

Spanish Legal Reproscape: The Making of a Bio-Industry

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Abstract

Europe accounts for the largest number of assisted reproduction treatments (ARTs) in the world, with 56 percent of the global reproductive market quota, followed by Asia (23 percent) and North America (15 percent). However, Europe's legal landscape of reproductive bio-commodities is a patchwork of permissive and restrictive countries, one of the main reasons for the transnational movement to access ARTs. Spain is the main destination for European middle- and upper-class couples seeking egg donation. The use of legislation has been a significant feature in making Spain a leading country in the global reprotoscope. This paper aims to understand the specific role of several undetermined legal concepts used by the Spanish regulation, such as "compensation" or "best interest of the child" in making global reproductive bio-commodities.

Keywords: Assisted reproductive technologies; egg donation; cross-border reproductive services; Spain.

Introduction

Europe accounts for the largest number of assisted reproduction treatments (ARTs) in the world, with 56 percent of the global reproductive market quota, followed by Asia (23 percent) and North America (15 percent).¹ However, Europe's legal landscape of reproductive bio-commodities is a patchwork of permissive and restrictive countries, one of the main reasons for the transnational movement to access ARTs.² Spain is one of the priority destinations for couples and women in Europe demanding eggs. Over half the donated ova used in in vitro fertilization (IVF) cycles across Europe come from Spain.³ Within the global bioeconomy, Spain counts as a safe hub for fertility treatments since they are offered in a formally well-regulated and publicly insured health system. However, the result is that the demographic profile of "altruistic" donors intersects with the lowest echelons of informal service labor, recruited from young, marginalized segments of the population.

The Spanish reprotoscope has been shaped following the first Act on assisted reproduction 30 years ago. The law's role in legitimizing new reproductive bio-commodities, such as human eggs, has significantly influenced the rise of Spain's popularity as a destination country for fertility treatments. The Spanish case highlights the arguments made by Cooper and Waldby that the use of bioethical guiding principles (e.g., "donation" and "compensation"). It has proved remarkably useful to the task of governing a precarious reproductive market of immigrants and young women that justifies exemptions from the standard protection offered by statutory labor contracts.⁴

In this article, I re-examine the history of the ART regulation in Spain (the first extensive law of reproduction in Europe). Following this, I will address the criticism of egg donation regulation, focusing specifically on the anonymity, compensation, and filiation concepts. I will also discuss the recent proposal to legalize surrogacy in Spain and draw some parallels between ova donation and surrogacy regulation. Finally, some provisional conclusions about the impact of these concepts on the female body's legal status will be proposed.

¹ Zegers-Hochschild, "International Committee for Monitoring Assisted Reproductive Technologies World Report," 1538.

² Dickenson, "Ova Donation for Stem Cell Research: An International Perspective," 139.

³ European Society of Human Reproduction and Embryology, ART in Europe, 2014: Results generated from European registries by ESHRE, 1591.

⁴ Waldby, Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy, 63.



Thirty Years of the Act of Assisted Reproduction in Spain

Despite its discreet approval, the Spanish law 35/1988 of November 22, 1988, on assisted human reproduction techniques (LTRHA) was the third Act in the world concerning the date of enactment after Victoria (Australia)⁵ and Sweden (which only referred to artificial insemination).⁶ The LTRHA was preceded by a Parliamentary Report on ART,⁷ which formed the Act of 1988.

The Spanish Act surprised the world by its “liberality.” It has been considered one of the most liberal pieces of ART regulation in the world.⁸ In 1988, it declared the right of single women to become a mother through sperm or embryo donation (art. 6.1 LTRHA) and the access of widowed women to the sperm of her deceased partner. A complex and integrated anonymous gamete donation system was meant to be put in place by latter development decrees. Embryo cryopreservation was authorized, and no prohibition was settled on research on it. The sole, relevant limit settled by the Act was the prohibition of surrogacy (in all forms). The law considers that surrogacy contracts are void and reinforces the presumption that the child’s mother gives birth to her (art.10 LTRHA).

