

12. Gender Discrimination in Medically Assisted Procreation

Helena Pereira de Melo

Abstract: In this chapter, we seek to analyze the current legislation on Medically Assisted Procreation (MAP) in the light of non-discrimination on the grounds of gender. Within the framework of the Council of Europe, the Istanbul Convention, established in 2011, contains a definition of gender, for the purposes of its application, that focuses less on the individual and subjective experience of what it means for each person to belong to a particular “gender” and more on the social construction of gender in each concrete society. The proposal to apply the principle of gender mainstreaming, i.e., to consider the “gender” dimension transversally in all dimensions of legal, political, and administrative activity, was made in September 1995 in the Beijing Platform for Action. Examples of the application of this principle are laws in the areas of contraception, abortion, Medically Assisted Procreation, rights associated with heterosexual and homosexual unions, parental responsibilities, the recognition of gender identity and the prohibition of unfair discrimination on the basis of this new factor of non-discrimination. The typification of hate crimes in the Criminal Codes of the different countries is, perhaps, one of the most important expressions of the current national Antidiscrimination Law on gender.

1. Introduction

This study analyzes the current legislation on Medically Assisted Procreation (MAP) in the light of non-discrimination on the grounds of gender. The concept of gender adopted for this purpose is that contained in the Yogyakarta Principles on the Application of International Human Rights Law regarding Sexual Orientation and Gender Identity (Yogyakarta Principles 2007). It was formulated at a conference held in Indonesia in 2007 by a group of human rights experts and presented to the United Nations in Geneva in that same year. According to these principles, gender is “the internal, individual, and deeply felt experience that each person has of gender, which may or may not correspond to the sex assigned at birth. This includes personal sense of the body (which may involve, by free choice, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including the way people dress, speak and their mannerisms.”¹

In 2011, within the framework of the Council of Europe, the Istanbul Convention, open for signature by Member States and those who are not members but have participated in its preparation and the European Union, contains a definition of gender for its application that focuses less on the individual and subjective experience of what it means for each person to belong to a particular “gender” and more on the social construction of gender in each concrete society. “Gender” thus refers to “(...) the socially constructed roles, behaviors, activities and attributes that a given society considers as appropriate for women and men” (Council of Europe (2011a, n.d.) is considered (together with sex) to be an anti-discriminatory factor that must

¹ See the preamble to these Principles.

be observed in the implementation of all the provisions of this international treaty (Council of Europe 2011b).

The proposal to apply the principle of gender mainstreaming (i.e., to consider the “gender” dimension transversally in all dimensions of legal, political, and administrative activity) was made in September 1995 in the Beijing Platform for Action adopted at the United Nations Fourth World Conference on Women (United Nations 1995).²

Examples of the application of this principle include diplomas that alter the Law previously in force in the areas of contraception, voluntary interruption of pregnancy, MAP, recognition of rights associated with heterosexual and homosexual unions, the possibility of celebrating same-sex marriages, a different understanding of the exercise of parental responsibilities, the recognition of gender identity and the prohibition of unfair discrimination based on this new factor of non-discrimination. The typification of hate crimes in the Criminal Codes of the different countries is, perhaps, one of the most important expressions of the current national Antidiscrimination Law on gender.³

This study focuses on the legislation in force in Portugal regarding MAP and analyzes it from the perspective of not discriminating unfairly on the grounds of gender.

2. Medically Assisted Procreation Techniques

Several diplomas regulate MAP in a detailed way in Portugal, adopted at national⁴ and international levels (Portugal 2001). Its interpretation and application by the courts, particularly by the Constitutional Court, have also been essential for the adequate regulation of the matter and the definition of balances, always

² See paragraph 19 of this Declaration.

³ See Article 240 (Diário da República 1995) of the Criminal Code, which states that:

- (a) Whoever founds or sets up an organisation or develops organised propaganda activities that incite to discrimination, hatred or violence against a person or group of persons because of their (...) gender identity (...), or encourages (...) will be punished by imprisonment of between one and eight years.

Whoever publicly, by any means intended for disclosure (...)

- (a) Provokes acts of violence against a person or a group of persons because of their (?) gender identity (...);
- (b) Defames or insults a person or group of persons because of their (?) gender identity (...) will be punished with a prison sentence of 6 months to 5 years. For more on this article see de Albuquerque (2010, p. 726 and following).

⁴ Law no. 32/2006 of July 26, which regulates MAP techniques, is successively amended by Laws no. 59/2007 of September 4, 17/2016 of June 20, 25/2016 of August 22, 58/2017 of July 25, and Law no. 48/2019 of August 14. See also Law no. 110/2019, of September 9, which establishes the principles, rights, and duties applicable to protection in matters of preconception, MAP, pregnancy, childbirth, birth, and the puerperium; the second amendment to Law no. 15/2014 of March 21, which consolidates legislation on the rights and duties of the health service user; Regulatory Decree No. 6/2016 of 29 December 2016, which regulates assisted medical procreation; and Law No. 12/2009 of March 26, which establishes the legal regime for quality and safety relating to donation, collection and testing, processing, preservation, storage, distribution, and application of tissues and cells of human origin and transposes Commission Directives 2015/565/EU and 2015/566/EU of 8 April 2015, as successively amended by Laws 1/2015 of January 8, and 99/2017 of August 25. Also important in this matter are the provisions of the Portuguese Constitution (see, e.g., Articles 1 [“Portuguese Republic”], 26 [“Other personal rights”], and 67 [“Family”]), the Portuguese Penal Code (e.g., Articles 150 [“Arbitrary medical and surgical intervention and treatment”] and 168 [“Non-consented artificial procreation”]), and the Portuguese Civil Code (i.e., Article 1839 [“Foundation and legitimacy”]).

