if she is not ready for having a child within 0 to 12 weeks but such practices of tracking pregnant women takes away their rights and because of such practices only PC & PNNDT and MTP Act were thought to be similar. Abortion is the consequence of sex selection and determination but not the cause and hence abortion should be seen separately from PNNDT. Further the speaker also explained that abortion is not equivalent to killing and the use of the terms like 'female feticide' or Kanya bhrun hatya stigmatize abortion. So it's necessary to avoid the use images of fetuses being crushed, stabbed and strangled, daggers going through the stomach of a pregnant woman, blood being splattered, of a female fetus speaking from the womb, imagery that selectively emphasizes on the value of women only as brides (like many men waiting to marry one woman), discourage services of safe and legal abortion and imply that all women who previously have daughters are opting for an abortion for sex selection, personification of fetus is wrong. She then briefly explained the difference between MTP and PC & PNNDT. The MTP fulfills reproductive right of women, regulates towards the avoidable death of mothers by unsafe abortion, and defines termination under some grounds as mentioned under the Act, eugenics, humanitarian, pregnancy leading to physical or mental trauma to the mother, failure of contraceptives. Whereas PC & PNNDT provides for the prohibition of sex selection before or after the conception and regulation of prenatal diagnostic techniques and regulates

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misuse of technology thus preventing sex selective abortion, regulates and demands ethical medical practice and in some way addresses social aversion & son preference complex of society.

She mentioned that by 2017 all the doctors who are running the hospitals and do sonographic test they need training compulsorily. All the new doctors need minimum 300 hours course to deal with sonography and PNDT. By this nexus between quacks and doctors will decrease and all the doctors will be registered and can only use and provide services in 2 clinics hence will be in the knowledge of health department.

She mentioned that a grey area is also the appropriate authority under the Act, which is this authority is in question and the doctors under the Act have to maintain the records of every patient and non-maintenance of records will not be treated as procedural error as per the guidelines of the case *Suo Moto v. State Of Gujarat*.

The session ended at this point for lunch break.



**Session 4**

**Role and Functions of Authorities under the PC & PNDT Act**

**Dr. Sabu M. George**

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The post lunch session was opened by the program coordinator Mr. Rajesh Suman, who welcomed the speaker and proceeded to give a brief overview about the topic which was also discussed in the earlier morning sessions.

Mr. Sabu started by posing question to the gathering like is there more women or men in the world, are men living longer or women, at birth how many more boys are born than girls. He then explained that women live longer and 5% they are born less naturally, but discrimination starts from the first stage of birth itself then in education and other sphere of life.

He explained that documentation is the necessary and major medical aspect which is important for the implementation of the Act, Section 29 of the Act provides maintenance of the records and negligence in which will be dealt as a presumption against the hospital, doctor etc.as the Indian market is huge. The market is important for the companies selling ultra sound machines and hence their regulation is also required and the Act also regulate the illegal buying and selling of the machines, the portability of the machine is also regulated. Therefore the registration of centers is made mandatory a center can be registered by receiving Application for registration of Genetic counseling centers, Genetic Clinics and Genetic Laboratories (Section 18-2) in Form A (Rule 4), Grant certificate of registration (Section 19-1 and Rule 6-1) having got advise of Advisory committee in Form B (Rule 6-2), reject certificate of registration (Section 19-2 and Rule 6-3) in Form C, receive applications for renewal of certificate; grant or reject renewal.

He then explained the evolution of the PC & PNDT Act, the first Act came in 1988 in Maharashtra which was inspired from the Act of sex selection of Canada, and a full-fledged legislation then came for India in 1994, and finally for Jammu and Kashmir in 2002 along with amendments in the 1994 Act. In 2002 ultra-sound, pre conception and embryo selection was added in the Act and all potential technologies were covered.

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The speaker further mentioned the Section 17-A which defines the power of the appropriate authority which are:

- Summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the Rules.
- Production of any document or material object relating to the earlier power.
- Issuing search warrant for any place suspected to be indulging in sex selection techniques or pre-natal sex determination.

Then a brief reading of, Section 18, 19 and 20 took place and the speaker explained that normally the principles of natural justice are followed but in this Act no reasonable opportunity of being heard is given by the authority.

