

THE NEW SPANISH LAW: A MODEL FOR EUROPE?

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Synopsis—The new Spanish Law on Technologies for Assisted Reproduction hides, behind a progressive appearance, a total disregard for women's health coupled with their discriminatory legal treatment. The law endows the medical profession with control over women subjecting themselves to these techniques and is permissive regarding embryo research. We reject the law and suggest, as a strategy of resistance, ample information of women on the technologies' psychic and physical consequences with the aim of eroding demand.

Synopsis—La nueva Ley sobre Técnicas de Reproducción Asistida esconde, tras una apariencia progresista, una falta de consideración total por la salud de las mujeres que son sus objetos y usuarias principales, junto con un tratamiento legal discriminatorio. La ley además da amplios poderes a los médicos que aplican las Nuevas Técnicas de Reproducción y es permisiva sobre la experimentación y manipulación de embriones. Rechazamos esta ley y sugerimos, como estrategia de resistencia, información amplia de las mujeres sobre las consecuencias físicas y psíquicas de estas técnicas para así prevenir que se submetan a ellas.

New Reproductive Technologies are presented to the public as an advance in science in the service of women. Nevertheless, if one analyses these new technologies more closely, their implications and consequences turn out to be far removed from these alleged goals.

In effect, the presentation of the New Reproductive Technologies as methods which revolutionize the ancient patriarchal conception of the family is totally false when one examines the reasons given for their development. The primary justification consists in presenting infertility as an illness and in conceiving motherhood as a "compulsory" social function of women, in the fulfillment of which any kind of risk, sacrifice, or danger must be accepted.

It has been difficult enough to guarantee the rights of women in law. The recent Spanish law regulating the New Reproductive Technologies in that country constitutes a distinct step backward even with regard to these limited gains.

On the 20th of October of 1988 the Spanish Parliament approved the definitive text of the Law on Technologies for Assisted Reproduction which is the first law regulating the New Reproductive Technologies and which establishes the legal conditions under which Artificial Insemination (AI), In Vitro Fertilization with Embryo Transfer (IVFET), and Gamete Intrafallopian Transfer (GIFT) can be carried out.

This event is very important. For the first time since the passage of the new Spanish constitution in 1978, which penalizes discrimination on the basis of sex, laws are being introduced which apply directly to women. This is to say, it is now no longer a question of revising existing laws. Instead, the law regulating the New Reproductive Technologies was formulated against the background of the achieved acknowledgement of women as full citizens.

THE LEGISLATIVE PROCESS

The history of the Spanish Law on Technologies for Assisted Reproduction is revealing in itself. The way in which the definitive text came into being says a lot about its final content.

Initially, the Spanish Congress set up a special Commission composed of six deputies who received the mandate to study the subject, to gather information from experts in the field and to draw up a report which was to provide the necessary elements for the formulation of a bill on the New Reproductive Technologies. Only one of the members of the Commission itself was a woman and of the reports the Commission received from "experts" only three were authored by a single or a group of women.

In January 1986 a report containing a total of 155 recommendations regarding the regulation of the so-called assisted reproduction were made public as the result of the above inquiry. Among these recommendations, number 136 surprisingly exonerated physicians and researchers from any responsibilities that might derive from the application of these technologies. Other recommendations were of dubious constitutionality. Ten of the recommendations proposed that homosexual couples should not be authorized to make use of the New Reproductive Technologies; consent of the spouse was required in 46 recommendations and in another 97 recommendations maximum phenotypical and immunological similarity was demanded between the donor, the woman undergoing fertilization, and her husband; children born when the reproductive material was not in the uterus of their mother when the biological father died, were denied the rights enjoyed by legitimate children in 13 recommendations, etc.

On April 10th of 1986, the Special Commission's Report was presented to the plenary of Congress which passed it without hardly any debate. Following the Report's recommendations the socialist deputies in 1987 presented the first draft

of a law regulating the New Reproductive Technologies.

This bill, surprisingly contained a list of prohibited practices such as cloning, sex preselection, genetic engineering with undesired embryos, but omitted a definition of the sanctions to be applied to those infringing these prohibitions. It also contained a provision referring to 'single' women (i.e., women who are not married or who do not live in a stable, heterosexual union) who were required to fulfill special conditions in order to have access to the New Reproductive Technologies.

This draft was debated by another special Commission with powers for approval for only two days. That means, it was not submitted to a plenary session of the Congress and thus reached the Senate with only a few amendments (for example, a series of penalties for malpractice were introduced). During the passage of the bill through the Upper House some more substantial amendments were made. In particular the discriminatory treatment of single women was dropped and instead any adult woman able to work, independently of her marital status and her life style was declared suited to make use of the New Reproductive Technologies.

Again, in spite of the fact that what was at stake was the artificial creation of life, the debate was minimal and superficial. Not only did Parliament devote little effort and attention to the issue but in addition the public was provided with hardly any information on the wide ranging implications and possibilities of the New Reproductive Technologies and the ongoing legislative process.