contingent and provisional, between different world views present in Portuguese society on what should (not) be allowed in the area of MAP.⁵

The main legislation that frames it is Law 32/2006 of July 26, which defines its material scope in broad terms in Article 2 ("Scope"). It covers various laboratory techniques for overcoming infertility, such as artificial insemination, in vitro fertilization, and intracytoplasmic sperm injection. It also covers the transfer of embryos, gametes (female or male), and zygotes to the uterus of the woman who will bear the child and the possibility of concluding a surrogacy contract. Analyses of the genetic constitution of the embryo, through preimplantation genetic testing and the "other equivalent or subsidiary techniques of genetic or embryonic manipulation," are also regulated by this diploma.

These techniques may be performed with the gametes (oocytes and spermatozoa) of the individuals that resort to them or with donor gametes. Gamete donation is permitted when "pregnancy or pregnancy without severe genetic disease cannot be achieved through any technique that uses the gametes of the recipients, and provided that effective conditions to guarantee the quality of the gametes are ensured."⁶ The donors are not legally considered the parents of the unborn child, which raises in new ways the question of the value of "biological truth" for the law, discussed regarding natural filiation and adoption. What does it mean, in legal terms, to be a "father"? Is a father the one who transmits part of the genetic heritage or the one who raises the child? By carefully selecting (regarding health) the possible donors of sperm and oocytes, are children being created with a "genetic guarantee," benefiting from a "genetic advantage" over those resulting from sexual relations? To what extent are we not, in Western societies, progressively accentuating the dissociation between sex and reproduction?

Today, it is already technically possible to reproduce ourselves through sexual relations, in the laboratory, with gametes from a third party (heterosexual or homosexual), without a partner, and, in the extreme, when declared legal, with our own oocytes, through cloning by nuclear transference or pathogenesis. Moreover, perhaps during this century, it will be considered a rational choice for any person to select, through the use of MAP, the embryos that will be implanted when deciding to have children to try to prevent the emergence of serious illness or disability, in which case the dissociation between sexuality and reproduction will be complete (Greely 2018, pp. 1–2).

The use of MAP techniques may involve significant manipulation of the reproductive cells used and the embryo resulting from them or only their joining in a laboratory or insertion into the woman's body, allowing for fertilization to occur "naturally." The legal problems arising from its application are, thus, very distinct. Intra-marital insemination, for example, only means that the woman is inseminated with her husband's spermatozoa, while intracytoplasmic sperm injection, by allowing men, whose spermatozoa are few and not very mobile, to have children who, if they are male, will be equally infertile, raises questions of "dysgenics" (i.e., the deliberate transmission to the next generation a genetic mutation that will express itself in a disease: infertility). This

⁵ See the Judgment of the Portuguese Constitutional Court (hereinafter "CC") nos. 101/2009 of 3 March 2009, 225/2018 of April 24, and 465/2019 of September 18.

⁶ See Article 10, paragraph 1 ("Donation of spermatozoa, oocytes and embryos") of Law 32/2006 of 26 July.

absolute contradiction of the results of natural selection is considered by some authors as ethically acceptable (as the child may also solve his infertility problem by resorting to MAP) and unacceptable by others (for artificially and deliberately conceiving children who will be sick because they are infertile).⁷

Apart from the issues of possible unfair discrimination against future generations from the use of these techniques, it also raises serious gender discrimination issues, as indicated by several feminists who have written on the subject. For centuries, in Western civilization, the philosophical concept of woman underlying the delineation of her socio-legal status has been strongly associated with her social role as a “mother.” Even today, there is strong social pressure for women to assume this role; MAP techniques can contribute to reinforcing this concept. If a woman cannot (because of illness or postponement of childbearing for professional reasons) reproduce naturally, then she can try the new MAP techniques. Thus, she is often called upon to do so, to become a mother, even if it implies treatments, particularly of a hormonal nature, which may have serious consequences for her future health, increasing, for example, the probability of suffering from oncological diseases. The woman is invited to be, as Gena Corea expressively writes, “*The Mother Machine*.” Thus, new and unfair sex-based discrimination emerges (Corea 1985).⁸

Another form of negative discrimination associated with the use of these techniques is discrimination based on socioeconomic status. The treatments necessary for the birth of a child through MAP are expensive. Further, although infertility is classified as a disease by the World Health Organization, and its treatment is assured through the institutions of the National Health Service, the public investment made in this field has proved insufficient to meet the demand for prompt healthcare in this area.⁹ As time is a critical factor for successful treatment (a woman’s fertile capacity decreases with age), and waiting lists are long for such treatments in Portugal, many choose private health facilities when they have indispensable financial resources. As these resources are expensive relative to the average income of the Portuguese population, the situation generates discrimination based on the socioeconomic status of infertile people: only those who have indispensable financial resources for this purpose can satisfy the desire to obtain a “take-home baby,” as expressively named by the North American doctrine (Cooper et al. 2016).

3. Fundamental Principles of Medically Assisted Procreation

The fundamental principles underlying the current legal regime on MAP include respect for the human dignity of all those involved in the application of the techniques and non-discrimination based on genetic heritage or being born through the use of new reproductive technologies.¹⁰

⁷ For more details on the possible consequences of the application of this technique on the rights of future generations, see Figueiredo (2005).

