



The Intersection of Law and Medicine: Analyzing the PCPNDT Act's Impact on Sonologists

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ABSTRACT

The paper seeks to analyse the effect of the Pre-Conception and Pre-Natal Diagnostic Technique Act (hereinafter referred to as the PCPNDT Act) on the right to the profession of Sonologist¹. The PCPNDT Act, which was enacted to prohibit female foeticide, has a chilling effect on the right to the profession of Sonologist. The stringent provisions of the PCPNDT Act, which punishes the Sonologist for mere non-maintenance of record (Form F) and clerical error, require legal scrutiny. The other counterpart legislation, the Medical Termination of Pregnancy Act 1971, does not have such stringent provisions. Both the acts mentioned above are the sides of the same coin. The unequal treatment of both Acts does not align with the principle of equality enshrined under the Indian Constitution. The study on the issue becomes important after the judgement of the *Federation of Obstetric and Gynaecological Societies of India vs. Union of India*² in which it was held that section 23 of the Act is Constitutional which talks about equating clerical errors under PCPNDT Act with the actual offence of sex determination.

Introduction

The objective of the PCPNDT Act is “To provide for the prohibition of sex selection, before or after conception, and for the regulation of prenatal diagnostic techniques to detect genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto”. It is aptly clear from the objective of the Act that, the Act is preventive and prohibitive. The major question arises here is whether after the implementation of the PCPNDT Act the gender ratio in the country has improved or not? The answer to this question lies in table 1.1 given below:

Table 1.1 Gender Ratio

| Year | Male | Female |
|------|------|--------|
| 1981 | 1000 | 971 |
| 2011 | 1000 | 943 |

Table 1.1 shows that there has been a decrease in Male-Female ratio by 2.8 % in the country.

An inference can be drawn from the abovementioned data, that there has been a decline in the Male-Female Ratio due to inadequate laws prohibiting female foeticide. But to counter this inference the Parliament enacted the PCPNDT Act and the MTP Act. Even after the implementation of the PCPNDT Act, there is no improvement in the Male-Female ratio in the country. The PCPNDT Act which was passed in the year 1994, even after 26 years of its existence in the Indian Legal system the Act has failed to achieve its objective. The implementation is more in letter and less in spirit. The problem of sex determination and gender selection is a serious issue and is one of the biggest social problems faced by our society. Despite the enactment of the Act and subsequent amendments, the Child Sex Ratio has not shown significant improvement, hence, putting sufficient concern and questions on the proper implementation of the Act. At this juncture, it is important to understand the fact that female foeticide is not solely the outcome of the technological invention rather the problem lies in the pitiful side of our society where people have become more gender-selective. This is the main problem which the law needs to rectify instead of shifting the burden solely on the Sonologist. The unrelenting myth that over-regulating the Sonologist will solve the social evil of female foeticide is not completely true.

¹ In medicine, the term is used in the field of (imaging) to describe the practise of medical ultra sonography.

² AIR 2019 SC 221

The PCPNDT Act regulates the pre-natal diagnostic techniques. As per the Act “Pre-natal diagnostic techniques” includes all pre-natal diagnostic procedures and pre-natal diagnostic tests; ³The definition is given in section 2(j) is an inclusive definition, i.e., the test and procedures not specified in the definition may also fall within it if they otherwise satisfy the characteristic of the Pre- natal diagnostic techniques. Till now there are only two types of pre-natal diagnostic techniques first is Invasive technique and second is Non-invasive technique. The invasive technique includes taking or removing samples of amniotic fluid, chorionic villi, embryo blood or any other tissue or fluid of a man, or of a woman before or after conception. The non-invasive technique includes ultrasonography. According to the data collected in the present study, all the Sonologist accepted the fact that invasive technique is not risk-free whereas Ultrasound is. Thus non-invasive technique that is ultrasound is largely used in India. The present study only analyzed the impact of PCPNDT Act on Sonographers which uses non-invasive techniques for the diagnosis.

After analysing the PCPNDT Act and the recent judgement of Hon’ble Supreme Court of *Federation of Obstetric and Gynaecological Societies of India vs. Union of India*⁴ the two key research questions which arise are-

1. Whether mandatory filing of Form F has an impact on Right to the profession of Sonologist?
2. Whether the power of search and seizure given to the appropriate authority under Section 30 of the Act has any impact on Right to the profession of Sonologist?

