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Human fetus and obstetric ethics in decision making: An analysis with reference to Chervenak & McCullough's ethical framework

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ABSTRACT

'Human Fetus' has become a prominent subject of discussion in the purview of the subspeciality of fetal medicine. The specialists in the field of fetal medicine are equipped with the developed diagnostic techniques which are supportive in detecting fetal abnormalities, infirmities, and chemical imbalances. Developments in the field of ultrasound technology have provided the doctors with the utmost convenience of monitoring fetal health. The current perception of modern science has elevated the status of fetus to a higher position than its previous status of being a medical recluse in the absence of proper technology to examine it. This context has created the controversy in both legal and medical spheres whether the doctors owe duty of care to the fetus, and recognition of the fetus as a patient conflicts with the interests of the pregnant woman. The main objective of this research is to analyze the legal consequences of upholding the status of the fetus while discussing the ethical framework of Chervenak and McCullough. Chervenak and McCullough's ethical framework is based on the concept of 'fetus as a patient'. The methodology of the paper is qualitative in nature, signified using doctrinal methodology. Both primary and secondary sources of law have been perused as methods of data collection. The author recommends balancing of interests between the pregnant woman and the fetus. The author in conclusion upholds the 'two patient model' and signifies the autonomy of the pregnant patient in granting the status of patienthood to the fetus.

KEYWORDS: *Fetus, Fetal Medicine, Law, Medical Ethics, Duty of care*

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1 INTRODUCTION

Modern medicine has revolutionized the world with medical techniques. Among the developed medical specialties, fetal interventions to promote fetal health are of prominent concern. The human 'fetus' was primarily a recluse whose existence was not precisely ascertained. The development of technologies facilitated the pregnant woman to visualize it before the birth. This converted the fetus to an entity whose defects were identified and treated in utero. In the current world, sub specialties in medicine have been developed to promote the interests of the fetus. Wyatt (2001) is of the view that the developed scientific understanding has resulted in the emergence of fetal medicine as a separate discipline. The techniques are supportive in the diagnosis and the detection of fetal abnormalities and defects. The ultra-sound technology has opened the way for doctors to monitor fetal health in a systematic way. Kuthe & Kuthe (2019) buttress the view marking the fetus as a living entity that comes into being as the result of fertilization of a human egg by a sperm and develops in the uterus of a woman or separated physically from the woman's body but is capable of surviving outside the uterus (ex-utero existence). This exposition further extends to the concept of 'rights of the unborn' prioritizing the emergence of fetal rights. Fetal rights have been referred to as 'most fascinating interfaces between medical science, morality and law' Kluthe & Kuthe (2019). This particularly emphasizes the fact that the right of an unborn human fetus or a developing human after the eight weeks of conception falls into the categories of civil rights and human rights encompassing criminal law, medical law, ethics, family law and employment law. The fetus is entitled to the right of being born alive, the right of being born healthily and the right not to be born Kluthe & Kuthe (2019). As the paper is focused on the techniques promoting the interests of the fetus in utero, it is apt to consider the innovative procedures that support diagnosing and treating fetal defects. Accordingly, paper has incorporated a discussion on maternal-fetal interventions. Such interventions benefit not only the fetus, but also the pregnant woman. In an instance where a defect of the fetus is detected, the pregnant woman is offered two options, namely, the termination of pregnancy or giving birth. However, treatment to the fetus is another option introduced by the current developments in medicine. In Sri Lanka, the termination of pregnancy is permitted only in limited circumstances and as a life preserving option to the pregnant woman. In such a context, treatment to the fetus in utero is significant. However, in the process, the fetus is accessed through the body of the pregnant woman, raising ethical considerations.

1.1 Background of the research

The focus of this research is on two patients undergoing the maternal- fetal surgery; namely, the pregnant woman and the fetus. Kurjak et al. (2009) elaborate that achieving patienthood by a fetus does not require the acquisition of independent moral status. This further emphasizes that becoming a patient is signified when a person is benefited from the clinical skills of the physician. The recognition of the fetus as a patient creates a doubt of up to what extent the doctor owes a duty of care to the fetal

patient. If the doctor owes a duty of care to the fetal patient, a doubt arises whether that conflicts with the interests of the pregnant mother. The discussion throughout the paper is built on the ethical framework introduced by Chervenak & McCullough (2015). The ethical framework identifies physicians' beneficence obligations to the fetus and autonomy & beneficence-based obligations to the pregnant woman. Thus, it is considered that, in a context where the fetus is recognized as a patient, a balance should be maintained between the obligations.

