NATIONAL JUDICIAL ACADEMY

Programme Report

Workshop For Magistrates on Pre- Conception and Pre- Natal Diagnostic Techniques Act, 1994

[18th to 20th August]

Programme Coordinators

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Introduction

Three days workshop for Magistrates was organised by National Judicial Academy, Bhopal from 18th August to 20th August, 2017. The object of the workshop was to provide platform to the magistrates dealing with such cases to discuss and deliberate various issues pertaining to Pre Conception & Pre Natal Diagnostic Techniques Act (PCPNDT), Medical Termination of Pregnancy Act (MTP) and Surrogacy (Regulation) Bill which would further help in evolving solutions. The entire workshop was split into 8 sessions spread over two and a half days with 38 participants and 4 Resource Persons.

Outline of the Programme

Day-1

Session 1- Jurisprudential and Socio- Cultural Foundation of PC& PNDT Act

Session 2- Role and Functions of Authorities under the PC PNDT act

Session 3- Appreciation of Evidence: Scientific/ Electronic Evidence under the PC PNDT act.

Day -2

Session 4- Trial process under the PC PNDT act

Session 5- Seizure and Release of Property under PC PNDT act.

Session 6- Medical Termination of Pregnancy and Sex Selection: Grey Areas.

Day-3

Session 7- Surrogacy, Genetic Engineering and Sex Selection: A Futuristic Approach.

Session 8- Enforcement Challenges under PC PNDT act.

Day-1

Session-1

Theme: Jurisprudential and Socio- Cultural Foundations of PC and PNDT Act

Speakers- Ms. Anuja Gulati and Prof. D.P Verma

Justice G. Raghuram, Director, National Judicial Academy initiated the session by welcoming all the resource persons and participants. He then gave a brief introduction of all the sessions and deliberated the objective of the workshop. After this, he stated that judges are not born but they are transformed by education. With this purpose, National judicial Academy came into existence in the year of 2002 and training courses for judges started in 2004. Further he threw some light on the topic of the session and the baton of the session was then handed over to Ms. Anuja Gulati. Her outlines of the presentation was**:**

- Jurisprudential foundation of PC &PNDT act.
- Socio- cultural context.
- Constitutional validity of PC PNDT act.

Speaker started her presentation by quoting trends of child sex ratio in India from census of 1991 till 2011. She disclosed that as per census 2011, child sex ratio ranged from 972 in Arunachal Pradesh to 834 in Haryana. Declining trends have spread from urban areas to rural and tribal areas. She pointed out that women with no education have better sex ratios as compared to women with some education.

Moving further, she revealed that 4.65 lakhs girls went missing from last 12 years owing to sex selection. The predominant reasons for sex selection are:

- Patriarchy.
- Desire to have small families but not without sons.
- Two child norms imposed by certain state governments combined with strong son preference.
- Easy accessibility to technology for sex determination at affordable price.
- Religious reasons (son's pious obligation).

She also discussed main consequences of declining sex ratios such as increase in violence against women and sex related crimes having severe consequences on physical, mental and reproductive health of women, marriage squeeze and increase in male bachelorhood. She explained real life incidents to made more clarifications.

Further, she proceeded towards jurisprudential foundation of PC and PNDT act and stated that in the year of 1978, Union Ministry banned sex determination in government hospitals but it was rampant in private hospitals as people made it as alternative to government hospitals. Maharashtra government felt the need to regulate such practice and became the 1st state to enact Maharashtra Regulation of PC PNDT Act in 1987.

She also threw some light on the provisions of International Conventions addressing sex selection and provisions of Indian constitution regarding gender equity and equality. For proper implementation of PC PNDT Act, Supreme Court and High Courts issued numerous guidelines from time to time in certain important judgements:

- CEHAT v Union of India[1] – Supreme Court directed to states that must appoint appropriate authorities by notification and list of appropriate authorities must be published in gazette.
- CEHAT v Union of India[2]- In this case, Supreme Court issued directions to government for creating public awareness against the practice of sex determination and sex selection.
- Hemant Rath v Union of India[3]- High Court gave directions to government for appointment of appropriate authorities, advisory committee for effective implementation of provisions of act.