THE APPROVED TEXT OF THE LAW

The Law on Technologies for Assisted Reproduction covers, in a generic and rather undifferentiated way, three reproductive technologies which are quite

distinct, namely In Vitro Fertilization with Embryo Transfer (IVFET), Artificial Insemination (AI), and Gamete Intrafallopian Transfer (GIFT). This lack of differentiation between reproductive technologies makes the treatment of the possible consequences even more difficult. Artificial insemination, for example, can achieve a pregnancy without coitus and does not carry the same physical and social risks as IVFET which involves health risks and psychological hardship for the woman at the same time opening the door to human genetic engineering.

THE GOALS OF THE LAW

The goals of the law set out in the introduction make reference to a number of aspects which ought to be looked into more closely. In the first place, it is argued that in Spain there are 700,000 married sterile couples of fertile age of whom between 10 to 13% could benefit from the New Reproductive Technologies. Implicitly the legislators suppose that all these couples want offspring, which is nonsense, or they are, as it were, thought to be obliged to reproduce. But elsewhere it is said that for only 40% of these couples IVFET is indicated. This means that the law is, in effect, made for 36,400 couples; and if we take into account that at most 12% of these couples, or rather women, will succeed in bearing a child, this figure drops further to 4,368 couples. In view of the grave deficiencies of the Spanish health system, this low demand for the New Reproductive Technologies should give food for thought.

Surprising is also the fact that for the first time a Spanish legal text distinguishes the different stages of gestation. Thus, the now so-called "pre-embryo," defined as such from the day of conception to day 14, is distinguished from the embryo which is understood to come into being on day 14 developing until the third month when the foetus begins its life in the uterus until birth

takes place. This allegedly scientific distinction is not an idle one since research and experimentation with and manipulation of pre-embryos becomes permissible and legal under this reconceptualization. The preservation of the embryos beyond day 14, however, is declared a very serious legal infringement.

The obligation to destroy embryos stands in direct contradiction with the Spanish law on abortion which is punitive and extremely restrictive. In Spain abortions are legal only in case of rape or for therapeutic or eugenic reasons. Still, the abortion law does not now constitute an obstacle for the scientific community to proceed with its endeavour to master the principles of life even if this implies an act (the destruction of embryos) which, were the agent a woman, would be criminalized and she be sentenced to jail.

THE WOMAN AS USER

Throughout the text of the law the absolute contempt and disregard for women is patent. The legislators do not appear to be aware that the principal objects of the New Reproductive Technologies are women's bodies. No satisfactory safeguards are contained in the law to protect women subjecting themselves to these technologies from physical and psychological harm.

The law is riddled with ambiguous terms which usually endow the physician with the power of decision making. Article 1.1, for example, establishes that the New Reproductive Technologies should be applied "when scientifically and clinically indicated." But the particular conditions for their use are not specified. Article 2a states that these technologies should be used "when there are reasonable chances of success." Still, the wording is so imprecise that it is not clear whether the 12% "success" rate we regard as reasonable in the case of IVFET, is the rate considered in the law. The same article also indicates that the New

Reproductive Technologies will only be applied when “no serious risk for the health of the woman is to be expected.” The word “serious” was added to the initial version because no scientist in the world can affirm with certainty that these technologies are free of any risk. According to the law it is now the physician who will decide whether the procedure is safe or not. Information for the woman undergoing “assisted fertilization” and advice is in the hands of the respective physician (Art. 2a). This also means that he will decide about the suitable number of pre-embryos to be transferred into the uterus to guarantee pregnancy (Art. 4). And it further means, that what really matters to the medical profession is the “success” rate rather than women’s health. Even in Article 19.2 medical responsibility is established only in the case of malpractice. In this way risks which are inherent to the technologies themselves are excluded.

As a consequence of its generally medico-technocratic philosophy (though the discrimination against the single woman has been eliminated) the law restricts the freedom even of the married woman since it demands the husband’s consent (Art. 6.3).

THE RIGHTS OF MEN

The rights of men, by contrast, are protected with subtle rigour. The donor of reproductive material, for example, is to remain anonymous. An infringement of this norm is penalized in the same terms as cloning or the creation of hybrids; the husband’s consent is required even though it is the wife who wishes to undergo an artificial fertilization. And article 6.5 establishes that there should be a phenotypical likeness between the donor, the woman, and her “environment” (presumably referring to her social context).

NEW DISCRIMINATIONS ON ACCOUNT OF BIRTH

The law, in general, grants children born by means of the New Reproductive Technologies the same rights as “natural” offspring. Still, there is an exception stipulated in article 9 which refers to those children whose biological fathers die when the latter’s reproductive material (whether in the form of semen or embryos) is not in the mothers’ uterus but deposited in a bank. In such instances the children are denied hereditary rights except when gestation has taken place within six months following the man’s death and he has established by will or other public document his wish that the child be regarded as his heir.

These children are discriminated against on account of their origin which is in contradiction with the new Spanish constitution which precludes any distinction between offspring in terms of hereditary rights.

The reason for this legal formulation seems to be the fear of men that women might squander the inheritance accumulated by fathers during their lifetime by giving birth to new claimants.