2 RESEARCH METHODOLOGY

The methodology adapted in the research is qualitative in nature.

2.1 Doctrinal Methodology

Doctrinal / Black Letter approach gives the research the form of a typical legal research, taking into account the relevant case laws and statutes. This research focuses on a case law decided by the Supreme Court of USA and international legal instruments. The doctrinal methodology adapted in this research is supportive towards analyzing the law in a clear way.

2.2 Literature Review

Literature Review is the prominent methodology which has been used to answer the research questions. This is supportive in providing an overview of the research problem. Throughout the research, the author used and analyzed the secondary sources of law, namely, journal articles, academic publications and texts. The author has analyzed the secondary sources of British and American writers as those two countries have been used as illustrative jurisdictions to illustrate the development of fetal rights. The reason to discuss the United Kingdom (UK) and the United States of America (USA) as illustrative jurisdictions is the recent technological advancements and the developments in the field of maternal- fetal surgery.

2.3 Content Analysis of literature

The prominent type of the content analysis used throughout the paper is conceptual analysis. This analysis supported the author to determine the existence and frequency of the concepts which are of imperative concern. The author involves in an exposition of philosophical ethics (obstetric ethics). The argument which was built throughout the whole research is supported by the clarified concepts to reach the conclusion that a Two Patient Model as asserted by the Chervenak & McCullough is the appropriate model to form ethical guidelines for physicians involved in fetal interventions.

3 RESULTS & DISCUSSION

3.1 Emergence of fetal rights

The evolution of fetus as an entity with rights was a process that took place over years. In the past, the English Law and the law in the USA did not consider the 'fetus 'as a person who has a distinct legal personhood from the mother. Fetus was considered a part of the body of the pregnant woman. USA has developed the law in a way to address the fetal rights. The recent legal development in USA on restricting the termination of pregnancy after the detection of fetal heartbeat (Texas Heartbeat Act) is a clear

demarcation of prioritizing the interests of the fetus. The enactment of fetal protection laws including fetal pain legislations have clearly demonstrated that different jurisdictions recognize the imperativeness of recognizing fetal rights. *Roe v. Wade* decided in 1973 signified that the state has a compelling interest to protect the life of the fetus.

3.1.1 International Framework and Fetal Rights

The Universal Declaration on Human Rights (UDHR) insists on the inalienable rights which are entitled to by all the members of the human family. Article 3 of the UDHR emphasizes that everyone has a right to life. Article 6 states that everyone has the right to recognition as a 'person' before the law, whereas the Article 7 insists on the equality of all persons before law. The phrase 'all the members of the human family' denotes the fact that the Declaration is applicable to all human beings in existence. Simultaneously, International Covenant on Civil and Political Rights (ICCPR), by its article 6 emphasizes that 'Every being has an inherent right to life' and the inherent right shall be protected by law. Convention on the Rights of the Child (CRC), in the preamble specifies that, the children due to their physical and mental immaturity deserve special protection before and after the birth.

3.1.2 Maternal - Fetal Antagonism and the Fetal Protection Laws

The pregnant woman and the fetus are considered 'two' separate entities and such recognition has led to the development of an adversarial relationship between them (Gvozden 2022). The recent emergence of the fetal protection laws has greatly affected women's behaviour during pregnancy and indirectly curtailed their freedoms.

The rationale of fetal protection laws marked that, if the health and behaviour of the pregnant woman influences the health and wellbeing of the fetus in a negative manner, she shall be held liable where in USA, the pregnant women had been subject to criminal charges in view of protecting the interests of the fetus Gvozden (2022). The cases have been decided on the basis of fetal protection policies. Such policies have prohibited the fertile women from engaging in certain jobs which were likely to cause harm to the fetuses. However, this estrangement of women from the jobs they prefer was considered a sexual discrimination that allegedly violate the Civil Rights Act of 1964.

