

The Portuguese law on Surrogacy – Promises and Perils

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Abstract: After years of intense debate, on August 22, 2016 the Portuguese Assisted Reproductive Technologies (ART) Law was altered, and altruistic gestational surrogacy was made legal in Portugal. Although the journey has not been easy since then. The Portuguese Constitutional Court was called twice (in 2018 and 2019) to analyse the legal provisions of the surrogacy legal regime. The judges concluded that altruistic surrogacy was not in violation of the Portuguese Constitution, although the legal solution, and later amendment, was, in some of its provisions, unconstitutional. The judges found that the law needed to guarantee the right of the surrogate to regret the arrangement after the child was born. Considering the rulings of the Constitutional Court, surrogacy contracts in Portugal are not enforceable and the surrogate can, after the child is born, revoke her consent and become the legal mother of the child. The Parliament altered the Law accordingly in 2021, although, for the time being, it is still to be regulated.

Using qualitative methods, including legal, and bioethical analyses and a review of literature, this paper introduces an overview of the Portuguese legal solution on surrogacy and discusses, in particular, the right to regret of the surrogate after the child is born. The conclusion is that the Portuguese law on surrogacy does not yet have a clear and needed position about who are, in fact, the parents or mother(s) of the child in contested surrogacy contracts if the surrogate regrets the arrangement and revokes her consent after the child is born.

Keywords: Assisted reproductive technologies, family, surrogacy contracts, Portuguese law, consent, right to regret.

1. INTRODUCTION

Surrogacy is an increasingly popular *method* for couples or single people to achieve a parental project by resorting to the reproductive cooperation of a third party. Intended parent(s) resort to a woman willing to become pregnant on his/her/their behalf and, after birth, relinquish – physically and legally – the child. The procedure is done through an assisted reproductive technique, most commonly *in vitro* fertilization (IVF) or intracytoplasmic sperm injection (ICSI). In fact, in many cases, surrogacy is the only reproductive solution couples, or single people, have to become parents. Either because of medical infertility or social infertility, for instance, gender, sexual orientation, civil status, or age.

In recent years legal and ethical discussions on surrogacy (re)emerged in Portugal since some legal proposals were presented in the Parliament to alter legal provisions related to surrogacy, i.e., to the prohibition of the technique.

The legal initiatives sparked even more the debates among policymakers, legal experts, healthcare professionals and public in general. In fact, surrogacy arrangements were, in any case, forbidden by the Portuguese legislation. Until 2016, surrogacy contacts

were, if existed, not only, void, and the surrogate considered the legal mother of the child, but also a criminal offense, according to the Article 39 of the Law n.º 32/2006, published on July 26, 2006 (Portuguese Medically Assisted Procreation Law (Lei da Procriação Medicamentada Assistida (LPMA) in the original) [1]

After intense debates, in 2016, Law n.º 25/2016, published on August 22, 2016, (Lei n.º 25/2016), came into force on September 1, 2016, and altered some of the Portuguese ART legal provisions. From that moment on, Portugal legalized surrogacy contracts under certain legal conditions. One year later regulation came into force. [2, 3]

Surrogacy, before forbidden in Portugal in any circumstance, became legally accepted and is defined as “any situation in which a woman accepts to endure a pregnancy on behalf of another person and to deliver the child after the delivery, renouncing to the powers and duties proper to motherhood.” (Article 8(1)). Portugal’s legislation adopts contracts to provide the arrangement for surrogacy and are the key element in determining the status of all the parties and the child. [4, pp. 14-15]

This paper delves into the landscape of surrogacy law in Portugal since 2016, aiming to shed the light on the legal solution the Legislator adopted, and to provide a comprehensive understanding of the challenges ahead in the realm of surrogacy law. In particular, we will analyse the right to regret of the surrogate after the

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child is born and the consequences of that right to the intended parent(s), recommending a legislative change to establish, in that case, the legal bond between intended parent(s) and the child.

To do so, we will analyze the legislative process that led to the current legal solution, the background that conducted to 2016 legal alteration permitting surrogacy and the contribution of the Portuguese Constitutional Court to shape the new legal solution on surrogacy that came into force in 2021 (although not yet regulated). The Court's decisions led to legal amendments that resolved some issues although, in our opinion, introduced new gaps that need to be considered for further legal amendments.

2. THE PORTUGUESE LAW ON SURROGACY. BACKGROUND AND THE 2016 LEGAL SOLUTION

Surrogacy was prohibited in Portugal until the legal alteration that took place on 2016.

The procedure was always at the epicenter of heated debates among policymakers, legal scholars, health professionals, bioethicists and public in general and the legal solution aligned with the perspective that surrogacy was not a procedure to be used as a legitimate one to have a child.

