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Diagnoza prenatalna a aborcja eugeniczna w Ustawie nr 2/2010 w prawie hiszpańskim

Streszczenie

Wstęp. Od czasu zalegalizowania aborcji w Hiszpanii w roku 1985 oraz wprowadzenia programów diagnostyki prenatalnej liczba zabiegów aborcji eugenicznej znacznie wzrosła. Zwiększenie częstości korzystania z technik diagnostyki prenatalnej doprowadziło do rozwoju nowej formy dyskryminacji opartej o kryterium wieku i stanu zdrowia, a odnoszącej się do grupy szczególnie wrażliwej: nienarodzonych chorych dzieci.

Cel. Celem pracy było poszukiwanie nowych rozwiązań prawnych w celu pełnej ochrony życia ludzkiego.

Materiał i metody. Dokonano przeglądu literatury dotyczącej aborcji eugenicznej oraz hiszpańskich rozwiązań prawnych.

Wyniki. Hiszpańska ustawa (2/2010) zezwala na aborcję płodu z powodu upośledzenia fizycznego lub psychicznego, gdy ciąża nie stanowi niebezpieczeństwa dla życia matki, co jest przejawem prawnej dyskryminacji ze względu na niedojrzałość lub niepełnosprawność. Płody upośledzone, do 22 tygodnia ciąży, według ustawy 2/2010 nie są traktowane tak jak pozostałe, ponieważ upośledzony płód otrzymuje mniejszą ochronę prawną.

Dyskusja. Istnieje potrzeba pogłębionej debaty etycznej wokół diagnostyki prenatalnej. Obecne ramy społeczno-polityczne w Hiszpanii pozwalają na oddzielenie celu terapeutycznego od celu eugenicznego diagnostyki prenatalnej, co powoduje ułatwienie dostępu do aborcji po stwierdzeniu pozytywnych wyników diagnostyki prenatalnej.

Wnioski. Hiszpańskie prawo zakłada prawo do aborcji do 14 tygodnia ciąży, ponieważ życie dziecka poczętego uzależnia od woli matki, tak jakby było ono jej częścią. Legalizacja aborcji eugenicznej jest przykładem naruszenia konstytucyjnej zasady niedyskryminacji oraz równego dostępu do opieki zdrowotnej niezależnie od stopnia niepełnosprawności danej osoby.

Słowa kluczowe: hiszpańska ustawa 2/2010, diagnostyka prenatalna, aborcja eugeniczna, niepełnosprawność.

Prenatal diagnosis and eugenic abortion in Spanish Law 2/2010

Abstract

Introduction. Since abortion was legalized in Spain in 1985, and official prenatal diagnosis programs implemented, eugenic abortion figures have raised yearly. The increase in use of prenatal diagnosis techniques has led, in turn, to the rise of a new form of discrimination, which is based on age and health conditions, against a vulnerable human group: disabled unborn.

Aim. To promote a new judicial framework for establishing a true regime for protecting human life right from the outset.

Material and methods. To achieve these goals a thorough review of the literature with regard to eugenic abortion and the Spanish Law has been undertaken.

Results. The Spanish Law 2/2010 allows one to abort a fetus that's physical or psychic differences were compatible with life and did not pose any danger to the mother, which would result in a clear case of legal discrimination, based on incapacity or a form of functional diversity or difference. The fetuses with disabilities (up to 22-week of pregnancy), in Law 2/2010, are not equal to others, since the disabled "nasciturus" receives less protection than the rest.

Discussion. A deep ethical debate regarding prenatal diagnosis is necessary. Nonetheless, the current socio-political framework in Spain makes the therapeutic use of prenatal diagnosis inseparable from its eugenic use, which, in turn, determines the bio sanitary framework when promoting abortion of disabled human beings and after a positive prenatal diagnosis.

Conclusions. The Spanish Law 2/2010 presumes the right to abortion until the 14th week of pregnancy because the "nasciturus" depends exclusively on the mother's will as if it were part of her. The legalization of eugenic abortion represents an open violation of the constitutional principle of non-discrimination and of equal access to health care independent of disability.