The LTRHA came ahead of society’s needs of the moment in 1988.⁹ However, it also fits in with the need to modernize the country, which yearned to leave behind a long dictatorship and open channels to society’s changes. The regulation of biomedical treatments in Spain had opened with the 1979 Transplants Act, considered in its day as one of the most advanced in the world (it established the principle of donation by default and an integrated system of waiting lists).¹⁰ In the 1980s, there was also the major reform of the family law, the decriminalization of abortion, the General Statute of Health’s approval, etc. As such, the LTRHA was not such an exotic piece of regulation as it may seem, but rather it was fully inscribed in the legislative trend of the period.

The LTRHA was hailed by the medical profession internationally. It was observed as a progressive law that would allow the proper development of procreation technologies in Europe.¹¹ Conversely, it provoked great disappointment and rejection by jurists. They branded it technically deficient (“as it has been written by a doctor instead of a lawyer”),¹² and it was not sufficiently discussed in the Parliament.¹³ The jurists also denounced the excessive delegation of the applicable standards on health authorities. The law had provided for making regulations implementing several fundamental issues, such as accreditation requirements for the fertility treatment centers; information protocols for donors; creating a national registry of donors; centers’ activity registry; creating the National Commission for Assisted Human Reproduction (CNRHA); and a list of hereditary diseases that could be screened on the embryo. Only four out of the six regulations were finally made. The first two were enacted seven and a half years after the Act’s commencement. The fourth took another six months to appear, ordering the creation of the National Commission for Assisted Human Reproduction. The Donor Registry has been enforced only recently, forcing fertility centers to provide data to the Assisted Human Reproduction Information System (SIRHA).¹⁴

The LTRHA has been revised twice since its introduction. The first turned out to be an ephemeral reform, passed in 2003¹⁵ and overturned in 2006. The reform responded to the case made by the Catholic Church about spare embryos from IVF treatments. The reform settled that only three oocytes could be fertilized in each cycle. The clinics protested the reform vigorously, asking for the limitation to be removed, which happened in 2006 (Act 14/2006). The new law on assisted reproduction established that “when the parental project no longer exists,” embryos can be allocated to research projects.¹⁶

⁵ *Infertility (Medical Procedures) Act* 1984.

⁶ *Swedish Law of Artificial Insemination* 1985

⁷ Palacios Report, 36.

⁸ Alkorta, *Regulación Jurídica de la Medicina Reproductiva: Derecho Español y Comparado*. 137; Romeo Casabona, *El Derecho y la Bioética ante los Límites de la Vida Humana*, 93, Pantaleón, *Contra la Ley Sobre Técnicas de Reproducción Asistida*, 19.

⁹ Lema, *Reproducción, Poder y Derecho*, 68.

¹⁰ Romeo Casabona, 63

¹¹ Zarraluqui, *Procreación Asistida y Derechos Fundamentales*, 26

¹² Pantaleón, 21

¹³ Hernández, *La Ley Sobre Técnicas de Reproducción Asistida de 22 de Noviembre de 1988*. 43; Martínez, *Derecho Tecnológico, la Nueva Inseminación Artificial*. Estudio de la Ley de 22 de Noviembre de 1988, 198; Martínez-Pereda, *La Maternidad Portadora, Subrogada o de Encargo en el Derecho Español*, 19; Moro, *Aspectos Civiles de la Inseminación Artificial y la Fecundación in Vitro*, 88; Pantaleón, *Técnicas de Reproducción Asistida y Constitución*, 134; Rivero, *Aspectos Jurídico-Privados más Relevantes de la Ley 35/1988 de 22 de Noviembre sobre Técnicas de Reproducción Asistida*, 50; Serrano, *Aspectos de la Fecundación Artificial*, 98.