Legal and ethical dilemmas surrogacy arise were in the collective awareness since, at least, the 1980's with the American legal battle of *Baby M*. [5] This case was among the ones that presented an example about legal issues surrogacy contracts can lead. In this case, a traditional and commercial surrogacy arrangement ended up in a judicial battle with worldwide coverage. The surrogate and the intended parents disputed motherhood after the surrogate regretted the arrangement. It promoted not only a judicial dispute but also a passionate social, religious, ethical, and political debate related, among other issues, to the commodification of children and of the unique female reproductive capacities. The very concept of family, mainly the establishment of motherhood, was in discussion. [6, p. 69] As it was clear in *Calvert v. Johnson* case [7] that imprinted a new legal dimension on motherhood. A dual criterion to determine motherhood. In the *Baby M* case, the Court ended up recognising that the surrogate was the mother of the child, although custody was awarded to the intended parents. In the *Calvert v. Johnson* case, the Court decided that the surrogate was not the mother but someone who accepted to execute a certain contract, i.e., to carry and give birth to a child. [8, p. 122]

Pregnancy was also seen as a service from then on. The Supreme Court of California emphasised the *intention* clause as a significant principle to establish parenthood, in particular motherhood, and surrogacy contracts could be enforceable.

Considering the legal heterogeneous landscape, globalisation produced *repro-tourists*. People turn to friendly legislations, escaping their own legal prohibitions in their jurisdictions, or looking for more affordable and/or easy processes. [9]

The phenomenon increases cross-border surrogacy arrangements, mainly in poorer countries and "[...] surrogacy cannot merely be seen through the lenses of ethics or morality but is a structural reality, with real actors and real consequences." [10, p. 144] Global surrogacy – a contract across borders – is one of the issues that intensifies those inequities, and "[...] people have been caught between various nations' regulations, while lack of international regulation can encourage exploitive situations." [11]. The so-called repronationalism, and how science and biotechnology are increasing their influence in many social, ethical, moral, and political, among others, sectors "[...], underlines how the rise of stem cell science is part of a country's national identity and political economy, shaped through reproductive policies and practice". [12, p. 354]

In fact, surrogacy is still under a heated bioethical (and legal) debate, and feminist are divided. If liberal feminists say that surrogacy, like abortion, is just an exercise of women's autonomy and a technique that accomplishes the right to have a family for those unable to procreate, other feminist scholars question that "[w]omen engaging in global commercial gestational surrogacy are exercising their autonomy in the context of the feminization of survival where women's autonomy is severely limited by low social status, poverty, and familial and governmental pressures." [13, p. 277] Others add that surrogacy is a form of *baby-selling* [14, p. 128], especially in commercial arrangements, a commodification of human beings, and a violation of human dignity. [15]

At the Human Rights Council session held on March 6, 2018, it was "[...] postulated the need to develop international law – both public and private – that would regulate surrogacy issues." [16, p. 522]. The lack of international principles related, mainly, to cross-border surrogacy arrangements increase the issue of the diverse legislative options for surrogacy. For instance,

the “[...] issuance of a permit for the child to enter the country, transcription of the foreign civil status records that indicate as a parent one or both intended parents, confirmation that a child is a citizen of the home country based on the filiation with the intended parent established abroad and the issuance of a passport.” [17, p. 653] Well-known cases like *Menesson v. France*, *Paradiso and Campanelli v. Italy* [GC] and *Labassee v. France*, among others, that were decided at the European Court of Human Rights (ECtHR), of parentless and stateless children in the context of surrogacy.

We do have to agree that all these issues raised, and others we recognize, need to be addressed, in particular, at the international level. Surrogacy, under some conditions, is, in our perspective, a valid and valuable *method* either for couples or single people to accomplish a parental project. Not only for those with medical infertility but also for cases of social infertility in particular, related to gender, gender identity, sexual orientation, and civil status [18]

In fact, public awareness about the procedure, and an increasing resort to the technique by Portuguese citizens abroad, in cross-border reproductive care, made the debate resurface and a new social *tolerance* to the procedure, and to make it legal, was palpable.

Besides this more pragmatic perspective, also the active legislative changes years before related to same sex marriage, adoption by single people or same sex couples, and even the possibility of women resort to ART, irrespectively of their civil status or sex orientation, are clear examples, in our perspective, of some social awareness about new forms of family and (assisted) reproduction, including, in this case, the procedures that involve third parties, as in surrogacy.

We understand that, after years of discussion, the social, and then, political landscape, was ready to alter the previous prohibition on surrogacy and make it, within certain rules and conditions, legal. In 2016, after some proposals from different political parties, surrogacy law was approved and an alteration to LPMA was made to accommodate the new legal framework.

Surrogacy contracts are necessarily altruistic, prohibiting any possibility of commercial arrangements or any payment (Article 8(2) (5)), including any kind of donation, of any amount or good, from the intended parents (or intended mother(s)) to the surrogate. The legal prohibition does not include the reimbursement of the surrogate’s medical expenses, including

transportation, but all must be proven by a valid document.

