

Analysis of the Impacts of The Requirement of Two Doctors' Approval on Abortions on Pregnant Women in England

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Abstract: In England, the Abortion Act 1967 (AA) provides several grounds for lawful abortions and allows women to lawfully procure abortions under certain conditions. However, the AA provides that doctors have the right to certify women's eligibility for abortions, causing several issues. The requirement of doctors' approval undermines pregnant women's individual autonomy, violates their human rights and runs counter to present legal and medical views. Meanwhile, the requirement of two doctors' signatures is problematic. Due to the lengthy procedure of collecting signatures and doctors' right to conscientious objection, this requirement causes delays in access to abortions, delaying the opportunity for early abortions and even the 24-week upper limit of permissible abortions.

Keywords: Two doctors' approval, Abortions, Pregnant women, Social justice.

1. Introduction

In England, abortion has always been a statutory offence. The Offences against the Person Act 1861 (OAPA), which applies in England, Wales and Northern Ireland, prohibits women from terminating pregnancies and inhibits other people from helping women abort. Section 58 of the OAPA states that any pregnant woman who intends to procure abortion shall be guilty and section 59 provides that anyone who assists any woman in procuring abortion shall be liable to sin [1]. Then, the Infant Life (Preservation) Act 1929 (ILPA), which is valid in England and Wales, forbids people from intentionally killing a child who is able to be born alive. Section 1 of the ILPA criminalises people who intentionally 'destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother' [2]. It is believed that the aim of the ILPA is to fill the lacune that a person who killed a baby during the spontaneous birth process would commit neither an offence of unlawful abortion nor murder [3]. Notwithstanding, people shall be exempted from conviction if the act of killing the child is done in good faith to protect the mother's life. About 40 years later, the the Abortion Act 1967 (AA), which applies in England, Scotland and Wales, came into effect and provides several grounds of lawful abortions, whereby women in England can lawfully procure abortions under certain conditions [4].

However, the AA empowers doctors to act as decision makers who have the right to assess and certify women's eligibility for abortions by requiring two doctors' approval on abortions. It appears that the requirement is problematic. Aims to examine the impacts of the requirement on pregnant women seeking abortions, this essay starts with the introduction of the requirement of two doctors' permission, then discusses the relationship between this requirement and women's autonomy and analyses the practical problems caused by the requirement of two doctors' signatures which is a part of the requirement of doctors' approval. Finally, the essay concludes that the requirement of doctors' approval

runs contrary to women's autonomy and fails to achieve the goal of protecting women's health, resulting in social injustice.

2. The Requirement of Two Doctors' Approval on Abortions

Although abortion has been a controversial topic for a long time, women have never stopped attempting to terminate unwanted pregnancies. Before 1967, it is estimated that about 10,000 women a year sought illegal abortions in the UK [5]. It is widely admitted that illegal abortions would increase morbidity and mortality [6]. With the purpose of providing women with widely available abortion services and addressing unsafe abortions problems, the AA was established, which comprises conditions for lawful abortions. It states that:

'1. (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.'

Although the AA somewhat liberalises abortion, it requires two registered medical practitioners' approval opinion produced in good faith on whether a woman satisfies the

conditions of lawful abortion, except for emergency abortions. Meanwhile, the two practitioners must sign an HSA1 form which records their consensus on the grounds for an abortion that a woman meets, as well as an HSA4 form which contains information such as treatment details and patients' personal information. Thus, doctors are empowered to determine the qualification of a woman for abortion based on medical discretion. As in the case *R v Smith*, Scarman LJ said that it is the doctor who can determine whether an abortion is legal, rather than the pregnant woman herself.

3. Women's Autonomy

There is a broad conception of autonomy indicating that each person should be free to pursue their own life plan based on their values and convictions. Individual autonomy is a fundamental human right entrenched in Article 8 'right to respect for private and family life' of the European Convention on Human Rights (ECHR) which has been incorporated into UK law by the Human Rights Act 1998. In *RR v Poland*, the European Court of Human Rights (ECtHR) stated that the 'decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy.' It is apparent that women's autonomous right to abortion, a part of reproductive autonomy, lies within the scope of individual autonomy. Some people opine that women's autonomy to abortion is crucial to them since pregnancies take place inside their bodies, so it should be the women themselves instead of anyone else that make the decision on abortions. Individual autonomy guaranteed by Article 8 of the ECHR is not absolute, which means that justifiable reasons could curtail the right. However, individual autonomy should be respected and should not be arbitrarily intervened unless there are sufficient and legitimate justifications [7]. It is admitted that the autonomy to abortion is not an absolute right and could be inhibited by good reasons. However, it is difficult to find appropriate reasons to decline women's access to abortions in practice. Although some opinions may insist that the respect for fetal life could be a good reason for curbing women's autonomy, the AA has allowed women to abort, coupled with the low rate of prosecution of illegal abortions, which implies that society prioritises women's autonomy and health over the protection of fetal life.