Methodology

The present study empirically aims to assess the impact of the PCPNDT Act on right to profession of Sonologist. To assess the impact a cross-sectional study was conducted among 30 Sonologist (who were selected randomly) in the country. A specially designed structured questionnaire was used to collect information. The respondents were divided into two category variables; Sonologist owning a private Clinic and Sonologist working in government hospitals. In the current study, the researcher hypothesizes that the professional impact of PCPNDT Act on both categories of Sonologist is same.

Analysing Medical profession from the lens of Article 19(1) (g) of The Indian Constitution

The medical profession is the highest regarded profession in India. All the doctors have a right to practice their profession subject to the rules and regulation framed by the government and the Medical Council of India. The profession of Sonologist is not an exception to this right. This right to practice flows from the fountain of Article 19(1) (g) enshrined under part III of the Constitution of India. It reads as “All citizen shall have the right to practise any profession, or to carry on any occupation, trade or business” and the only restriction on this unfettered right is the authority of the State to make a law imposing reasonable restrictions under Article 19(6). The reasonable restriction mentioned under Article 19(6) of the Constitution had been debated a lot in the past. Various test has been evolved by the Hon’ble Supreme Court to evaluate the laws passed by the state under the garb of reasonable restriction. The position of the court while interpreting the reasonable restriction mentioned under article 19(6) is clear and unambiguous. But while interpreting the same reasonable restrictions for the Medical profession the approach of the court is different.

In the Landmark Judgement of *Dr Y.P. Singh And Ors., Etc. vs State Of U.P.*⁵ were the petitioner challenged the order of the state government prohibiting government doctors from private practice. The petitioner contended that such an order was against their fundamental right to profession. In the instant case, the court has applied the test of compelling public interest and held that “The restrictions envisaged in Clause (6) of Article 19 besides being reasonable should also be in the interest of the general public. Here again, there is no hard and fast rule for determining when a business or trade or profession is affected with the public interest. The circumstances in each case would determine whether challenged governmental rule or regulation should be vindicated or condemned where the interest of public health is involved. The public interest would justify interference with the exercise of freedom in question. The circumstances which clothe a particular kind of business or profession with a public interest must be such as to create a peculiarly close relation between the public and those engaged in the business or profession and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. In matters of health and education, public interest appears to be public needs. When one devotes himself of a profession in which the public has an interest, he in effect grants to the public an interest in that profession and must, therefore, submit to be controlled by the public for the common good. He may withdraw the grant by discontinuing the profession but so long as he continues with the profession, he must submit to the control. Private interest is, therefore, to be adjusted as against public interest. While public interest cannot be converted into a precise set of guidelines to inform the action of the decision-makers, it cannot at the same time be described as merely a myth. It directs our attention beyond the more immediate towards broader, more universal interest because public interest connotes that

³ 2(J) The Pre-Natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Act, 1994

⁴ Supra note 3

⁵ AIR 1982 All 439

which benefits society”.⁶ Such a view was also approved by the Hon’ble Supreme Court in the case of *Ram Kishan Dutta Roy and others vs State of West Bengal and others*⁷. The reasoning given by the Hon’ble Court while analysing the restriction with respect to medical professionals was based upon the maxim *Salus populi suprema lex esto* as societal interest is involved in it. The court has favoured societal interest over individual interest.

Recently the Constitutional bench of the Hon’ble Supreme Court in the case of *Modern Dental College vs State of M.P.*⁸ applied the test of proportionality to evaluate a law passed by the state government restricting the petitioner to exercise his right under 19(1)(g) of the Constitution under the broad cannons of reasonable restriction. The court held that “... a limitation of a constitutional right will be constitutionally permissible if: (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (‘proportionality stricto sensu’ or ‘balancing’) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.”⁹ This judgement opens new horizons and dimensions for interpreting reasonable restrictions mentioned under 19(2)-(6). The judgement opens the door for revisiting the rules framed under PCPNDT Act. The Sonologist too has the Constitutional right to practice his profession freely, any restriction to such right has to pass the test of proportionality. The penal provision framed under PCPNDT Act equating clerical error under Form F to female feticide is arbitrary and has a chilling effect on right to profession of Sonologist. As mentioned in the above judgement the limitation should have a purpose. But the penal provision under the PCPNDT act does not have any clearly defined purpose. The above inference is further supported by the data collected from the respondents is shown in Figure 1.1 below