⁸ For more information on the increase in the average age of Portuguese mothers at the birth of their first child, in Portugal, (which stood at 31 years in 2015), see the work of Torres (2018, p. 31).

⁹ The World Health Organization defines infertility as “a disease of the reproductive system expressed as the inability to achieve pregnancy after 12 months or more of regular sexual intercourse and without the use of contraception.”

¹⁰ See Article 3 (“Dignity and non-discrimination”) of Law 32/2006 of July 26. Similarly, see paragraph 3 of Article 26 (“Other personal rights”) of the Portuguese Constitution states that “the law shall

Non-discrimination based on genetic heritage is among the essential principles of bio-rights at domestic and international levels and a consequence of the respect for the eminent dignity of all human persons, regardless of their genetic characteristics.¹¹ At the level of MAP, its application concerns the selection of gamete donors (carefully carried out at the health level with implications for the genetic constitution of the embryo formed through them), the selection of embryos in the Preimplantation Genetic Diagnosis and Prenatal Diagnosis context, and the subsequent decision to terminate (or not) the pregnancy for eugenic reasons.

This question arises, for example, when discussing whether donors with genetically determined profound deafness should be excluded from the donor pool (is deafness a “disease,” a “disability,” or a “difference” in legal terms?) or whether embryos with trisomy XXI, which are genetically different from the general population, should not be implanted. Reflecting on this discussion, the solution in the United Nations Convention on the Rights of Persons with Disabilities is the right of such persons to “decide freely and responsibly on the number and spacing of their children and on the access to age-appropriate information, education in procreation and family planning, and the provision of the means necessary to enable them to exercise these rights,”¹² (United Nations 2007) as their failure to exercise this right may constitute unfair discrimination on grounds of disability based on their genetic heritage.

The negative side of the equality principle prohibits discrimination based on how the embryo was generated: whether by sexual intercourse or the use of laboratory-based MAP techniques. If, in the past, the discrimination was based on the fact of being born “legitimate” or “illegitimate” (i.e., during a marriage contract or outside marriage), which was considered unconstitutional and revoked with the Civil Code Reform of 1977, the question now arises regarding the mode of in vitro embryo production.¹³ As an increasing percentage of the population is born out of the use of these techniques, the strangeness with which they were initially viewed by the various discourses, including the religious one, is gradually fading.¹⁴ However, the current legal discourse continues to be one of the stigmas that may remain associated with the fact that these children are not the result of the “traditional” method of reproduction of human beings (sexual relations), which initially (when the first “test-tube baby,” Louise Brown, was born in 1978) was felt with particular

guarantee the personal dignity and genetic identity of the human being, namely in the creation, development and use of technologies and scientific experimentation.”

¹¹ See Article 1 (“Object and purpose”) of the Convention on Human Rights and Biomedicine and Article 2 of UNESCO (1997).

¹² See Article 23(1)(a) (“Respect for home and family”) of the Convention on the Rights of Persons with Disabilities, adopted in New York on 30 March 2007, and approved by Resolution of the Portuguese National Assembly No. 56/2009 of 30 July 2009.

¹³ The amendment of the paternity regime to satisfy the constitutional principle that imposed non-discrimination of children born out of wedlock, resulted from the adoption of Decree-Law no. 496/77 of November 25.

¹⁴ For example, the Congregation for the Doctrine of the Faith (1987) of 22 February, states: “The origin of a human person, in reality, is the result of a donation. The one conceived must be the fruit of his parents’ love. The child cannot be wanted and conceived as the product of an intervention of medical and biological techniques: that would be reducing the child to become the object of a scientific technology. No one can subject the coming into the world of a child to conditions of technical efficiency to be evaluated according to parameters of control and domination.”

intensity. Today, in Portugal, the law determines that it cannot be mentioned in the birth certificate that the child was generated with recourse to MAP techniques.¹⁵

Another principle underlying the legislation applicable to MAP techniques in Portugal is the principle of subsidiarity, which states that the use of these techniques should be understood as a subsidiary and not an alternative method of reproduction. With the emergence of these techniques, the range of options open to human beings at the reproductive level has widened: reproduction is now possible through sexual intercourse and in vitro within the framework of a heterosexual or homosexual couple, with gametes originating from the couple or third parties, during their lifetime or even after their death. It is even possible to reproduce without a partner, through human reproductive cloning (already technically possible, although prohibited) or, if you are a woman, using donor spermatozoa.

Initially, the Portuguese legislator resorted exclusively to the principle of subsidiarity for the legal framework of these techniques to the extent that the use of these techniques was only declared lawful in case of previously diagnosed infertility, the need to treat a serious illness, or the risk of transmitting diseases of genetic, infectious, or other nature. The use of these techniques as an alternative mode of reproduction was not permitted (e.g., if a couple chose to use these techniques because they did not want to have sexual relations or have children at certain time intervals, thus cryopreserving in vitro-produced embryos to implant them in due course). With the second amendment to Law 32/2006 of July 26, which widened the scope of beneficiaries of MAP techniques to all women regardless of infertility diagnosis, marital status, and sexual orientation, the application of the principle has been mitigated to the extent that, for this group of beneficiaries, MAP effectively comprises an alternative method of reproduction.¹⁶

One may wonder whether the widening of the scope of beneficiaries should not also be extended to all men regardless of infertility diagnosis and sexual orientation, as single men and homosexual men, single or married, remain excluded from access to these techniques. The discussion centers on the negative discrimination based on sex or sexual orientation these individuals may suffer, as it would be possible for them to reproduce using a surrogacy contract if the latter were to be considered valid with them as contracting parties. The Portuguese legislation in force does not contemplate this possibility, which has been contested by part of the doctrine, particularly with regard to the LGBTQIA+ Movement.

