



N.M.⁵ was in her 22nd week of pregnancy when her doctor discovered signs of severe fetal abnormalities. She was told to wait an additional two weeks for a test that could confirm the diagnosis. Unfortunately, the test performed at 24 weeks confirmed substantial abnormalities in the fetus' heart that posed a risk to its survival. Doctors predicted that even if a child were born from the pregnancy, the child would require a lifetime of surgeries and could possibly suffer sudden death. The diagnosis was devastating for N.M. and her husband as this was a wanted pregnancy.

N.M. requested an abortion and was referred to an obstetrician, **Dr. Nikhil Datar**. In light of N.M.'s assessment of her personal situation and the risk to her health if she continued the pregnancy, Dr. Datar recommended an abortion. Under the Medical Termination of Pregnancy Act, 1971 (MTP Act), abortion is only legal for fetal impairment or in select cases of "grave injury" to mental health until the 20th week of pregnancy;⁶ after 20 weeks, abortion is restricted to when the pregnant woman's life is at risk.⁷ Because **N.M.'s** pregnancy was beyond the legal limit, she, her husband, and Dr. Datar sought judicial authorization from the **High Court of Mumbai** for an abortion.

The High Court denied their request, failing to recognize the severe mental anguish suffered by **N.M.** because she was forced to carry a pregnancy to term that medical experts had testified could end in fetal demise or, result in the birth of a child with a seriously compromised quality of life.⁸ **N.M.** miscarried a week after the Court's decision.

Why this case is important

This case seeks to address the physical and mental trauma that may be experienced by women who are diagnosed with severe fetal abnormalities but are denied the choice to continue or terminate the pregnancy. It also reveals the ethical dilemma faced by doctors who are unable to act in the best interest of their patients because their hands are tied by the law.

The right to safe and legal abortion is a human right. In 2005, the Human Rights Committee considered a case of denial of a legal abortion where the fetus was severely impaired.¹ It held that denial of abortion when the fetus is severely malformed violates a pregnant woman's right to freedom from cruel, inhuman, or degrading treatment by causing foreseeable and preventable mental distress.²

The International Federation of Gynecology and Obstetrics (FIGO) recognizes an ethical obligation to allow women to terminate a severely malformed fetus.³ FIGO emphasizes that in such cases, "[t]he decision to terminate a pregnancy should rest primarily with the parents."⁴

Many countries with legal abortion permit the procedure in cases of fetal impairment throughout pregnancy, either explicitly or to protect a pregnant woman's health.

Under the MTP Act, 1971 abortion is only legal for fetal impairment, or in select cases of “grave injury” to mental health until the 20th week of pregnancy; after 20 weeks, abortion is restricted to when the pregnant woman’s life is at risk.

Having faced similar cases prior to – and since – **N.M.’s**, Dr. Datar filed a special leave petition before the **Supreme Court of India** to appeal the decision.⁹ He is represented by Human Rights Law Network (HRLN). The Center for Reproductive Rights (the Center) authored a memorandum outlining international and comparative legal arguments in support of the case.

Claims

The petition and the Center’s supporting memorandum argue that the 20-week restriction in the MTP Act violates women’s fundamental human rights under the Indian Constitution and as guaranteed by international law. Under the Indian Constitution, the right to life includes both the right to health and the right to a dignified existence. Both of these rights are violated when women are compelled to carry a pregnancy to term that compromises their health and that can severely impact their financial wellbeing and family welfare. Denial of access to legal abortion in such circumstances amounts to forced pregnancy and constitutes violations of the right to freedom from cruel, inhuman, and degrading treatment, as well as the rights to life, health, and non-discrimination. The mental trauma caused by being forced to carry a pregnancy to term in cases where the fetus is so severely impaired is foreseeable.

The Center’s memorandum further argues that an abortion law that lacks a health exception throughout pregnancy interferes with providers’ ability to ethically provide the best quality of care for their patients, including care needed to prevent foreseeable harm to pregnant women’s lives and health.

Remedies

The petition seeks an order by the Supreme Court directing the Government of India to revise the MTP Act to permit abortions for fetal impairment throughout pregnancy. Among other things, it requests the Court to order the following reforms:

- Consider introducing language recognizing the link between fetal impairment and women’s physical and mental health. The MTP Act currently contains explanations to Section 3 stating that terminations for rape and contraceptive failure are permissible because the anguish caused by each constitutes a “grave injury to her physical or mental health.”¹⁰ The MTP Act should also recognize that a diagnosis of fetal impairment could potentially produce anguish constituting a grave injury to mental health and that such an exception must exist throughout pregnancy, since certain fetal anomalies cannot be detected until after the 20th week of pregnancy.
- Consider extending the health exception to match the life exception, which does not have a time limit, and include grounds for fetal impairment.
- Consider establishing an authorization process that involves the woman’s own doctor(s) and the opinion of the pregnant woman.
- Evaluate the possibility of creating an appeal process that can provide women with recourse in case of an inappropriate refusal to terminate.

Current Status

The Supreme Court is examining the petition and other submissions including a compilation of 20 different countries’ laws that permit medical termination of pregnancy in cases of fetal impairment beyond 20 weeks. The Indian Ministry of Health is reviewing the MTP Act. HRLN continues to provide legal representation to Dr. Datar and recently filed an application seeking a court date for the case to be heard.

Endnotes

¹ *K.L. v. Perú*, Communication No. 1153/2003, Human Rights Committee, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

² *Id.*

³ INTERNATIONAL FEDERATION OF OBSTETRICIANS AND GYNECOLOGISTS (FIGO) COMMITTEE FOR THE STUDY OF ETHICAL ASPECTS OF HUMAN REPRODUCTION AND WOMEN’S HEALTH, RECOMMENDATIONS ON ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY 58-9 (Oct. 2009), available at <http://www.figo.org/docs/Ethics%20Guidelines%20-%20English%20version%202006%20-2009.pdf>.

⁴ *Id.* at 75.

⁵ N.M. is an alias provided to respect the confidentiality of the petitioner.

⁶ Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 (India), available at <http://mohfw.nic.in/MTP%20Act%201971.htm>.

⁷ *Id.*

⁸ Court decision dated Aug. 4, 2008, *Dr. Nikhil D. Datar, Gynaecologist, Mr. X (Identification withheld for preserving confidentiality) and Mrs. X (Identification withheld for preserving confidentiality) being wife of Mr. X v. Union of India (UOI) through its Govt. Pleader and Advocate General*, W.P. (L) No. 1816 of 2008 (Bombay High Court).

⁹ Special Leave Petition, *Dr. Nikhil D. Datar v. Union of India & Ors.*, S.L.P. (Civ.) No. XXXX of 2008 (Supreme Court of India).

¹⁰ Medical Termination of Pregnancy Act, *supra* note 6.