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Original Scientific Paper
DOI: 10.47152/ns2024.24

STERILIZATION AND DISABILITY: FROM ATYPICALITY TO CRIMINALIZATION

Physical integrity is a right recognized in various bills of rights, as well as in constitutional and political texts. A right considered absolute and not subject to limitation, not even by the will of the person holding it, bodily affection is only accepted in those cases authorized by law.

In Spain, the impact on physical integrity in cases of voluntary sterilization, organ donation and sex change operations are decriminalized. This decriminalization was also extended to persons with disabilities in 1995. However, social criticism has led to its repeal in 2020.

This paper seeks to analyze the regulations related to the sterilization of judicially incapacitated people with disabilities in Spain, its origin and evolution, and to make a comparative analysis of the regulation in different European countries. The aim is to understand the changes that have occurred in the different legislations and the current legal framework.

Keywords: *dignity, human rights, body integrity, sterilization, disable person.*

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1. Introduction

Physical integrity is a right recognized in various bills of rights, as well as in constitutional and political texts. It is considered an absolute right, not subject to limitation, not even by the will of the person holding it. Bodily affectation is only accepted in cases authorized by law. In Spain, the impact on physical integrity in cases of voluntary sterilization, organ donation, and sex change operations is decriminalized.

This decriminalization was also extended to persons with disabilities. The 1995 reform of the Criminal Law included Article 428, which addressed the sterilization of an incapacitated person, stating that “the sterilization of an incapacitated person suffering from a serious mental deficiency shall not be punishable” provided that “it has been authorized by a judge at the request of the legal representative of the incapacitated person, after hearing the opinion of two specialists, the Public Prosecutor’s Office, and after an examination of the incapacitated person.” Although this was considered a measure in accordance with the Constitution and international declarations of rights by the Constitutional Court, social criticism led to its repeal in 2020 through the approval of Organic Law 2/2020 of December 16, 2020, which amended the Criminal Law to eradicate forced or non-consensual sterilization of judicially incapacitated persons with disabilities.

This paper seeks to analyze the regulations related to the sterilization of judicially incapacitated people with disabilities in Spain, including their origin and evolution, and to provide a comparative analysis of the regulations in different European countries. The aim is to understand the changes that have occurred in the legislation and the social and anthropological motivations underlying them.

2. The sterilization of an incapable person suffering from a serious mental deficiency: the Spanish case

The Spanish regulations regarding the sterilization of an incapacitated person suffering from a serious mental deficiency have undergone profound changes. To understand these changes, we examine the regulations, judicial decisions, and parliamentary debates of recent years.

The 1973 Penal Code regulated matters relating to physical integrity in Chapter IV, entitled “Injuries.” Article 428 stated: “The penalties indicated in the previous chapter shall be imposed in their respective cases even if there is consent from the injured party.”¹

In 1983, during the Second Legislature, the Socialist Government introduced a bill for the Urgent and Partial Reform of the Penal Code. In it, although the good of the integrity of the person continues to be affirmed as an absolute right² the bill, for the first time, included a cause of atypicality “in the cases of organ transplantation carried out in accordance with the provisions of the Law, sterilizations and transsexual surgery carried out by a doctor”. Provided that such consent is “valid, free, conscious, and expressly given”. Although consent will not be valid, according to law, when “it has been obtained vitiatedly, or by means of a price or reward, or if the grantor is a minor or incapable” (Bolentín Oficial del Estado, 1983).

During the III Legislature, the bill presented by the Socialist Government to update the Penal Code was approved. Article six of that law added to Article 428 a ground for atypicality regarding the sterilization of an incapacitated person, stating that “the sterilization of an incapacitated person suffering from a serious mental deficiency shall not be punishable,” provided that “it has been authorized by a judge at the request of the legal representative of the incapacitated person, after hearing the opinion of two specialists, the Public Prosecutor’s Office, and after examining the incapacitated person.”

Finally, in the final vote on the bill, out of 254 votes cast, 205 were in favor, 3 were against, and there were 46 abstentions (Diario de Sesiones del Congreso de los Diputados, 1989, pp. 11324 y ss.).

In July 1994, the Constitutional Court ruled in its judgment 215/1994 on the issue under study. In this judgment, the Plenary resolved the question of unconstitutionality 1.415/1992 in relation to the modification introduced by Article 6 of Organic Law 3/1989

¹ Own translation of the official texts cited in the document from Spanish to English.