The possible unfair negative discrimination of men is also discussed regarding another rule in the 1982 Penal Code, which states that “whoever performs an act of artificial procreation on a woman without her consent is punished with a prison sentence of 1 to 8 years.”¹⁷ Further, whoever performs an act (vg. non-consensual collection of spermatozoa from an unconscious man) of this nature on a man is not punished. Underlying this legal type of crime, is there not, as was the case for decades with crimes against sexual freedom and self-determination, the concept

¹⁵ See paragraph 6 of Article 15 (“Confidentiality”) of Law No. 32/2006 of July 26, which states that “the birth certificate shall under no circumstances, including in cases of surrogate pregnancy, state that the child was born through the application of MAP techniques.”

¹⁶ See Article 4(3) (“Recourse to MAP”) and Article 6(1) (“Beneficiaries”) of Law 32/2006 of July 26, as amended by Law 17/2016 of June 20.

¹⁷ Art. 168 (“Non-consensual artificial procreation”) of the Penal Code.

of the woman as a fragile and defenseless victim, who must be protected from the man who attacks her? Is there also not the concept of a man as a potential aggressor, whose vulnerability is assumed to be non-existent, as it is not foreseeable that he will be a victim of this type of crime?

4. Prohibited Purposes of Medically Assisted Procreation

The legislator prohibits the use of MAP techniques for certain purposes in fulfillment of the aforementioned principles of its legal framework, in particular that of the dignity of the human person. The use of human cloning for reproductive purposes is, therefore, prohibited on the grounds that predetermination of the genetic heritage of the clone would offend the margin of genetic indeterminacy that exists in sexual reproduction (where two distinct genetic heritages are combined) and could have serious consequences for the future exercise of the rights to genetic identity and the free development of personality.¹⁸ Beyond the right not to be born as the clone of another person, living or dead (which cannot be respected in the case of monozygotic twins), the right not to be cloned, to produce clones of a given individual (e.g., from genetic material where consent for collection has not been given) also results from this prohibition.

Human cloning for reproductive purposes is only permitted in the case of a genetic mitochondrial disease in the mother. In this case, it will be necessary to resort to the donation of oocytes, with the nucleus of the donated oocyte being replaced by that of the ill woman. The clone obtained after the fusion of the nucleus with the donated genetic material, through an electrical or chemical stimulus, is a clone of the ill woman, as it shares the nuclear genome with her.¹⁹

The prohibition of human reproductive cloning also results from the provisions of the first Additional Protocol to the Convention on Human Rights and Biomedicine, which prohibits the Cloning of Human Beings, signed and ratified by the Portuguese State in 2001. Article 1 states that “any intervention for the purpose of creating a human being genetically identical to another human being, whether living or dead,” is prohibited, with the term “genetically identical” meaning, for its application, that a human being has in common “the same set of nuclear genes.”

Beyond prohibiting the use of this specific technique, whose appropriateness with the recent advances in Epigenetics must be reconsidered in the medium term, the use of MAP for the improvement of non-medical characteristics (such as skin or eye color) of the unborn child is also prohibited.²⁰ In these cases, it is considered that it would constitute an instrumentalization of the genetic constitution of the unborn child to the interest of a third party (in principle, the parents), which is offensive to the child’s human dignity. The use of genetic preimplantation testing and genetic engineering for improvement with the aforementioned purposes is, thus, prohibited, expressing positive eugenics that would lead to the existence of two types of human beings: the “genetically guaranteed” because their genetic constitution has been

¹⁸ See Article 7, paragraph 1 (“Prohibited Purposes”) of Law 32/2006, of 26 July.

¹⁹ See Article 36 (“Reproductive cloning”) of Law no. 32/2006 of July 26, which punishes whoever “transfers to the uterus an embryo obtained through the technique of nucleus transfer, except when such transfer is necessary for the application of MAP techniques” with a prison sentence of between 1 and 5 years. See Melo (2019a).

²⁰ See Article 7, paragraph 2 of Law 32/2006, of 26 July.

carefully chosen or improved and the remaining members of the human species whose genetic constitution would result from the genetic lottery associated with sexual reproduction. This prohibition also aims to prevent the emergence of offensive situations of discrimination based on the genetic heritage of individuals belonging to the second of these groups (Council of Europe n.d.).

Similarly, to prevent eugenic tendencies, in this case, negative eugenics, preimplantation genetic testing of embryos is prohibited regarding “multifactorial diseases where the predictive value of the test is very low,”²¹ as no significant benefit accrues to the embryo tested in terms of preventing the future onset of symptoms of the disease. Further, the systematic non-implantation of embryos carrying the pathogenic mutations associated with them would be a measure of negative eugenics, and the harmful effects of that might be disproportionate to the expected benefits.