Keywords: Spanish Law 2/2010, prenatal diagnosis, eugenic abortion, disability.

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INTRODUCTION

Since abortion was legalized in Spain in 1985, and official prenatal diagnosis programs implemented, eugenic abortion figures have raised yearly. According to the Health Department's figures, the total number of abortions performed between 1985 and 2009 was 1,462,076; 41,833 were eugenic abortions. Over the last five years considered, 2005-2009, and due to mass access to prenatal screenings, the number of abortions practiced to avoid potential "risks to the fetus" was 15,350, which represents 36.7% of all eugenic abortions.

Specifically related to the subject of this paper is Organic Law 9/1985, from July 5th. Once the new writing of article 417 bis of the Penal Code [1] was ratified, this organic law legalized abortion before the twenty-second week of pregnancy when a fetal anomaly or disease is diagnosed.

Since then, scientific societies and health administrations have promoted and implemented institutional prenatal diagnostic screening programs that are strategically conceived to make abortion easier when it is due to fetal causes.

1. Prenatal Diagnosis

The International Federation of Gynecology and Obstetrics understands prenatal diagnosis, PD, as part of an abortion process: "A potential benefit of prenatal diagnosis is the rejection of the diseased conceptus when requested by the woman and permitted by the law. The legal position and the likely attitude of the woman to termination of pregnancy should be ascertained in advance" [2].

Likewise, the Spanish Society of Gynaecology and Obstetrics, SEGO, states that: "Prenatal diagnosis allows for fetal treatment and voluntary interruption of pregnancy when medical science cannot offer more adequate solutions" [3].

As it may be observed, for these national and international health policy institutions, as well as for scientific societies, making abortion easier is an ethical premise under which PD must always be available. This means that individual medical assistants are not able to separate PD's therapeutic use from its eugenic use.

Indeed, prenatal diagnosis is conceived with a double intention, and even if it has a therapeutic use, or it helps in assisting a newborn baby with health problems, but these uses is unfailingly related to a eugenic one. This is the case to such a large degree that the WHO acknowledges doctors who oppose abortion the right to not participate in prenatal diagnosis, even if it recommends its application in all countries [4].

In all, the only ethical intervention in the fetus, whether it is diagnostic or therapeutic, is the one that benefits the fetus itself [5]. Now, it is also necessary to clarify that when this type of abortions are recommended, it is not due to medical causes, but to other kind (social, economic, family-related, health-policy-related). In other words, the elimination of the fetal patient is actually not a therapy that will benefit the fetus. Nowadays, eugenic abortion translates into approving, as a medical act, the destruction of certain human lives. The Spanish Medical College Organization has proved to share this mentality by suppressing article 24.1 from its previous Deontological Code, which stated that "an ill human embryo fetus must be treated according to the same ethical guidelines, including its parents' informed consent, that apply to all other patients" and introducing a new article (7.1) which considers a medical act legal, and abortion, a medical act, thus redefining what a medical act is against its own doctrine without any kind of justification [6].

2. Law 2/2010

The Spanish abortion law reform, Organic Law 2/2010 [7] about Sexual and Reproductive Health and Voluntary Interruption of Pregnancy, allows the doctor to terminate the pregnancy, within the first fourteen weeks:

Indeed, the Law allows abortion according to the wish of the pregnant woman within the first fourteen weeks of gestation without the need to specify any reason, article 14, that is, abortion is permitted according to the mother's wish, "woman's wish", only when the time requisite is met (within the first fourteen week of gestation) and another formal (consisting of the mother's informed consent and once three days have passed).

The Spanish abortion law reform allows abortion that occur within a determined period of legally fixed time, without the requirement for an objective cause or a specific objective cause that would allow, at least formally, the death of the unborn child.

Exceptionally, up to the twenty second week, the mother can abort the pregnancy only in two circumstances, article 15: if the pregnant woman's life or health were at risk (if the fetus puts the physical life of the mother at risk referred to as "therapeutic abortion) or if the abortion were caused by anomalies in the fetus, the latter being referred to as "eugenic abortion".