Nowadays, the requirement of doctors' permission on abortions runs counter to modern values favouring women's autonomy. Firstly, it appears that relying on doctors' authorisation on abortions is incompatible with modern legal views. In 1967 when the AA came into force, abortion was treated as a medical issue because abortion was carried out with hazardous surgical techniques. Looking at the grounds for lawful abortions provided by the AA, there are always assessments of health risks, both women's and children's, physical and mental. Thus, it is unsurprising that the AA places doctors as decision makers of abortions [8]. There is an argument that the AA strengthens the medical control over abortions but fails to promote women's autonomy. However, the current legal principle regarding medical treatment emphasises patients' autonomy to their medical care rather than rigorous medical scrutiny, meaning that requiring doctors to certify women's abortion needs is outdated. In *Montgomery v Lanarkshire Health Board*, Supreme Court believed that patients should be regarded as capable of understanding the risks of medical treatments and taking responsibility for their choices and subsequent consequences,

instead of being placed 'in the hands of their doctors'. Furthermore, there is judgement suggesting that if patients have the capacity to make decisions, medical professionals should comply with patients' choices no matter whether the choices are rational or even contrary to their best interests. Pregnant women are empowered to make decisions relating to their pregnancies as well. For instance, a woman can refuse a caesarean section, even if doing so would lead to the death of her fetus.

Secondly, requiring doctors to make decisions on abortions is inconsistent with modern medical ethical principles that support patients' autonomy. There is a shift in medical ethical principles from 'doctor knows best' paternalism to respect for patients' autonomy. In medical professional codes, there are suggestions that patients should have the right to participate in deciding their medical treatments. Nonetheless, entitling patients to make decisions does not mean that patients work alone. Doctors should provide patients with adequate information to support them and explain to patients medical options, benefits and risks, enabling them to make informed choices. Further, even from doctors' perspective, they are in favour of women's autonomy to abortion. Many doctors express that they endorse the application of informed consent, a basic principle in other medical treatments, in the procedure of abortions, instead of doctors' approval. In addition, section 1(2) of the AA provides that doctors should take 'pregnant woman's actual or reasonably foreseeable environment' into consideration when assessing a woman's eligibility for abortion, implying that doctors need to evaluate a woman's social circumstances. However, women's social circumstances involve various elements, such as relationships with their partners and financial situations. Therefore, it is difficult for medical professionals to assess these comprehensive social factors [9].

4. Two Doctors' Signatures

In practice, the requirement of two doctors' signatures, which is an essential part of the requirement of doctors' approval, gives rise to disputes. One essential purpose of requiring two medical practitioners' signatures is to protect women. However, it seems that the requirement does not fulfil this objective.

Firstly, there is an opinion that the requirement of two doctors' signatures is likely to create unfair delays in abortion. Typically, when women seek two doctors' signatures, they must find a doctor who will refer; the referring doctor may or may not sign. After the abortion has been approved by the provider service, women sometimes need to go back to their GPs to seek a second signature. Time can be consumed during the process of seeking signatures. The Royal College of Nursing (RCN) said that the request of two doctors' signatures could delay the referral process, which would delay the timing of abortions. Although it is hard to tell how much delay is owing to signatures, research suggested that many women had waited more than 14 days between demanding and receiving an abortion, and some women have had asked for an abortion before 12 weeks' gestation, making women miss the good timing of early abortions.

Secondly, the doctors' right to conscientious objection is likely to aggravate delays as women may encounter doctors who conscientiously object to abortions when seeking signatures. Section 4 of the AA sets out the right to conscientious objection for healthcare professional participants who object to abortion due to morals or beliefs,

allowing them not to participate in abortion treatments. Although the conscientious objection clauses can safeguard doctors, they are likely to cause delays in abortion services. In terms of doctors' attitudes towards abortion, surveys showed that about 18%-24% of doctors expressed that they were broadly anti-abortion and were reluctant to refer women [10]. Since abortion is an offence in England, doctors may confront the risk of criminal prosecution, even possible imprisonment, and frequently undergo fears and stigma engendered by potential criminal sanctions, leading to the unwillingness to participate in abortion treatments. Abortion has been regarded as a medical profession's 'dirty work', making professional service providers of abortion usually feel stigmatized [11]. If a doctor conscientiously refuses to grant a termination to a woman, the woman needs to spend more time seeking another doctor. Furthermore, the General Medical Council (GMC) requires that doctors who refuse to refer women to abortions upon conscientious objection should explain to patients and tell patients that they have the right to see another doctor. The Department of Health (DH) also recommends doctors who are conscientiously opposed to abortion to timely refer women to another doctor. Notwithstanding, a finding shows that some doctors who decline to refer women to abortions are less willing to refer them to other doctors. There is also evidence demonstrating that many women seeking abortions have confronted obstacles when contacting doctors, including doctors refusing to help them and declining to refer them to another doctor. Moreover, there is no regulation requiring doctors to publicise their conscientious objections. Hence, women are not able to know in advance doctors' attitudes. Consequently, doctors with conscientious objections to abortions tend to refuse to refer women to abortions, delaying access to abortion services.