Justice Shalini then explained the other provisions like Section 24, 27, 28 and 29. In Section 24 presumptions are made one is the women who has gone PNDDT for a purpose other than that prescribed by the law was compelled by her husband or relative to do so. Further in joint reading of Section 29, Section 4 proviso and rule 9 of the Act it is presumed that doctors have to maintain record and non- maintenance of record will arise a presumption against doctor.

Section 5 and 6 were discussed further which specifically mention that written consent of the women is required for any such PNDDT test. Rule 9 of the Act suggest maintenance of such records. The speaker then explained in practicality only decoy patient cases come up in the courts because there is as such no aggrieved party in these cases of termination of pregnancy after determination of sex of the child. Women are not made accuse and AA can also be made accused.

The house then went on for discussing the issues who can be accused, who can file complaints and how search and seizure should be done. The speaker explained that along with documentation context, reporting and notice are few other things which one should keep in mind while dealing with PC &PNDDT Act. He said that basic elementary things are not taking place and all other rules are followed but because basic things are not done acquittal of a doctor or any other accused happens. The importance of Section 18-A was again emphasized by the speaker and the sessions ended for the day.

## Film Screening

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The movie BOL which had made records in Pakistan was shown later that evening. The film starts by showing the protagonist about to be hanged. She tells her story to media right before this happens. She grew up with six sisters, a mother and a father. The father always wanted a son so that the son could help with the financial issues of the family. The father doesn't like Saifi since he is transgender. Saifi is deeply loved by the rest of her family. Zainab is married to a guy who keeps harassing her for not giving birth. Hence, she comes back to her father's house, since Hakim is a very religious man who has bonds with the mosque. Hakim initially refuses because the man, is running a brothel. One day Saifi is raped. Hakim overhears Saifi telling her mother and Zainab what happened. Later on, when everybody is asleep, Hakim suffocates Saifi to death with a plastic bag. Hakim marries Meena for money Meena has her baby, and it is a girl meaning Saqa gets to keep it. Hakim begs Meena to give him the baby so that the child doesn't have to face a horrible future. Saqa overhears and kicks Hakim out.

Later on, Meena comes to give Hakim's family the baby. When Hakim's wife asks who that woman was, he takes the baby and tells her that he married her. She screams at him, and he beats her up. The mother tells the kids what happened, and Zainab insists they all leave the house and move somewhere else to start a new life.

At night, Saqa comes to take Meena's daughter, since Meena was not supposed to give it to Hakim. Hakim tries to kill the daughter to keep her from a horrible future. He is killed by Zainab with a fatal knock on the head. They hide the baby. Zainab tells Saqa that Hakim killed the baby and threw her out somewhere; she tells him that she killed Hakim, which is why she is being given the death penalty.

The movie was in short a story of a family having daughters and a transgender child whom they use to treat as brother, the father was of stereotypical thought process. The question the movie raised was why it is a crime to kill a person and it is not a crime to give birth to child, to a child you cannot take care of and provide basic needs of food, cloth and shelter.

**DAY 2**

**Session 5**

**Trial process under the PC & PNDT Act**

**Hon'ble Justice Shalini S. Phansalkar Joshi**

**Mr. Sanjay Parikh**

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The second day of the workshop started, Mr. Rajesh Suman welcomed everyone back and gave introduction about the session. He said that for more than 20 years now the Act is in the domain of public but the problem is not been handled an the implementation of the Act is still a question, as the accused is always powerful in these cases he is a doctor. He then invited Justice Shalini to speak on the matter.

Justice Shalini emphasized on the decided cases which clarify the object and purpose of the Act and interpretation of provisions in such a way as to give effect to the Act. She started with Section 20 dealing with cancellation or suspension of registration, Section 20(3) gives power to the appropriate authority to cancel registration or suspend registration of clinic after recording reasons in writing. It is a welfare statute and it needs such interpretation which will give effect to the Act and assist in implementation of the Act. A question was raised regarding this that will it not amount to double jeopardy this was questioned in *Chitra Agrawal v. State of Uttaranchal* AIR 2006 Utr 78, as the Act is giving punishments as well as cancelling the registration, it would not amount to double jeopardy as this is not double punishment it is just the one punishment under one trial only it was held that, the action of cancellation of registration is directed against ultra-sound centre whereas criminal action is directed against the person who has committed the offence and both the actions are independent. Hence, they can be proceeded with simultaneously.

