Committee for Public Relations and Ethical Issues of the German Society of Human Genetics

Statement on the Revision of § 218 a of the German Penal Code with Elimination of the So-called Embryopathic Indication for Terminating Pregnancy

I. On 29 June 1995 the German Federal Assembly agreed on a revision of § 218 a of the penal code, eliminating without substitution the so-called embryopathic indication as prerequisite for unpunishable termination of pregnancy. In the future, impunity for a termination of pregnancy is acknowledged under only three conditions:

1. within the framework of a limited period up to the 12th week after conception, and at least three days after a obligatory professional counseling session ("pregnancy-conflict counseling") according to § 219 of the penal code (§ 218 a, Paragraph 1);
2. within the framework of a so-called criminological indication up to the 12th week after conception without obligatory counseling according to § 219 (§ 218 a, Paragraph 3);
3. within the framework of a so-called medical indication without a time limitation and without obligatory counseling according to § 219 (§ 218 a, Paragraph 2).

Arguments supporting the amendment and various prior commentaries reveal that the revision is meant to incorporate the embryopathic indication into the medical indication. This is especially intended to counteract the misunderstanding that a handicapped life enjoys less protection than a nonhandicapped. This misunderstanding arose even though the earlier ruling referred unambiguously to the question of whether the pregnant woman would become unreasonably burdened and did not pass judgement on the value of handicapped life.

The reform has led to some uncertainty and has raised the question of whether prenatal diagnosis is at all permissible under these conditions and whether termination of pregnancy after prenatal diagnosis is legal. Since the reform has been passed in the Federal Council and will probably become law within this year, resulting questions relevant to medical practice will be addressed in the following from the medical genetics point of view.

II. The medical indication is worded as follows (§ 218, Paragraph 2):
"Termination of pregnancy undertaken by a physician with the consent of the pregnant woman is not illegal if, taking into account the woman's present and future life circumstances, the termination is indicated according to medical knowledge in order to avoid endangering her life or to avoid the risk of serious impairment to her physical or mental health and the risk cannot be averted by any other reasonable method."

III. Basic changes of medical practice involving prenatal diagnosis will not be required by
the elimination of the embryopathic indication from § 218 a. In the future, prenatal diagnosis may still be made available to a pregnant woman concerned about her infant having an illness or a malformation whose risk can be clarified by this method. As in the past, counseling prior to prenatal diagnosis should make the woman aware that if the test result is not normal, she may face a difficult conflict situation, and it should inform her of the legal framework for terminating a pregnancy.

IV. The former embryopathic indication already centered on whether the pregnant woman would be unreasonably burdened, whereby it was uniformly accepted that the final decision in this respect rested with the woman. The embryopathic indication for termination of pregnancy applied when the requirements of § 218 a Paragraph 3 were met and the woman herself decided for termination because of the unreasonableness of her present and future situation. It has always been a misunderstanding to assume that the real reason behind the stated embryopathic indication for terminating pregnancy was that an infant's disease or developmental disorder had been judged "not worth living with." The reform eliminates special reference to a situation in which a disease, a handicap, or a risk thereof has been established for the infant. To this extent, misconceptions that handicapped life is less well protected than nonhandicapped will be prevented.

V. The reform does not mean that there are no longer indications for termination of pregnancy when the prenatal diagnosis is abnormal. The medical indication expressly provides that circumstances affecting the pregnant woman at present and in the future are to be considered. These include the results of a prenatal diagnosis, its present significance to the woman, what it might reveal about the infant's development, and the effect of the latter on the woman's future situation. Therefore, counseling sessions after a prenatal diagnosis must, as always, provide the woman with comprehensive information about the finding and its significance for the infant's development. When the prenatal diagnosis is not normal - independently of the type of finding and the severity of the infant's expected disease or handicap - indications for terminating pregnancy must depend exclusively on whether, according to medical knowledge, the pregnant woman's physical or mental health is at risk of becoming severely impaired. Here, the decisive criterion is still in evaluating whether alternative solutions to avoid endangering maternal health would be reasonable, about which the woman must also be counseled. As with the former embryopathic indication, the criterion of a reasonable burden particularly includes the woman's evaluation. Nevertheless, a sharply outlined task for the physician proceeds from the new rule, i.e., to determine whether the pregnant woman's health is at risk of becoming severely impaired now or in the future. This applies especially when the woman herself cannot assess how the various options may affect her health.

Since the physician has to consider exclusively the health of the mother, he/she is not obliged to advise a pregnant woman to terminate a pregnancy because of an abnormal test result.

Now as before, the physician must not yield to a request to terminate a pregnancy when a normal - but for the parents undesired - trait has been determined (see Statement on the Prenatal Diagnosis of Sex (Med Genetik 2(1990)8) and Statement on Prenatal Paternity
VI. As in the past, the reform does not stipulate a time limit for terminating pregnancy for medical indications. Therefore, as before, within the first 12 postconception weeks, there is a legal overlap of the medical indication and the time limit model ("Fristenregelung"). Previously, the embryopathic and medical indications overlapped in this manner up to the 22nd postconception week. With the reform, termination of pregnancy from the 13th postconception week on is unpunishable only in the framework of a medical indication. For the period after the 22nd postconception week there is no change from the previous ruling.

Therefore the reform provides no change from the previous practice for the period after the 22nd postconception week. As before, after the 22nd postconception week, prenatal diagnosis is indicated only if the results have direct consequences for improving the treatment of the woman or the infant or when the diagnosis is indispensable in preparing the woman for the birth of an ill or a handicapped child. As before, if interruption of pregnancy is medically indicated after the 22nd postconception week, the risk of the maternal illness must be weighed against the risk to the infant (usually viable at this time) due to premature birth.

VII. With a medical indication the reform does not provide for mandatory professional counseling according to § 219 ("pregnancy-conflict counseling") nor for a three-day prescribed interval between counseling and terminating the pregnancy. An earlier statement on the so-called embryopathic indication had also established that counseling according to § 219 should not be required inasmuch as a genetic counseling occurs, which according to numerous statements constitutes a binding framework for prenatal diagnosis (Med. Genetik 6(1994)187). Adherence to the several-day prescribed interval between counseling after prenatal diagnosis and termination of pregnancy has turned out to be reasonable and necessary for the woman and her partner to deal emotionally with their decision. Although such an interval is no longer required within the framework of medical indications, hasty decisions and actions - even when defensible for medical reasons - should be avoided. When termination is indicated, the positive aspects of waiting several days before it is actually carried out should be presented to the woman.

VIII. The reform does not require that a pregnant woman after a prenatal diagnosis with an abnormal result has to be routinely referred to another specialist to determine whether her physical or mental health is endangered and termination of pregnancy is medically indicated. Within the context of genetic prenatal diagnosis, the indications are best established by a medical geneticist (Facharzt für Humangenetik (a physician specialized in human genetics)) during genetic counseling. Since medical geneticists are required by further education regulations to be qualified in the psychological and ethical aspects of genetic counseling, all requirements listed in § 218 a, Paragraph 2 for the medical indication to terminate pregnancy in such a situation can be met (see the earlier Statement on the Embryopathic Indication, Med Genetik 6(1994)187).