The special emphasis on this characteristic of the arrangement is demonstrated by the fact that, despite any payment or donation, the Portuguese solution also forbids the arrangement when the surrogate is, in any form, in an economic subordination with the intended parents (or intended mother(s)), including any work relationship (6).

It is forbidden traditional surrogacy and, at least one of the intended parents/ mother(s) needs to have a genetic link to the child (Article 8(3)). [19, 20, 21, 22]

After the law was published, it was regulated in 2017 by the Regulatory Decree n. ° 6/2017, from July 31, 2017. It established all the procedures and clauses that need to be assured with the surrogacy agreement. It was necessary a written contract between all parties. The procedure is preceded with the authorization of some entities, namely the National Council of Medically Assisted Procreation (Conselho Nacional de Procriação Medicamente Assistida (LPMA) in the original), which is also the entity that will supervise the agreement, and with the previous hearing of the Order of Physicians.

The authorization application must be submitted with the following information:

- “the parents’ and surrogate’s identifications
- the acceptance of the conditions of the standard gestational surrogacy contract, signed by the parents and the surrogate
- medical documents from the medically assisted procreation centre where the treatment will be carried out to prove that:
 - the genetic mother does not have a uterus, has an injury or disease in the uterus that definitively prevents pregnancy or is in another clinical situation that justifies the gestational surrogacy
 - the surrogate is not a donor of any oocyte (cell that generates the ovum) for that pregnancy
- a statement from a psychiatrist or psychologist supporting the gestational surrogacy contract
- A statement from the director of a medically assisted procreation centre agreeing that the treatments will be carried out at those facilities”.

The agreement needs to have a written form and can be only authorised under medical circumstances, and exceptionally. Only and if there is no other medical option and if the intended mother does not have a uterus, has an injury or disease in the uterus that definitively prevents pregnancy, or is in another clinical situation that justifies the gestational surrogacy (Article 8(2)), can be performed (along with the other conditions mentioned). This also means that a single man or a gay couple are not able to access surrogacy in Portugal since the pre-requisite to resort to surrogacy is a female's medical incapacity to procreate.

We can also discuss if single women or lesbian couples can resort to surrogacy, according to the Portuguese legislation. It is not clear, and even today this question is still pending. The Portuguese ART law allows, in general, lesbian couples or single women to access any form of medically assisted reproduction, although the provisions related to surrogacy all seem to consider only heterosexual couples. If this is interpretation, it is not understandable the restriction. In fact, it is difficult – not to say impossible in our perspective – to explain that the LPMA (Article 6) considers that only heterosexual couples, lesbian couples – married or not – or single women can apply to one of the medically assisted procreation techniques in Portugal. Although, if to surrogacy, not even lesbian couples or single women can access it, is just a legal incongruence in our perspective, and a discriminatory solution. [23]

The Law also establishes that only authorized centres can perform medically assisted procreation, including surrogacy. No other medical institution or physician is allowed to perform it.

If CNPMA authorizes the arrangement (and the Order of Physicians is heard), the parties can engage in the surrogacy contract.

According to the alluded Regulatory Decree from 2017, the contract had to define several rules, including:

- “[T]he surrogate’s obligation to comply with the advice given by the doctor monitoring the pregnancy and to carry out the necessary examinations and procedures to ensure the normal development and well-being of the child
- the surrogate’s right to participate in the choice of the doctor who will monitor the pregnancy, the

type of delivery, and the place where the birth will take place

- the surrogate’s right to receive psychological counselling before and after childbirth
- the rights and duties of the surrogate, such as the possibility of refusing to take tests like amniocentesis or the possibility of traveling on certain means of transport or outside the country during the final three months of pregnancy
- ensuring that complete and adequate information on the treatments to be performed and the risks they may pose to health is provided
- providing information to the parents and surrogate on the effects of the surrogate’s lifestyle on the development of the child
- the rules to follow if there is any health issue with the child or the surrogate during pregnancy
- the rules to follow in case of miscarriage
- how can the people involved in the contract withdraw from it after failing a certain number of attempts at pregnancy
- the circumstances under which the people involved may terminate the contract and what the consequences will be
- that the parents make no payment (in cash or assets) or coerce the surrogate, besides the payment of expenses related to the medical monitoring of the pregnancy
- the health insurance or other subsystems associated with the contract
- how to resolve any potential disputes that may arise over the interpretation or performance of the contract.”

This contract does not admit any kind of restrictions to the behavior of the surrogate, not even – although the parties might add clauses to the agreement – impose any clauses that violate the surrogate’s fundamental rights, freedom, and dignity (Article 8(11)).

If there is any violation of the pre-requisites of the agreement, the contract is void (Article 8(12)), and in some situations, there is also criminal responsibility (Articles 34 and 39).