¹⁴ *Sistema de Información de Reproducción Humana Asistida (SIRHA)*

¹⁵ *Human Artificial Reproduction Act 35/1988 Reform Act 45/2003*

¹⁶ *Human Assisted Reproduction Act 14/2006*, art. 11

It also allowed pre-implantation genetic diagnosis for therapeutic purposes and “designer babies.” Researchers congratulated the government and considered it “research-friendly.”¹⁷

Over thirty years after the enactment of the LTRHA, Spain holds the record for the highest number of private clinics in Europe.¹⁸ Spain has become one of the prominent global hubs for assisted reproduction. The clinics treat women from all over Europe, and there is an increasing number of local couples and single women demanding fertility treatments. The average age of local female patients in 2018 was 39 years, along with the ever-increasing maternity age of Spanish women.¹⁹ More recently, new demands on assisted reproduction are being made by intending parents asking for equal access to parenthood through surrogacy.

Egg Donation in Spain

More than half of the oocytes implanted in European fertility clinics come from Spain.²⁰ Of this large number of gametes, 80% have been provided by national women and the rest by non-national residents.²¹ Spanish fertility clinics have become the preferred destination of German and Norwegian women seeking treatments prohibited in their homeland. French and British women who have difficulties accessing ova donation locally due to the lack of available eggs in their countries also come to Spain. Additionally, most couples who wish to keep their infertility treatment a secret arrive at Spanish hospitals in summertime pretending to be on a holiday trip to the Mediterranean.²² Another attraction of the Spanish ova market lies in the donors responsible for one of the highest rates of efficiency concerning pregnancies achieved by cycle.²³ Leftover eggs from IVF treatments (i.e., women who use their eggs in autologous IVF cycles) are rarely used in Spain.

Spanish hospitals' egg supply and competitive prices occur because donors are compensated with 1000€ each cycle under a very strict regime of anonymity covering the donors' and beneficiaries' identities.

Anonymity of the Donor

The LTRHA mandated absolute confidentiality on treatment data and the identity of the donor and recipient. On many occasions, couples have tried to thank their donor, but the physicians would answer that they cannot give any contact information (not even through the center). Even donors who wanted to learn about the donation's result have not obtained any response. The doctors and health professionals will not even tell them if the donation resulted in birth or proved fruitless. Any breach of this rule makes the biomedical and administrative team responsible for a severe crime.²⁴

Notably, the origin gamete donation rules (anonymity and compensation) comes from the regulations of the first semen banks that emerged in Europe in the 1970s.²⁵ These rules, devised by doctors and the health authorities of the time, were automatically applied to egg donation regulation in the LTRHA following IVF's introduction. The early acceptance of anonymity comes as no surprise, given the medical profession's strong influence on the provisions of the 1988 Act. In contrast, most lawyers of the time made numerous objections to the requirement for anonymity.²⁶ These objections followed from reform in 1981 to the Civil Code, whereby the principle of biological truth was adopted following the mandate of the 1978 Constitution (art. 39.2 CE). The jurists' doubts were reflected in the Palacios Report,²⁷ but the Parliament finally settled the issue by adopting the rules of anonymity of semen banks defended by doctors. Once this milestone was settled, fertility centers have very narrowly interpreted the anonymity ruling.

Data about the donor are recorded at the fertility center. In adoption, the adopted child could access the civil registry data when she is 18.²⁸ In contrast, the information the donor child can get about her conception is completely left to the parents' will since there is no record or register on the issue outside the clinical record.

¹⁷ Boada, *La Nueva Ley de Reproducción Asistida*, 13

¹⁸ European Society of Human Reproduction and Embryology, 2017, 2018

¹⁹ Sociedad Española de Fertilidad, 201.

²⁰ Registro Nacional de Actividad-Registro SEF, *Informe Estadístico de de Técnicas de Reproducción Técnicas de Reproducción Asistida*, 20; Marre, 170; Zafra, 2019.

²¹ Marre et al. On Reproductive Work in Spain. *Transnational Adoption, Egg Donation, Surrogacy*, 163

²² Campbell, *Destination Spain: The Rise and Rise of Fertility Tourism*, 3

²³ European Society of Human Reproduction and Embryology, 2017a, 2017b.

²⁴ *Human Assisted Reproduction Act 14/2006*, art. 26, 2, b, 5.