Moreover, to prevent negative discrimination, though based on another factor—sex—the use of MAP techniques for selecting the sex of the child to be born is prohibited. The aim is to prevent the use of preimplantation genetic testing and prenatal diagnosis techniques to implant or abort embryos or fetuses that do not correspond to the desired sex, which, as a rule, will be male, given the preference still present in certain groups in the Portuguese society to have children of that sex. There is, however, one exception to the prohibition on choosing the sex of the unborn child: where it is necessary for medical reasons, for example, to prevent the transmission of a disease linked to the sex chromosomes, such as hemophilia.²²

Similarly, the use of MAP techniques for the creation of chimeras or hybrids by fusing genetic material from different species is prohibited. This practice, which is well represented in Greek and Latin mythology, is punishable with a prison sentence of one to five years, as it is considered offensive to human dignity.²³

5. The Surrogacy Contract

Law 32/2006 of July 26 defines surrogate pregnancy for its application as “any situation in which a woman is willing to bear a pregnancy for another person and to give up the child after birth, renouncing the powers and duties of motherhood”²⁴ and only allows the celebration of this contract for clinical purposes and if offered free of charge. The existing provisions on the matter are not currently applicable in practice, as the Constitutional Court has declared several of the rules therein to be unconstitutional.²⁵ In fact, the application of these norms could induce contradictory solutions with other norms in force (e.g., those regarding the voluntary interruption of pregnancy). Paragraph 10 of Article 8 of the above-mentioned law established that the surrogacy contract must contain provisions to be observed “in the event of

²¹ See Article 7, paragraph 2 of Law 32/2006 of July 26.

²² In accordance with the provisions of paragraph 3 of Article 7 of Law 32/2006 of July 26, it is permitted to choose the sex of the child to be born using MAP in cases “where there is a high risk of a sex-linked genetic disease and for which direct detection by pre-implantation genetic diagnosis is not yet possible, or where there is a serious need to obtain a compatible HLA (human leukocyte antigen) group for the treatment of a serious disease.”

²³ See Article 38 (“Creation of chimeras or hybrids”) of Law 32/2006 of July 26.

²⁴ See Article 8, paragraph 1 (“Surrogate motherhood”) of Law no. 32/2006 of July 26. See Raposo (2017).

²⁵ In particular, it declared unconstitutional, with general binding force, the rules contained in paragraphs 2, 3, 4, 7, 10, 11, and 12 of Article 8 of the referred diploma. See the Judgment of the CC no. 225/2018 of April 24 (Rapporteur: Pedro Machete (Constitutional Court of Portugal 2018)).

a voluntary termination of pregnancy.” If the Penal Code admits the exclusion of punishment for voluntary interruption of pregnancy in the conditions established in Article 142 and determines in its no. 4 that the decision to perform the interruption belongs, as a rule, to the pregnant woman, how can one accept the lawfulness of a clause in a surrogacy contract in which the pregnant woman renounces, in advance, to exercise her freedom to consent (or not) to an eventual interruption of pregnancy? If the lawfulness of this clause were accepted and the pregnant woman did not comply with it, could she be held liable under civil law for an unjustified breach of the contract she had signed?

Next, one must question how the provisions of this paragraph of Article 8 can be combined with those of paragraph 11: “The contract referred to in the previous paragraph may not impose restrictions on the behaviour of the surrogate mother or impose rules that violate her rights, freedom, and dignity.” In light of this provision, is it permitted for the pregnant woman to have sexual relations with her partner, drink alcohol, or smoke during the performance of the surrogacy contract? Did the legislator disregard the best interests, particularly in terms of the future health, of the child that was “ordered”?

Can the woman who signed the contract regret having done so and not accept the implantation of the embryo in her uterus or not deliver the child to the beneficiaries after birth? Law 32/2006 of July 26, only determines that the consent of the beneficiaries is “freely revocable by any of them until the beginning of the therapeutic processes of MAP”; that is, until the uterine transfer. The surrogate mother does not fall within the personal scope of application of this rule, as she is not a “beneficiary of the techniques.” The non-consensual uterine implantation of an embryo would constitute an illicit offense to her physical and moral integrity, contrary to her constitutionally enshrined rights. Would there be an obligation for the pregnant woman to compensate the couple to whom she committed herself to deliver the child, given the breach of contract? Or would there be compensation for moral damage if the woman chooses not to deliver the child once the birth has taken place? In this case, would the pregnant woman adopt the child she gave birth to, because according to the legal provisions contained in the aforementioned diploma, she is not considered to be the mother at a legal level?²⁶ Could the court order the judicial delivery of the child, as has been the case for centuries with the possibility of demanding the judicial deposit of a married woman?

The Constitutional Court of Portugal (2019) has ruled on these issues in Judgments no. 255/2018 of April 24, and 465/2019 of September 18, the second of these judgments having, to a large extent, merely repeated the content of the first.

In the first of these judgments, although the Court did not recognize the existence of a constitutionally enshrined right to resort to surrogate motherhood, it admitted the existence of constitutional values that justify the conclusion of contracts that include it at a legal level in cases where the intended parenthood cannot be achieved in any other way because of medical situations preventing pregnancy. This conclusion does not, in itself, offend the dignity of the child, the surrogate mother, or the fundamental duty of the State to protect the child that will be born using this technique.

²⁶ According to paragraph 7 of Article 8 of Law 32/2006, “the child born through the use of surrogate motherhood is considered the child of the respective beneficiaries.”