Additionally, surrogacy law does not inhibit the protection of parenthood, either to the intended parents or the surrogate. The Regulatory Decree n. ° 6/2017, July 31, 2017, in its Article 6 established that, to the birth of the child, the intended parents/ mother(s) have the right to a parental leave, and the surrogate benefits from the equivalent regime applicable to abortion. All the needed absences from work related to parental protection are applicable either to the surrogate, and to the intended parents/ mother(s)).

3. THE LEGAL PARENTHOOD IN SURROGACY AGREEMENTS IN THE 2016 LPMA

Surrogacy cases are, in fact, an issue about parental rights, “[...] *since they involve different people playing roles during pregnancy that would normally be played by just one person.*” [24, p. 122]. In Family Law, the Portuguese Civil Code states, in its article 1796(1), the principle *mater certa est quem gestation demonstrate*. [25] This principle encapsulates the main problem in surrogacy, since motherhood is established, according to the principle, to the woman who gives birth to the child. A principle that is centred on the biological truth seems an antagonism to the very nature of surrogacy.

Considering the developments of the medically assisted procreation, the *biological truth* principle associated with parenthood is in crisis. In IVF, for instance, the sperm donor can be a man that is not the mothers’ husband or partner, and the donor is not the father of the child but the husband or partner of the mother (Articles 20 and 21 of Law n. ° 32/2006, from July 26) [26, p. 274], if existing.

In surrogacy the issue expands. [27] Since motherhood, traditionally, is established to the woman that gives birth to the child, the surrogate should be the legal mother of the child and, if married, her husband, (presumably) the legal father. So, who are the legal parents of the child, in surrogacy contracts?

This is a matter of dispute and depends very much of the legal option the legislator adopts. Even in countries that accept surrogacy arrangements, legal motherhood can be established differently.

In Portugal, the original solution (from 2016) established, in Article 8 of LPMA, that the “*child born through surrogacy is considered to be a daughter/son of the intended parents.*” In this solution, the surrogate had to express her consent – free and informed – to be

a surrogate, although, after she became pregnant, the contract was enforceable. The surrogate could not revoke her consent after the child was born. She wouldn’t, under the enforcement of the contract, be the mother of the child she carried and gave birth to.

4. THE PORTUGUESE CONSTITUTIONAL COURT AND THE 2016 SURROGACY LAW

After the Law of 2016, the Portuguese Constitutional Court was called to analyse its provisions.

The main conclusion was that surrogacy, altruistic and gestational, was in accordance with the Portuguese Constitution. Women (surrogates) had the right to accept to become surrogates, and that intended parents also had a constitutional interest to resort to surrogacy to fulfill their parental projects. Although, the decision 255/2018, from April 24 [28], even considering surrogacy in accordance with the Constitution, declared unconstitutional Article 8 of the Law n. ° 25/2016, from August 22, in its numbers 2, 3, 4, 7, 8, 10, 11 e 12 (in its original version).

The judges identified two major problems with LPMA. The first was related to confidentiality clauses in medically assisted procreation techniques with gamete and embryo donors.

The Court decided that Article 15 and the solution of confidentially inserted in the law violated the right of personal identity of the child (Article 26(1)) of the Portuguese Constitution, the principle of security, and the duty of the State to protect childhood (Articles 26(1), 69(2)).

In fact, personal identity includes the right to personal history, including genetic origins. [29] To the Constitutionalists Gomes Canotilho and Vital Moreira, the right of personal identity must be interpreted as the right each one has to identify himself or herself as a singular individual, including their personal history. [30]

Quoting Rafael Vale e Reis, Article 15 of LPMA was a true restriction of the right to know about the genetic origins. [31] And any legal solution, as Tiago Duarte supports, that includes the possibility of a confidentially clause in any assisted reproductive technologies with gamete or embryo donation, including in surrogacy procedures, must be found unconstitutional. [32]

Supporting those arguments, that was also the solution adopted by the Court.

Related to the first issue, the Portuguese Parliament ended approving the Law n. ° 48/2019, from July 8, 2019. [33] Being the sixth alteration to the LPMA, the new Article 15 ended the confidentiality clause, now stating that anyone that is born through any medically assisted procedure, related to gamete or embryo donation can, in the competent health care services, get all genetic information related; also, when the person completes, at least 16 years old, can obtain, at the CNPMA, the identity information related to his or her donor. The same solution is given to all that are born through one of those procreation techniques that include gamete or embryo donation when the person is at least 16 years old to obtain information related to any legal matrimonial impediments.

The new legal norm caused a severe problem considering the previous donation of gametes and embryos. The donors gave their consent for the donation of their gametes or embryos considering the previous legal solution, i.e., all the possible information related to the genetic link that could be disclosed, excluded any kind of identification of the donors.

The second issue, related to surrogacy in particular, was the absence of a legal provision that stated the right to regret of the surrogate after the child was born. The Court concluded that it was unconstitutional that the surrogate could only exercise her right to regret until the beginning of the procedure and not, as the Court decided, until after the birth of the child. Another question was also considered by the Constitutional Court related to lack of assurance of the right of abortion on the surrogate side.

