



NATIONAL JUDICIAL ACADEMY INDIA

P-1164

WORKSHOP FOR MAGISTRATES ON PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES ACT, 1994

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Programme Coordinator

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The Workshop was designed to enhance the capacity of Judicial Magistrates in implementation of the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter called PC & PNDT Act) and the expeditious disposal of cases. The workshop focused on issues regarding social context of the PC & PNDT Act; grey areas between medical termination of pregnancy and sex-selection; role and functions of authorities under PC & PNDT Act; jurisprudence concerning implementation of PC & PNDT Act; trial process and appreciation of evidence under PC & PNDT Act. Dr. Justice Shalini S. Phansalkar Joshi, Dr. Neelam Singh, Dr. Sabu M. George, Justice Atul Sreedharan and Justice U. C. Dhyani were the resource persons of the workshop.

Session 1: Jurisprudential and Socio-cultural Foundations of PC & PNDT Act.

The Additional Director (Research & Training), NJA set the content of the discuss by highlights several directions given by Supreme Court on the jurisprudential foundation of PC & PNDT Act to inculcate sensitivity on the particular issue by judicial officers. It was mentioned that Articles 14, 15(3), 16, 39 and Preamble to the Indian Constitution gives status of equality to women at par with men, and special provisions and statute were enacted to eliminate discrimination against women at all levels. Declining child sex ratio in India and its consequences was discussed. Consequences of declining sex ratios such as increase in violence against women and sex related crimes were also discussed.

It was stated that in India mostly people want small families but with a male child. It was pointed out that sex selection and termination of pregnancy based on sex is the extreme form of discrimination against girls, as they are not even allowed to be born and this is not an ordinary crime. The technology is facilitating the commission of this crime. The Constitution of India is very clear in the matter of discrimination of women and technology cannot be used to discriminate women in the society.

It was stated that social mindset is an ultimate thing to achieve, hence there is a need to work for focused implementation of the law. It was also suggested that there is a need to interpret the law in the broader context of how the issue impacts social and cultural fabric of the country and with the intention of preventing gender discrimination.

Provisions of International Conventions addressing sex selection regarding gender equity and equality were discussed. Landmark cases including *CEHAT vs. Union of India* [(2001)5 SCC 577], *CEHAT vs. Union of India* [(2003) 8 SCC 398], *Hemant Rath vs. Union of India* (AIR 2008 Ori 71) and *Gaurav Goyal vs. State of Haryana, M/s Mopani Infertility Clinic vs. Appropriate Authority* (AIR 2005 Bom 26), *Voluntary Health Association of Punjab vs. Union of India and Others* (AIR 2013 SC 1571) were also discussed during the session.

Session 2: Role and Functions of Authorities under the PC & PNDT Act

It was pointed out that medical association is one of the richest associations and is quite influential. Initially CMO was considered to be the Appropriate Authority to investigate the matters under the said Act. Powers and duties of Appropriate Authority (AA) under PC & PNDT ACT were discussed. It was emphasized that mostly appropriate authorities are inactive and insensitive to the issue, as many of them are doctors and from the same fraternity. The composition and role of the advisory committee was also discussed during the discourse.

Session 3: Medical Termination of Pregnancy and Sex Selection: Grey Areas

It was stated that there can't be total prohibition on technology pertaining to pre-conception and sex determination as this technology is necessary to detect diseases which are gender specific and pertaining to any disability at an initial stage; but its misuse should be avoided. The law regulates pre-natal diagnostic techniques to limit the use only for detection of the abnormalities, metabolic disorder or sex-linked disorders. The Act does not prohibit the technology totally but seeks to curb its misuse for determination of sex and disclosure. It was enunciated that there should be notice affixed in clinic premises conspicuous in both local and English language that sex selection and determination is illegal and is punishable under law.

It was stated that police has not been given much role as the Act deals with most respected profession of all the time and the complaint has to come from appropriate authority. On the contrary investigation is not a bar. Courts have also been given enough power to adjudicate the case as per its facts and circumstances. It was emphasized that Medical Termination of Pregnancy Act (herein after referred here as MTP Act) is a progressive legislative which aims to empower and provide decision making rights to women regarding their body. The objective of the MTP Act is to prevent maternal morbidity and mortality associated with unsafe abortion.