She concluded her presentation by referring two judgements in which constitutional validity of PC PNDT act was challenged such as Vinod Soni v Union of India[4] and Vijay Sharma v Union of India[5]. In both these cases, court stated that right to life can't include right to selection of child whether pre- conception or post conception and selection of sex affects the dignity of women and undermines their importance and also violates her right to life.

Second Speaker Mr. D.P Verma explained legal status of children by citing numerous provisions of law such as contingent right in property given to unborn child and his vested interest depend upon his survival under Hindu Law and unborn child treated as legal person in exceptional circumstances in Transfer of Property Act. Further, he highlighted section 313 to 316 of IPC and explained that killing a child in womb is an offence in India. He also quoted judgements of Ireland and Canadian courts.

Speaker further, emphasized on concept of equality and stated that every human being has inherent right to life. In respect to this, he refereed article 3 of UN charter and article 6 of International Covenant on Civil and Economic rights 1966. In his concluding remarks, he described the need of proper implementation of PC PNDT act.

At the end of this session, Mr. S.P Srivastava requested to participants that social legislation like PC PNDT Act should not be interpret strictly but must be liberally interpreted. He referred Voluntary Heath Association of Punjab v Union of India [6]case wherein Supreme Court directed to magistrates that regularly reports must be submitted to high courts and made speedy disposal of cases under PC PNDT act.

[1] (2003) 8 SCC 398
[2] (2001) 5 SCC 577
[3] (civil writ petition no. 9596 of 2007)
[4] (2005 cri. LJ. Bom.3408)
[5] AIR 2008 BDM 29
[6] AIR 2013 SC 1571

Session-2

Theme- Role and functions of authorities under PC & PNDT act.

Speaker- Ms. Anuja Gulati

Session was initially taken up by Ms. Anuja Gulati wherein she discussed section 17, 27, 28 of PC PNDT Act, 1994 and explained at length functions, duties and powers of appropriate authorities under the act. She stated that chief functions of appropriate authorities are to grant, suspend and cancel registration of clinics after seeking advice from advisory committee. Moreover, creating rules, spread public awareness and to supervise the implementation of PC PNDT Act are also functions of appropriate authorities. Elaborating further, she referred Dr. Surjit Govind Dange v State of Maharashtra[7] case in which court stated that it is the responsibility of appropriate authority to take adequate legal actions against use of any sex selection technique by any person and in exceptional circumstances appropriate authorities can suspend the registration of the clinic and seize the sonography machines without giving show cause notice.

Moving further, she threw some light on the duties of Appropriate Authorities such as:

- Search, seize or seal equipment or clinic and seize records at a genetic counselling centre, laboratory and clinic.
- To scrutinize records and filling a complaint.
- Prepare reports.

She also cited two important judgements named Mrs. Suhasini Umesh Karanjakar v Kolhapur Municipal Corporation[8] and Dr. Preetindar Kaur v State of Punjab [9]wherein court directed to appropriate authority to disposal of the pending cases under PC PNDT with utmost priority, preferably within one year is the one of the duty of appropriate authority. Court also widens the scope of section 28.

Further, Speaker pointed out that deficiency or inaccuracy in filling form under rule 9 of PC PNDT regulation is not merely a procedural lapse but an independent offence which was stated in one of the judgement Suo Moto v State of Gujarat[10].

In addition to it, Speaker stated that quasi-judicial power vested in appropriate authorities like issue summons, order for search warrant and call for production of any document. Moreover, appropriate authorities can also visit in any centre which is suspected to contravene the act. She concluded her presentation with the statement that there is need of proper training to member of appropriate authorities so that acquittal couldn't made on technical grounds.

[7] Order dated 16.08.2012
[8] 2011 (4) AIR Bom R326 (F.B)
[9] 2011 Cri LJ 876
[10] 2009 Cri. L.J. 721 (F.B.)

Session-3

Theme-Appreciation of Evidence: Scientific/Electronic Evidence under the PC&PNDT Act.

Speaker- Dr. Geeta Oberio

The Session was initiated by Dr. Geeta Oberio. She splited participants into eight groups consisting five members in each group. She allotted a problem to every group and directed them to solve it within half hour through discussion. Case problem which was allotted to each group basically related with offence under PC PNDT Act. In given problem, full information mentioned regarding evidences which produced before court and arguments advanced by complainant and respondent.