Further she discussed few decided case. In *Vijay Sharma v. Union of India* AIR 2008 BOM 29 the questioned raised was whether the power to cancel registration of the Clinic given under 20(3) of the Act can also include power to suspend the registration, it is clearly provided in the Act that the power includes both cancellation and suspension as the title of Section 20 is cancellation or suspension of registration, the interpretation in a welfare legislation will favour

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the victims. In another case similar judgement was given i.e. *Malpani Infertility Clinic v. Appropriate Authority* AIR 2005 Bom 26. Contention was that Section 20(3) of the Act provides only for cancellation and not for suspension of the registration of the clinic. It was held that such power has to be read in the Section otherwise the provisions of a welfare enactment will be rendered nugatory. The speaker also explained that Section 28 of the Act does not narrow down its power but broaden the provisions of the Act, the Section talks about taking cognizance of the offence and this will be exactly like the case which is filed other than on police report and follow same procedure of CrPC. In *Dr. Preetinder Kaur v. State of Punjab* 2011 Cri.L.J. 876 the scope of Section 28 of the Act was discussed, it was held that it does not narrow down the class of persons who can initiate action under the Act, apart from Appropriate Authority, an officer authorised by Central or State Govt. can also file a complaint, complainant can also be a person authorised by Appropriate Authority itself or even a social organisation and broadens the scope of Section 28, giving authority to wide class of persons to initiate action, it being a legislation to prevent social evil.

The session proceeded with the new question that whether Appropriate Authorities are competent to ensure due compliance of the Act from the Clinics which are un-registered under the Act, In *Qualified Private Medical Practitioners and Hospitals Association v. State of Kerala* MANU/KE/0330/2006. Considering the object of the Act & provisions of Section 4(1) & Section 22 of the Act, it was held that, “Appropriate Authorities are competent to ensure due compliance of the Act from all persons, at all places & at all institutions, whether registered or un-registered under the Act, where the ultra-sound scanning device is installed”. Section 4(1) restricts the use of PNDD to only registered clinics and Section 22 prohibits advertisements of any such treatment, or determination. Along with this Section 4(3) was also discussed which permits PNDD in certain conditions, in the case *Suo Moto v. State of Gujarat* 2009 Cri. L.J. 721 (F.B.) the Section was discussed progressive interpretation to Section 4(3) is given, holding that by virtue of deeming provision of the proviso to said Section contravention of the provisions of Section 5 or 6 is legally to be presumed. Hence, there need not be allegation in the complaint about the inaccuracy or deficiency in maintaining record as resulting in contravention of Section 5 or 6 of the Act, the burden to prove if someone is in contravention of this provision does not lie on the prosecution and efficiency or inaccuracy in filling Form –F under Rule 9 is not merely a procedural lapse but an independent offence.

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The speaker then explained Section 30 which is to be read with rule 12 of the Act, the power of search and seizure under the Act to the appropriate authority this was explained with the help of a case law *Dr. Mrs. Suhasini Umesh Karanjakar v. Kolhapur Municipal Corp.* 2011(4) AIR Bom R 326 (F.B) . In this case it was held that words “any other material object” used in Section 30 of the Act and Explanation (2) to Rule 12 clearly provide that Appropriate Authority is empowered to seize and seal ultra-sound machines, other machines and equipments capable of aiding or assisting in sex-selection. Considering declining sex-ratio in Maharashtra from 913 in 2001 to 883 in 2011, the directions were given for expedite disposal of the pending cases under the Act with utmost priority, preferably within one year. The machine is like weapon which is used in commission of the offence, the machines can be seized at the time of inspection and no 15 days’ notice is required in seizure or confiscation, no show cause notice is to be given before inspection or after it. This was discussed in *Dr. Kalpesh J. Patel v. State of Gujarat* MANU/GJ/0994/2011, the issue raised for consideration was whether Appropriate Authority can seize and seal Sonography machine without issuing a Show Cause Notice or giving an opportunity of hearing and it was held that there is no express provision in the PCPNDT Act or the Rules for issuance of a Show Cause Notice before making Panchnama and sealing Sonography Machine, Seal and seizure of Sonography Machine is to furnish evidence for commission of an offence. Hence, it cannot be said that prior Show Cause Notice is essential before conducting search and seizure. Otherwise, it would frustrate the object itself. There is no requirement of passing a reasoned order before taking such action in the context of Section 30 and Rule 12 of the Act. Section 154 of the CrPC has to be followed and information of the offence has to be given as it is cognizable offence.