PC & PNDT Act seeks to prevent misuse of pre-natal diagnostic techniques used to determine sex of foetus whereas MTP Act seeks to prevent unsafe abortion. Both the Acts are not in conflict but are supplementary to each other. One of the most prominent grey areas in the law pertains to application of the Act to cases of abortion by unmarried girls. It was stressed that this area has not been addresses by the legislation even after legalizing live-in relationships. The MTP Act specifically deals with cases of abortion by married women. It was suggested that there should be a continuous process to amend the Act on many unaddressed issues and areas. *Vijay Sharma vs. Union of India* [AIR 2008 Bom (29)] and *Dr. Nikhil Datar vs. Government of India* (MANU/MH/0937/2008) known as "Niketa Haresh Mehta's Case" were discussed.

Session 4: Trial Processes under the PC & PNDT Act

It was stated that discovery of truth is the objective of trial. Hierarchy of courts was discussed. It was emphasized that trial should be fair and 'fair trial' roots are enriched under Articles 20, 21, 22 of the Constitution which talks about life, liberty illegal detention and most importantly right to have 'fair trial'. It was stated that Section 5 of Cr.P.C provides that special law will prevail over general law, but to fill up the vacuum one has to take the resort of Cr.P.C. It was emphasized that if provisions are not exhausted special law will prevail or else general law will prevail. It was suggested that one should not jump to conclusions as procedure must always be adhered to and laws of natural justice should not be defeated at any stage of the case. The principle of arrest and remand was discussed during the discourse. It was stated that as per Section 28 of the PC & PNDT Act, no court shall take cognizance of an offence under this Act except on a complaint made by the Appropriate Authority concerned, or any officer authorized in this behalf by the Central Government or State Government, as the case may be, or a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court. Section 30 concerning powers to search and seize records was discussed during the discourse. It was stated that sonography machine is most important tool in the commission of offence under the PC & PNDT Act. Prevention of crime best achieved by sealing such machines. It was suggested that opening of seal and release of such machines should not be made mechanically. Sections 22, 27 and 28 of PCPNDT Act were discussed.

The cases *Dr. Mrs. Suhasini Umesh Karanjakar vs. Kolhapur Municipal Corp.* 2011 (4) AIR Bom 326 (F.B), *Dr. Vandana Ramchandra Patil vs. The State of Maharashtra and Anr.* (Cr. Writ Petition No.4399 of 2012 Decided on January 23, 2013), *Dr. Pradipchandra Mohanlal Gandhi & Anr. vs. Maharashtra Medical Council, through its Registrar and Anr.* (Civil Writ Petition No.6495 of 2012 Decided on October 22, 2012), *Satya Trilok Kesari @ Satyanarayan s/o. Trilokchand Lohia vs. State of Maharashtra and Anr.* (2012 (6) LJSOFT 389), *Dr. Ravindra s/o Shivappa Karmudi vs. State of Maharashtra* (2012 (10) LJSOFT 138) were also discussed during the session.

Session 5: Appreciation of Evidence under PC & PNDT Act

It was stated that when fact is proved it is called proved fact and then onus shifts to person challenging such fact to disprove it. Fact not-proved means fact which has not been proved nor has it been disproved. It was stressed that guilty intention *i.e.* "mens rea" is the essential element of crime. The PCPNDT Act provides for presumption that women must have been forced by in-laws or husband to have abortion as mother can't kill her own child and people are obsessed with male child.

It was stated that Form "F" should be maintained regarding consent and signature. If such forms are not maintained it will be presumed that the sonography machine used for sex selection amount to illegal purpose and thus onus of burden would be shifted on accused. It was stated that regarding maintenance of record no intention has to be seen and only *actus reus* will apply pertaining to strict liability. However, every case has to be judged its own merits.

With regard to the general rule of evidence it was stated that identification parade is a weak evidence unless corroborated with other evidence. It was emphasized that the best evidence is direct evidence and oral evidence should be excluded in presence of documentary evidence. In circumstantial evidence every chain should be linked. It was emphasized that leading question cannot be asked in cross examination. When recording evidence of child witness the court has to satisfy itself that child is a competent witness. Sections 113A, 113B and 112 of the Indian Evidence Act, 1872 were also discussed during the discourse.

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