²⁵ Bujan, *Histoire de CECOS: Une Oeuvre Collective*, 18.

²⁶ Vid. References at note 25.

²⁷ Palacios Report, 36.

²⁸ Civil Code, art. 180.

Comparable jurisdictions, such as the British²⁹ and Swedish³⁰ in Europe, or Victoria in Australia,³¹ have reviewed this rule of anonymity and recognized the child's right to know her origin. They also stated that this right refers exclusively to access the donor identity data, while in no case does such knowledge allow any claim of parenthood. Therefore, it is not a rule of parentage law but a personal right to know a relevant piece of identity information. The right to know the biological origin as a fundamental right has been recognized by many more European countries in the last decade (Finland, Netherlands, and Belgium). Furthermore, the European *General Data Protection Regulation (EU) 2016/679 (GDPR)* could oblige European fertility clinics to inform donor-conceived people about the existence of clinical files that contain very sensitive information about them. Under the new regulation, the right of access (Article 15) is a personal right. It gives citizens the right to access their personal data and gain information about how this data is being processed, such as the purposes of the processing, with whom the data is shared, and how the data is acquired. A data controller must provide, upon request, an overview of the data categories that are being processed and a copy of the actual data. Hiding sensitive information about the biological origin and preventing offspring access to donor information files "for her own sake" could breach the general principle of accessing sensitive data. Ultimately, it must be discussed if the conflict between the donor's privacy and the legal parents against the child's interest in knowing their origin should be resolved in favour of the latter.

It has been said that the right to know the genetic origin can be interpreted as an aspect of the ever-evolving right to health since genetic testing is gaining more momentum.³² It is also very relevant information for donor-conceived people when they decide to have children themselves. The genetic origin will be routine information that is difficult to keep secretive shortly since genetic screening combined with the gene matching platforms and Internet web sites continue to expand.

So far, the arguments used to defend the child's right involve informing her of their biological origin. Still, there is also another consequence of the anonymity rule that is rarely cited. I am referring to the donor's invisibility from the obligation of anonymity that is imposed upon her. As we have observed, donors who request information from the clinics in Spain find that the clinics refuse to provide information on the donation results. All the donor's involvement with the child is radically cut after the donation, except where the newborn needs some health assessment that requires the donor's intervention. However, doctors will do their best not to disclose the donor's identity even in this case (art. 5.5 LTRHA). This institutional effacement also has an important implication from the perspective of donor rights and bio-value transference. Physicians and the law have conceptually framed assisted reproduction to imitate biological reproduction. Gametes are exchanged as if it could consist of a simple exchange of tissue. In reducing the meaning of donating to "giving tissue," as the clinics claim, the nature of the transmission is denied. As Sara Lafuente has put it, we should frame it as a transference of reproductive capacity instead of talking about egg donation.³³

Compensation: Quid Prodest?

The medical practice of compensating donors with a fixed price, pre-agreed between clinics, was initially tolerated by authorities and later sanctioned by the law.³⁴ In 1998, one year after its establishment, the Spanish National Commission on Assisted Reproduction was consulted on donor compensation. At the time, young women donating their oocytes were being compensated 600€. The Commission first examined the issue in 1998 and decided that:

The financial compensation of 100,000 pesetas (600€) per donation for the donation of oocytes (equivalent to twenty times the usual compensation by sperm donation) is proportionally acceptable for compensating a greater discomfort and damage caused by oocyte extraction, thus it should be considered that this emolument does not break nor undermine the principle of gratuity or disrepute of the purely altruistic motivation of the donor.³⁵

At this point, differences between public and private clinics were made evident since, in public hospitals, compensating donors with any amount is not allowed. The 2006 Act revisited the issue and ordered the Health Ministry to fix the criteria and the limits for this compensation, "so that compensation is not the sole incentive for donation."³⁶ Yet, this even more diluted and weak limit was never implemented. Clinics have held their ways, and they keep adding the Consumer Price Index (CPI) to calculate the annual "fee," which was around 1000 € in 2020. This amount is enough incentive for young women who are not well off in Spain.