In Chelsea Becker case (2019), Becker was arrested and charged under the California Penal Code for the offence of causing a miscarriage of the unborn. This case resembles the very ground on which Adora Perez was charged (2017). The reason behind the charge was connected to Adora's own behaviour. Adora had suffered a stillbirth, and was criminally charged since the stillbirth of the baby had been caused as a result of Adora's use of drugs. Similarly, in the state of Indiana, USA, Kelli Leever- Driskel was charged (2018) under the offence of feticide, based on the use of drugs by the pregnant woman.

In the context of fetal pain legislations, different

views have been presented against and in favour of. Arora & Salazar (2014) quote Planned *Parenthood of Southeastern Pennsylvania V. Casey* decided in 1992, which held the ruling that the state has a compelling interest to protect the interests of the viable fetus. Further, the court held that the opposing claims to the rights must also be balanced. The pregnant woman has an autonomy to take decisions over the fetus. However, in the perspective of the court, the women's autonomy to make decisions relating to the fetus should be balanced with the state's interest of protecting the viable fetus. A viable fetus's status as a patient is buttressed by the recognition of fetal pain. The traditional viewpoint did not recognize the perception that the fetus feels pain. However, developments in the fields of fetal neurology and fetal anesthesiology prove that a fetus feels pain and has sensory perceptions. Further, it necessitates the existence of fetal assessment and management strategies to ensure the sufficient availability of procedural and post – procedural pain control (Thill, 2023). Developed jurisdictions such as the United Kingdom (UK) and the United States of America (USA) have inclined to recognize fetal pain. In the UK, British Medical Association (BMA) has brought forth recommendations to doctors to take appropriate measures to minimize the risk of pain to the fetus. Such recommendations have been made amidst the belief that, even in an instance where there is no incontrovertible evidence as to the fact that fetus feels pain, the use of fetal analgesia in relevant procedures to an extent relieves the pregnant women and health professionals from stress. Further, the Royal College of Obstetricians and Gynecology, by its report, Fetal Awareness Evidence Review, has revealed that fetal pain before 28 weeks of gestation is unlikely.

The discussion on medical duty of care to the fetus is connected to the topic of 'legal personality' of the same. Romanis (2019) expounded the English Law perspective on the legal personality of the fetus. In view of the English Law, a person cannot be bestowed with legal rights before birth. Quoting the very view of Sir George Baker in *Paton v. British Pregnancy Advisory Service* (1978), 'a fetus cannot have a right of its own until it is born and has a separate existence from its mother'. In Re F 1988, the application of an authority to make an unborn child a ward of the court was rejected by the court on the ground that the fetus has no legal personhood.

'Birth' is the focal point of personality. This is discussed in the purview of criminal law and in the civil law of negligence Romanis 2019). On the other hand, conferment of legal status on the fetus influences the interests of the pregnant woman, and there comes into existence a conflict between the rights of the fetus and of the pregnant woman. In addition, the acquisition of legal personality is not merely the right to be born, but the right to be born alive. Considering 'birth' as a focal point of bestowing legal personality is deemed to be outdated with the advancement of reproductive technologies. The techniques relating to fetal monitoring have enabled physicians to detect the development of human beings in utero and

such human beings exhibit the signs of supported life. Cao et al (2018) expounded that the legal status of the fetus is designed from two different perspectives involving criminal law and law of torts. Criminal law interferes in governing abortions and law of torts involves in dealing with cases relating to pre-birth injury. Fetal inventions including maternal - fetal surgery were commenced as simple medical procedures whereas they have currently developed into a stage of maturity with *in-utero* procedures and clinical trials.

In the perspective of Wyatt (2001), medical developments have necessitated the exercise of medical duty of care to the fetus. Medical duty of care is owed only to a fetal patient. As Wyatt (2001) elaborated, a fetus becoming a patient is not analogous to a born baby. Granting patienthood means that the fetus is kept in a unique position. The reason is that the fetus is dependent on the mother / pregnant woman for its survival. The significant reason is that it is difficult to administer treatment to the fetus without affecting the bodily integrity of the mother. This phenomenon urges to balance the interests between the fetus and the mother / pregnant woman. The pregnant woman cannot be considered as a mere biological incubator to the fetus.

