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The New Abortion Law in Belgium Leads to a Virtually Full Right to the Termination of Pregnancy in the First 12 Weeks

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Abstract: In 1990, the termination of pregnancy became possible in Belgium under certain conditions. Up to 12 weeks of pregnancy, the explicit request and will of the woman and the emergency situation were the most important conditions for being allowed to have an abortion. After 12 weeks, the intervention was only permitted when the pregnancy had threatened the life of the woman or the child was suffering from a serious and incurable disease. These Belgian legislation was thoroughly reformed in 2018. This article examines whether these recent legislative changes preserve the original objectives of the abortion legislation, i.e., to ensure a balance between the protection of unborn life and the provision of assistance to the pregnant woman in need. The analysis is done by testing the recent changes in the law against these two objectives. The removal of the condition of the emergency situation, the introduction of an exception to the cooling-off period, the compulsory referral of the doctor in the event of a refusal to carry out the intervention herself, the punishment of persons who physically try to prevent a woman from entering a care institution and a limited extension of the pregnancy period have led to a quasi-full right to abortion in the first 12 weeks of pregnancy. The precarious balance in the original 1990 law between the woman's need and right to self-determination and the protection of unborn life is completely abandoned in the early period of pregnancy. After these 12 weeks, however, medical conditions such as a serious and incurable disease of the unborn life or when the pregnancy threatens the life of the woman remain in force.

Keywords: Abortion, Legislation, Belgium, Pregnancy, Self-determination

1. Introduction

Almost 30 years after the partial depenalization of abortion [1], Belgium has amended its legislation on a number of fundamental points. This happened almost silently and the new law can count on general approval, both in the Chamber of Representatives and in public opinion.

The text [2] contains the transfer of several articles from the Criminal Code to a special law, the deletion of the condition of the emergency situation, the introduction of an exception to the waiting period, the mandatory referral to another doctor (if the original doctor refuses to perform the abortion), the punishment of persons who physically attempt to ban a woman's access to a healthcare institution and a limited extension of the pregnancy term for an abortion.

Although the majority parties primarily present these modifications as a modernization and an adaptation to the social reality, they do indeed mean a fundamental change in the way in which a society deals with this emotionally charged ethical theme.

The Basic Law on Termination of Pregnancy from 1990 came about as a delicate balance between the distress of the woman (and that distress can only be terminated by ending the pregnancy) and the protection of the unborn life.

The proponents of a partial depenalization based themselves on the individual freedom and the self-determination of women, while the opponents demanded respect for the unborn life (with justified grounds in criminal law that made possible a sufficiently flexible policy [3]).

The Voluntary Termination of Pregnancy Law ensures that the woman autonomously decides on an abortion in the first 12 weeks after the conception, so that there exists in our country an effective right on termination of pregnancy. By means of a separate law, as it is also the case for the regulation of euthanasia or the status of embryos, abortion is removed from the criminal law sphere. This should reduce the still existing

stigma [4].

This article discusses the various adjustments in comparison with the Basic Law on Termination of Pregnancy and makes an analysis of the possible consequences on legal and social level.

2. The Modifications to the Basic Law of Termination of Pregnancy of 3 April 1990

Shortly after the partial depenalization in 1990, a whole series of legislative proposals followed to ease the conditions for termination of pregnancy, in particular the deletion of the condition of the emergency, the shortening or the abolition of the waiting period and the extension of the deadline to terminate the pregnancy [5]. Only from the far right there were proposals to re-punish abortion [6] or to subject it to stricter conditions. The previous majority of liberals, Christian Democrats and Flemish nationalists submitted a bill [7] in the summer of 2018 that partly met these aspirations.

During the parliamentary discussions of the Voluntary Termination of Pregnancy Law, it turned out that our country hardly has reliable statistics, such as the number of abortions and the period of pregnancy in which they occur, or the precise reasons why women resort to this surgery. It remains remarkable that there is very little scientific research about this in Belgium [8]. The latest report from the National Evaluation Committee for Pregnancy Termination, set up to, among other things, formulate recommendations for possible legislative initiatives and / or other measures to reduce the number of termination of pregnancy [9], dates from 2012 and contains figures for the years 2010-2011.