²⁹ *Human Fertilisation and Embryology Act 1990 as amended by the Human Fertilisation and Embryology Act 2008*

³⁰ *Genetic Integrity Act 2006*

³¹ *Assisted Reproductive Treatment Act 2017*

³² Alkorta, *Anonimato del Donante y Derecho a Conocer: un Difícil Equilibrio*, 165

³³ Lafuente, *Shall We Stop Talking about Egg Donation? Transference of Reproductive Capacity in the Spanish Bioeconomy*, 2019.

³⁴ *Human Assisted Reproduction Act 35/1988*, art. 5.

³⁵ Comisión Nacional de Reproducción Humana Asistida, 1998. Translation by the author.

³⁶ *Human Assisted Reproduction Act 35/1988*, art. 5.3.

The case illustrates how clinics have profited from the gray zone of the term compensation to make an expansive interpretation accepted by the public authorities that has never been challenged in a court to date. Therefore, it is necessary to review the whole concept of “compensation” to return to the path of the prohibition of trade in human gametes. The rule of property is not an adequate frame for regulating gamete transfer, as long as they are both elements of human reproduction and elements of human reproduction. This pretension is regressive since it goes back to atavistic ownership models on human body parts wiped out by the modern legal systems. Human gametes must remain *extra commercium*; they are not suitable for appropriation and transfer by price as elements of the human body and because no person can claim to own the human genome of another, not even her own. Some time ago, Europe established the rule that human DNA is not appropriable concerning patenting the genome.³⁷ This same rule should apply when it comes to establishing parenthood relationships.

Crossing the Rubicon: The Debate on Surrogacy in Spain

From its commencement, the LTRHA stated that surrogacy contracts are void, and the woman who gestates and gives birth is the legal mother of the child born. This applies the rule *mater semper cert est*, combined with the legal prohibition to challenge her motherhood.³⁸

Balancing Eggs and Gestation

The Palacios Report refused surrogacy, arguing that “this kind of contract is unacceptable in a fair and democratic society, as there is an increased risk of abuse and commercialization of vulnerable women.”³⁹ Notably, these same risks of abuse and commercialization were not appreciated concerning egg donation at that time. Perhaps the explanation lies in the conflict between genetic maternity and pregnancy maternity raised a little further in the same report. Regarding this conflict, the Commission concludes:

The gestational component is more important than the genetic one, as the gestating mother bears the child within her for nine months and protects the child physiologically and psychologically, this being an element that will give priority to the childbearing woman, and opposes surrogacy. In this sense, we recommend that the biological preponderance of gestational maternity over the genetic one is admitted and that the legal mother is always the gestating mother, even if originally there was an intervention of donors.⁴⁰

Thus, according to the Spanish legal order, egg donation, even challenging the principle of biological truth, will be an acceptable practice if the cause of the transfer of gametes is altruistic. Conversely, surrogacy, no matter if the cause is commercial or altruistic, would be unacceptable because contracting pregnancy services undermines the woman and child’s dignity.⁴¹ In Spain, as in other legal systems that allow egg donation but reject surrogacy, pregnancy enjoys a different legal consideration or value compared to gametes. In all cases, the kinship is determined by labor and childbirth, regardless of whether there is a genetic link between mother and child. This prohibition accounts for a strong public order principle.

Reproductive Tourism and Fait Accompli Politics

Given the prohibition to contract surrogacy services at home, couples seeking surrogate mothers flocked to California guided by Spanish fertility clinics that held commercial agreements with local Californian surrogacy agencies since the mid-eighties.⁴² More recently, as new hubs began to emerge in countries such as Tabasco (Mexico), India, Thailand, and Europe (Ukraine and Russia), for-profit intermediary agencies began to arise. These agencies can freely move to Spain, offering brokerage services to couples and individuals wishing to have children through surrogates abroad.⁴³ Stimulated by lower prices, surrogacy figures soared; informal data show that surrogacy has surpassed the number of international adoptions in Spain.⁴⁴

In the beginning, there were no problems with Spanish citizens returning home with the newborn. For over a decade, Spanish authorities at the Consular Registry tolerated the practice of considering intended parents as the natural parents of the offspring born abroad.⁴⁵ It was not until the recognition of same-sex parentage that case law on the issue began to emerge. The first case was raised in 2006, just after the Same-Sex Marriage Act 13/2005. At this time, male gay couples struggling to register the

³⁷ UNESCO, Universal Declaration on the Human Genome and Human Rights, 1997.

