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CONTENTIOUS ISSUES

EMERGING MEDICAL CONCEPT OF 'FETAL PAIN' AND RELATED CONTROVERSIES IN LAW

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ABSTRACT

The research explores an emerging field of law that deals with medical jurisprudence, but takes a multidisciplinary approach, as it does not purely demarcate an intersection between law and medicine. The instant research intends to analyse the foetal pain perception while referring to the developments in law. Not only the law but also the ethical conduct of the professionals dealing with the foetus is challenged by the developed neuro-scientific evidence supporting the potential human being's sensory perceptions. The researcher has adopted a qualitative approach to unfold the identified controversies in law. One of the significant aspects of the methodology is the comparative method, utilising the main jurisdictions (the United Kingdom and the United States) in the world. The United Kingdom has been discussed to highlight the British Medical Association's stance on foetal pain, whereas the United States provides a solid foundation for the research with case law. The concluding perspective of the paper presents that the legal recognition of foetal pain has changed the doctor-patient relationship that exists between the pregnant woman and the medical professional who deals with her condition.

Keywords: ***Autonomy; foetal pain; law; rights***

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INTRODUCTION

The research is interwoven around a rare field of discussion in the legal fraternity. The prominent concern of the research is on the foetus (unborn human) and its pain perception. 'Pain' is a term that can be defined in different ways. However, in the scope of medicine, it has been given a technical definition, namely an 'unpleasant sensory and emotional experience associated with, or resembling that associated with, actual or potential tissue damage'[1]. In the general sense, 'pain' is a common sensory perception to all human beings who are already born. However, there is a controversy in the field of medicine about the fact of whether a 'potential' human being, such as a fetus, can feel pain. The specific controversy relating to foetal pain has arisen with the debate relating to the termination of pregnancy and the subsequent developments of foetal medicine/in utero treatment of the foetus. In addition to this, the expert medical professionals who are involved in the process of treating the foetus *in utero* face ethical problems (the breach of beneficence and nonmaleficence) when they disregard the pain of the foetus. Even though the recognition of foetal pain is considered an advancement in the field of clinical medicine, opponents come up with the argument in favour of the autonomy of the pregnant

woman. This creates a collision between the rights of the pregnant woman and the foetus. The paper studies the emerging medical concept of foetal pain and the maternal-foetal conflict that originates from it. It further analyses the stance of comparative jurisdictions in dealing with the legal implications of the same. The methodology that will be adopted in the research is purely qualitative. The researcher prominently focuses on primary and secondary sources of law. Primary sources of law include international/ national legislation, and the secondary sources of law that will be used by the researcher are the medical law textbooks, scientific articles on foetal pain, and guidelines of professional organisations such as the British Medical Association (BMA). In addition to the literature survey, the researcher conducts a comparative study with two developed jurisdictions in the world, namely the United Kingdom (UK) and the United States of America (USA).

DISCUSSION

The discussion that focuses on foetal personhood is interlinked with the concept of 'foetus as a patient.' Not only the matter of patienthood of the foetus, but the research is inclined to consider the rights of the pregnant woman. The exposition on foetal and maternal rights leads to a clear idea of the maternal-fetal conflict. The conflict between the rights of the pregnant woman and the foetus has another facet. The constant collision between the interests of the mother and the unborn inflicts a substantial influence on the 'duty of care' and ethical obligations of medical professionals. This matter has frequently arisen in instances where procedures are performed for the benefit of the foetus.

The evolutionary aspects of personhood and ethics relating to the pregnant woman and the foetus

The recognition of foetal rights is creating controversies. As per the view of Isaacs (2003), the grant of full moral rights to the foetus leads to identifying it as a separate entity from the existence of the pregnant woman[2]. This leads to a conflict of interest between the pregnant woman and the foetus. Under 'No Foetal Rights,' Isaacs (2003) quoted the view of Mary Warren, who has asserted that the foetus has no moral status independent of the pregnant woman[2].