3.2 Chervenak & McCullough's Ethical Framework

The performance of a maternal - fetal surgery necessitates a high degree of clinical skills where the obstetricians confront ethical challenges pertaining to the clinical practice. Chervenak & McCullough (2015) highlight the concept of 'obstetric ethics' which deal with the morality of obstetric medicine. In the context of maternal-fetal surgery, obstetric ethics concern about the obligations which the obstetricians owe to pregnant women and fetal patients. The professional obstetric judgment is based on the ethics of beneficence and autonomy. An obstetrician's perspective on the health interests of the pregnant woman creates beneficence-based obligations and the pregnant woman's own perspective on her health creates autonomy-based obligations. The fetus is positioned in a different level in comparison to the pregnant woman. The fetus is an entity with an insufficiently developed central nervous system and, as a consequence, the fetus is unable to possess values. Thus, the fetus is considered as an entity who has no power to form own perspectives as to one's own health interests and is not entitled to autonomy-based obligations. In the absence of autonomy-based obligations, the fetus is not deprived of the beneficence-based obligations. This signifies the fact that physicians have a duty to consider the health interests of the fetus.

3.2.1 One Patient Model or Two Patient Model?

The two models (One Patient Model and Two Patient Model) discussed by Begovic (2021) are worthy of consideration. The One Patient Model emphasizes that the pregnant woman is the only patient involved in the process of maternal -fetal surgery and the fetus is considered a dependent entity on the body of the former. The Two Patient Model is often under discussion in the context of scientific literature. It posits that, since a surgical

intervention to the fetus is done through the body of the mother / pregnant woman, the ethical issues pertaining to the surgery are complex due to the involvement of two patients. This leads to the recognition of the fetus and pregnant woman as two separate patients towards whom the physicians are bound to balance their obligations. This further emphasizes the fact that patienthood imputed to the fetus is not dependent on the legal personhood but on the autonomous decision making of the pregnant woman to present the fetus to a physician. The fetus's status of patienthood is further asserted by the physician's act of balancing clinical benefits over harm. This clearly shows that the autonomous decision making of the pregnant woman has been prioritized to grant the status of patienthood to the fetus.

3.2.3 Balancing the interests; an exposition in the light of Obstetric ethics

The professional responsibility model of Obstetric ethics is a guide which provides a path to the obstetricians to manage the ethical challenges in clinical practice and research. Chervenak & McCullough (2015) emphasize that a particular obstetrician who counsels for the benefit of the fetus must consider the obligations he owes to the pregnant woman as well. The ignorance of the status of the pregnant woman has the tendency to result in a conflict between the obstetrician's recommendation and the autonomous view of the former. The occurrence of such a conflict between the medical recommendation and the patient's autonomy can be prevented through the process of informed consent, respectful persuasion, and negotiation. Respectful persuasion is considered as supportive for obstetricians to appeal to the values of pregnant women and to make recommendations on the values so identified.

3.3 In utero treatment of the fetus

The techniques of obstetric ultrasound have facilitated the assessment of fetal health and the visualization of fetus in different stages of gestation. When the fetus is detected with anomalies, the pregnant woman has two options, namely either to terminate the pregnancy or to continue with it and treat the child after the birth. With regard to the two options, in utero treatment of the fetus plays a significant role. In the scope of the discipline of fetal medicine, different diagnostic, therapeutic and surgical interventions are performed on the pregnant women for the promotion of the health of fetus. Begovic (2021)'s perception on maternal -fetal surgery is that it provides a third option to the women who bear an unborn with medical issues. A pregnant woman who gets to know that the fetus has a medically diagnosed condition or a defect can either terminate her pregnancy or give birth to the child with medical defects or infirmities.