³⁸ *Human Assisted Reproduction Act 14/2006*, art. 10

³⁹ Palacios Report, 34

⁴⁰ Palacios Report, 36. Translation by the author.

⁴¹ Palacios Report, 23

⁴² Ximenez, Porqué California es la Meca de la Gestación Subrogada, *El País*.

⁴³ Pereda, Vientres de Alquiler un Negocio Millonario, *El Periódico*.

⁴⁴ San Roman, Somebody's Children: The Politics of Transracial and Transnational Adoption by Laura Briggs (Review), 140

⁴⁵ Roca i Escoda, The Case of Spain, 353

child in the Consular Registry made visible an issue that was previously covered up conveniently by the façade of heterosexual couples giving birth abroad. In this case, the intended parents, two Spanish men, sought to register the official birth certificates of surrogate-born twins in conformity with a pre-birth judgment issued by a California court, with no reference to the genetic or gestational parentage of the twins. The consulate refused to register them as legal parents, and the children were denied visas to travel to Spain. A court hearing the matter declared that it was a violation of Spanish law not to include the gestational mother as a parent in the registry since the primary and most important fact for this purpose was who gave birth.⁴⁶

At the same time, the Spanish Parliament had been sized to address surrogacy, among other issues concerning the revision of the LTRHA. However, the Parliament refused to tackle the problem since there was no minimum consensus on the matter.⁴⁷ The new law of reproductive technologies of 2006 kept the exact same wording for the surrogacy regulation as the original 1988 Act. At this point, the Spanish Ministry of Justice intervened to establish guidelines for entry into the civil registry of children born to surrogate mothers abroad.⁴⁸ The Ministry found it necessary to balance the children's interests with the Spanish government's interests in prohibiting surrogacy. It concluded that his balance could be achieved by obtaining a judgment in a host country court, recognizing the birth certificate's legal validity, and making factual findings that the surrogacy contract was entered into without fraud, overreaching, or exploitation of the surrogate mother.⁴⁹

The General Public Prosecutor challenged this instruction before the Supreme Court. The resolution of the court (STS 247/2014, April 6, 2014) ruled against the instruction, condemning surrogacy contracts as incompatible with Spanish public order:

[...] Surrogacy is a means for commodifying gestation and legal parenthood, also meaning "reification" of the pregnant woman and the child, allowing certain intermediaries to conduct business by exploiting young vulnerable women and creating a kind of "selective-citizenship" in which only those with high financial resources can reach parenthood, in ways that the majority of the population cannot afford.⁵⁰

Still, the Court also suggested that nothing prevented the genetic father from registering as the child's legal father. After that, the resolution said, the spouse could adopt the child also to become a legal parent.⁵¹ At this point, Spain's Civil Registry Law has been amended to deal more directly with birth certificates issued by other countries in international surrogacy cases, strengthening the requirements for the intended parents to get access to the registry.⁵²

As is the case in other European countries, these decisions show that Spain deploys a *fait accompli* politics in surrogacy. Commercial surrogacy is prohibited at home but is tolerated when done abroad, as long as Spanish citizens may get a desired result from the domestic courts of becoming the child's legal parents, invoking the child's best interest overrules the public policy prohibition.