Do you think that there is any relationship between Form F and Female feticide?
30 responses

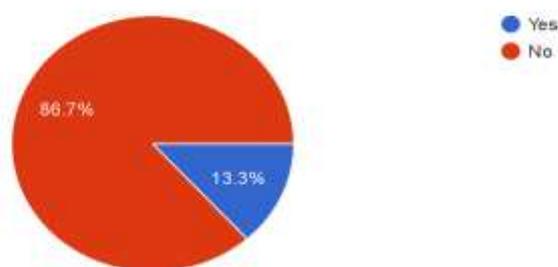


Figure 1.1 showing the opinion of respondents about the relationship between Form F and Female Feticide that 86.7% of respondents thinks that there is no relationship between Form F and Female Feticide

Observation

1. Whether mandatory filing of Form F has an impact on Right to the profession of Sonologist. As per PCPNDT Act, it is mandatory to fill form F in Obstetric ultrasound cases by the Sonologist, whereas when he performs any other case he is not required to do the same. Form F is divided into 4 sections A, B, C & D. Section A consist of basic demographic details of the patient, Section B is filed only by Doctors performing the non-invasive test (Ultrasound), Section C is filed by the Doctors performing the invasive test and Section D consists of two declarations one by the doctor that he/she has not detected the sex of the foetus nor disclosed the confidential information to someone else and the second declaration is filed by the pregnant women that she does not want to know the sex of the foetus The impact of such a requirement on professional efficiency is tabled below.

Table 1.2 Respondents professional efficiency in Obstetric ultrasound cases (N=30)

| | Increase | Decrease | No Change |
|------------|----------|----------|-----------|
| Frequency | 00 | 23 | 07 |
| Percentage | 00% | 76.67% | 23.33% |

⁶ Id

⁷ (1993) 3 SCC 724

⁸ 2009 7 SCC 751

⁹ Id

Table 1.2 shows that the majority (76.67%) of Sonologist feels that their professional efficiency decreases while performing Obstetric ultrasound cases. This due to the requirement of mandatorily filing of Form F while performing obstetric ultrasound cases.

The Central government has through the appropriate authority made the filling of Form F online mandatory, which was further upheld in the decisions of many High Courts naming few Radiological & Imaging Association vs. Union of India¹⁰ and SK Gupta vs. Union of India¹¹.

Table 1.3 Respondents satisfaction for Filing Form F Online (N=30)

| | Fully Satisfied | Satisfied | Unsatisfied |
|------------|-----------------|-----------|-------------|
| Frequency | 06 | 08 | 16 |
| Percentage | 20% | 26.67% | 53.33% |

Table 1.3 shows that the majority (53.33%) of Sonologist are not satisfied with the requirement of filing Form F

The Four sections mentioned in Form F above is the same whether the Sonologist uses online or offline mode. The only difference is that, while filing Form F online the Sonologist requires a stable internet connection and working mobile number of the patient. This difference does create a problem, while personally interviewing one of the respondents he said “In my area, the internet connectivity is really poor because of which I am not able to do obstetric ultrasound cases. The portal which is used for filing Form F has lots of lags like before we start obstetric ultrasound cases we have to fill Form F in the portal, where section A of the form requires a mobile number of the patient. The system sends an OTP(one-time-password) to such number for verification purpose, sometimes the system takes hours to send such OTP because of which I am not in a position to start the obstetric ultrasound cases and ultimately it is the patient who is affected. As it is mandatory to fill Form F even in emergency obstetric ultrasound cases we are not in a position to start the ultrasound test”. The requirement of filing Form F online in emergency obstetric ultrasound cases even if the Sonologist faces internet connectivity is a serious issue. To assess the seriousness of the issue a question was asked from all the respondent which is given in the figure below

In case of medical emergency, if there is any technical issue in filling Form F online than do you use offline mode?
30 responses

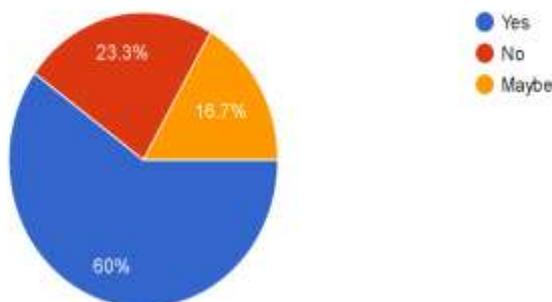


Figure 1.2 shows that 23.3% of Sonologist will not switch to offline mode even in emergency cases. Which means only because of the fear of non-compliance of the provisions of the PCPNDT Act, the Sonologist is running from their primary duty