Some parliamentarians therefore wonder that this lack of scientific material cannot be a reason to postpone such a thorough reform for the time being. Because of this lack of well-founded research, the hearings with explanations of the experts are mainly based on their own experiences, which may not reflect a general and objective picture of the real situation [10]. However, for a majority of the elected representatives, this did not prevent them from making substantial changes to the abortion legislation.

2.1. The Transfer of Most Articles from the Criminal Code to a Special Law

The Basic Law on Termination of Pregnancy held on to the criminalization: termination of pregnancy was explicitly mentioned in the Penal Code. Only if the doctor and the woman met the conditions of Articles 348 up to and including 352 could an abortion take place with impunity. The initial text attempted to reconcile two interests: on the one hand the right to self-determination of the pregnant woman and on the other hand the right to protection of the embryo or the fetus [11].

Research shows that almost three quarters of the Belgian population is not aware that abortion was still in the Penal Code [12]. The complete depenalization is therefore one of the most important requirements among the proponents of an as liberal as possible abortion law. Only in this way can the legislator guarantee a full right to termination of pregnancy. After all, for the left-wing opposition, criminal law must not aim to create a sense of guilt or stigmatization in termination of pregnancy: dignity and autonomy must be respected as a woman's right [13]. Women may not undergo punishment for voluntary termination of pregnancy, even if the surgery takes place outside the statutory conditions. Sanctions would promote the sense of guilt and force women to go abroad or give rise to clandestine practices, with all its consequences [14]. Only an abortion against her will should still appear in the criminal law.

The Voluntary Termination of Pregnancy Law superseded articles 350 and 351 (who determined the conditions under which an abortion was not punishable) from the Penal Code [15]. The new provisions and penalties are now incorporated in a separate law, just as there is a separate euthanasia law or a law on medically assisted procreation [16]. In addition, Articles 352 (because of the abolition of Article 351 and the removal of forced labor from the Belgian criminal law system) and 383 (the deletion of the provisions that recommend, give instructions and give publicity about abortion and the means with which it was carried out, punishable) are changed. This does not go far enough for the leftist opposition: it is for them about a "copy paste" of the 1990 law, in which there is no question of a depenalization but of a new penalization [17].

The new provisions are a typical political compromise between the different views on the unborn life and the right to self-determination of women. The punishability remains if the termination of pregnancy takes place outside the legal conditions, but the new abortion scheme is included in a separate law, separate from the Penal Code. The proponents emphasize the fact that abortion has been removed from the Penal Code, while opponents point out that the woman continues to be punishable if she chooses an abortion that does not comply with the legal provisions.

2.2. The Abolition of the Condition of the Emergency Situation

The numerous legislative proposals [18] from the 1970s and 1980s did not mention the emergency situation as a condition, but emphasized the autonomy of women. Sometimes there were medical and social / ethical-social indications, where in the first indication "only" two doctors had to give their approval, while for the second type of reasons three doctors had to give their approval [19].

It was not until 1986 that the condition of the emergency situation was discussed in the legislative proposal of R. LALLEMAND, L. HERMAN-MICHIELSENS, and others [20], which would later form the basis for the eventual partial depenalization. The authors of the Basic Law on Termination of Pregnancy, adopted in 1990, described the indications of the emergency situation as the firm will of the woman, a certain state of mind or a psychological condition that did not threaten her health [21].

The parliamentary preparations of the Basic Law on Termination of Pregnancy mention heated debates about the exact interpretation of this condition. The Council of State even proposed to remove this condition from the law: the condition could not be accurately and objectively defined and therefore had no legal content [22]. In a later opinion, this court has slightly nuanced this view [23]: the condition has no legal but moral content: the content and the assessment is the final responsibility of the woman [24].

