The Ethics of Abortion for Foetal Abnormality

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ABSTRACT

The recent outbreak of the mosquito-borne Zika virus in the wider Caribbean and beyond has thrust the issue of abortion into the spotlight once again. This is as a result of the latest guidance provided by the Centres for Disease Control, which has implicated the Zika virus as a cause of multiple foetal abnormalities, including microcephaly. Whereas the controversy surrounding abortion has always been about choice, and the competing rights of the mother versus the rights of the unborn foetus, the issue of foetal anomalies adds a new dimension to the debate. What are the ethicolegal implications of a mother seeking an abortion for reasons of foetal abnormality? This article will explore those implications, but it is beyond its remit to comment on the ethics of abortion per se. (Throughout this article I use the term abortion to mean a termination of pregnancy and not in its unfortunate criminal context).

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INTRODUCTION

A woman's right to seek an abortion has always been a source of intense debate, given the clash of interests between the woman's right to do with her body as she sees fit, and the rights of the unborn foetus. The advent of the Zika virus has pushed this issue to the forefront again, given the recent guidance from the Centers for Disease Control (CDC). CDC scientists have now concluded that there is enough evidence to implicate the Zika virus as a cause of microcephaly and other severe foetal brain defects. (1) The ramifications of this are that as the outbreak continues, there will be an increase in the numbers of women seeking to have an abortion, reflecting the increase in the antenatal diagnoses of foetal anomalies. Should a woman be allowed to seek an abortion under those circumstances? In whose interest is the abortion being performed, the mother or the unborn foetus? There are profound ethical, legal, and social issues at stake here (and for the sake of brevity this article will avoid the core issue as to the permissibility of abortion itself) including those of disability, discrimination, and eugenics.

The legal status of abortion in the Caribbean

In the United Kingdom, abortion remains a criminal offence unless performed under certain conditions. These conditions have been enshrined in The Abortion Act of 1967. Section 1(1)(d) of this Act states that a person shall not be guilty of the offence under the law relating to abortion If 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. (2) This so-called disability provision has been mirrored by legislation in Barbados [Section 4(b) of the Medical Termination of Pregnancy Act of 1983] and Guyana [Section 6(b) (ii) of the Medical Termination of Pregnancy Act 1995]

(3) (4). Abortion remains a criminal offence in Trinidad and Jamaica, governed by each country's respective Offences Against the Persons Acts of 1861.

Problems with the disability provision

There are two main problems with the disability provision. Firstly, it explicitly distinguishes between the termination of non- disabled and disabled fetuses, in that the former is permissible only up to a certain gestational age, but the latter is permissible at any point during the pregnancy. This raises questions of discrimination against the unborn disabled foetus. Secondly, the disability provision states that abortion is not illegal if there is a "substantial" risk that the infant will be "seriously" handicapped. There has been much discussion as to what constitutes a "substantial" risk of a "serious" handicap and this lack of specific criteria leaves doctors open to accusations of "playing God" when deciding to perform an abortion. Even the Royal College of Obstetricians and Gynaecologists (RCOG) best guidance is an admission that there is no legal definition of what comprises a substantial risk. (5) Whether a risk is substantial or not is multifactorial, depending as it does on the nature and severity of the condition, and the likelihood of any further complications. Neither is the law able to define a "serious' handicap. If an abnormality is untreatable and would lead to the death of the child after birth (e.g. Tay-Sachs disease), then abortion is permissible. Apart from this a clinical judgement has to be made as to whether the abnormality would produce a "serious handicap". RCOG guidance suggests that, as a minimum, a serious handicap would require the child to have physical and/or mental disability that would cause significant suffering or long-term impairment of their ability to function in society. (6) The link between microcephaly and a wide spectrum of conditions including seizures, developmental delay, intellectual disability, hearing, vision, and feeding problems,

make this Zika-induced complication a prime candidate for classification as a serious handicap in the Caribbean.

These challenges to the disability provisions do not occur in a vacuum. In 2003 Reverend Joanna Jepson successfully applied for judicial review of the decision by the West Mercia Police (WMP) not to prosecute two clinicians who carried out an abortion on a pregnant woman at 28 weeks gestation for a diagnosis of cleft palate. (7) Reverend Jepson considered this to be an example of an abortion that was not consistent with the criterion of "serious" handicap. After internal and external reviews by the WMP and the Crown Prosecution Service (CPS) respectively, the latter concluded that the two doctors concerned did form the opinion that the child would have a substantial risk of a serious handicap and that their decision was taken in good faith. (8) No charges were brought against the doctors, but it emphasizes the difficulty of not having a clearer definition of what constitutes a "serious" handicap.