Justice Shalini then handed over to Mr. Sanjay Parikh for explaining in detail the trial and procedure. Mr Sanjay started by pointing out the ambiguity in the procedure to be followed in PC & PNDDT Act, the trial stage starts with Section 27 and 28. Section 27 tells us that the offence under the Act is cognizable, non-bailable and non-compoundable. It is cognizable that means police can arrest and Section 28 demonstrates who can be a complainant, any interested person, appropriate authority or NGO or person authorised by centre or state government, as the maximum punishment is 3 years it will be a warrant trial, on a complaint filed otherwise than on police report. The speaker then posed a question which is the right stage of taking cognizance, either before the inspection or inquiry or after beginning of the trial? The speaker explained that

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the procedure of a warrant trail will be followed throughout, summons then examination and then cognizance will be taking place Section 200 of CrPC will be followed then decision on dismissal or issue of process can be taken. Then the speaker explained the process under Section 200 and then Section 17-A powers of the appropriate authority was discussed again along with Section 30 power of authority of search and seizure also along with rule 18-A(3) which explains the duties and code of conduct of the appropriate authority. Few questions were then asked that what they can do if police files a charge sheet regarding any offence covered under the Act. The speaker explained that court cannot take cognizance based on a charge sheet, only on complaints cognizance can be taken, police can arrest but court cannot take cognizance. The speaker then asked the gathering to read few important cases on the same, one is from Punjab Haryana High court, *Dr. Tejinder Pal Singh Multani v. State of Punjab*, which says that the power to delegate and authorise an officer to make a complainant is conferred upon all the three authorities under the provisions of Section 28 and a court can take cognizance. Another case is *Dr. Arvind Pal Singh v. State of Punjab*, in this the court held that, a plain reading of the Section 27 of the Act suggest that police has power to arrest a person who is found indulging in an offence under the Act and there is no bar or prohibition on stage of investigation. Police has power as per CrPC Section 2(c) to arrest without warrant.

The speaker then explained the difference between investigation, charge sheet and FIR, all can be done by police but the question is whether it will be admissible in court. It is clear that from the charge sheet the court cannot take cognizance but whether investigation report is admissible is evidence that is not known and case is going on in Supreme Court. The powers of AA cannot be taken away by police that is clear but AA doesn't have power of arrest. Further a question is at what stage arrest can happen, after summons or police can based on complaint can arrest. The session ended for tea break on the note that Section 18-A discusses the code of conduct of AA which has to be strictly followed.

Session 6

**Appreciation of Evidence under the PC & PNDDT Act**

**Hon'ble Justice Shalini S. Phansalkar Joshi**

**Mr. Sanjay Parikh**

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After tea break everyone one was welcomed back to the last session of the workshop by Ms. Shruti. She invited Mr. Sanjay Parikh to speak on appreciation of evidence in the cases related to PC & PNDDT Act.

Mr. Sanjay Parikh started from he had left the discussion in the earlier session and started explaining Section 29 maintenance of records and search and seizure of the machine. He again explained that keeping in mind the economic reasons or anything else the machine cannot be returned to the culprit, accused or any other person because it is machine which was included or involved in a crime or commission of a crime. If seizure is done in premises then that premises can also not be used. Further the discussion went ahead and the limitation period was talked, the limitation period for filing a case or complaint under the Act is three years and many cases have been rejected due to this. Dismissal based on limitation period, how is it justified and up to what extend is right was the question to the learned magistrates who have gathered and participated in this workshop from all across the country. The replies suggested acceptance of condo nation of delay application provided under Section 473 of the code of criminal procedure.

The debate on whether an offence under the PC & PNDDT Act is a continuing offence or not started which is covered under Section 472 of the CrPC, many participants suggested their opinion as to it is not a continuing offence but delay can be condoned for certain reasons as the court may deems fit, but few others said that it should be treated as continuing offence as dowry cases are treated and if the offence is continuing there is no question of condo notion of delay application. For this a case is going on in Supreme Court that is *State of NCT Delhi v. Sanjay* 2014.