The previous existing legal solution, i.e., the surrogate could revoke her consent until the beginning of the medical procedures, violated the surrogate's right to the development of personality, interpreted accordingly to the human dignity principle, the right to have a family, and led to an excessive restriction of those rights, considering Article 18(2), Articles 1 and 26(1), as well as Article 36(1) of the Portuguese Constitution. [34]

What we understand is that the judges concluded that it should be followed a model of consent of the surrogate like the one in the adoption cases, and until sometime (how much time?) after the child is born, the surrogate should be able to exercise the right to regret. We are not comparing, or even saying that the Court compares both. Our remark is only considering that in cases of adoption, even if the mother decides to give

her child to adoption before birth, afterwards – after the child is born – she can revoke her consent.

But there is still another problem pending, even after the 2021 law. This solution presented by the Constitutional Court leads to high levels of uncertainty and, in our opinion, erases the distinction between adoption and surrogacy. Surrogacy is not a perfected adoption, and the criterion to establish motherhood should not diminish the substantial differences between both. Besides that, as Professor Sousa Ribeiro [35, p. 32] claims, if surrogacy is a matter of fundamental rights for the surrogate, it is also true for the intended parents/ mother(s), since they are the ones that develop a parental project.

After the 2018 decision, the Parliament altered some of the LMPA provisions, but in 2019, they ended at the Constitutional Court again. And again, the legal provisions related to the surrogate's right to regret (or, again, the absence of a provision that included that right) were, again, declared unconstitutional by the decision 829/2019. [36]

The Court considered, once again in the 2019 decision, that the absence of the right to regret after the child was born violated the fundamental right of the surrogate of the development of personality, interpreted accordingly to the human dignity principle. In this decision the Court assumed that pregnancy is a complex, dynamic, and unique procedure, and the relation between the surrogate and the foetus needs to be taken into account. The main issue was, considering that relation, and bound, and the influence of the surrogate in the development of the child *in utero*, if we can assume that the consent of the surrogate *ex ante* is really and/or fully informed. It should not diminish the increasing and the natural mutation of the alluded relation during pregnancy.

The judges also recall the Report of Medically Assisted Procreation and Surrogacy, where the Counsellor-President Miguel Oliveira da Silva, of the CNECV (the Portuguese Ethical Council for Life Sciences, “Conselho Nacional de Ética para as Ciências da Vida”, in the original), related to the Report 63/CNECV/2012, claimed that the significant relation between the pregnant and the foetus is not neutral and there is a true interaction between both. [37]

It is clear, as it is in the Constitutional Court argument, that there is a tension between the biological criteria to establish motherhood, and the possibility to establish it solely by contract.

5. THE 2021 PORTUGUESE SURROGACY LAW

On December 16, 2021, it was published in Portugal Law n. ° 90/2021 [38] that altered the Portuguese surrogacy solution, accommodating the rulings of the Constitutional Court.

The actual legal solution from 2021 is still to be regulated. The 2017 Decree was revoked, since it regulated the solution before the Constitutional Court declared some provisions unconstitutional.

Considering the amendments from 2021, the Portuguese legal solution on surrogacy (Annex I) maintained most of the previous provisions (from 2016) with some exception, in particular related to the legal right of the surrogate mother to revoke her consent until after the birth of the child.

The Portuguese legislator maintained that only gestational, altruistic surrogacy is permitted to heterosexual couples (married or not), and, also, in our perspective, although the law is not clear, to single women or lesbian couples (married or not). Although surrogacy is not commercial, documented medical expenses and transportation are reimbursed to the surrogate (Article 8(2) (7)).

Access to surrogacy is only allowed when the intended mother has a medical condition that definitively prevents pregnancy (Article 8(2)), and at least one of the intended parents, or intended mother(s), is(are) necessarily the donor(s) of the gamete(s).

The legislator clearly defined surrogacy as a last resource procedure and maintained the requisite of, at least, one biological link between the child to be and the intended parents.

Considering article 8(1) (9) (10) we can conclude that the legislator adopted a legal transfer of parenthood. There is no need for a parental order, before or after the procedure. The intended parents, or intended mother(s), are, by contract, the legal parents (mother(s)) of the child, although, the surrogate can revoke her consent until after the child is born (until the child is registered) (article 8(1) (9) (10), article 14 (2)).

Intended parents/ mother(s) must give written informed consent to the procedure, and, after ART procedures starts, it cannot be revoked. The surrogate must give written informed consent to the procedure, and, after the child is born, and until the registration of

the child, she can revoke it according to article 8(10) and article 14. The timing that the surrogate must revoke her consent is, in fact, dubious. Children, according to the Portuguese law, can be registered right after birth until 20 days after according to article 96 of the Portuguese Civil Registration Code [39].

The contract – a standard and formal document – needs to be previously authorized by CNPMA, and the Order of Physicians and Psychologists are heard in each case. CNPMA also supervises all of the procedures.