² Article Six: “The penalties indicated in the preceding chapter shall be imposed in their respective cases even if there is consent of the injured party.”

The Plenary of the Court begins by considering sterilization as an act protected by fundamental rights, as the legislation recognizes “the self-determination of the person regarding their physical integrity in this case and in others contemplated in Article 428 of the Criminal Code - organ transplantation in accordance with the provisions of the law and transsexual surgery.” It does not imply inhuman or degrading treatment because “it is not intended to humiliate or debase, nor does its medical practice involve any inhuman or degrading treatment.” Consequently, since incapacitated persons enjoy the same rights, “the convenience that this possibility granted to capable persons may be extended, exclusively for their benefit, to those who, due to serious mental illness, are not capable of giving the free consent required by the law.”

The question, therefore, lies in the validity of consent, which, “by definition, cannot be given by someone who suffers from a serious mental deficiency. Hence, the legal provision requires authorization that, at the request of the legal representatives of the disabled person, the judge must grant or refuse.” This is in accordance with the law, as otherwise, the incapacitated person would be denied “any medical treatment - and especially an ablative surgical intervention - essential for life or simply beneficial to the health of the severely mentally handicapped. Sterilization itself may be medically indicated for these purposes.”

In addition, the Court considers that “the sterilization of the incapacitated person, of course always subject to the requirements and guarantees already examined that Article 428 of the Penal Code imposes for judicial authorization,” is necessary to respect their fundamental rights since “it allows them not to be subjected to constant surveillance that could be contrary to their dignity (Article 10.1 of the Constitution) and their moral integrity (Article 15.1 of the Constitution).” Additionally, it makes “possible the exercise of their sexuality” to the extent of their abilities, “without the risk of possible procreation” - pregnancy and paternity - “the consequences of which they cannot foresee or consciously assume due to their mental illness.” For all these reasons, the Court declares the contested rule constitutional.

During the Fifth Legislature (1993-1996), the reform of the Penal Code in Spain was approved through an Organic Law. Title III, entitled “Injuries,” regulates criminal offenses related to violations of the right to physical integrity (Article 15 of the 1978 Constitution). Article 156 establishes that:

“However, the sterilization of an incapacitated person suffering from a serious mental deficiency shall not be punishable when the sterilization has been authorized by a judge, either in the same incapacitation procedure or in a voluntary jurisdiction proceeding processed after that procedure, at the request of the legal representative of the incapacitated person, after hearing the opinion of two specialists, the Public Prosecutor’s Office, and after examining the incapacitated person.”

In 2006, the Convention on the Rights of Persons with Disabilities was approved. Spain ratified it in April 2008. Article 23, entitled “Respect for the home and family,” states:

States Parties shall take effective and appropriate measures to put an end to discrimination against persons with disabilities in all matters relating to marriage, family, parenthood, and personal relations, and to ensure that persons with disabilities are on an equal basis with others.

The following sections establish that such measures must aim to:

- a) Recognize the right of all persons with disabilities of marriageable age to marry and found a family on the basis of the free and full consent of the future spouses;
- b) Ensure the right of persons with disabilities to decide freely and responsibly on the number of children they wish to have and the time between births, and to have access to age-appropriate information, reproductive education, and family planning, as well as provide the necessary means to enable them to exercise these rights;
- c) Ensure that persons with disabilities, including children, maintain their fertility on an equal basis with others. (Boletín Oficial del Estado, 2008)

The ratification of this Convention was a turning point in the social and legislative debate on the regulations in force in Spain. This led to the reform of the Penal Code carried out during the X Legislature, which introduced modifications to the article that is the subject of this study. In the preamble to the law, point XXVII states:

“People with disabilities must be subject to reinforced criminal protection in view of their special vulnerability. The provisions of the Penal Code that serve this purpose must be in accordance with the International

Convention on the Rights of Persons with Disabilities, signed in New York on December 13, 2006.”

To this end, among the measures taken is the modification of the terms used³ and with regard to our object of study, the preamble indicates that:

Similarly, better treatment is given to sterilization agreed by a judicial body, which is limited to exceptional cases in which there is a serious conflict of protected legal rights. The new article 156 refers to the civil procedure laws, which will regulate the cases of sterilization in the most appropriate way and guarantee the rights of the affected persons. Until this new regulation is issued, the current regulation contemplated in the Code will remain in force.