Facts of the case problem were: On 29-01-2014 a team was constituted to make surprise visit to various ultrasound centres and MTP centres to inspect the illegal activities going on in district Nehru Nagar consisting of 7 hospitals. At 11.00 a.m. the team visited hospital of Dr. X and Y, after disclosing purpose of their visit, team inspected the premises of hospital. During inspection, the instruments being used in the MTP, D&C and abortion were found in operation theatre. Both Dr. X and Dr. Y could not produce any registration/ license for conducting MTP in the hospital and failed to give any satisfactory answer for stocking such instruments. There were many short comings found in records kept by hospital. The Civil Surgeon and two other members authorized Dr. V Civil Surgeon Vide authority letter bearing no. PNDT/2014-15/309 dated 05-09-2014 to file the present complaint. On the application filed by deputy civil surgeon F.I.R registered against Dr. X and Dr. Y under Section23 and 25 OF PNDT act and Section 5(4) of MTP act. The police reported to court about complaint against Dr. X and Y.

While allotting problem, Dr. Geeta Oberio directed to each group to take this case as a real case came before you and you have to give your opinion on what will you do immediately after reporting case before you? Decide it in the light of evidence, arguments?

At 3.30 pm, all the groups came back to the conference hall and one by one gave their respective opinions.

Group1 stated that complainant is not member of appropriate authority due to which court will not take cognizance on complaint.

Group 2 stated that gist of complaint not proved by complainant. So case is not fit for cognizance by court.

Group 3 it is a fit case for cognizance and Dr. X and Y found guilty.

Group 4 this group quoted section 460 and stated that irregularity does not vitiate proceedings, isolated discrepancy could be sheer negligence.

Group 5 Dr. X and Y found guilty due to serious discrepancies and also they have no defence for unregistered instruments.

Group 6 Dr. X and Y found guilty due to discrepancies in the form f which is not an accidental mistake.

Group 7 Dr. X and Y not found Guilty.

Group 8 Notification of authorisation to complainant is not exhibited so complaint can be dismissed due to improperness.

After getting opinions from each group Dr. Geeta Oberio stated that Machines are the major part of the evidence. She suggested to participants, rule of Ejusdem Generis should be applied while dealing with accuracy of records maintained in hospitals. Further she pointed out that there is no decided case laws on the point of whether notification of authorisation is necessary or not? But Bombay high court and Punjab and Haryana high court made their efforts to solve this issue.

Bombay high court held that if notification of authorisation is not published then the authorisation cannot be considered as valid. On the other hand, Punjab and Haryana High Court held that authorisation can be made with retrospective effect. By keeping in mind above decisions of different high courts, Dr. Geeta Oberio suggested to participants that you can decide the issues by exercising judicial discretion.

Further she referred Thukral's case and K.S Sehgal's case and suggested to participants to be extra cautious while deciding matter under PC PNDT Act because ultrasound machine is not only used for pre conception and for pre- natal diagnostic but also for some other purposes. In her concluding remarks, she stated that contents of string operations can be used in evidence.

Session- 4

Theme- Trial Processes under the PC& PNDT Act.

Speaker- Dr. Justice Shalini S. Phansalkar- Joshi

The distinguished speaker initiated the session by calling for the views of the participants on utility of PC PNDT act. After getting various responses as to utility of the act, the speaker proceeded with the session. She stated that PC PNDT Act is specially based on three provisions:

- It **prevents** the misuse of technology for determination of sex of foetus.
- It **regulates** the use of technology for the purpose of detection of specific genetic disorders.
- It also **penalise** for violation of the provisions of act.

She went ahead with the discussion of section 28 of the PC PNDT act which reads as "court shall not take cognizance of an offence except on complaint made by (a) the appropriate authority concerned or any officer authorise by central government or state government or the appropriate authority or (b) a person who has given notice of not less than 15 days in the manner prescribe to the appropriate authority, of alleged offence and of his intention to make a complaint to court.

Further, speaker pointed out that section 28 of act must not be read as constituting a narrow class of person but it must be subjected to purposive interpretation and given a wider meaning to pave way for the provisions of this legislation to be set into motion. With the purpose to make more clarification on this point, she cited Preetinder Kaur v State of Punjab[11] case wherein court clearly stated that section 28 of the act doesn't narrow down the class of person who can initiate action under act.