The Law allows eugenic abortion, or abortion due to functional diversity. Indeed, the 2010 Law, like the 1985 Law, allows eugenic abortion within the first 22 weeks of gestation, since it is considered that after this period the fetus is viable (in the sense that it can further develop independently of the mother). Nonetheless, abortion is allowed with no time limit when the fetus shows serious anomalies incompatible with life, or with an extremely serious or incurable disease, arts. 15b and 15c, respectively. In both cases, a medical diagnosis of the disease is required: in the first case, from two doctors, while in the second case, from one doctor or from a clinical committee, depending on the case.

Now, the above-mentioned article of Law 2/2010 is not written in the same terms as the third assumption of the 1985 Law. In the latter:

1. It was only possible to practice an abortion when the existence of serious anomalies was prognosticated, but not in an advanced stage of pregnancy in which such anomalies, or an extremely serious an incurable disease, had been detected.
2. Abortion was not considered legal in any case after the 22-week-period of gestation;
3. A report from at least two specialists was always required.

On the other hand, article 15 of Law 2/2010 allows abortion of a fetus that will be born alive, but with a very serious and incurable disease that has already been detected. At any rate, why does a human life that is going to live and survive after birth not deserve to be protected, even if it suffers

from a very serious disease? Are this article and article 14 compatible with the Constitutional Court's constant and repeated doctrine on the application of article 15 of the Spanish Constitution to incipient human life? In particular, are this article and article 14 compatible with the Constitutional Court's interpretation in Judgment 53/1985, in which the life of the unborn child is regarded as a legally protected good?

With reference to the Constitutional Court in Judgment 53/1985, using the benchmark of the interpretation of the Constitutional Court regarding the application of article 15 of the Spanish Constitution to the beginning of human life and as a legal basis for the Constitutional Court in Judgment 116/1999 and 212/1996, establishes a protection regime for the nasciturus's life. The aforementioned judgment prescribes that human life is "a development that begins with gestation (…) The pregnancy has generated "tertium" existentially distinct from the mother (…) Life is a reality from the beginning of pregnancy", Legal Basis 5 [8].

The nasciturus's life, according to the Constitutional Court's judgment, constitutes a legal good to protect: "The life of the unborn child, as it embodies a fundamental value – the human life – guaranteed in article 15 of the Constitution, is a legal good for which protection is provided therein constitutional basis", Legal Basis 5c [9].

Then, for the Judgment, the nasciturus is not subject to the right to life, but a constitutionally protected legal good, Legal Basis 7. In other words, the nasciturus does not hold the fundamental right to life, but the nasciturus's life is a constitutionally protected good. In other words, the nasciturus does not hold the fundamental right to life, but the nasciturus's life is a constitutionally protected good.

However, the life of the unborn child as a good constitutionally protected requires the State to: "The positive obligation to contribute to the realization of these rights, and the values it represents", Legal Basis 4 [8].

These obligations are expressed further down: "Based on the considerations in the legal 4, this protection that the Constitution implies exempting the unborn child to the State generally two obligations: to refrain from interrupting or impeding the natural process of pregnancy, and to establish a legal system for the defense of life involving an effective protection of the same and that, given the fundamental nature of life, also include, as a final guarantee criminal laws. This does not mean that such protection is to take absolute, for, as in connection with all goods and constitutionally recognized rights, and in certain cases may even be subject to limitations", Legal Basis 7 [9].

Therefore, the Judgment allows that the nasciturus's life constitute a legal good whose protection is found in said fundamental constitutional precept, but negates the ownership of said rights in that it didn't yet possess legal personality that, according to the provision of the Spanish Civil Code, was affected by virtue of being born alive, article 29, once completely detached from the birth mother, article 30.

According to the Constitutional Court's judgment, the nasciturus's life constitutes a legal good that is to be protected Legal Basis 7. Thus, it may be stated that in abortion the nasciturus's life as a legal good comes into conflict with rights related to constitutional values, such as that of a woman's life and dignity. None of these two goods can be considered absolute; hence, deliberation is in order.

