The Women’s Rights Foundation has recently issued a publication named *Women’s Sexual and Reproductive Health & Rights – Position Paper 2018*. Recommendation number 7 outlined of the Position Paper makes reference to access to safe and legal abortion to all women in Malta in public and licensed private providers in a number of instances.

This paper shall deal solely with the scenario posited by the Foundation “In cases of severe fatal foetal impairment.”

**Abortion of impaired foeti – is it genocide?**

In 1948, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide came into force, to which Malta became a State Party in 2014. Article 2 defines genocide as;

> “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> 1. (a) Killing members of the group;
> 2. (b) Causing serious bodily or mental harm to members of the group;
> 3. (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> 4. (d) Imposing measures intended to prevent births within the group;
> 5. (e) Forcibly transferring children of the group to another group.”

It is interesting to note that sub article (d) refers to measures preventing birth within a particular group, which can be interpreted as both preventing conception, such as through forced sterilisations as well as post-conceptual measures, such as abortion.

Whilst it is self-evident that the description given out in Article 2 does not include ‘disability’, “the description of the acts constituting genocide set out in Article 2 of the Convention could easily be applied to a broader spectrum of persons.”

Moreover, the United Nations General Assembly extended this rather narrow view by, amongst others, declaring that genocide is “the denial of the right of existence of entire human groups [...] such denial of the right of existence shocks the conscience of mankind, [...] and is contrary to moral law and to the spirit

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2. de Gaetano pg 41
and aims of the United Nations.”\textsuperscript{3} This view is embraced by scholars such as Pieter Drost who affirmed that “\textit{genocide is the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such.”}\textsuperscript{4}

The view extending the meaning of genocide to the act of singling out a particular section of society with the aim of eliminating them has also been examined in the light of abortion by a number of scholars, some of whom have described this practice as nothing more than a 'backdoor' eugenics policy.\textsuperscript{5} This is comparable to sex-selective abortions which are widely practised prevalently in Asia, particularly in China as a result of traditional custom, especially while the One-Child Policy was still in force.

**Local Legal Considerations**

In 2012, Malta ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), of which Article 10 provides that,

\begin{quote}
“\textit{States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.”}
\end{quote}

The above does not denote an automatic ban on the abortion of foeti which may be impaired, fatally or not, given that the reference is made to a ‘human being’, and no reference whatsoever is made to any stage in the life of said human being, whether post or during gestation.

However, Article 3 (1) of the Equal Opportunities (Persons with Disability) Act, Chapter 413 of the Laws of Malta (EOA) states;

\begin{quote}
“\textit{Every person has an intrinsic right to life, dignity, respect and mental reproductive and physical integrity, and the State shall guarantee this right to persons with disability, both before and after their birth.”}
\end{quote}

This article, which is clearly inspired by Article 10 of the UNCRPD, offers specific protection in relation to the ‘intrinsic’ right to life of a person, irrespectively of whether the person has a disability. Thus, the legislator is reaffirming a constitutional right afforded to the citizens of Malta without distinction. Even though Article 32 of the Constitution of Malta, guarantees a number of rights to all persons in Malta whatever their race etc., with the exclusion of disability, the fact that the affirmation quoted above is found in the first sub-article of a bill of rights for persons with disability, shows the legislator’s intention of reaffirming that such rights are to be enjoyed by persons with disability.

Moreover, the state has a positive obligation to guarantee such right “to persons with disability, both

\begin{thebibliography}{9}
\bibitem{1} United Nations General Assembly Resolution 96(1), of 13 December 1948, as quoted in de Gaetano pg 42
\bibitem{2} Pieter N. Drost, \textit{The Crime of State}, Sythoff, Leiden, 1959, at 125. as quoted in de Gaetano pg 43
\bibitem{3} Troy Duster, \textit{Backdoor to Eugenics}, Routledge, New York City (New York), 1990. As quoted in de Gaetano pg 37
\end{thebibliography}
before and after their birth”, thus signalling an outright refusal of the legislator to permit the abortion of a pregnancy “on the grounds that the foetus demonstrates a potential anomaly which may lead to impairment, thus making the potential person at birth, disabled.”

The positive obligation referred to above means that the while the state is forbidden from offering abortion of potentially impaired foeti in public health structures, it is also forced to actively forbid and prevent such abortions in private clinics. This may also be construed as an impediment on Parliament to pass legislation which allows the abortion of an impaired foetus.

It should also be noted that the EOA enjoys precedence over other local legislation on matters pertaining to disability due to a superseding/precedence clause in Article 37.

Other Considerations

Abortion of pregnancies involving severe fatal foetal impairment has also been discussed by the UNCRPD Committee, especially in relation to the 2010 Spanish Law on the Voluntary Termination of Pregnancy.

The committee asked for clarifications on why the Spanish Government allowed for the statutory limit to terminate a pregnancy from 14 weeks to 22 weeks, in the case of there ‘existing a risk of grave anomalies in the foetus’. Furthermore, the time limit is waived totally, in case of the ‘detection [of] foetal anomalies incompatible with life’, or in case of “detection in the foetus [of] an extremely grave and incurable infirmity.”

Even though the system cited above includes a number of checks, such as that on the medical professionals detecting the “anomalies” and “infirmity” it is worth noting that these provisions allow the abortion of pregnancies involving pre-natally identified Down’s syndrome. In fact, 95% of foeti pre-natally diagnosed with the syndrome are being aborted. This is in line with figures in Austria, where such births fell by 60% between 1995 and 2006, and Iceland where almost 100% of the foeti thus diagnosed have been aborted.

Conclusion

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6 Busuttil pg 80
7 Op. cit. pg 80
8 Op. cit. pg 82
9 de Gaetano pg 235
11 Concluding observations of the Committee on the Rights of Persons with Disabilities – Austria.
Thus, after considering the above, the CRPD is of the opinion that the recommendation to have access to legal and safe abortion in relation to ‘severe foetus impairment’, would lead to the practice of eugenics that would exterminate a group of persons with disability in a matter which cannot be described in any different manner than genocide.

Given also that the ‘inherent right to life’ of persons with disability is locally extended to human beings before they are born through the EOA which supersedes other legislation which is in conflict, CRPD believes that such protection to potentially impaired foetuses should under no circumstance be withdrawn. If anything, CRPD is of the opinion that such protection should be entrenched so as to afford such protection should abortion decriminalised in the future.

References

Equal Opportunities (Persons with Disability) Act, Chapter 413 of the Laws of Malta

United Nations Convention on the Rights of Persons with Disability