'Personhood' has sparked an ongoing controversy, and it has become an argumentative factor among philosophers[3]. The beginning of personhood has been interpreted in diversified ways, among which is the view that the personhood of the human starts at the point of fertilisation, whereas the contrary view supports the argument that personhood starts at an arbitrary point after fertilisation[4]. The status of being a patient is worthwhile to discuss. A human becomes a patient based on the ethical principle of beneficence, and it is based on the fulfilment of two components. The first component is a patient presenting to a physician, whereas the second component is the existence of clinical interventions that benefit the patient[5].

The significant aspect of being a patient is the autonomy he/she has to make decisions about diagnosis, prognosis, and relevant medical treatments. However, the grant of the status of a patient to a foetus has caused controversies relating to the autonomy it exercises. This issue arises mainly in the domain where the foetus is detected with abnormalities, and the professionals insist on the treatment of the foetus in utero. 'Foetus' as a patient is not autonomous due to its inability to possess its values and perspectives[6]. However, the treatments to the foetus in utero are administered through the body of the pregnant woman by making her a patient in the same procedure. In such an instance, the autonomy of the pregnant woman is significant. Pregnant women have the right to make autonomous decisions in the purview of medical care[7]. The scope of her autonomy includes the ability to decline medical advice while exercising the right of informed refusal[8]. Thus, the autonomy of a pregnant woman in deciding whether or not to undergo a foetal intervention is significant. This creates a doubt on the stage at which the foetus becomes a patient. Thus, at what instance does the foetus become a patient? The foetus becomes a patient when the pregnant woman is presented for obstetric care[5]. It is evident that the decisional supremacy of the pregnant woman decides the status of the foetus, and the well-

being of the latter should be facilitated through the protection offered to the former.

The emerging concept of fetal pain in the contexts of the termination of pregnancy and the treatment of the foetus

It is evident that the medical concept of 'foetal pain' did not emerge overnight. That was a result of a considerable effort in research and experiments. However, the existence of neuroscientific evidence has given rise to foetal pain perception. It has emerged as a main topic in the purview of performing termination of pregnancy and the treatment of the foetus. The application of the concept of 'foetal pain' in termination of pregnancy has been censured as a burden exposing pregnant women to inappropriate interventions, risks, and distress[9]. When treating a foetus as a patient, the discussion of the concept of foetal pain is emerging. The subjective experience of pain in the early stages of human development is unknown. This contention is further inclined towards the objective evidence of foetal pain, namely the physiologic, hormonal, and behavioural responses[10]. However, the rejection of foetal pain is considered impossible. The denial of foetal pain is grounded on the notion that it restricts the termination of pregnancy and women's autonomy, but the recognition of foetal pain is still compelling[11]. BMA in 2020 has cited the findings of the foetal awareness evidence review, a report of the Royal College of Obstetricians and Gynaecologists (RCOG -2022)[12]. It has been noted in the report that there is an unlikelihood of pain perception in foetuses less than 28 weeks of gestation. However, BMA has recommended that doctors be attentive in taking due measures to minimise the pain of foetuses. Such recommendations of the professional bodies imply that doctors owe a duty of care to protect the interests of the unborn. The utilisation of analgesia and anaesthesia in the performance of surgical procedures for the benefit of the foetus started in the early 1980s, which encompasses the administration of foetal anaesthesia during all invasive foetal procedures[13].