Consequently, and according to the above-mentioned judgment, the absolute defenselessness of the nasciturus under Law 2/2010 is not compatible with the right to life, as provided for in the Spanish Constitution. In other words, a woman's rights cannot have absolute priority over the nasciturus's life, given that such advantage means, in any case, the disappearance of a good that is constitutionally protected, as well as the embodiment of a core value of the Constitution.

If the Constitutional Court's doctrine protects life as a legal good, it seems contradictory not to protect it during a stage of the process that is not only necessary for life outside the mother's womb, but also a relevant moment of such life's development. Therefore, this is the constitutional frame within which an effective protection of the human embryo and fetus with a disability or disease should be articulated.

Nonetheless, it should be noted that constitutional rights of the human embryo should be seen as "legal good", half way between a human being and being treated as an object, in my opinion, supposes the beginning of the progressive legal vulnerability of the life of the embryo and fetus in Spanish legislation [10]. If it is legally accepted as "good", all in all, materially or not, that is susceptible to appropriation and, therefore, to legal-economic traffic, the nasciturus's life then has its "legitimate owner" at its disposal (mother, society, doctor, state). With this, the nasciturus's life then depends on the wish of others, thus transforming itself into a legal business object. In any case, the nasciturus's life is in the hands of the legislator that is the person who draws up the Spanish legal system, who will decide if the nasciturus's life is or is not protectable, in each case.

In short, from the Constitutional Court's Judgment it is accepted that the nasciturus's life constitutes a legal good, but denies ownership of fundamental right in that it does not yet possess legal personality. By not recognizing legal personality, these are not subject to rights but are objects, similar to things, legally protected. In this way, in the face of conflict or weighting of interests between a subject of rights (the wish of the mother, abort and research on embryos for therapeutic purposes) and an "object" (the embryo or fetus) that lacks those rights, the balance always sways towards to the former.

The Civil Code recognizes the nasciturus, conceived unborn embryo ("nondum natus"), certain favorable effects and that, at birth, consolidates the rights that it acquired eventually once conceived, as long as it is born.

But, what are the favorable effects? Among those favorable effects that should be recognized and tutelary to the nasciturus, one should differentiate between the effects derived from fundamental human rights from those others characterized by economical patronage or merely civil or political, born from the positive the legal system or legal business. The first should recognize the nasciturus without the slightest restriction from conception, given its human dignity, paying special attention to the basic human right to life [11]. Although, the rights based in a positive legal system, would be sufficient recognition as indicated in the two aforementioned articles of Civil Code.

In this way one would achieve, on the one hand, respect to the dignity of the new person in its first phase of existence

and would protect its fundamental human rights, and, on the other hand, protect the security of the economic-patrimonial.

But we continue with the theme of this work: the legal good. As soon as it becomes evident that the embryo or fetus is a legal good constitutionally protected by article 15 of the Spanish Constitution, the rightful protection of the embryo or fetus cannot be left to the discretion of the pregnant woman.

For this reason, in my view, pursuant to Law 2/2010 it is acknowledged that it might be the case that there is no genuine conflicting objective situation for the pregnant woman. In other words, there may be cases without a justifiable element or motive. This Law enables the pregnant woman to decide at her discretion how she wishes to proceed. Put another way, the 2010 law extends to situations of real objective conflict for the woman, but it could also extend to cases in which objectively and pragmatically there is no true objective conflict, or cases in which there exist only reasons borne of convenience or usefulness in which abortion could also be possible should the woman so decide [8].

Consequently, the Law is solely in favor of the woman and fails to recognize any legal good worthy of being protected. That is, it fails to acknowledge the embryo or fetus as a legal good constitutionally protected, something completely contrary to the Spanish Constitutional Court's judgment 53/1985. Article 14 of the Law 2/2010 assumes the acknowledgement of a freedom to choose to abort until the 14th week of pregnancy because, until that time, the continuity of human life of the unborn baby depends entirely on the mother does will [12].