The Court considered, however, that certain provisions of the current law on MAP offend constitutional principles and rights. Thus, it declared the unconstitutionality with the general binding force of several rules of Law 32/2006 of July 26. The Court did so regarding the norms contained in numbers 4, 10, and 11 of Article 8 of this diploma, as far as they admit the celebration of surrogacy agreements on an exceptional basis and with previous authorization for violation of the right to the free development of personality and the right to found a family on the part of the pregnant woman, given the restrictions that may be imposed on her and the principle of legal determination for lack of clarification in the law of the limits that may be imposed on the contractual autonomy of the parties.

Regarding paragraph 12 of the aforementioned article, the Court also determines nullity for breach of any of the legal requirements, to the extent that, by imposing nullity, without differentiating as to the degree of seriousness of the breach committed, it infringes the principle of legal certainty and creates legal uncertainty as to the status of a child born under a gestational contract. This uncertainty arises from the fact that the declaration of nullity of this contract would prevent the consolidation of the legal status of filiation, which is offensive to the personality rights of the child.

The Court also declared Article 8(8), along with Article 14(5), unconstitutional with general binding force in the second of the above judgments, insofar as they do not allow the revocation of the consent of the surrogate mother until the child is delivered, on the grounds that it offends her right to the free development of her personality, as enshrined in Article 26(1) of the Constitution of the Portuguese Republic, interpreted following two other constitutional precepts: Article 1, which enshrines human dignity, and Article 36(1), which enshrines the right to found a family.

Finally, it was also declared unconstitutional with general binding force, paragraphs 1 and 4 of Article 15 of Law 32/2006, of 26 July, in the part where they impose an obligation of absolute secrecy on the donation of gametes and embryos, surrogacy, and the identity of the donors and the surrogate mother, as they offend the right to personal identity and the development of the personality of the child born through them.

Given that the decisions of unconstitutionality with general mandatory force produce, as a rule, affects the enforcement of the rule and that the National Council for Medically Assisted Procreation had already authorized the signing of gestation contracts, as the respective therapeutic procedures had begun, the aforementioned declaration of unconstitutionality would imply that the children born via such procedures would be left without an established filiation.²⁷ Hence, to avoid this situation, the Constitutional Court limited the effects of the declaration of unconstitutionality: it did not affect the mentioned contracts that were being executed by the parties.²⁸

Several questions of antidiscrimination law are raised which are difficult to answer, such as whether bearing a pregnancy for another person is a service that does not involve the improper use of the body of the woman providing it, as surrogate

²⁷ See Article 282(4) ("Effects of the declaration of unconstitutionality or illegality") of the Constitution of the Portuguese Republic.

²⁸ See the aforementioned Judgment of the CC no. 225/2018 of April 24, and the Judgment of the Constitutional Court no. 465/2019 of September 18, published in the Official Gazette, no. 201/2019, Series I, of 18 October 2019, p. 117 et seq.

mothers are, generally, in countries where the contract is considered lawful, poorer and more uneducated than the women to whom they will deliver the child at the end of the pregnancy.

These arguments were discussed in Judgment no. 465/2019 of September 17, regarding the proposed wording of Article 8 of Law no. 32/2016 of July 26; and Decree no. 383/XIII of the Portuguese National Assembly (Constitutional Court of Portugal 2019; Raposo 2017).²⁹ The right of the pregnant woman to change her mind after the start of MAP therapeutic processes was not consecrated therein. This solution was declared unconstitutional by the Portuguese Constitutional Court for violation of the right to free development of the personality of the pregnant woman, interpreted per the principle of the dignity of the human person and the right to form a family. The new proposals under discussion in the Portuguese Parliament maintain the solution previously approved by this democratically elected sovereign body of recognizing the surrogate mother's right to regret.

The National Ethics Council for the Life Sciences, in April 2019, in its Opinion No. 104/CNECV/2019 on this possible change in the legal regime of surrogacy, highlighted the risk that, by allowing the revocation of the consent of the surrogate mother, it would allow "the possibility of frustration of the realization of the parental project, even after the therapeutic procedure has been initiated" (CNECV 2019).

It will be interesting to see what position the Constitutional Court will take if these proposals, discussed in Parliament, are approved.

6. Embryonic Research

The current legislation prohibits the creation of embryos for scientific research, which can only occur with embryos that already exist, are surplus (regarding the parental project of the infertile people for whom they were created), or are non-viable. Scientific research is also allowed on embryos obtained by cloning (carried out by somatic nuclear transfer or embryo splitting) (i.e., embryos "obtained without the use of sperm fertilisation").³⁰ These embryos can also result from "iPs" (stem cells that have been artificially induced to develop such that they behave like embryos), parthenotes (unfertilized oocytes that behave like embryos), or embryos produced from gametes originating from stem cells. The rapid scientific progress that has been made in this area in recent years makes it challenging to provide an adequate regulatory framework. This conclusion is easily reached if one examines the case law of the Court of Justice of the European Union on the patentability of embryonic stem cells.³¹

As per the Portuguese legislation in force, embryo research may only be carried out for therapeutic or scientific research purposes that "may benefit humanity" as

²⁹ Paragraph 8 of the aforementioned Article 8 is amended to state that "A woman may be a surrogate mother if she is, preferably, related by bloodline to the second degree or up to the fourth degree collaterally, related up to the second degree or adopter of at least one of the beneficiaries." Paragraph 15 of this article stated that "the conclusion of legal business of surrogacy is made by means of a written contract, established between the parties (...), which must contain, among others, clauses having as object 'the provisions to be observed in case of possible voluntary interruption of pregnancy, in accordance with the legislation in force.'" The rights and duties of the surrogate mother are set out in articles 13 a) and b) of the draft law, which do not include the pregnant woman's right to regret.