It soon became apparent that this condition did not have the least significance. Even though the Belgian legislation gave the doctor co-decision power about its appreciation, in practice it is woman who defines the concept of emergency. By far the most early terminations of pregnancy takes place because of personal, social or economic reasons. For the abortion centers the emergency situation coincides with the request of the woman. On the occasion of the 25th anniversary of the Belgian abortion law, the abortion centers argued for legislation that guarantees the right to and access to abortion care, so that everyone can think without taboo and in a good way about, if and when they want to be pregnant, from whom, how often and under what conditions.

Pretty soon after the adoption of the Basic Law on Termination of Pregnancy in 1990, there was already political and social pressure to delete the condition of the emergency. In the parliament, proposals were submitted in this sense. The demonstration of an emergency hampered the exercise of the right to self-determination of the woman: not the doctor, but the woman, and she alone, had to decide whether or not she wanted to continue her pregnancy.

The emergency is no longer included in the Voluntary Termination of Pregnancy Law, but both the finally approved bill of the majority parties and the opposition amendments do not give a thorough explanation for the abolition of this condition. An expert at the hearing talked about a legally very unclear concept, which is coming over as patronizing and fueling the feeling of guilt [25]. However, during the political debate in 1990, this condition was good for many pages in the parliamentary minutes. The abolition of the emergency situation does not make any difference in practice, but this means that the only substantive requirement for termination of pregnancy in the first 12 weeks will be lost. The free will of the woman is now the guiding criterion, as a result of which the right to self-determination now comes fully to the fore. Abortion on request in early pregnancy is a new reality in Belgian society.

2.3. The Relaxation of the Reflection Period

A period of reflection of six days is provided between the first consultation and the termination of pregnancy [26]. The term starts on the first visit to the doctor who will perform the procedure and not at the first consultation of the doctor who refers (for example the family doctor) [27]. The question arises as to whether this mandatory waiting period still meets the needs of women: for one woman the six days is a torture, for the other it is just good enough and for another woman not long enough [28].

Moreover, such a period is difficult to control, and even if it is exceeded, a judge can still rely on the justification of the state of emergency [29]. The abortion centers, some of the speakers at the hearing and members of the left opposition wanted a shortening or even the abolition of this term: they experience this condition as patronizing and paternalistic for the woman. After all, she has already made the decision and a doctor must respect this without having to be obliged to observe a reflection period. For the left opposition, only a drastic reduction (up to 48 hours) was an acceptable compromise: this ensures that a woman has time to thoroughly review and consider all aspects of her request.

The new legal text retains the waiting period of six days, but a doctor can deviate from this if there is an urgent medical reason for the woman to accelerate the termination of pregnancy [30]. What we need to understand under "an urgent medical reason", the new law does not mention. In practice, a doctor will be able to autonomously determine what he or she considers to be an urgent reason. The parliamentary preparations do not contain a definition of this concept, even though the Flemish Socialist Group insists on a definition of "urgent medical need" in the interest of sufficiently clear and accurate legislation without loopholes [31].

The parties of the political majority even confirm that the waiting period has been lifted [32]. The new law offers the possibility to set a time for reflection tailored to the specific situation of the person concerned (for example if the psychological condition of the woman so requires). The doctor can decide in full autonomy which psychological and / or physical reasons are eligible [33]. Such a vague description has given the legislator the actual decision-making power over the reflection period to the doctor. This could be the rule in practice, if the woman has a psychosocial reason to have an abortion as soon as possible [34].

The obligatory mentions of a number of alternatives such as adoption or the care of children and the information obligation on contraception are retained. Amendments that wanted to delete this obligation because it was perceived as paternalistic and patronized were not accepted [35].

2.4. The Compulsory Referral by the Refusing Doctor

So far, the attending physician was not obliged to refer the pregnant woman to another doctor. He only had to inform the woman about his refusal at the first visit [36]. An amendment to include this in the Basic Law on Termination of Pregnancy did not make it, among other things because of the fear of a "wrongful birth action" (a claim, instituted by the parents, for the damage suffered from the conception / birth to reimburse a child) [37]. The provision on the conscience clause, in which no physician, no nurse, no member of the paramedical staff can be compelled to cooperate in termination of pregnancy is retained, but the physician is now obliged to refer to a colleague or an institution that sympathetic to such a request. The government thereby obliges the doctor to indirectly cooperate in a law that he or she fundamentally

rejects because of moral objections, something that was considered undesirable during the parliamentary debates in 1990. This ethical issue is after all about a fundamental choice about life and death, which goes far beyond a religious belief.