In defence of the disability provision

But how can we justify this special provision enshrined in the Medical Termination of Pregnancy Acts of Barbados and Guyana, as opposed to the general ban on late abortions. This can be analyzed from the point of view of (i) the foetus, and (ii) the mother (parents).

The Foetal Interests Argument

The Foetal Interest Argument attempts to justify the disability provision by claiming that the termination benefits the unborn foetus by saving it from a life of suffering. The idea is that it would be wrong to subject the foetus (or the future persons that they will become) to severe preventable suffering if their quality of life would be not merely low, but negative.

However the Foetal Interests Argument only holds true for a very narrow range of conditions. Cases where the child's quality of life would be classified as negative are few and far between. Microcephaly caused by the Zika virus would cause a spectrum of disabilities, not all associated with an absolutely negative quality of life. It would be absurd to say that a blind or deaf child has a life that is not worth living. So citing foetal interests actually has little relevance to the vast majority of terminations that fall under the disability provision.

The Parental Interests Argument

The Parental Interests Argument is justified particularly by the interests of the mother, as the burden of caring for a disabled child is greater than that of caring for a non-disabled one. However even if we accept that caring for a disabled child is more difficult, the main objection to this argument is that of disability discrimination (the so-called Disability Discrimination Objection). Advocates of this objection argue that many of the problems faced by parents of disabled children are as a result of social discrimination, rather than any intrinsic impairment per se. This argument has especial rhetorical force in the Caribbean, given the general lack of social services for those with disabilities. Some writers even attempt to draw a parallel between disability and categories such as gender, skin color, or sexuality. `Given the obvious social discrimination that black and female children sometimes face, how would we justify any legal provision that authorizes the abortion of fetuses on the basis of their being black and/or female, and that as such, their parents would be subject to additional strain and worry? This would be tantamount to endorsement of a policy of eugenics.

Whether or not being disabled can be likened to being female or black depends greatly on which model of disability one subscribes to. The social model of disability states that disability is

a sociopolitical construction, a product of organization and culture rather than a personal limitation due to a person's impairment (9). But according to the medical model of disability, at least some of the problems faced by those with disabilities are caused by their physical and/or mental impairments (impairments meaning a harmful subnormal functioning of a bodily part, process or system). In other words the social model holds that what makes a person disabled is social discrimination rather than impairment per se. If we adhere to the social model, then the practice of selective termination of disabled fetuses for the benefit of the mother amounts to nothing more than an endorsement of discrimination against people with disabilities.

However there are reasons for doubting the applicability of the social model of disability. Firstly, its definition of disability is too broad and fails to distinguish between disability and disadvantage. So for example a paraplegic in an entirely wheelchair-friendly environment might not be considered disabled, while blacks in a racist society would. Secondly, it ignores the obvious fact that some (if not most) of the disadvantages associated with disability are not caused by society, but are intrinsic parts of the impairment itself. So the main ethical objection to the Parental Interests Argument (that the termination of disabled foetuses is only in a parent's best interest because of social discrimination against persons with disabilities, and so should not be legally condoned because of the apparent collusion with eugenics and discrimination) is not entirely successful.

CONCLUSION

This article has explored two attempts to defend the disability provision. The Foetal Interests Argument fails because it only applies to a very small minority of "serious" disabilities. The

Parental Interests Argument succeeds only partially because of the Disability Discrimination Objection. As far as the Parental Interests Argument appeals to harms caused by impairments, then it is non-discriminatory. But when it appeals to those harms that are caused by social factors, they aid and abet social discrimination. Unfortunately it is precisely that milieu that exists in the Caribbean. There is a marked lack of social support for those with disabilities, and this merely serves to increase the pressure on a mother faced with the prospect of having a disabled child as well as another mouth to feed. Indeed, it can be said that this lack of social support makes it almost impossible for a mother to make a free choice about whether or not to abort a disabled foetus. While acknowledging the right of any society to decide how scarce resources are allocated, we must also acknowledge that the existence of the disability provision only serves to perpetuate prejudice and removes any impetus for improving the available social support network for those with disabilities. The emphasis should be on changing this existing social support network so that better systems are in place.

The legal challenges to the disability provision (as epitomized by the Jepson case) means that doctors should take especial care when deciding what is a "substantial" risk of a "serious" handicap. If there is any doubt as to the prognosis of any abnormalities detected, the patient should be referred to fetal medicine specialist as early as possible in the pregnancy. This is not only good practice, but also goes a long way towards demonstrating that any decision made by clinicians regarding abortion was made in good faith.

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