Indeed, Law 2/2010, in respect of the human life of the fetus, the mother's will is always given priority, as if the issue related to a part of herself, in a way that it is not necessary for her to have any reason or circumstance which justifies her decision to end the life of her unborn child. In this new assumption on abortion, the State renounces the protection of the life of the nasciturus, especially as regards the uncertainty surrounding the legal position relating to that human life during this period of time, and abandons its fate to that decided by the mother with no other guarantee than the note that information has been passed to her, remaining unread, and that the fetus has not yet reached the fourteen weeks in the womb.

On the other hand, in Judgment 53/1985, the Constitutional Court raises the issue of the Constitution's compatibility with the case of eugenic abortion referred to in Court Consideration 11, section c):

"The no. 3 of the article in question contains the indication of the probable existence of severe physical or mental defects in the fetus. The basis of this assumption, which includes real borderline cases, is in the consideration that the uses of criminal sanctions entail the imposition of conduct that exceeds what is normally required of the mother and family. This statement takes into account the exceptional situation in which they find the parents, especially the mother, compounded in many cases by the failure of state and social benefits that contribute significantly to alleviate the welfare aspect of the situation, and eliminate insecurity that inevitably has to trouble parents about the fate of the affected by the severe defect in the event that they survive.

On this basis and the considerations that we have previously made in connection with the enforcement of behavior, we understand that this course is not unconstitutional. As for progress on the implementation of the policy and the widespread detention and intensity of welfare benefits that are inherent in the social state (in the line initiated by the Law of April 7, 1982 on disabled people, including the handicapped deeply, and supplementary provisions) will contribute decisively to avoid the situation that is in the basis of decriminalization" [13].

Now, overcoming this deficiency and eliminating the parents' insecurity about the fate of a fetus affected by a serious malformation – in case it manages to survive – is, in itself, the State's responsibility. So far, the State has not fulfilled its obligation regarding the elimination of social, economic, political, and legal barriers, so that persons with disabilities can exercise their rights under equal conditions in the bosom of an integrating and inclusive society where human diversity is respected and valued. For that reason, this situation cannot become a justification to discriminate fetuses with functional diversity, but rather, to demand from the State the fulfillment of its obligation to show respect for the dignity of all human beings, as stated in article 10 of the Spanish Constitution.

In all, according to Law 2/2010, physical, psychic, mental or sensory anomalies can be the specific cause of abortion, (for example, specific types of birth blindness or deafness; the lack of upper or lower limbs) between week 14 and 22 (which is not possible if such functional diversity does not exist) and beyond week 22 if such functional diversity can be described as an "extremely serious and incurable disease at the moment of diagnosis", for example, in case Down Syndrome is detected in the fetus.

The issue raised by these cases in Law 2/2010 is their compatibility with the right to no discrimination, the right to life, and the positive obligations that are to be demanded from the Spanish State, according to the Constitution, in defense of people with functional diversity.

From the outset, the nasciturus is protected as a legal good by article 15 of the Constitution without holding the fundamental right to life. Thus, by the inherent dignity that should be acknowledged to the nasciturus, constitutional protection within the frame of the other fundamental rights and liberties established in the Spanish Constitution should also be acknowledged to the nasciturus, even if it is not a holder of those rights and liberties. Even more so, if we consider that dignity is the first of the constitutional values established in article 10, which introduces Title One of the Constitution regarding fundamental rights and liberties. This fact explains, for instance, the consideration of the nasciturus as holder of succession rights.

In this sense, we believe the nasciturus is protected by article 14 of the Spanish Constitution, even if only a person holds the right to no discrimination, according to such article.

Therefore, the differentiation made in article 15 of Organic Law 2/2010 between fetuses in which "a risk of serious anomalies exists", article 15b, or in which "an extremely serious and incurable disease" is detected "at the moment of diagnosis", article 15c, has no objective or reasonable justification. Thus, the use of these differentiating elements should

be regarded as arbitrary and lacking a constitutionally acceptable base.

Finally, the Law from 2010 ties in abortion with the sexual and reproductive rights of women. In other words, that the abortion should be recognized as a personal and intimate right of all women irrespective of age; that abortion be considered a right, protected by the state, which form part of the sexual and reproductive health of the woman.