[11] Supra no.9

Thereafter, questions were posed to the participants as to whether investigation by police will vitiate the trial? And why act conferred investigational power on appropriate authority? After getting divergent opinions from participants, she stated that trial will not vitiate owing to investigation by police. However, it was remarked that it would be preferable for the investigation to be carried out by the appropriate authority to reduce the burden of police at some extent that's why the investigation power conferred on appropriate authority.

Further, attention was drawn to the section 24 of the PC PNDT Act which given prescription about who can be offender under the act? Speaker stated that it is mandatory for court to take presumption that pregnant women was compelled by her husband or any other relative, to undergone pre- natal diagnostic techniques for sex determination and such person shall be liable for abetment of offence. Elaborating further, she highlighted that social factors are compelled to pregnant women to undergone such technique. She can neither liable for abetment nor considered accomplice as she is not able to take decision independently due to patriarchal nature of society.

In the light of the above deliberations, she concluded with the words that court ought to look into the object and purpose behind the legislation before taking action.

Session-5

Theme- Session and Release of Property under PC&PNDT act

Speaker- Dr. Justice Shalini S. Phansalkar Joshi

The session was initiated by Justice Shalini S. Phansalkar Joshi wherein she explained at length section 4(3) of PC PNDT act by quoting various judgements. Any deficiency or inaccuracy found regarding maintenance of record shall amount to contravention of provisions of section 5 and 6 of act. In this concern, speaker mentioned Suo Moto v State of Gujarat [12]and Dr. Surjit Dange v State of Maharashtra [13]cases wherein court emphasized for proper maintenance of records in clinics otherwise, it will creates suspicion regarding misuse of machinery.

Further, speaker posed a query to the participants related with interim custody of the seized sonography machines. After getting various responses, speaker drew comparison of seized sonography machines and seizure of arms and weapons which are not returned on bond in a pending trial, on account of their high probability of its repeated use in committing a subsequent offence. With the purpose to make more clarification on this point, she referred Dr. Vandana Ram Chandra Patel v State of Maharashtra[14] wherein court stated that sonography is an important component of offence and while making order pertaining to custody of seized sonography machines, court must keep in mind the impacts of such order.

In addition to it, Speaker pointed out that there is no time limit prescribe in PC PNDT act for disposal of cases but there are certain significant judgements of high court and supreme court wherein court stated that as expeditious as possible the disposal of cases under PC PNDT act and it is the duty of high court to monitor the cases pending in various courts such as in judgements of:

[12] Supra no.10
[13] Supra no.7
[14] Cr. Writ petition no.4399 of 20

- Dr. Mrs. Suhasini Umesh Kran v Karanjaban[15]
- S.K Gupta v Union Of India[16]
- Voluntary Heath Association of Punjab v Union of India[17]

Further, she stated that we as judges, given vast discretionary power regarding punishment but we have to exercise this power judicially by applying own mind and reasons. She also threw some light on the conditions of appreciation of evidence and concluded her presentation with the words that judges should be very sensitive and realistic of matter and while appreciating evidence, keep in mind objects and reasons of act, restraints then decide matter on circumstantial evidence.

Session-6

Theme- Medical Termination of Pregnancy and Sex Selection: Grey Areas.

Speaker- Ms. Anuja Gulati

Ms. Anuja Gulati opened the session with the questions that whether there is any relationship between MTP Act & PC PNDT Act and whether abortion in India is illegal? She replied herself that sex selection is wrongly confused with abortion, creating an impression that abortion is illegal thereby resulting women being deprived from their right to access to safe and lawful termination of pregnancy. Medical termination of pregnancy or abortion is a conditional right of a woman, which she is entitled to, under the four conditions as expressly provided in the MTP act such as:

- Grave risk to the life of pregnant women.
- Risk of physical injury and mental injury to women.
- Risk of physical and mental abnormality in child.

Further, she emphasized that there is need to distinguish the basis of MTP&PC PNDT act. The purpose of PC PNDT act is to prevent sex selection and sex determination, while the MTP act is aimed at preventing unsafe abortion and to promote safe abortion.