The speaker also felt that the Act should be made continuing offence as the impact on society is continued, the missing girl child will continue to be missing and no law can maintain the status



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quo hence elimination of girl child should be a continuing offence. Further Section 4(2) of the PC & PNDT Act was discussed along with Section 23(2) of the Act, which discuss about the person who can use the PNDT test without violating the Act or committing any offence under the Act, both the Sections are simultaneous and can be applied simultaneously along with Section 20 of the Act. Where the suspension of registration will continue till trial of the case, judiciary is not associated in the Act but it can ask the AA to take necessary steps which are needed for collection of evidence or investigation.

Further for the purpose of trial important presumptions which are provided in Section 24 are crucial. Section 24 talks about the presumption for the innocence of the women who has undergone PNDT otherwise than provided in the Act, Section 4(2), (3). Section 23 of the Act provides 3 years of maximum punishment for any contravention with the Act. *The Suo Moto v. State of Gujarat* 2009 Cri. L.J. 721 (F.B.) was discussed again, in this case, full bench of Gujarat High Court was deciding the reference made by single judge ,whether deficiency or inaccuracy in filing Form F as required under statutory provision is merely a procedural lapse.

The full bench:

- Gives progressive interpretation to S.4(3) of the Act holding that by virtue of deeming provision of the proviso to said Section, contravention of the provisions of S.5 or 6 is legally to be presumed. Hence, there need not be allegation in the complaint about the inaccuracy or deficiency in maintaining record as resulting in contravention of S. 5 or 6 of the Act.
- Burden to prove the contravention of this provision does not lie on the prosecution.
- Deficiency or inaccuracy in filling Form –F under Rule 9 is not merely a procedural lapse but an independent offence.

Form-G talks about the consent of the women, and Form-F talks about the PNDT test for what purpose and when the women has undergone it, if the records are not maintained doctors have to prove otherwise that they were not involved in any offence. If the clinic is not- registered that is a separate offence and if the clinic has sonograohy machine that is separate offence.

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The speaker explained that if we see or read Section 4(2) with Section 23(3) it is clear that the purpose of PNDD should not be anything apart from that which is provided in Section 4 (2).

A debate among the participants and speaker started regarding the Section 4(2) and 4(3) started. The question was that form-F number 10 provides list of things which on which PNDD can be done and it includes pretty much everything, so why the Act didn't states that except for sex determination anything and everything is allowed under the Act. To this two groups were divided one was saying that the Act mentions the exceptions in which PNDD can take place and only under those legally PNDD can take place which is given in Section 4(2), (3) of the Act, if the Act permits all the PNDD test except for sex determination than that would make Section 23(3) and 24 redundant as it is. PNDD can be conducted for many reasons as provided under the Act, Section 4(2) states that PNDD can be conducted to check abnormalities in the foetus. Many abnormalities such as sex-linked diseases are such which cannot be determined without determining the sex of the child, in those cases the sex of the child should not be communicated to the parents. In *Malpani Infertility Clinic v. Appropriate Authority* AIR 2005 Bom 26 a writ petition, order passed by AA suspending the registration of petitioner's diagnostic center was challenged. Main contention raised was that Section 20(3) of the Act provides only for cancellation and not for suspension of the registration of the clinic. High Court rejected this contention saying that such power has to be read in to the Section, Otherwise the provisions of a welfare enactment will be rendered nugatory and the court held where there is a conflict of private interests to carry on a particular activity, which the public authority considers as damaging to social interest, the under the statute has to be read as an enabling power.

The two interpretations of the provision can be done but Mr. Parikh explained that in the first interpretation where it is seen that except for determination of sex and communication of sex of the fetus PNDD can be used in any way, the Act will become redundant as many of the people will use PNDD for other purposes on paper and behind they will be determining the sex of the child and abort the child, to save these conditions law has to read as it is given and every word has a significant value. Form-F if will be used in routine it will make Section 24 redundant.

In the concluding remarks he said that there is scope of interpretation of law but the legislation is a welfare legislation and should be interpreted accordingly. The work to bring change in the

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society and its perspective is upon the judiciary and judiciary has to work towards gender equality to change the mindset of the people.

### **Feedback and Evaluation**

**Hon'ble Justice Shalini S. Phansalkar Joshi**

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At the end of the programme Mr. Rajesh Suman thanked everyone on behalf of whole National Judicial Academy and all the participants and Justice Shalini for her valuable inputs. And then the participants were given an evaluation form to fill and give any further suggestion for improvement.