Indeed, the fundamental modification introduced by the Organic Law 2/1010 is based on the fact that if during the first 14 weeks the pregnancy can be interrupted without any social responsibility, it is because abortion is defended as a right of the female autonomy, article 3.

Against this stance, the Report produced by the Spanish Council of State, dated 17 September 2009, which we referred to earlier, underlined the fact that abortion is not a right, not even when the State renounces it's being punished on certain grounds or in respect of the typical penal sanctions it brings. There is no right to create a bad objective: the destruction of the unborn child's life. There is no "right" to abortion which is unknown within our edicts or laws, which are susceptible to being taken as a model.

The Legal Council pointed to this in its Report on the Draft Bill:

1. "The 'right to choose', as such, on termination of pregnancy, is not expressly recognized in international treaties cited in the Explanatory Memorandum. On the contrary, it must be emphasized clarity of the principles of international law concerning human rights that protect the life of the unborn".
2. "The majority legislative trend in the States of the European Union does not support the system of limits on abortion. Among the States that support a system of deadlines are several states have recently joined the European Union in the last two enlargements (Estonia, Latvia, Lithuania, Bulgaria, Slovenia) with abortion legislation of undemocratic regimes, clearly pro-choice based on ideological and demographic reasons, incompatible with fundamental rights and where there are a high percentage of abortions as reflecting the use of abortion as a contraceptive method, absolutely reprehensible practice from any point of view.
3. "The Bill does not comply with the duty to establish a legal system for the protection of the unborn child to be taken as a real effective protection of the same. Termination of pregnancy at the request of women during the first 14 weeks of gestation without the support of other causes, will nothing less than the sacrifice of the unborn child. The unborn child has human life than the mother" [14].

In our opinion, Law 2/2010 does not provide for a system of guarantees which can avoid the absolute failure to protect the life of an embryo, nor the conditions in which a woman can take an informed and free decision, trampled upon by the requirements of public information and a period of reflection, article 14 a.b, and they do not adequately protect the embryo or foetus.

As has already been referenced, the current Law on abortion in Spain would not conform to the Constitutional Jurisprudence because, according to the judgments 53/1985 [15], 212/1996 [16] and 116/1999 [17], the law does not offer the requisite protection to the nasciturus that it required by the Constitutional Court's Jurisprudence.

3. The Organic Law 2/2010 and eugenic abortion

In addition to the incompatibility of Law 2/2010 with articles 14 and 15 of the Spanish Constitution, many have pointed out the existing contradiction between the case of eugenic abortion in article 15 off Law 2/2010 and the Spanish Constitution, in the light of the 2006 Convention on the Rights of Persons with Disabilities and other International Human Rights Treaties ratified by Spain. Specifically:

1. The Convention on the Rights of Persons with Disabilities: "State Parties shall prohibit all discrimination on the basis of disability and guarantee equal and effective legal protection against discrimination on all ground to persons with disabilities", article 5. Later it is said: "State Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure that persons with disabilities effectively enjoy it on an equal basis with others", article 10 [18]. From these articles we can gather that the nascituri with disabilities should also have such constitutional protection "on an equal basis with others". Understanding something else represents a violation of the collective dignity of persons with disabilities, for we believe that such disability can be the cause of differentiation in the balance among constitutionally protected values, which goes against the institutional dimension of equality referred to in article 14 of the Constitution.
2. The Charter of Fundamental Rights of the European Union, on 7 December 2000, states that: "Any discrimination based on the grounds of sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited", article 21.1.
3. The International Covenant on Civil and Political Rights, on 23 March 1976, states that: "All persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", article 26 [19]. Thus, the Covenant states as well that: "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent", article 5.2 [20].
4. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No 177 of the Council of Europe, on 4 November 2000, states that: "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other

opinion, national or social origin, association with a national minority, property, birth or other status. 2 No one shall be discriminated against by any public authority on any ground, such as those mentioned in paragraph 1", article 1 [21].