Neither the law on health professions nor the law on patients' rights explicitly mentions termination of pregnancy as part of "medicine" or "healthcare". Yet there is a consensus that certain parts of the abortion law do indeed fall under the above mentioned categories.

For example, the refusing physician is obliged to transfer a copy of the patient file to the patient (Patient Rights Act) or to the succeeding physician (Healthcare Professions Exercise Act) [38]. The opposition has tried in vain to anchor abortion as a patients' right in the new legislation [39]. and to include the procedure in the Health Professions Exercise Act [40].

There are no criminal sanctions in the Voluntary Termination of Pregnancy Law if the doctor does not refer the woman, but a woman can, if she feels that she has been harmed, bring a civil action to claim damages. This could be the case, for example, if, due to a lack of information, the deadline for pregnancy is exceeded and she is therefore no longer able to have an abortion.

2.5. The Punishment of Persons Who Prevent a Woman from Entering an Abortion Institution

Persons who try to prevent the woman from having free access to a health care institution that performs terminations of pregnancy, risk from now on a conviction to a prison sentence of three months to a year and a fine of one hundred euros to five hundred euros [41]. This provision is inspired by foreign legislation that targets the pro-life activists at the gates of abortion centers [42]. The explanation of the new law [43] refers to the punishment of a "physical" hindrance. However, the law does not clarify what is exactly meant by "hindrance", so there is a risk that a judge will interpret this provision in a broad way. Addressing the woman to change her mind, giving a leaflet with pro-life arguments or even the usual presence with a protest sign could be experienced as intimidating and annoying. Even sending a simple e-mail to convince women to abandon an abortion could fall under this provision in a broad interpretation [44].

The introduction of this penal provision is remarkable, because there are no known court cases in our country in which someone has prevented a pregnant woman from entering a hospital or abortion center. Moreover, the penal code and police regulations contain sufficient provisions to deal with such offences. This is therefore a provision with a rather symbolic meaning which must emphasize that the legislator wishes to guarantee abortion legislation by all means.

2.6. The Deadline to Terminate the Pregnancy

Several amendments from the opposition contain an increase of the deadline to terminate the pregnancy, sometimes up to 22 weeks: the current period of 12 weeks no longer corresponds to the way society looks at the termination of pregnancy [45]. Afterwards, an abortion would still be possible for the medical reasons (already provided for in the Basic Law on Termination of Pregnancy for both the child and the woman), but also for psychosocial reasons. The most important argument is that many women go to the Netherlands after the 12-week period, where a deadline of 24 weeks applies.

Especially women who are in a socio-economically difficult situation would therefore not be able to fully exercise their right to termination of pregnancy: after all, such an intervention costs a lot of money and is not reimbursed abroad. From a medical point of view, each pregnancy term for abortion remains very arbitrary: there is no essential, functional or prognostic difference. Even the criterion of viability (which is 22 weeks) is debatable, since the fetus's life depends on extremely advanced care, the prognoses remain very uncertain and that limit also changes because of medical progress [46]. An extension of the gestational age for abortion was not politically feasible.

The principle of progressive legal protection, whereby the unborn child enjoys greater protection as the pregnancy progresses, is the basis of the Basic Law on Termination of Pregnancy, which sets stricter requirements for abortion after 12 weeks [47].

After this period, the intervention can only take place if the completion poses a serious danger to the health of the woman or if it is certain that the unborn child will suffer from an extremely serious ailment that is recognized as incurable at the time of the diagnosis. For some Members of Parliament, the words "if established" should be adapted to the reality. These words should be replaced by the words "if there is a serious risk" [48].