Consequently, the wording of the second paragraph of Article 156 is modified, which now states that:

Sterilization ordered by a judicial body shall not be punishable in the case of persons who are permanently unable to give the consent referred to in the preceding subparagraph, provided that the case is an exceptional case in which there is a serious conflict of protected legal interests, in order to safeguard the best interests of the person concerned, all in accordance with the provisions of civil legislation.

In 2020, Organic Law 2/2020 was approved. This law amends Article 156 of the Criminal Code to eliminate the atypicality clause related to the sterilization of incapacitated persons. It states that “the grantor is a minor or absolutely unfit to provide consent, in which case the consent provided by them or by their legal representatives will not be valid.”

The bill originated in the Senate. In the preamble of the Initiative (BOCG, March 6, 2020), it is indicated that the purpose of the Initiative is to align Spanish legislation with the Convention on the Rights of Persons with Disabilities, approved in 2006. The atypicality clause contemplated in Article 156 was deemed

³ “The original text of the Penal Code inappropriately refers to “handicap” or “incapacitated”, a terminology that has already been superseded in our legal system prior to the Convention, since the approval of Law 51/2003, of 2 December, on equal opportunities, non-discrimination and universal accessibility for persons with disabilities, and which should be replaced by the more appropriate terms of “disability” and “person with disabilities in need of special protection””.

a violation of “the rights of persons with disabilities by perpetuating myths such as ‘the good of the family,’ ‘the inability of women with disabilities to be mothers,’ or ‘for their sake,’ which are in direct violation of Article 23 of the Convention.” This is particularly relevant in the case of women and girls, as indicated in Article 6⁴ of the Convention and in General Comments No. 1 and No. 3⁵ of the Committee on the Rights of Persons with Disabilities. As recommended by the United Nations in 2011 to Spain⁶.

It is also stated in the preamble that “forced sterilization is a more widespread practice than public opinion considers. According to data from the General Council of the Judiciary, over the last decade more than a thousand forced sterilizations have been performed in Spain, the majority of which were on women. In 2016 alone, CERMI, based on official data, reported 140 cases, with an additional 865 cases between 2005 and 2013.”

The rule was approved with all deputies voting in favor: Yes: 348, No: 0, Abstentions: 0.

It is relevant for the study to examine the Journal of Plenary Sessions of Congress (*Boletín Oficial de las Cortes Generales* 2020, pp. 116 et seq.) and the Journal of Senate Sessions (*Boletín Oficial de las Cortes Generales*, 2020, pp. 107 et seq.). All parliamentary groups support the reform of the law. The arguments in favor of the modification are diverse and can be broadly classified into

⁴ “Furthermore, in its article 6, on women and girls with disabilities, it stresses that States Parties recognize that women and girls with disabilities are subject to multiple forms of discrimination and, in this regard, shall take measures to ensure that they can fully and equally enjoy all human rights and fundamental freedoms.”

⁵ “Despite these findings and international agreements, the Committee on the Rights of Persons with Disabilities, in its General Comment No. 1, confirms that women with disabilities are subject to high rates of forced sterilization, and are often denied control of their reproductive health and decision-making, assuming that they are not capable of consenting to sex.

In its general comment No. 3 on women and girls with disabilities, it indicates that some forms of violence, exploitation and abuse may be considered cruel, inhuman or degrading treatment or punishment and a violation of various international human rights treaties. These include: pregnancy or forced sterilization performed under coercion, or involuntarily; all medical procedures and interventions performed without free and informed consent, including those related to contraception and abortion.”

⁶ “The United Nations, through the Committee on the Rights of Persons with Disabilities, already officially recommended, in 2011, to the Kingdom of Spain the adaptation of its internal legislation (Penal Code) on this point, so that this guarantee would not be violated.”

three groups. First, the assessment of the previous norm as contrary to international law. Second, the classification of the sterilization of persons declared incapable with severe disabilities as forced sterilizations. Third, the consideration of the practice as an attack on the dignity of persons declared incapable with severe disabilities - imposing such a significant decision by a third party, the absence of guarantees, the control of maternity by third parties, and the discriminatory nature of the measure.

There is no mention of the criteria and arguments put forward in previous reforms at the legislative, parliamentary, or judicial levels.

3. The sterilization of an incapable person suffering from a serious mental deficiency: comparative European Law

The process carried out in Spain is not common to all neighbouring countries, where varied legislation with diverse criteria and requirements can be found.