If the surrogacy legal provisions are violated, either surrogates, intended parents or any other not allowed third parties, as promoters or intermediaries, face criminal responsibility, according to article 39.

6. DISCUSSION

The Portuguese legal solution on surrogacy raises important issues, in particular considering the provisions that now state that the surrogate has the right to regret and can revoke her consent until after the child is born.

The surrogate can revoke her consent until after the child is born. She can do it until the child is registered. This moment is not clear since the child can be immediately registered after birth until 20 days after. The timeline for the surrogate exercise her right to regret is dubious.

The legal solution can also lead, in cases when the surrogate revokes her consent after birth, to a succession of parents and families to that child. That is, from the moment the child is born until he/ she is registered the child has no legal parents or, in fact, they are not yet determined. Truth is that surrogacy law provides that the intended parents are the parents of the child, although, this parentage only becomes definitive if the surrogate does not revoke her consent after birth since, in this case, the obvious consequence is that she will become the (legal) mother of the child.

Related to this matter in particular, already in 2023, a draft of the law that precedes the regulation on surrogacy was in public consultation. [40] Among other entities consulted, either CNPMA [41] and CNECV issued opinions related to the draft of the above-mentioned legal decree. In particular, CNECV is of the opinion that the intended parents/ mother(s) are, until the child is registered, the ones that represent the child,

and, in accordance with the legal draft, that the child should be rendered to the intended parents/ mother(s) after birth. [42]

Besides the obvious problem it arises, in our perspective, related to the child's identity and the right to have a family, the new legal solution, following the rulings of the Constitutional Court, raises two main queries. The first is about the legal position of the intended parents to the child. The law does not provide any consequences or solutions. The second is about compensation. Not only considering all expenses paid to the procedure but also moral damages and/ or loss of chance, in particular when, one or both intended parents, lose the chance to have a genetic related child.

Considering this last issue, under the Portuguese law, article 81(2) of the Civil Code, states that it is owed compensation for all the losses caused to the legitimate expectative of the parties when someone revokes the consent (considering personality rights, including the ones of the surrogate in discussion). Under this legal provision the surrogate is responsible to compensate all the losses. Although our recommendation is to include a special provision on the surrogacy law about this. The main reason is because the costs of ART treatments and all other expected expenses in surrogacy contracts that intended parents/ mother(s) must support, besides moral damages, will lead to a high amount to be paid by the surrogate. This amount of the compensation can encapsulate an effective limit to the free exercise of the right to regret of the surrogate.

To the question related to what the consequences to the intended parents are if the surrogate revokes her consent. The law does not state any consequences and any solutions to that fact. What we understand is that the surrogate will become, in that situation, the mother of the child. Although, considering the perspective of the intended parents or mother(s) if they are not to be the parents or mother(s) of the child, even if he/ she is their genetic child. Authors have been discussing the topic but, with no legal solution or regulation of the law and without any cases, it is unclear. Obviously, in surrogacy the main issue is what is the principle to take into consideration to determine motherhood: genetic, gestational, social, or even a combination of some of these principles.

An important opinion of CNECV is directed at the legal status of the intended parents/ mother(s) if the

surrogate revokes her consent after the child is born. The Council considers that it should be guaranteed that the intended parents/ mother, with a genetic link to the child, should be (also) considered legal parents of the child, even if the surrogate revokes her consent. I.e., if the surrogate revokes her consent, she is the legal mother of the child, but other biological links should be guaranteed to the intended parents/ mother. The one(s) with a genetic link to the child. So, if the intended parents are a heterosexual couple and are both genetically linked to the child, they also should be considered legal parents. The child would have two mothers and one father. In any case, whether are two intended mothers or a single woman, the child would have two mothers. The one to whom is genetically linked, and the surrogate. [43]

The Council's viewpoint is worth considering. It seems to resolve many of the issues raised by the right to regret that the Constitutional Court enforced for the surrogate. It guarantees the gestational and genetic link to the child, with no exclusions of parental figures, besides intention when it is the sole criterion, i.e., the intended father or mother with no genetic link to the child. Even the intended father or mother with no genetic or gestational link to the child is still part of the child's (dual) family, since he or she is the wife/ husband/ partner of the mother/ father.

In fact, the case is not that simple, and other issues can be raised by the proposed solution. Just consider the follow: since in Portugal only altruistic surrogacy is admissible, most of the future cases will be held among family members. Mothers or sisters that agree to become surrogates to their relatives. So, considering the solution, we could have a surrogate that would be the legal mother of the child, and, for instance, her son the legal father. Truly a family puzzle not in all easy to consider in some cases.