The performance of maternal-fetal surgery is significant as such a procedure facilitates the treatment of the fetus. This gives recognition to the concept of 'fetal patient'. Dickens & Cook (2003) have a balanced perspective where they state that, the concept of fetuses being patients can serve a benign protective, cautionary purpose altering healthcare providers and pregnant women to the implications that

medical treatment can have for fetuses. Further, the medical procedure is understood as giving the pregnant women an opportunity to provide appropriate care to the children that they are intending to deliver. As Agnieszka et al (2007) specified, pre-diagnostic techniques include invasive and non - invasive procedures administered to the fetus through the body of the pregnant woman. Non-invasive procedures include ultrasound techniques (routine ultrasound scan, high resolution ultrasound scan, fetal heart echocardiography and magnetic resonance imaging) whereas invasive procedures include chorionic villus sampling, amniocentesis and cordiocentesis. The interventions are not solely diagnostic but also include therapeutic procedures including fetoscopy. The 'fetal operatee' is extracted from the body of the pregnant woman to perform the surgery and is connected to the body of the pregnant woman by the umbilical cord. However, the open fetal surgery has considerable maternal-fetal complications including preterm labour, rupture of membranes, chorioamnic separation, dehiscence of the uterine scar etc Nassr et al (2017). It is evident that, within the scope of in utero treatment of fetus, the interests of the pregnant patient are at a considerable risk.

3.3.1 'Autonomy' of the pregnant patient

The decision to undergo a treatment benefitting the fetus is not a singlehanded decision of the mother. The decision is collective and involve the different views of the family and health professionals engaged in the operation. As Deprest (2011) elaborated, information provided to the pregnant patient includes facts on prognosis, consequences of the treatment in future, medical and educational support, as well as benefits, harms and alternatives. The patient's participation in the medical decision making process is of imperative concern in obstetric ethics. As Blumenthal-Barby et al (2015) signify, the communication relating to fetal interventions can be improved by incorporating the best practices for risk communication. 'Shared decision making' reflects a patient centered and individual approach ACOG (2009).

3.3.2 Informed Consent

'Informed consent' is a bi-directional sharing of information (Kotaska 2017). Thus, the health professional informs the patient about the diagnosis, history, treatments, risks and benefits. In response, the patient informs the health professional about individual values, circumstances and preferences. The ultimate result of the rapport is the recommendation of the health professional (Clinician) a particular treatment or a course of action. The performance of procedures on the body of the pregnant mother for the promotion of the interests of the fetus, incurs risks to the former. As Smajdor (2011) opined, when facing an open surgery, the pregnant patient has to undergo two caesarean sections in the instance where the surgery is performed and when giving birth to the baby. This has the risk of rupturing the fetus. However, this is not the only risk incurred by the pregnant patient. There are consequences such as preterm labour and delivery. Thus, informed consent of the pregnant patient is considered a part of the maternal altruism by virtue of the conditions

faced by fetus.

4 CONCLUSION & RECOMMENDATIONS

At the inception, the English Law and the law of the USA considered that a 'fetus' is not a person and that legal personhood is granted only after the birth. This traditional view has been changing following the advancements in the context of fetal medicine, as the concepts of fetal pain, fetal heartbeat and fetal protection laws came into existence. The developments in the field of ultrasound technology supports the identification of different types of fetal moments which resemble liveliness. Maternal - fetal surgery is recognized as a medical procedure which is performed on a fetus with medical defects. This medical procedure creates an uncertainty as to the legal personhood of the fetus. The traditional view of considering birth as the focal point of personhood is contested by emerging research which argue that the personhood is started *in- utero*. This gives rise to the concept of 'fetus as a patient'. Recognition of fetus as a patient imparts legal rights to it overriding the interests of the pregnant woman.

Chervenak & McCullough's ethical framework expounds obstetric ethics and the balancing of interests between the fetal patient and the pregnant woman. Their perception of recognizing the fetus as a patient is not dependent on legal personhood but the pregnant woman's very act of producing the fetal patient to the physician. This is further emphasized by the 'Two Patient Model' where the physician has a duty of care to both the pregnant woman and the fetus. Thus, it is evident that the fetus, amidst the advancements of technology, is not a medical recluse anymore. Visualizing techniques in the scope of obstetric ultrasound facilitate the identification of fetal anomalies and their treatment in utero. However, such treatments to the fetus are administered to the fetus through the body of the pregnant patient. Thus, she faces the interventions in the interest of the fetus. Further, in utero treatments cannot be administered to the fetus without the informed consent of the pregnant patient. Her autonomous decision making plays an integral role in the scope of recommending treatments. Thus, in the context of in utero treatment, it is the autonomous decision making of the pregnant patient, not the concept of personhood,that becomes imperative in determining the patienthood of the fetus.

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