The Jurisprudence of the European Court of Human Rights

The jurisprudence of the European Court of Human Rights on recognizing legal parenthood in surrogacy cases is quite consistent with the Spanish Supreme Court's position. In fact, the European Court has condemned France for preventing the genetic father of the offspring to register as the child's legal parent in several partial surrogacy cases (*Menesson v. France*⁵³, *Labasse v. France*⁵⁴). This jurisprudence invokes the right to respect the private life (within the meaning of Article 8 of the European Convention of Human Rights) of a child born abroad through a gestational surrogacy arrangement. This requires the legal relationship between the child and the intended father, where he is the biological father, to be recognized in domestic law. However, the court has approved the Italian Government's decision to consider adoption and deny the legal parenthood of intended parents where there was no genetic tie among the offspring and the intended parents (*Paradiso & Campanelli v. Italy*).⁵⁵ It seems that the genetic bond, the ancient *ius sanguinis* rule, is still conditioning the court's decisions on the matter, as has been the case in recent Australian Family Court decisions.⁵⁶

⁴⁶ Juzgado de Primera Instancia N° 15 de Valencia, 2010.

⁴⁷ Surrogacy Bill, 2017.

⁴⁸ Dirección General de los Registros y del Notariado, 2010.

⁴⁹ Farnos, Inscripción en España de la Filiación derivada del Acceso a la Maternidad Subrogada en California. Cuestiones que Plantea la Resolución de la DGRN de 18 de Febrero de 2009, 25.

⁵⁰ Sentencia del Tribunal Supremo 247/2014, FJ 4

⁵¹ Sentencia del Tribunal Supremo 247/2014, FJ 12

⁵² Dirección General de Registros y del Notariado, 2019

⁵³ ECHR, 2014, *Menesson v. France*

⁵⁴ ECHR, 2014, *Labasse v. France*

⁵⁵ ECHR, 2017, *Paradiso & Campanelli v. Italy*

⁵⁶ Robert, "Genetic Bodily Fragments and Relational Embodiment: Judicial Rhetoric about "Biological Truth" in Paternity Disputes in the Family Courts," 64.

recently, the court has given an Advisory Opinion, stating that respect for private life within the meaning of Article 8 of the Convention also requires that domestic law provide a possibility of recognizing a legal parent-child relationship in certain instances. This applies if there is an intended mother (who is designated in the birth certificate legally established abroad as the “legal mother”), the child was conceived using the eggs of a third-party donor, and the legal parent-child relationship with the intended father has been recognized in domestic law.⁵⁷ The domestic proceedings do not concern a child born through a gestational surrogacy arrangement abroad and conceived using the intended mother’s eggs. However, the Court considers it important to emphasize that, where the situation is otherwise similar to that in issue in the proceedings, the need to recognize the legal relationship between the child and the intended mother applies with even greater force.⁵⁸

A resolution similar to that of the European Court of Human Rights has been provided by other European countries where surrogacy arrangements are prohibited. In several states where surrogacy contracts are forbidden, it is, nonetheless, possible for an intended father who is the biological father to establish paternity concerning a child born through surrogacy. Further, some of these countries permit an intended mother to establish maternity of a child born through a surrogacy arrangement to whom she is not genetically related. The procedure for establishing or recognizing a legal parent-child relationship between children born through a surrogacy arrangement and the intended parents varies from one state to another. Several different procedures may be available within a single state. The avenues available include registering the foreign birth certificate, adoption, or court proceedings not involving adoption.⁵⁹

This regulation shows that the appropriate role of states’ public policies against surrogacy in applying the current law remains contested. The concern about these minors’ situation has prompted the European Court pronouncements, where the best interest of the child and the decisions *in concreto* have resulted in enforcing the effects of surrogacy contracts by the back door.