This is not our position. [44] We are not even raising issues to the fact that the child could have two mothers, that is not the problem, or even that the child could have more than two parents [45]

The main issue, in our perspective, is that with surrogacy, it is not possible to maintain classical criteria to establish parenthood, in particular, motherhood. Like it or not, the main and prevalent criterion is intention. Being able to revoke the consent – and we do understand that it enforces the surrogate status – and return to *mater semper certa est* principle is just not compromising to the unique nature of surrogacy and what it represents. A *method* to (intended parents)

procreate, and the surrogate to enhance her autonomy deciding what to do with her body and, living with the consequences of her choices. Any other solution is a paternalistic one that not only violates the intended parents/ mother(s) right to have a family but also denies their right to accomplish their parental project and, on another side, the rights of the child. The right to be born not an orphan or in a limbo between two possible families, but into, a family, not any random family depending on the will of the surrogate.

Until science was able to create an embryo in the petri dish, determining the natural mother was not a problem. With the scientific possibility to separate the “[...] *birth-giver from the genetic mother and the terms “biological mother” or “natural mother” become confusing.*” [46, p. 67] If we include another criterion, the *social mother*, the intended mother in surrogacy cases that is not the genetic mother nor the gestational carrier, an all-new set of issues arise. Who is the *true* mother of the child being the key issue [47].

The relationship between the parent and the child is an important matter, and it is essential do guarantee the fundamental rights of all parties. The bound gives not only the legal status of the child but also the most needed social and affective links and a sense of belonging. Legally, parenthood also establishes the citizenship [48, 49] of the child, and the responsibilities and duties of the parent(s).

The child's origins are not only a crucial aspect of his or her identity but also a fundamental right that should be taken into consideration and is a State's duty to fulfill.

CONCLUSIONS

The Portuguese Parliament, in 2016, altered ART law and made surrogacy legal in Portugal. It is legal to enter, under strict conditions, a surrogacy contract. [50] Children born under surrogacy are considered, by contract and without any judicial order (before the

ANNEX I

Table 1: Legal Solutions of Surrogacy Law in Portugal

| Surrogacy Law | Solution | Legal provisions Comments and observations |
|-----------------------|----------|---|
| Traditional Surrogacy | No | Article 8(4) |
| Gestational Surrogacy | Yes | Article 8(4) |
| Commercial Surrogacy | No | Article 8(2) |

arrangement or after the child is born), the daughter and/ or son of the intended parents/ mother(s).

The Portuguese Constitutional Court concluded that gestational, altruistic surrogacy is in accordance with the Constitution. Although the Court, addressing specifically the surrogate's rights under the 2016 law, considered that it was essential to ensure the right of the surrogate to revoke her consent after the birth of the child. Without this clear provision, the Court concluded that fundamental rights of the surrogate were violated.

The 2021 law introduced alterations in accordance to the Constitutional Court rulings, among others. Specifically, it introduced the right for the surrogate to revoke her consent until the registration of the child after birth. The surrogacy contracts were not, according to the rulings of the Court, to be enforced if the surrogate (mother) regretted entering the arrangement.

Within this new framework we conclude that if the surrogate revokes her consent, she will be legally the mother of the child. The law does not provide any solutions about the consequences intended parents will face in that case, either to their legal bound to the child (genetically related to, at least, one of the intended parents) or any due compensation for all the expenses paid with the procedure and/or moral damages and loss of chance.

In accordance with the discussion of the topic, we conclude that amendments are needed to accommodate legal solutions to these queries since they are key issues directly related to the understanding of the procedure and its consequences.

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(Table 1). Continued.

| Surrogacy Law | Solution | Legal provisions Comments and observations | | |
|---|--|--|---|--|
| Altruistic Surrogacy | Yes | Article 8(2) (7) | | |
| | | Documented expenses related to medical assistance and transportation, supported by the surrogate can be reimbursed | | |
| Genetic link to the intended parent(s)/ mother(s) | Yes | Article 8(4) | | |
| | | At least one of the intended parents, or intended mother(s), is necessarily the donor(s) of the gamete(s) | | |
| Contract | Yes | Article 8(5) (6) (13) | | |
| | | Standard gestational surrogacy contract | | |
| | | Written form | | |
| | | Free and informed consent from the surrogate and intended parent(s) or mother(s) | | |
| | | Previous authorization from the CNPMA – the request must be accompanied by: identification of the parties; acceptance of all the conditions and clauses of the standard contract medical documentation attesting the conditions required from Article 8(2) (4) | | |
| | | hearing from the Order of Physicians and Psychologist | | |
| | | Overview of the contract from the CNPMA | | |
| Compulsory clauses | Yes | Article 8(13) (14), Article 13-A | | |
| | | The surrogate is in compliance with medical guidelines of the obstetrician and is to carry medical exams and therapeutic acts for the follow-up of the pregnancy, to ensure a normal evolution and the well-being of the foetus | | |
| | | The surrogate has the right to participate in all decisions regarding delivery and the place where will take place | | |
| | | The surrogate has the right to psychological support through pregnancy and after delivery | | |
| | | Rights and obligations of the surrogate, such as to refuse to undergo diagnostic testing, such as amniocentesis, and traveling | | |
| | | Information to the parties about clinical techniques and potential health risks | | |
| | | Information to the parties about the consequences of the surrogate's lifestyle on embryonic and foetal development | | |
| | | Provisions to be observed regarding health interurrences | | |
| | | | | Provisions to be observed in cases of voluntary abortion (in accordance with Portuguese legislation. Article 140 of the Portuguese Penal Code) |
| | | | | Possibility to terminate the contract by any of the parties in the event of a number of failed pregnancy attempts |
| | Terms of revocation of consent or contract | | | |
| | Health insurances associated or subsystems | | | |
| | The form of conflict resolution adopted | | | |
| | It is not permissible to impose on the surrogate any conducts that violates her rights, namely: | | | |
| | The right to be informed about medical, psychological, social, and legal implications of the surrogacy | | | |
| | | | contract and health risks related to complications during pregnancy | |
| | | | The right to have the embryo transferred in an authorized centre | |
| | | | The right to be assisted by a doctor and a psychologist | |
| | | | The contract cannot diminish the surrogate's fundamental rights, including social and labour rights | |