Developments in law- foetal pain legislations

The early judicial pronouncements of the courts in the USA provide a clear idea about the reluctance to accept foetal pain as a ground to curtail the autonomy of pregnant women. In *Charles V Carey,* the enforcement of Illinois statutes governing abortion was disputed. One of the disputed provisions required the physicians to inform the patients about the reasonable certainty of organic pain to the foetus from the methods of abortion that would be employed by the physician. Not only the 'reasonable certainty of pain,' but it was also required for the physicians to inform about the methods that can be employed to control the pain. The statutes imposed criminal liability on physicians who do not comply with this requirement of informing the patient (pregnant woman). The court viewed that these statutes are unconstitutionally intruding on the physician-patient relationship[14]. In addition, the court asserted that requiring such an informed process is medically meaningless and medically unjustified, which results in creating cruel and harmful stress to the patients[14]. However, the later developments in law in the USA have shown that there is a state interest in preserving the foetus. In *Planned Parenthood of Southeastern Pennsylvania V. Casey*, the court expressed its views on the maternal-foetal conflict and the state's compelling interest in the viable foetus[15]. The power of the pregnant woman in autonomous decision-making and the interest of the viable foetus should be balanced[15]. This contention was further supported by *Women's Medical Professional Corp. V. Voinovich,* which reviewed a statute restricting partial birth abortion. The view expressed by the court on this statute was positive, where it was identified as a way of accommodating the interest of the state in preventing cruelty to foetus[16]. If further elaborated, the statute was recognised as avoiding unnecessary cruelty to the foetus.

In the USA, different states have enacted foetal pain legislation to restrict the decision-making of pregnant women on termination of pregnancy. The state of Nebraska in the USA was the first to pass a law on foetal pain[17]. Subsequent to the above developments, one of the milestones in the legal framework in the USA is the "Pain-Capable Unborn Child Protection Act"

(PCUCPA)[18]. The objective of enacting the Act was to protect the unborn children from pain in the course of abortions. In a general sense, the substantial medical evidence has shown that the foetus feels pain by 22 weeks of gestation[18].

The current positivity in the USA has been adopted by the UK. As discussed above, the BMA has emphasised the necessity of medical scrutiny to prevent foetal pain[12]. The legislative process of the UK relating to foetal pain prominently dealt with the concept of foetal sentience. The Foetal Sentience Committee Bill, as introduced by the UK, is more inclined to the scientific and medical evidence and stresses the importance of such evidence for the formulation of policies and law making process[19]. The bill further accepted that there is a debate existing in the community about foetal sentience and foetal pain[19].

CONCLUSION

The emerging medical concept of foetal pain is applicable in two main instances, namely the termination of pregnancy and the treatment of the foetus in utero. This reflects the consideration of pain that the foetus feels when undergoing surgical procedures. The paper identifies the foetus as a dependent potential living being lacking autonomy. The pregnant woman is considered autonomous in every aspect. The recognition of foetal pain in the scope of abortions has been viewed as a restriction on the exercise of autonomy by the pregnant woman. Even though the proof of foetal pain is purely based on a higher extent of scientific and medical evidence, the professional bodies in foreign jurisdictions have insisted that doctors should focus on the minimisation of pain to the foetus. The comparative jurisdictions: The USA has enacted foetal pain legislation, whereas in the UK, a bill is in existence to address the matter. In the USA, PCUCPA recognises the application of foetal pain perception to unborn children who have passed 22 weeks of gestation. This is the same in the UK, where the Foetal Sentience Committee Bill has accepted the capability of an unborn child to feel pain after 28 weeks of gestation.

It is evident that foetal pain perception has currently developed into a legal yardstick in the world to control the actions of physicians and the wishes of pregnant women. The development of medical technologies to view the foetus in utero has turned into a conduit for providing the necessary scientific basis to form relevant policies and legislation. The emerging trends of legal recognition of foetal pain have been creating a specific 'duty of care' on the part of the physician. This has substantially altered the traditional doctor-patient relationship that existed between the pregnant woman and the medical professional who is involved in the termination of pregnancy or the treatment of her foetus in utero. The legal recognition of foetal pain can be interpreted in two ways. The first is the medical duty of care of the professionals to the foetus (this is mainly applicable to the professionals who conduct procedures for the treatment of the foetus, they have a duty not to cause pain to the foetus). The second is the restrictions on termination of pregnancy on the grounds of foetal pain, which depict the curtailment of reproductive freedom, bodily integrity, and the autonomy of the pregnant woman.

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The author declared no conflicts of interest.

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AUTHOR CONTRIBUTIONS

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