At the European level, references to forced sterilization appear in various documents. For example, the 2011 Istanbul Convention on Action against Violence against Women and Domestic Violence, adopted by the Council of Europe, addresses issues related to abortion and forced sterilization. Article 39 states:

The Parties shall adopt the legislative or other measures necessary to establish as a criminal offence, when committed intentionally: (...) (b) the performance of a surgical intervention which has the purpose or effect of terminating a woman's ability to reproduce naturally without her prior and informed consent or understanding of the procedure.

This Convention is "is the first European regional instrument of international law of a binding nature that sets international standards for the prevention and protection of women against violence with which each country that has acceded to the Convention must be harmonized" (Delibasić, 2018: 23).

Article 7 of the Rome Statute of the International Criminal Court also establishes that

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic

attack directed against any civilian population, with knowledge of the attack” and in the letter g, list as an act (...) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

As “crimes against humanity have not been codified in an international treaty” this definition has been considered the “latest consensus of the international community, and, for the time being, is considered the most authoritative definition (Soltvedt and Heberling, 2018: 257).

However, the lack of specific mention of incapacitated persons results in diverse national legislation across different states. At the level of Spain, that is, with a ban on the sterilization of people with disabilities, there are 7 countries: Ireland, Belgium, Sweden, Austria, Italy, Slovenia and Poland.

In France and Germany, sterilization is prohibited, but similar to the Spanish Penal Code of 1995, their regulations allow for the sterilization of disabled individuals under guardianship with judicial authorization. This authorization is granted only after consultation with their guardian and the individual with disabilities.

In contrast, there are 14 countries that permit the sterilization of some people with disabilities in their legislation: Portugal, Denmark, the Czech Republic, Slovakia, Hungary, Croatia, Malta, Finland, Estonia, Latvia, Lithuania, Bulgaria, and Cyprus. Among these, three countries - Portugal, the Czech Republic, and Hungary - legally allow the sterilization of minors. The legislation varies, and the authorization is subject to various judicial guarantees. In some of these countries, decisions are made by specialized entities, such as a special council or commission (Denmark and Slovenia) or the Commissioner for Mental Health (Malta) (EDF Report, 2022).

4. Conclusiones

Voluntary sterilization has been decriminalized in some legislations as an act resulting from an individual's self-determination regarding their reproductive choices. However, non-voluntary sterilization is considered by various countries' regulations and international agreements to be an act contrary to human dignity. The issue addressed in this research is the regulation of sterilization for individuals who, due to severe disabilities, are unable to provide consent.

The twentieth century was marked by a strong eugenic mentality that led to the systematic sterilization of people with disabilities (Rowlands & Amy, 2019). For example, by 1935 in the USA, "30 states had passed sterilization laws, hoping to improve the population as a whole." As a result of these laws, approximately 60,000 individuals with mental illness and intellectual disabilities were involuntarily sterilized during the early part of this century (Denekens, Nys, Stuer, 1999). In Germany, it is estimated that 225,000 people had been sterilized by 1937 (Denekens, Nys, Stuer, 1999). This legislation and its practices were considered a direct violation of human dignity, as they went against the "spiritual and moral value inherent to the person, which manifests itself uniquely in the conscious and responsible self-determination of one's own life and which carries with it the claim of others" (Velasco Guerrero, L, 2022: 230).

That is why, in the Spanish case, the decriminalization of this conduct was pursued with the maximum normative guarantees, ensuring that it would only be carried out for the benefit of the person with disabilities. The regulatory changes analyzed have eliminated this possibility in all cases. This situation places Spain among a minority of countries in the field of comparative law.

However, in the debate at both the Spanish and European levels, while the systematic abuses experienced in these cases have been highlighted, the questions raised at the time of decriminalization have not been addressed. Specifically, whether decriminalization for individuals with severe disabilities is necessary for respecting their fundamental rights, as it "allows them not to be subjected to constant surveillance that could be contrary to their dignity (art. 10.1 C.E.) and their moral integrity (art. 15.1 C.E.)". Additionally, it enables "the exercise of their sexuality" to the extent of their abilities, "without the risk of possible procreation"

- pregnancy and paternity - the consequences of which they cannot foresee or consciously assume due to their mental illness (STC 215/1994).

Although I believe that the current legislation aims to guarantee dignity and autonomy for people with disabilities, the harsh reality of severe disability often means that these individuals are unable to understand the process or provide informed consent. Therefore, considering the various arguments, I do not think this debate is closed. Given the ongoing discussions and differing perspectives, it is likely that regulations will continue to be debated and reassessed in the coming years.

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