(Table 1). Continued.

| Surrogacy Law | Solution | Legal provisions Comments and observations |
|---|----------|---|
| Parenthood | | Article 8(1) (9) (10), Article 14 (2) |
| | | The intended parents, or intended mother(s), are, by contract, the legal parents (mother(s)) of the child, although, the surrogate can revoke her consent until after the child is born (until the child is registered) |
| Parental order | No | Article 8(1) (9) (10) |
| Pre-requisites for the surrogate | Yes | Article 8(3) (8) |
| | | Preferably, the surrogate must have had a child previously, and concrete circumstances of the case might dictate an impediment |
| | | It prohibits any surrogacy contract when, between surrogate and intended parent(s), there is any kind of economic subordination, labour, or service relation |
| Pre-requisites for the surrogate | Yes | Article 8(3) (8) |
| | | Preferably, the surrogate must have had a child previously, and concrete circumstances of the case might dictate an impediment |
| | | It prohibits any surrogacy contract when, between surrogate and intended parent(s), there is any kind of economic subordination, labour, or service relation |
| Consent | Yes | Article 8(10) Article 14 |
| | | Intended parents/ mother(s) must give written informed consent to the procedure, and, after ART procedures starts, it cannot be revoked. |
| | | The surrogate has to give written informed consent to the procedure, and, after the child is born, and until the registration of the child, she can revoke it |
| Husband/ wife or civil partner of the surrogate | No | It is not required he or she consent to the procedure, and he or she is not the father or second mother of the child |
| Access to surrogacy: pre-requisites | Yes | Article 8(2) |
| | | Surrogacy is in last-resort cases related to the woman's (intended mother) medical conditions: |
| | | Absence of uterus |
| | | Injury or disease in the uterus, or Another clinical situation that definitively prevents pregnancy |
| List of potential beneficiaries (Intended Parents(s)/ mother(s)) | Yes | Article 4, Article 6 |
| | | Heterosexual couples (married or not) |
| | | Lesbian couples (married or not), or Single women |
| Rights and duties of the intended parents/ mother(s) | Yes | Article 12, Article 13 (in general for all ART procedures) |
| | | The right to be informed about risks, procedures, and success rates |
| | | The right to be informed about medical, social, and legal implications of the ART treatments |
| | | The right to be informed about the reasons to refuse treatment |
| | | The right to be informed about adoption as an option, and its social implications |
| | | The duty to give all information asked to a correct diagnosis |
| | | The duty to follow medical guidelines |
| The duty to give follow-up health information related to the child after birth to global evaluation of ART treatments | | |
| Rights and duties of the surrogate | Yes | Article 13-A, Article 13-B |
| | | The right to be informed about medical, psychological, social, and legal implications of the surrogacy contract and health risks related to complications during pregnancy |
| | | The right to have the embryo transferred in an authorized centre |
| | | The right to be assisted by a doctor and a psychologist |

(Table 1). Continued.

| Surrogacy Law | Solution | Legal provisions Comments and observations |
|--|----------|--|
| Criminal Responsibility | Yes | Article 39 |
| | | To intended parents and surrogates that engage in a commercial surrogacy contract |
| | | To intended parents and surrogates that engage in a surrogacy contract in violation of the provisions from Article 8(2), (4), (5), (7), (8) |
| | | Anyone who promotes and intermediates a contract in violation of the provisions of Article 8(2), (4), (5), (7), (8) |
| | | Anyone who has an economic gain to celebrate or promote a surrogacy contract |
| Accredited Medically Assisted Procreation Centre | Yes | Article 5 |
| Other contract clauses | Yes | Article 8(14), Article 13-A (2) Clauses can be added, but, in any case, they cannot be a restriction to the behaviour of the surrogate or a violation to the surrogate's fundamental rights |

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