

**Opinion no. 71 of 8 May 2017
on the practice of late termination of
pregnancy for medical reasons**

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I. Request for an opinion

On 8 December 2014, the Committee received via email the following question from Mr. Jacky Botterman, chairperson of the medical ethics committee of the St. Lucas General Hospital (AZ St.-Lucas) in Gent:

'Respected members of the Advisory Committee on Bioethics,

In a recent plenary gathering of the medical ethics committee of the St. Lucas General Hospital in Gent, a question was raised regarding the legal and ethical permissibility of the exercise of foeticide.¹

Concretely, it involves the killing in utero of a viable child, for which it has been decided in advance that a termination of pregnancy be carried out.

If the child is potentially viable, there is a chance that a (possibly severely disabled) child will be born, alive. This is not the intention, neither of the parents in question, nor of the treating gynaecologist. However, from that moment on the termination of the child's life is legally considered to be murder.

In practice, this results in certain cases in foeticide.

We were wondering if a legal framework exists and to what extent the Committee would be willing to express an ethical opinion.'

This request for an opinion was declared to be admissible at the plenary gathering of 9 March 2015.

II. Introduction

The request for an opinion concerns a voluntary termination of pregnancy for medical reasons at a late stage of the pregnancy (i.e. from the 23rd or 24th week) in cases where the foetus would be viable if it were to be born. It involves in any case a severe foetal pathology, discovered at this stage of pregnancy. Concretely, it involves discontinuing the vital functions of the foetus *in utero* before it is expelled.

¹ Foeticide is a medical act, conducted during a medical termination of pregnancy. Concretely, it involves discontinuing the vital functions of the foetus *in utero*, before it is expelled. This term is used in medicine amongst other contexts, but it does not appear in the Criminal Code. In order to avoid confusion, this term is therefore not used in this opinion.

III. Legal considerations

The *legal* question posed to the Committee is as follows: in connection with a voluntary termination of pregnancy which is decided upon in compliance with the legal requirements, does a legal framework exist to kill the foetus *in utero* while this same foetus, if it were to be born, could possibly be a viable child? The answer is negative: there is indeed no legal provision regulating the manner of conducting a termination of pregnancy.

Article 350 of the Criminal Code (introduced by the Law of 3 April 1990) states the requirements which should be respected in order to legally conduct a voluntary termination of pregnancy. According to this provision, no crime is committed when a pregnant woman who finds herself in an emergency situation requests a physician to terminate her pregnancy and if this termination is conducted before the end of the 12th week after fertilisation and in compliance with the other requirements stated by this Article. However, a termination of pregnancy can also be conducted after this term if the completion of the pregnancy would result in grave danger to the health of the woman or if it is certain that the child which would be born would suffer from an extremely serious disorder recognised to be incurable at the moment of diagnosis. In such a case, the physician consulted by the woman must request the cooperation of a second physician, whose advice must be added to the medical file.

Article 350 of the Criminal Code states that a voluntary termination of pregnancy must be conducted 'under medically justified circumstances,' in a healthcare institution,² but does not specify how it should be conducted.

Furthermore, the foetus does not have the status of a person, either in the Criminal Code or in the Civil Code. Only when the child is in the process of being born, does the Criminal Code consider it to be a person.³ In contrast, a child is only a person in the Civil Code once it is born alive and viable.

IV. Ethical considerations

Some cases of a late termination of pregnancy are due to a poor medical follow-up of the pregnant woman with, as a consequence, a late diagnosis of the foetal pathology. Preventive measures should be taken to ensure better prenatal diagnosis. However, even the best

² This healthcare institution must have 'an information service to receive the pregnant woman and inform her in detail over her rights, the support and benefits guaranteed by law to families, mothers, married or otherwise, and their children, as well as the possibility of adoption; [an information service], at the request of the physician or the woman, which will give her assistance and advice regarding the means that she has at her disposal to solve the psychological and social problems created by her situation' (art. 350, 2nd paragraph, 1^o, b of the Criminal Code; own translation).

³ Cass., 11 February 1987, R.D.P.C., 1987, p. 812; Pas., 1987, I, 694. The Court of Cassation ruled in this case that the physician or the midwife unintentionally commits murder due to a lack of foresight or precaution by causing the death of a child during the delivery, a child which has not yet lived outside of the womb, if this death is caused by their fault or negligence. Article 396 of the Criminal Code states: 'The killing of a child at birth or immediately thereafter is called infanticide.' In the case of premeditation, this act is punishable as murder.

medical care cannot guarantee the early detection of all serious anomalies.

In the case of a late termination of pregnancy, it is often necessary to discontinue the vital functions of the foetus intrauterine, as the child will otherwise be born alive with all the consequences that this would entail, particularly regarding the difficult decisions that will then have to be taken when it is precisely this sort of situation that one tried to avoid: namely the birth of a child with a severe disability.