The Terms of the Debate in Spain: Defusing Altruism

The Spanish Supreme Court’s decision condemning commercial surrogacy⁶⁰ incited parents’ associations, especially ones belonging to the gay community, to ask for the legalization of altruistic at-home surrogacy. Intending heterosexual parents coalesced with other progressive campaigns to widen the scope of what constitutes “a family,” to include gay couples and single parents.⁶¹ Gay men are heavily represented in this campaign and have pressed for the legalization of surrogacy contracts as a logical consequence of the Same-Sex Marriage Act 13/2005. In 2018, the Spanish Fertility Society (SEF) and the liberal party *Ciudadanos* supported the pro-surrogacy camp and proposed a Bill to legalize altruistic surrogacy.⁶² Its main premise consisted of stating the fundamental right of every citizen “to start a family by means of surrogacy” in the name of “the evolution of liberty, the enrichment of the personality and the multiplicity of ways of understanding the personal and social life.”⁶³ The Bill proposed “compensating” the surrogate for the expenses and economic losses that pregnancy and labor should carry.⁶⁴

However, surrogate compensation would follow the same path as egg donor compensation. It would also become an incentive for the candidates. Once again, the construction of the term “compensation” could be used to disguise the practice of exploiting young, vulnerable women.

Conclusions

Many European countries decided to close the doors to donor-assisted ART in the 1980s. This was not the case for Spain, which decided to take the flag of progress, enacting a permissive ART statute allowing all techniques and forms of donation, except for surrogacy contracts. In 1988, the LTRHA considered surrogacy as the Rubicon of the Spanish reproscape. Thirty years later, Spain has become a privileged destination for patients seeking donated ova and other treatments, while Spaniards travel to foreign destinations searching for surrogate mothers.

As evidenced by the previous examination, the law played a central role in this process, both by default and excess. The principles of altruism and anonymity of the donation were first adopted by the regulation of ART in 1988, resulting in desultory

⁵⁷ ECHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

⁵⁸ ECHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

⁵⁹ ECHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

⁶⁰ Sentencia del Tribunal Supremo, 2014.

⁶¹ “Son Nuestros Hijos”, 2020.

⁶² Surrogacy Bill, 2017.

⁶³ Surrogacy Bill, 2017, Preamble

⁶⁴ Surrogacy Bill, 2017, art. 5.

ways of institutional effacement of the donors. The prohibition of disclosing information about the donor is mainly used to provide an appearance of “naturalness” to the assisted procreation. However, it is at the price of ignoring the child’s right to know her biological origin and that of the donor to recognize her contribution. The Spanish case also illustrates how clinics have profited from the gray zone of the term “compensation” to make an expansive interpretation, accepted by the public authorities and so far never challenged in a court, to attract donors with a fixed price of 1000€ per cycle of hormonal stimulation. This way, under a guise of compliance with the universally admitted bioethical principle of donor compensation, a precarious and informal donor market of immigrants and young women has been established. Under the cover of a safe and legal offer, a contingent of young women, mostly students,⁶⁵ serves as an unregulated workforce to provide ova for a pittance.

At the same time, Spanish citizens easily circumvent the insufficient regulation about surrogacy by seeking the services abroad, as is the case in many European countries. The fait accompli fulfills the legal vacuum. Commercial surrogacy is prohibited at home but tolerated when done abroad. This is true as long as Spanish citizens may actually achieve the desired result from the courts of becoming the child’s legal parents, invoking the child’s best interest, which overrules the public policy prohibition. The undetermined legal concept “best interest of the child” is used to legalize this contract’s effects, recognizing parenthood to the intended biological parent through the civil registry.

Reframing ART in Spain could consist of correcting the excess and vacuum. The new donor-assisted reproduction model requires disclosing the donor’s identity and recognizing donor-assisted reproduction as a third form of parenthood determination. We should avoid the simulation that operates in the present law and recognize openly, with all its implications, that there is another way of becoming a legal parent with the intervention of a gamete donor. The new regulation of this form of childbearing with donor intervention could be attempted at the Civil Code, adding a third typology to the existing biological and adoptive forms. Conversely, it is necessary to review the rhetoric of “compensation” to return to the path of the prohibition of marketing human gametes.

Regarding surrogacy, sufficient regulation explicitly prohibiting commercial contracting and condemning intermediaries should be in place. Further decisions on the legal parenthood of children born in foreign countries based on the child’s interest should not substitute the responsibility of international bodies (The Hague Group, the European Council, and the United Nations) to finally condemn commercial surrogacy as a form of gendered human exploitation.

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