The legislator has not drawn up an exhaustive list of extremely serious and incurable diseases: after a while it would be outdated and the difference between "a serious ailment" and "an extremely serious ailment" would be difficult to objectify [49]. Finally, there is no limit: the unborn child can be aborted until the birth within the boundaries of the current Belgian legislation.

There are no reliable statistics on the number of termination of pregnancy after 12 weeks, which, however, did not appear to be an obstacle to a thorough amendment of the abortion legislation. For example, in 2010 (the one-but-last year of which the National Evaluation Committee for the termination of pregnancy still had figures) 121 abortions were performed after 12 weeks. Based on the number of births and the prevalence of abortions due to fetal abnormalities, the number of termination of pregnancy would actually be 570 [50].

The legislator finally opted for a limited extension of pregnancy period in the event of a termination of pregnancy in the first 12 weeks. The term for an "ordinary" abortion is extended by the number of days of the waiting time if the first visit to the doctor is less than six days before the expiry of this 12-week period [51] which in practice means an extension to 13 weeks.

3. Conclusion

Although the new law does not go far enough for the advocates of full-fledged abortion, our country has clearly opted for a virtually full right to termination of pregnancy in the first 12 weeks of pregnancy. The request and the will of the woman are sufficient to justify the abortion.

The precarious balance of 1990 between the need and the right to self-determination of women and the protection of the unborn life was completely abandoned in the early period of pregnancy. When the Basic Law on Termination of Pregnancy was drafted, proponents described the problem of abortion as a conflict of values between the right to life and the rights of the woman [52].

In the current law it is the woman and she alone who decides in the first 12 weeks about the fate of her unborn child. Such a vision is presented as liberal, social and progressive, where the termination of pregnancy belongs in the list of the most essential human rights.

The reference to international and supranational soft-law [53] ensures that there is slowly but surely an international consensus that turns soft-law into hard-law, making this ethical dilemma then becomes a competence of the courts on which the Belgian legislator has little or no control anymore [54].

The importance of the unborn child is hardly discussed in the parliamentary preparations for the new law. The main concern in the political debate was that women should have the unquestionable right to dispose of one's own body. Only a few members of parliament talked about the balance between the interests of women and the fetus.

The various amendments from the left opposition only intended to further relax the conditions for the intervention, in particular the shortening of the reflection period (up to 48 hours) and the extension of the pregnancy period to 22 weeks in situations, independent of a danger for the woman or a very severe incurable situation the unborn child.

The only possible progress is, according to this view, an even longer pregnancy term for an abortion, even beyond the arbitrary limit of viability without any punishment. Such practices are already happening in our country without exact figures or social commotion. The requirement of an emergency, the only substantive condition, which indeed almost coincided with the will of the woman, has disappeared.

The transfer of the legal dispositions of the Criminal Code to a separate law gives a clear signal that abortion is more and more considered as a normal medical treatment. The possibility of calling on medical urgency can lead to a de facto abolition of the reflection period.

The clause of conscience is maintained, but doctors are obliged to refer. Finally, it will be necessary to determine whether the provision that provides for penalties for persons who prevent women from entering abortion centers will not lead to a restriction of the right to speech and freedom of expression.

The far-reaching liberalization of the abortion law has further damaged the protection of the unborn life and is non-existent in the first twelve weeks of pregnancy. The new text still refers to "the child", even though that unborn life has less legal certainty than in the Basic Law on Termination of Pregnancy of 1990.

If the legislator did not want to grant life protection during pregnancy or only limited legal protection, then it would make sense that they would opt for names that are customary in the different stages of pregnancy, such as embryo (where a legal definition already exists) and fetus.

However, the reference to the child in a law about the abortion of that same unborn life shows that our society maintains a double standard in this ethical theme. An inconvenient truth that deserves a serene and dignified debate in the coming years.

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[35] Article 350, second paragraph, 5° of the Basic Law on Termination of Pregnancy.

[36] Voorstellen van Wet betreffende de zwangerschapsafbreking [Propositions of the Bill on voluntary termination of pregnancy], *Parl. St*., Senate, 1988-89, 7 July 1989, No. 247-2, p. 146.