There is an agreement that the earlier abortions take place, the lower are the risks of abortions, indicating that the timing of abortion is of pivotal significance. The Royal College of Obstetricians and Gynaecologists (RCOG) presents that the risks of later abortions are higher than the early termination of pregnancy. The British Medical Association (BMA) also articulates that abortions performed in early gestation have lower risks of complications and are less traumatic. Consequently, the requirement of two doctors' signatures is highly likely to increase the risks of terminating pregnancies by delaying access to abortion services, negatively affecting women's health. Moreover, delays can have more adverse impacts on women whose gestation is slightly under 24 weeks, because the AA sets the upper limit of lawful abortions as 24 weeks except for particular situations. According to statistics, the amount of abortions carried out over 20 weeks is small. However, it demonstrates that there are abortions occurring over 20 weeks. Thus, if there are delays in referral, these women are likely to be past the legal limit. Besides, some women expressed that they felt distressful and anxious when facing delays caused by refusal and long waiting time, which compromises women's mental health.

However, some views insist that delays may have some advantages because they give women more time to consider their abortion decisions. Studies find that most women who request abortions have made affirmative decisions of terminating pregnancies, implying that they do not need more time given by delays. In addition, when the government responded to the problem of delay arising from the requirement of two doctors' authorisation on abortions, they stated that there was no clear evidence showing that the

requirement had created delay as the percentage of early abortions is high according to the statistical data. Yet, the high proportion of early abortions cannot prove that delays in abortion caused by the requirement do not exist. Further, the requirement is not in line with the government's purpose of encouraging early abortions instead of late abortions.

Moreover, the requirement of two doctors' signatures plays a useless role in safeguarding women. Firstly, nowadays, abortion, especially medical abortion, is much safer than carrying a pregnancy to birth [12]. In England and Wales, the percentage of medical abortions represented 85% in 2020, indicating that most abortions are performed with abortion drugs. Additionally, regarding gestation time of abortions, in England and Wales, the proportion of abortions carried out at under 10 weeks was 88% in 2020, and 94% of abortions occurred at under 12 weeks. Therefore, due to the low risk of the first trimester (1 to 12 weeks) abortions, there is an argument that the first trimester abortions automatically conform to section 1(1)(a) of the AA. Thus, many people support that in the first trimester, the requirement of doctors' approval on abortions should be removed. Given the high proportion of early abortions, it appears that the requirement of doctors' signatures is superfluous under most circumstances. Secondly, although the DH states that two doctors should make the decision on an abortion based on sufficient information relating to the woman seeking an abortion, doctors can sign the document forms without seeing or examining the woman. Some doctors sign forms in inappropriate ways, such as pre-signing blank forms without women's information, signing forms after abortions and using signature stamps without consulting the doctor. In 2012, the evidence from an investigation conducted by the Care Quality Commission (CQC) showed that pre-signing of HSA1 forms was widespread. On the one hand, some arguments support that it is acceptable to pre-sign forms in some exceptional circumstances. For example, if a doctor will be away from the clinic, he/she is able to pre-sign batches of forms which can only be used under the doctor's authorisation after the doctor has assessed women's information. On the other hand, there is a view that pre-signing of forms without women's information is not in line with the requirements of forming opinions in good faith upon the AA. In consequence, there are views considering that the requirement of two doctors' signatures is a "sham" and "just an administrative process". Besides, it seems that there is no clear evidence that the process of two signatures could help improve women's health outcomes. Thus, it is unlikely that requiring two doctors' signatures is helpful to protect women in the context of abortion.

5. Conclusion

According to the OAPA and the ILPA, abortion is an offence in England. The AA establishes some justifiable defences against offences, providing pregnant women with opportunities for lawful abortions. However, the AA requires doctors to certify women's qualification for abortions, which gives rise to a series of problems. On the one hand, the requirement of doctors' approval undermines women's individual autonomy, which not only infringes women's human rights but also is inconsistent with current legal and medical views. On the other hand, in practice, the requirement of two doctors' signatures, a component of the requirement of doctors' approval, is problematic. It creates delays in access to abortions because of the time-consuming

process of seeking signatures and doctors' right to conscientious objection, leading to missing the good time of early abortions even missing the 24-week's upper limit of lawful abortions. Besides, given the low risks of and the high proportion of early medical abortions, the requirement of two doctors' signatures is likely to be unnecessary. Consequently, the requirement of doctors' approval on abortions does not work well as a safeguard for women, even jeopardising women's health and women's autonomy, leading to social injustice.

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