To sum up this legislation of the Spanish legal system, it could be stated that inequality of treatment according to functional diversity becomes legal through the acknowledgement of eugenic abortion of Law 2/2010, which establishes that the level of protection of the nasciturus's life may be lowered when there is a risk of severe functional diversity. This also represents an open violation of the non-discrimination principle in the light of the above-mentioned treaties.

On the other hand, persons with functional diversity, both at the national and international level, have expressed their rejection of eugenic abortion, since they consider it a discrimination and underestimation of the dignity of people with functional diversity.

In Spain, this group maintains that Law 2/2010, by allowing a kind of abortion based on the unborn child's singular characteristic of disability, defends the idea that certain people (persons with disabilities) are not equal to others, since the birth expectations of a nasciturus with disabilities are protected to a lesser extent.

Indeed, the current writing of article 15 b) and c) configures a discriminatory situation for certain human beings, based on their personal circumstances, and specifically, on the possibility or reality of suffering from serious diseases or anomalies.

In particular, and in relation to the second case of abortion "if there were serious anomalies in the fetus", the Spanish Committee of Representatives of Persons with Disabilities (CERMI), stated on February 18th, 2009 that: "Defending the so-called eugenic abortion, which is practiced to prevent the birth of a person with disabilities, is the equivalent of defending the idea that the life of a person with disabilities is inferior in value to that of a person without disabilities and, therefore, a less favorable treatment is allowed" [22].

In a report presented in 2009, this Committee claimed that: "this regulation (the one that legalizes eugenic abortion) implicitly considers the life of a disabled person less valuable than that of a little girl or boy without disabilities, since it does not equally protect the development of the nasciturus" [23].

A representative of the group of persons with disabilities declared the following:

"The principles of the United Nations Convention oppose the approval of the so-called eugenic abortion, which is practiced to prevent the birth of a disabled person. According to such principles, eugenic abortion is a case of discrimination based on the presumption that the value of a disabled person's life is inferior to that of a person without disabilities, and therefore, a less favorable treatment is allowed. Over the last few years, the European Disability Forum, to which the CERMI belongs, and other organizations that represent persons with disabilities in several parts of the world have declared themselves against eugenic abortion, since they consider it discriminatory. The 2006 UN Convention echoed such vision. Legislation as regards the interruption of pregnancy by trimester, in which a case of disability is not relevant, would not go against the Convention" [24].

A few months later, in January of 2010, the CERMI presented its amendment proposals to the bill on abortion, in which the following was stated, among other things: "Any legislation that allows eugenic abortion, the one that is practiced to prevent the birth of a little boy or girl with disabilities, and that implicitly considers the life of a disabled person less valuable than that of a person without disabilities, is discriminatory from a perspective that demands human rights and disabilities, and that has been established as a legally binding rule at the national and international level by the Convention on the Rights of Persons with Disabilities. The lives of persons with disabilities have the same dignity and value as any other, and they must be protected by the legal system in the same conditions as other lives, and as far as legal protection is allowed" [25].

In the same line, the organizations that represent persons with disabilities have also expressed their rejection of eugenic abortion at the international level on repeated occasions:

a) According to the European Disability Forum, EDF: "Any form of discrimination against disabled people should be outlawed, including any legislation on abortion" [26].
b) Disabled Peoples' International, DPI, Europe demands:
   "1. An absolute prohibition of compulsory genetic testing and of the pressure on women to eliminate – at any stage in the reproductive process- unborn children, who, it is considered, may become disabled.
   2. That disabled people have assistance to live – not assistance to die.
   3. That having a disabled child does not become a special legal consideration for abortion.
   4. That no demarcation lines are drawn regarding types of disability or their severity. This creates hierarchies and leads to increased discrimination of disabled people in general" [27].

CONCLUSIONS

1. Law 2/2010 presumes the acknowledgement of a right to abortion until the 14th week of labor because the nasciturus causes itself to depend exclusively on the mother's will as if it were part of her. With Law 2/2010 the supposed protection of the embryo recognized by the constitutional jurisprudence subjugates itself to the will of the mother as an absolute right.