[37] Thierry VANSWEEVELT, "Abortus [Abortion]", *OSS*, 2011, episode. 68, Brussels, Belgium.

[38] Verslag van de tweede lezing van het Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking [Report on second reading of the Proposition of the Bill on voluntary termination of pregnancy,] *Parl. St. 2017-18*, No.. 54-3216/003, Amendements No. 29 en 30, p. 46.

[39] Verslag van de tweede lezing van het Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking [Report on second reading of the Poposition of the Bill on voluntary termination of pregnancy], *Parl. St. 2017-18*, No. 54-3216/003, Amendementen nr. 31 en 32, p. 46.

[40] Article. 3, second paragraph of the Voluntary Termination of Pregnancy Law.

[41] See for example French legislation: LOI n° 2017-347 du 20 mars 2017 relative à l'extension du délit d'entrave à l'interruption volontaire de grossesse (1).

[42] Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking [Proposition of the Bill on voluntary termination of pregnancy (D. CLARINVAL, C. VAN CAUTER, V. VAN PEEL en E. VAN HOOF), *Parl. St.* Chamber, 2017-18, No. 54-3216/001, p. 4.

[43] De Morgen, hoe de nieuwe abortuswet inhakt op ons rechtssysteem [How the new abortion law is affecting our legal system], Fernand Keuleneer, 12 July 2018, Antwerp, Belgium.

[44] Amendementen, ingediend in plenaire vergadering, Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking [*Parl. St., 2017-18*, No. 54-3216/008, Amendement No. 72 Lalieux and others], p. 7. Amendements relating with the Propositon of the Bill on voluntary termination of pregnancy.

[45] Verslag van de tweede lezing van het Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking [Report on second reading of the Poposition of the Bill on voluntary termination of pregnancy], *Parl. St. 2017-18*, nNo. 54-3216/003, Intervention of Mrs Anne Roets, p. 82.

[46] Thierry VANSWEEVELT, "Juridische aspecten van het statuut van en het onderzoek op stamcellen en embryo's [Legal aspects of stem cell and embryo research and status]", *T.Gez/Rev.dr.santé* 2007-08, Brussels, Belgium, p. 134.

[47] Verslag van de tweede lezing van het Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking [Report on second reading of the Proposition of the Bill on voluntary termination of pregnancy, *Parl. St. 2017-18*, No. 54-3216/003, Intervention of Mrs Muriel Gerkens, p. 3.

[48] Nationale Commissie voor de evaluatie van de wet 3 april 1990 betreffende de zwangerschapsafbreking [National Commission for the Evaluation of the Law of 3 April 1990 on Termination of Pregnancy] Law of 13 August 1990) [, Report to the Parlement 1 January 2010 - 31 December 2011, p. 77.

[49] Article 1, 3° of the Voluntary Termination of Pregnancy Law.

[50] Voorstellen van Wet betreffende de zwangerschapsafbreking [Propositions of Law on Termination of Pregnancy], *Parl. St*., Senate, 1988-89, 7 July 1989, No. 247-2, p. 6.

[51] Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking [Proposition of theBill on voluntary termination of pregnancy (D. CLARINVAL, C. VAN CAUTER, V. VAN PEEL en E. VAN HOOF), *Parl. St.* Chamber, 2017-18, N°. 54-3216/001, 3-4.

[52] De Morgen, hoe de nieuwe abortuswet inhakt op ons rechtssysteem [How the new abortion law is affecting our legal system], Fernand Keuleneer, 12 July 2018, Antwerp, Belgium.

[53] Verslag van de eerste lezing van het Wetsvoorstel betreffende de vrijwillige zwangerschapsafbreking, *Parl. St. 2017-18*, No.. 54-3216/003, Intervention of Mrs Catherine Fonck, 28.

[54] Maarten COLETTE and Paul DE HERT, "Waarom Individualisering abortus ons niet (helemaal) bekoort [Why Individualisation abortion does not appeal to us (at all)]", *De Juristenkrant*, 2018, Brussels, Belgium, N°. 377, 15.