From an ethical point of view, a late termination of pregnancy is problematic and can only be justified in a serious situation where, under certain conditions, it can be considered to be the 'least harmful' solution. It involves exceptional cases in which future parents and doctors are confronted with such serious foetal abnormalities that they consider a medical termination of pregnancy to cause the least harm.

There exist various philosophical and ethical views on the protection of the foetus.⁴ There is probably consensus on two points:

(1) protection of the foetus is not absolute, as it is generally accepted in cases where the mother's life is in danger that her life should be given priority. Article 350 of the Criminal Code provides for the possibility of a termination of pregnancy after the term of 12 weeks after fertilisation if the completion of the pregnancy would pose a serious danger to the health of the woman;

(2) as the pregnancy proceeds, an increasing number of people will feel that there has to be a very serious reason to justify an abortion. The fact that the foetus must suffer from a very serious medical condition for which there is no treatment, is a legal and ethical requirement.

The question remains how this legal and ethical requirement of a very serious and incurable disease is to be determined. The ethical assessment of whether or not a late termination of pregnancy and the necessary discontinuation of the foetal vital functions are justified, takes many different elements into account, and the final judgement will be influenced by the philosophical background and the specific weighing up of values by both the parents concerned and the doctors. The assessment of concrete situations is coloured by the importance given to the consideration of the severity of the condition, the estimation of the quality of life of the future person with a handicap, the judgement and carrying capacity of the parents as well as empathy for them, how one looks at the sanctity or inviolability of life in principle, and the extent to which the doctors may feel themselves to be responsible for the situation.

Article 350 of the Criminal Code determines that the physician to whom the pregnant woman turns for a late termination of pregnancy must obtain the advice of a second physician 'whose advice must be added to the medical file.' This provision does not specify anything about the qualification of this second physician, his independence or the content of his advice. In

⁴ There exist various opinions within the Committee on the issue of the statute of the embryo. See in this respect opinion number 18 of 16 September 2002 on research on the human embryo *in vitro*, which can be consulted on www.health.belgium.be/bioeth in Dutch, French and German.

practice, one sees that patients who are eligible for a late termination of pregnancy are increasingly referred to the larger hospitals with an extensive paediatric department and a neonatal intensive care unit. Depending on the nature of the foetal pathology, an appeal can be made to the relevant medical specialists (often more than one specialist will be involved in a single case). The members of the Advisory Committee believe that the indication for a late termination of pregnancy best occurs in hospitals that have a maternal/neonatal intensive care unit. It is essential that the fullest possible diagnostic tests be conducted, in order to arrive at a precise diagnosis of the severity of the abnormality. If this does not happen, the couple will often end up with many unanswered questions, for which no answers will be able to be given.

Some members believe that the advice of the local medical ethics committee should be able to be sought. This would allow a multidisciplinary discussion between the various positions, but must occur within a short time given the urgency of the medical decision to be taken.

Other members do not find it advisable to consult the local medical ethics committee, given that it has absolutely no decision-making power. The problem raised in this case is, according to these members, a strictly medical one, and the decision lies exclusively with the couple concerned, in consultation with their gynaecologist.

The Committee notes that the drafting of an exact list of 'acceptable' and 'not acceptable' indications is neither possible nor desirable, but considers it appropriate for the relevant professional groups (gynaecologist, geneticists, neonatal specialists, ...) to think about a 'peer review' system in connection with this issue.

V. Recommendations

Article 350 of the Criminal Code provides for the possibility of the termination of pregnancy, even after 12 weeks after fertilisation, in the case of a foetus with a very serious and incurable disorder. It is not necessary to adapt the existing legal provision. However, the Advisory Committee on Bioethics does formulate several recommendations for an improved prevention of late terminations of pregnancy and specifies some ethical requirements of due diligence concerning the application procedure and its modalities.

1. An improved, more expert follow-up of pregnant women would result in earlier detection of foetal disorders and would allow the parents to make the appropriate decisions at an earlier stage of pregnancy. Many late terminations of pregnancy in the case of a viable foetus would thus be avoided.
2. The Advisory Committee is of the opinion that a late termination of pregnancy in the case of a viable foetus should occur in a hospital that has an extensive paediatric department and a neonatal intensive care unit. In such a hospital, the necessary experts can be consulted for advice regarding the foetal pathology.
3. There is no consensus regarding presenting the case to the medical ethics committee of the hospital concerned for advice. Some members are in favour, seeing this as a

guarantee for multidisciplinary consultation on the ethical dimension of the specific case. Other members are not in favour, pointing to the lack of decision-making power of the local medical ethics committee regarding the strictly medical problem which this committee has nothing to do with.

4. The drafting of an exact list of indications for late termination of pregnancy due to a serious and incurable condition is not desirable, but the Advisory Committee considers it appropriate if the relevant professional groups were to organise a 'peer review' system in connection with this issue.

This opinion was prepared by:

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The documents concerning the preparation of this opinion are stored at the Committee's Documentation Centre, where they may be consulted and copied.

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This opinion is available on the website www.health.belgium.be/bioeth