Now let's analyse the purpose of Form F, which was discussed in para 17 of the judgment of the Federation of Obstetric and Gynaecological Societies of India vs. Union of India.¹² “Section 4(3) of the PCPNDT Act requires every Genetic Counselling Centre/Genetic Clinic to fill Form ‘F’. The filling of Form ‘F’ is commensurate with the objects of the Act which is to regulate the technology and to avoid the abuse of the technology for sex determination. It gives ¹³insight into the reasons for conducting ultrasonography and incomplete Form ‘F’ raises a presumption of doubt against the medical practitioner. In the absence of Form ‘F’, the Appropriate Authority will have no means to supervise the usage of the ultrasonography machine and shall not be able to

¹⁰ AIR 2011 BOM 171

¹¹ D.B.Civil Writ Petition (PIL) No.3270/2012

¹² Supra 4

¹³ ID

regulate the use of the technique. The non-maintenance of records is not merely a technical or procedural lapse in the context of sex determination, it is the most significant piece of evidence for identifying the accused”.

It is aptly clear from the arguments made by the Solicitor General in para 17 of the aforementioned judgment that Form F is a substantial piece of evidence and in no way such evidence shall be allowed to tamper. Can every clerical error made by the Sonologist while filing the Form be punished at par. According to the researcher, the clerical errors made in Form F can be classified into two categories-

- i) Clerical Error made with Mens Rea
- ii) The clerical error made without Mens Rea

If the clerical error is made under the first category than the punishment provided under section 23 of the act is justified but if the case falls under the second category than the punishment given under section 23 is disproportionate. The observation of the court in the Federation of Obstetric and Gynaecological Societies of India vs. Union of India that “To effectively implement the various provisions of the Act, the detailed forms in which records have to be maintained have been provided for by the Rules. These Rules are necessary for the implementation of the Act and improper maintenance of such record amounts to a violation of provisions of Sections 5 and 6 of the Act, under proviso to Section 4(3) of the Act. Besides, any breach of the provisions of the Act or its Rules would attract cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, by the Appropriate Authority as provided under Section 20 of the Act.”¹⁴ Applying such observation to the second category of errors is not justified, such error could be designated as negligence on the part of Sonologist.

In the aforementioned judgement, the court accepted the fact that error in the maintenance of Form F is a serious offence and the doctor cannot escape from this liability but when we compare the general criminal liability of doctor under section 304A of the Indian penal code the reasoning of the court is different. The court in the case of Suresh Gupta vs Government of NCT of Delhi¹⁵ held that in the field of the medical profession the doctors should be given some freedom of action and the doctor should not be made criminally liable for every negligence that he commits. In normal negligence cases, he can be made liable under the Law of Tort and can be made a party for compensation. Criminal liability for negligence should arise only if it is a case of “gross negligence”. Gross negligence though not used in Section 304A but it has to be read to be implicit in the section. When the court introduced the concept of “gross negligence” under section 304A of Indian Penal Code, then what is the rationale of excluding such interpretation for the provisions of PCPNDT Act.

Table 1.4 Government Doctors opinion on the mandatory requirement of filing Form F (N=15)

| | Fully Justified | Justified | Not Justified |
|------------|-----------------|-----------|---------------|
| Frequency | 00 | 10 | 05 |
| Percentage | 00% | 66.67% | 33.34% |

Table 1.5 Private Doctors opinion on the mandatory requirement of filing Form F (N=15)

| | Fully Justified | Justified | Not Justified |
|------------|-----------------|-----------|---------------|
| Frequency | 00 | 06 | 09 |
| Percentage | 00% | 40.00% | 60.00% |

Table 1.4 and Table 1.5 clearly shows that government doctors think that requirement of mandatorily filing Form F is justified.

Whether the power of search and seizure given to the appropriate authority under section 30 of the Act has any impact on Right to the profession of Sonologist

The appropriate authority is a statutory authority appointed under section 17 of the PCPNDT Act. The power of appointment is given to the states government concerning the states and for the Union Territories, such power is vested with the central government. There are two kinds of appropriate authority one is the state appropriate authority and second is District appropriate authority. The appropriate authority has been clothed with very wide powers which include the power of search and seizure defined under section 30 of the Act, power of cancellation of registration of the diagnostic clinic and power to file a complaint against the diagnostic clinic if there is non-compliance of any provision of this Act. That criminal law sets into motion under PCPNDT on the complaint made by the appropriate authority. These power given to the appropriate authority are without checks and balances because of which some time appropriate authority acts arbitrarily.