Moving further, she stated that large percentages of abortions are unsafe which is conducted by unregistered, untrained providers under unsafe conditions. As per the data 56% of 6.4 million abortions in India are conducted in unsafe condition and 10 women die due to abortion complications each day. She also remarked that any communication addressing sex selection should not be such as to jeopardise a women's right to access to safe and lawful abortion, neither any other of her reproductive rights.

In addition to it, she suggested to the participants that while dealing with cases under PC PNDT act, follows the guidelines given in two significant judgements such as:

- Vijay Sharma v Union of India [18]
- Om Prakash v Union of India[19]

[15] Supra no.8
[16] AIR1977 Delhi 209
[17] Supra no.6
[18] Supra no.5
[19] 2009

She concluded her presentation with the statement that avoid language and imagery that takes away women's right to safe abortion and refrain from use of words such as foeticide, killing, murder. There is need to change our mind-sets then, equality will possible in real sense.

Session-7

Theme- Surrogacy, Genetic Engineering and Sex Selection: A futuristic Approach.

Speaker- Dr. Justice Shalini S. Phansalkar Joshi

Dr. Justice Shakina S. Phansalkar Joshi commenced the session which was based on surrogacy. She stated that there is no law pertaining to surrogacy till today. Surrogacy means hiring the uterus of another woman, in the circumstances when couples are infertile to have their own children in a natural way. She also threw some light on the divergent types of surrogacy such are:

- Partial Surrogacy.
- Full surrogacy.
- Gestational surrogacy.
- Altruistic surrogacy.

Further, she counted the names of celebrities who gone for surrogacy like Tushar Kapoor, Amir Khan, Karan johar etc. She also discussed the physical and mental impacts on surrogate mothers and society from which they commonly belong. As per revelation by study, 68% of surrogate mothers in Delhi and 70% in Mumbai are working as domestic worker.

In addition to it, she also outlined the provisions of proposed bill regarding surrogacy. Some of the provisions are:

- Single parent, foreigners, unmarried couples, Indian resides overseas, gay, Indian residents having own child through adoption or natural process can't go for surrogacy.
- Secondly, infertile couples after 5 years of their marriage with the medical proof can go for surrogacy.
- Thirdly, married women up to 35 ages or more who is blood relative of wising couples can be a surrogate mother once in a life with the consent of her husband.
- Fourthly, commercial surrogacy is banned.

In her concluding remarks, she suggested to participants that keep the rights of surrogate mother whenever matter came before you.

Session-8

Theme- Enforcement Challenges under PC& PNDT act.

Speaker- Dr. Justice Shalini S. Phansalkar- Joshi

Justice Shalini S. Phansalkar- Joshi initiated the session by highlighted numerous hurdles coming in the way of implementing PC PNDT act. She stated that it is very difficult to detect offence and lack of awareness among people are the major challenges for non- enforcement of the act. Further, she added that judiciary made a lot of efforts from time to time for proper implementation of act by issuing directions as in the case of Voluntary Heath Association v Union of India[20] and in S.k Gupta v Union of India[21] in which court directed to conduct seminars, workshops and training programmes with the purpose to spread awareness in public and also directed to government to appoint appropriate authorities which will help to achieve this goal.

Moving further, she stated that laws should not be interpreting to hinder the object of act but interpret in such way it advances the object. In respect to this, she cited two significant judgements:

- Kindulubala Subramanyam v State Of A.P[22]
- Jarkuman v State of M.P[23]

Ms. Anuja Gulati continued the discourse and further added that the jurisdictional issues, changing modus operandi of sex selection, difficult to maintain the seller, long pendency of cases, frequent transfer of appropriate authority are also creating obstacles in the way of enforcement of PC PNDT act. She suggested to the participants that don't look into PC PNDT act in isolation but to read this by connecting with other laws.

Mr. D.P Verma also shared his perception on topic of this session. He stated that cases are not coming the courts regarding under PC PNDT act due to certain lapses.

At the end of the Session 8 Mr. D.P Verma, Additional Director of the Programme conveyed a vote of thanks on the behalf of National Judicial Academy and expressed his gratitude to all the resources persons for making this workshop a great success.

[20] Supra no.6
[21] Supra no.16
[22] (1993)2 SCC 684
[23] (1999) 5 SCC1