³⁰ See Article 9, paragraph 4 ("Research using embryos") of Law 32/2006 of July 26.

³¹ Issued mainly in relation to the interpretation of the provisions of Directive 98/44/EC of July 6. See Melo (2019b).

long as it is previously authorized by the entity with regulatory powers in the field of MAP, which is the National Council for Medically Assisted Procreation.

7. The Donation of Gametes and Embryos

The donation of gametes (spermatozoa and oocytes) and embryos is legally permitted when, given the state of medical and scientific knowledge, “pregnancy or pregnancy without severe genetic disease cannot be achieved through any technique using the gametes of the recipients and provided that effective conditions to ensure the quality of the gametes are ensured.”³² The insemination of a woman with donor semen is allowed regardless of medical indication whenever “pregnancy cannot be achieved by any other means,” thus materializing the right of women to be mothers outside the context of a heterosexual relationship. The use of fresh semen for insemination purposes is not allowed to prevent the transmission of diseases such as HIV/AIDS; only cryo-preserved semen should be used for MAP purposes.³³

Donors are not, legally speaking, considered to be the parents of the unborn child because of the donation of gametes or of surplus embryos that have not been used in the context of the parental project of a couple or of a single woman who has resorted to MAP techniques. The child that is born as a result is considered to be the child of the beneficiary of the techniques and of the person who, together with the latter (if any), has consented to the use of MAP.³⁴

The Constitutional Court, in its judgments on the constitutionality of rules contained in Law 32/2006 of July 26, has changed its position on the anonymity of the gamete donor. In Judgment no. 101/2009, of 3 March 2009, it was noted that such anonymity would be justified, stating that “(...) this limitation to the knowledge of the progeny (although not of absolute character) is justified, as has been shown, by the need to preserve other constitutionally protected values, so that it can never be understood as arbitrary discrimination capable of jeopardizing the principle of equality between citizens” (Constitutional Court of Portugal 2009).

Thus, a regime of “mitigated anonymity” was accepted insofar as, though the rule was that the identity of the donor was not accessible in cases of heterologous procreation (i.e., by a couple of different sexes using gamete donation) or single-woman or female couple procreation, access to information on the identity of the donor was allowed in some circumstances. Law no. 32/2016 of July 26, allowed it if there were “weighty reasons recognised by a court judgment” and not knowing this identity would cause the unborn child intolerable suffering. It also allowed, through the National Council for Medically Assisted Procreation, access to genetic information to determine whether there was a risk of incest in the event of a foreseeable marriage between children born through MAP or the transmission of a hereditary disease.

However, in Judgment no. 225/2018 of April 24, the Constitutional Court significantly changed its position on the matter, considering that it deserves constitutional

³² See paragraph 1 of Article 10 (“Donation of spermatozoa, oocytes and embryos”) of Law No. 32/2006 of 26 July.

³³ See Article 19 (“Insemination with donor semen”) of Law 32/2006, of 26 July.

³⁴ See Article 20 (“Determination of parenthood”) of Law no. 32/2006, of July 26 and Article 1839 (“Grounding and legitimacy”) of the Civil Code that does not allow the judicial challenge of parenthood based on artificial insemination to the spouse who has consented to it. On the legal relevance of the consent of the beneficiary of heterologous procreation who has not contributed to the MAP process with reproductive cells, see Supreme Court of Portugal (2018).

censorship “in the light of current thinking about the importance of knowing one’s origins as a fundamental element in the construction of identity” and the aforementioned legislative option of establishing donor anonymity as a rule in heterologous procreation (with recourse to gamete or embryo donation) and surrogate pregnant women, as this rule “(...) constitutes an undoubtedly serious impact on the rights to personal identity and the development of personality, established in Article 26, no. 1, of the Constitution of the Portuguese Republic.” Thus, the Court declared the unconstitutionality, with general mandatory force, of several rules of Article 15 (“Confidentiality”) of Law 32/2006 of July 26:

- The provisions contained in paragraph 1 regarding the obligation of strict confidentiality with respect to persons born as a result of MAP in those situations.
- The provisions contained in paragraph 4 for infringement of the said fundamental rights given an unnecessary restriction of those rights, as follows from a combined reading of Articles 18(2) and 26(1) of the Portuguese Constitution.

Therefore, according to the law in force, people born through MAP, with recourse to the donation of oocytes, spermatozoa, or embryos, can obtain either from the competent health services, information of a genetic nature concerning them, or from the National Council for Medically Assisted Procreation, once they reach a civil majority, “information on the civil identification of the donor.”³⁵

This change in jurisprudential orientation does not, however, undermine the rule that donors of gametes or embryos are not considered the legal parents of the unborn child. The fact that the child can access the identity of the donors does not generate parental responsibilities.

With the careful medical selection of gamete donors intended to prevent the transmission of genetic variation associated with disease or disability to the next generation, will the children resulting from MAP be genetically “more guaranteed” than those resulting from natural fertilization? Are persons conceived through sexual relations, carriers of the genetic constitution resulting from the natural lottery, negatively discriminated against relative to those produced in a laboratory with gametes from carefully selected donors? Will it not be inevitable in the future that parents rationally decide to completely dissociate sexuality from reproduction, choosing to always have children through the use of MAP to ensure the best possible genetic makeup by selecting gametes and embryos that are as healthy as possible?