   On account of this, the need becomes evident for a new judicial framework for establishing a true regime for protecting human life right from the outset. It is indispensable that this framework should capture this sensitivity for the weak which should be at the forefront of the Law, that is to say, that it centers its medical actions with respect for life and with regard to the dignity and rights of human beings.

   The physicality, or corporality, of the embryo and fetus demonstrates the presence of a being, not of a mere 'something'. The embryo's natural state, its corporality, the fundamental process of which is to continue being in existence, evolves by way of a fundamental continuity until its birth, in other words, it continues to evolve from a starting point of being already a human being. In effect, the human embryo is not the first step toward being a human but a human being already taking his or her first steps.

Legal protection for the corporality of a fragile human being, one distinct to that of the mother who does not own the embryo's corporality, gives substance and meaning to the term 'dignity'. Only since the protection and care of the live human embryo is meaning given to the responsibility and protection of the human dignity as an incontrovertible principal for democratic societies.

2. The Law allows one to abort a fetus that's physical or psychic differences were compatible with life and did not pose any danger to the mother, which would result in a clear case of legal discrimination, based on incapacity or a form of functional diversity or difference. Less protection would be afforded to a protectable legal good by the mere fact of having a disability or functional difference.
3. The increase in use of prenatal diagnosis techniques has led, in turn, to the rise of a new form of discrimination, which is based on age and health conditions, against a vulnerable human group: disabled nascituri.

   Unfortunately, an adequate use of prenatal diagnosis has been appropriated for eugenic purposes. An adequate use would be one that is aimed at pregnant women who are in a situation of high risk, from a medical and ethical point of view, without compromising the integrity of the fetus. Although, a negative ethical evaluation of such diagnosis would involve a eugenic purpose and establish a connection between prenatal diagnosis and eugenic abortion, in case of a positive result. This second type of diagnosis would reinforce the image of the disabled person as an individual that has to be excluded from society [28].

   A deep ethical debate regarding prenatal diagnosis is necessary. Nonetheless, and precisely due to Law 2/2010, the current socio-political framework in Spain makes the therapeutic use of prenatal diagnosis inseparable from its eugenic use, which, in turn, determines the bio sanitary framework when promoting abortion of disabled human beings and after a positive prenatal diagnosis.
4. The acknowledgement of eugenic abortion stipulated in sections b) and c) of article 15 of Law 2/2010 represents, in our opinion, an open violation of the constitutional principle of no discrimination, and of inequality of treatment based on functional diversity. This interpretation was made by the Spanish Constitutional Court itself, and supported by the International Treaties that Spain ratified on the matter. Following article 10.2 of the Constitution, such treaties must be used to interpret the fundamental rights and liberties established in the Constitution.

   Indeed, Law 2/2010 sends the following message: persons with disabilities are not equal to others, since the disabled nasciturus receives less protection than the rest. This law discriminates against 14-week-fetuses, or even against those who are beyond the 22-week period, based on their functional diversity. Certainly, preventing the birth of a baby with anomalies is clearly discriminatory, for it confers less value to a disabled person's life than to others.

   Therefore, Law 2/2010 implies a diversity of treatment that should be considered arbitrary, unjustified and not reasonable, since it is absolutely prohibited by the Convention on the Rights of Persons with Disabilities, article 5; as much as by the Charter of Fundamental Rights of the European Union, article 21.1; the International Covenant on Civil and Political Rights, article 2.1; the Convention for the Protection of Human Rights and Fundamental Freedoms, article 14 and, consequently, the Spanish Constitution when interpreting the application of article 15, which is in accordance with such Treaties.

   It becomes necessary to approve a legislation in which human beings with functional diversity, whether they are considered a person in the legal system or not, are not worthy of a lower protection standard than those who do not have such functional diversity. The repeal of Law 2/2010 is called for here with the objective of eliminating those laws, regulations, customs and practices that constitute discrimination, and preventing the infringement of the dignity, inherent values, and equal and inalienable rights of all members of the human family, independently of their differences (article 4.1b, "To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities") [18]. To this end, public authorities must offer all the necessary support to human beings with functional diversity, so that they can deal with their situation of disability or disease.

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