SURROGATE MOTHERHOOD

The new Law on Technologies for Assisted Reproduction declares null and void surrogate motherhood contracts independent of whether they imply payment or are for free in agreement with the earlier prohibition of such practices. But should there be surrogate motherhood, filiation will be determined by birth (i.e., the mother will always be the woman who has given birth).

This position seems to be adequate since it renders without effect possible practices which may give rise to some form of female reproductive slavery. Still, article 10 contains the following final paragraph: “the possible legal action by the biological father claiming paternity will be safeguarded.” In other words, the law authorizes the contrac-

ting man to petition a judge for a certificate of paternity. If the man succeeds and is recognized as the father, he could also take custody of the child. Moreover, this is not improbable if we bear in mind that this man will probably belong to a relatively better off class than the pregnant mother. In view of this, in practice, it will be of little value that the surrogate motherhood contract is declared null and void.

AN OPEN DOOR FOR GENETIC ENGINEERING

The law authorizes the intervention in "pre-embryos" for purposes of diagnosis and treatment while they are alive in order to determine their viability or to detect or treat diseases. The intervention in embryos or foetuses in the womb is equally permitted if this is for their well-being or may favour their development. However, information on the procedures to be used and the associated risks is required and the couple must give their consent in writing. The medical team will provide this information. The physicians once again enjoy full powers in this respect.

Another requirement made is that intervention in embryos or foetuses in the womb should only be carried out in cases of clearly diagnosed disease and reasonable certainty of success. The actual diseases which allow intervention and justify treatment are, however, not mentioned although a list of such is promised to be made public by Royal Decree in the space of six months. Finally, intervention should be carried out in an authorized centre.

Lastly, these interventions should not influence hereditary nonpathological characteristics which, in fact, allows intervention in the case of pathological traits.

INVESTIGATION AND EXPERIMENTATION WITH GAMETES AND "PREEMBRYOS"

As regards gametes, article 16 contains a list

of authorized practices although it concludes by granting ample powers for "any other investigation considered suitable for authorization or failing that by the National Multidisciplinary Commission." This means that official agencies may be entitled to grant such permission.

Article 14 which prohibits fertilizations between human and animal gametes ranging from tests on hamsters to dividing an ovum into two cells, contains, nonetheless, the qualification that those practices should be excluded from the prohibition "which count with the permission of the relevant official authority."

Investigation and experimentation is permitted with pre-embryos "in vitro" for pharmaceutical purposes if the "pre-embryos" are not viable. In the case of dead embryos the authorization is granted for "scientific" purposes. It should be noted here that aborted foetuses are also considered as nonviable pre-or embryos depending on the moment when the abortion occurred.

SANCTIONS

Because of enormous risks involved for society a whole range of aberrant practices made possible by genetic engineering, such as cloning, trading in pre-embryos or their use for cosmetics or similar purposes, sex preselection, etc. are defined as very grave infringements in the law. They carry an administrative sanction of a fine of a maximum of 100,000 pesetas being regulated by a civil law on medical practices. This means that these practices are not regarded as criminal offenses but instead a price is put on them which can very easily be paid by certain multinationals.

The infringements are enumerated and the same fine is stipulated for keeping fertilized ova alive beyond the 14th day or disclosing the anonymity of a donor, for creating hybrids or transferring gametes of different donors to a woman's uterus, or for utilizing genetic engineering for military purposes or for exterminating the human species.

But the undesirable social consequences of these technologies are not mentioned. Nothing is said, for example, about the possible uses of the mapping of the human genome, for instance, to exclude applicants for certain jobs, for life insurance policies, or for purposes of the general control of the population.

CONTROL MECHANISMS

Under this law IVFET programmes can be carried out without any qualms at authorized public or private centres. The investigation, experimentation, and intervention in gametes, pre-embryos, embryos, or foetuses will not be subject to any control beyond the authorization by a governmental (i.e., a political) agency.

The National Commission for Assisted Fertilization will be endowed with maximum powers. This Commission is supposed to be created within six months of the passage of the law. It will be constituted by representatives of the Government and of the Administration and of entities engaged in issues of fertility as well as of a wide range of social interests. In spite of the lack of definition of its constitution, it is clear, however, that women and their organizations have no place in it and hence no way of exerting control over the application of the law.

CONCLUSION

In view of the grave implications of the New Reproductive Technologies and

especially the far reaching consequences for women, we disagree with a law which fails to protect the rights of women as their privileged objects and users and which does not provide adequate means of control of and penalization for the technological aggressions which they can entail.

The law was passed with irresponsible haste which may have grave consequences for women, in particular, and for society in general. Neither adequate information has been provided nor has any public debate taken place. In an almost cryptic way a law has been formulated and passed which leaves us without defenses.

Our endeavours should now be directed at informing all women about the true meaning of the New Reproductive Technologies for them. If we as women do not yield our bodies, our wombs, and our ova, those who defend and want to implement these technologies will not be able to advance along the path which they have taken. If literally nobody goes to the clinics, it will be impossible to put into practice and further develop the New Reproductive Technologies.

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