Linked to this question is the importance of the biological constitution in the recognition of the legal quality that is the eminent dignity of the human person. Will the “fundamental unity of all members of the human family” and the recognition of their “inherent dignity and diversity” reside in the human genome, as proposed by UNESCO (1997) in the Universal Declaration on the Human Genome and Human Rights?³⁶ What is the effective importance of biology, in particular belonging to the human species in the recognition of human rights? This question, associated with those of reductionism and genetic determinism, must be rethought given the results of the Human Genome and Human Epigenome Projects, which reveal that we are close to other species (in particular with other advanced primates) and that genetic

³⁵ See Article 15, paragraph 2 of Law 32/2006 of July 26.

³⁶ Article 1 of this Declaration (UNESCO 1997).

determinism is less intense than initially assumed, given the possibility of mutations in the genetic makeup of each individual because of the influence of the environment.

8. Final Considerations

The current legislation on MAP in Portugal and its interpretation and application according to Jurisprudence and Doctrine seeks to protect against unfair discrimination on the grounds of gender. However, as is often the case in matters of Antidiscrimination Law, it is necessary to be alert to trends that are contrary to legal protection against this form of discrimination, expressed mainly by the recent doctrinal current that aims to combat the alleged “gender ideology.”

This ideology was, for example, recently defined by Dom Nuno Brás, as intending to “impose on everyone the disappearance of the differences and complementarities that biological reality brings, in favour of a presumed capacity of the human being to create, starting from culture, an asexual and tolerant world—utopically more peaceful but, in fact, a source of conflicts not only between people or empires but also (and much more seriously) between the human being and his own nature” (Brás 2019). Similarly, one can read in the apostolic exhortation, *Amoris Laetitia*, signed by Pope Francis in 2016, that this ideology “denies the difference and the natural reciprocity of man and woman. It envisages a society without gender differences and empties the anthropological basis of the family” (Francis 2016).³⁷

According to this current of thought, reflected in the legal system of some States because of being defended by the ideologies that currently dominate them (consider Brazil³⁸ or the United States of America)³⁹, gender ideology can be criticized because it challenges the idea from classical anthropology of the substantial unity of body and soul, rejects the sexual determination of the body as constitutive of the subject’s identity, rejects the binary system of “masculine/feminine” and the normative heterosexuality often associated with it, and dismisses the existence of a necessary relationship between family and procreation.

As Diogo Gonçalves, Pedro Afonso, and Margarida Neto expressively write on the subject, “gender ideology confuses reality with its expression, reality with language,” mainly by “manipulating language (...) sometimes by suppressing concepts, sometimes by introducing new ones, sometimes by promoting significant semantic changes” (Gonçalves et al. 2018).

By imposing itself as a “single mindset” with the support of major international or supra-national organizations such as the United Nations, the Council of Europe, or the European Union, this ideology offers, in the words of those who contest it, “a new ethical-legal order in the regulation of sexuality,” which aims to assert itself as “a global cultural revolution” to be fought by all available means (Bolsonaro 2019; Alves 2019; Hains 2019).

³⁷ See No. 56 of this exhortation dedicated to “gender ideology,” delivered in Rome on 19 March 2016 (Francis 2016).

³⁸ See, for example, the statements made on the matter by President Jair Bolsonaro (2019), namely in his inauguration speech on 1 January 2019, where he stated his intention to “unite the people, value the family, respect religions and our Judaeo-Christian tradition, combat gender ideology, preserving our values; and those of Minister Damares Alves (3 January 2019), in particular when she states that she inaugurated a “new era in Brazil” in which “boys wear blue and girls wear pink” (Alves 2019).

³⁹ See, for example, the news item (Hains 2019). Soon the legislative setbacks regarding protection against gender discrimination, see Hollanda (2018).

This doctrinal position may have, as a practical consequence, less protection for people against negative discrimination on grounds of “gender” in all dimensions of their lives, including access to MAP techniques, which will undeniably be contrary to their eminent dignity as human persons and their right to develop their personality freely and harmoniously. Arguably, it brings the fundamental risk of repealing much of the anti-discriminatory legislation adopted in recent decades on access to MAP techniques, the legal institute of marriage, and the typification of hate crimes. This risk underlies the return to the male/female binary system and the normative heterosexuality that, for centuries, accompanied it in our legal system.

Thus, to counter the situation, it is essential to promote, at all levels, the exercise of attentive and active citizenship in defense of people’s rights against unfair discrimination to adopt educational policies that convey clear and technically precise ideas of what “gender” means and the need to combat negative discrimination based on it. Particular attention should also be given to training those who apply the law (judges, security forces) in these matters of anti-discrimination law.

Raising awareness, including through the media, of the need to respect and apply the principles and standards of this new branch of law remains essential to ensure adequate protection of people against gender discrimination in all dimensions of their lives, particularly the issue being addressed here: access to new MAP techniques (Silva 2016, p. 58). Finally, it is essential to be alert to the dynamic nature of philosophical, anthropological, and sociological thought on these matters that the Law, as a normative discourse influenced by other social discourses present in a society at a given time, should accompany. Themes such as “gender stereotypes” (Lima and Sobral 2016; Silva 2016; Badiou 2019; Torres 2018), “gender identity and diversity,” “gender expression,” “genderflux,” “genderfluid,” and “agender” should be part of the legal discussions held for the adequate regulation of these matters in Portugal in the 21st century.

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