Do you think that usually powers exercised by Appropriate authority are irrational and baseless?
30 responses



Figure 1.3 shows that 66.7% of Sonologist thinks that appropriate authority exercises its power irrationally and arbitrarily. This could be one of the reasons that the conviction rate is really low in the cases of the PCPNDT Act. As the Sonologist who is arrested or whose ultrasound machine gets seized is ultimately acquitted from such charges. The assumption that it is really difficult to prove charges against the doctor in obstetric ultrasound cases because of lack of shreds of evidence does not hold good as the counterpart legislation MTP Act has a better conviction rate

Table 1.6 Conviction rate in 2018 under the PCPNDT Act and MTP Act

| ACT | Arrest | Charge sheet | Conviction | Acquittal | Conviction Rate |
|-----------------|--------|--------------|------------|-----------|-----------------|
| PCPNDT Act 1994 | 198 | 177 | 12 | 47 | 6.06 % |
| MTP Act 1971 | 87 | 76 | 8 | 21 | 9.1 % |

It is clear from Table 1.6 that, of the total arrest made under PCPNDT Act only 6.06% of cases led to the conviction, whereas conviction rate is 9.1 % under MTP Act which is greater than the conviction rate under PCPNDT Act.

The difference in the conviction rate in both the acts mentioned above could be because of many reasons. One of the reason may be the working and functioning of the appropriate authority constituted under the PCPNDT Act. As it is clear from the figure 1.3 which shows that majority of Sonologist thinks that appropriate authority exercises there power arbitrarily. Does both category variable have the same opinion about the functioning of appropriate authority? The answer to this question is given in Table 1.7 and Table 1.8 below

Table 1.7: Government doctors satisfaction about working of Appropriate authority (N=15)

| | Fully Satisfied | Satisfied | Unsatisfied |
|------------|-----------------|-----------|-------------|
| Frequency | 01 | 07 | 07 |
| Percentage | 6.66% | 46.66% | 46.66% |

Table 1.7 and Table 1.8 clearly show that Sonologist working in a government hospital is more satisfied with the working of appropriate authority.

Table 1.8: Private Doctors satisfaction about working of Appropriate authority (N=15)

| | Fully Satisfied | Satisfied | Unsatisfied |
|------------|-----------------|-----------|-------------|
| Frequency | 00 | 04 | 11 |
| Percentage | 00% | 26.67% | 73.33% |

The reason for such greater satisfaction could be based upon a premise that if the appropriate authority seizes the ultrasound machine of the government hospital than the Sonologist is not personally effected whereas when the ultrasound machine of the private Sonologist is seized by the appropriate authority his professional interest gets affected. Another reason for greater satisfaction for the government doctor could be that one of the members of the appropriate authority is the chief medical officer of the same district government hospital.

CONCLUSION

Female feticide is a social evil which should be eliminated from our country. Saving the life of a girl child for better tomorrow should be the motto of the government. But it is equally important to protect our doctors from frivolous cases filed under the PCPNDT Act. After analysing the data collected it is emptyly clear that the deterrent effect created by the provisions of the PCPNDT Act is not solving the purpose for which it was

enacted. On the contrast, it has a chilling effect on the right to the profession of the Sonologist. The doctor has the fundamental right to practice his profession, under the garb of social cause, PCPNDT act cannot be used to penalize the Sonologist disproportionately. Penalizing a Sonologist for clerical errors made without mens rea is against the principles of Criminal Law. An act becomes offence only if it has both ingredients of mens rea and actus reus, there is no need to make such clerical errors a strict liability offence. Equating clerical errors with female feticide is the most coercive method of regulating the profession of Sonologist. The prohibition in the PCPNDT act should not take away the professional freedom of the Sonologist. It's time that Hon'ble Supreme Court reconsiders its recent judgement of Federation of Obstetric and Gynaecological Societies of India vs. Union of India. It is clear from the above study that impact of PCPNDT Act on government doctor and a private doctor is different. Hence the hypothesis stands disproved.