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**Legal initiative for Gestational Surrogacy in Portugal: An overview
of the legal, regulatory, and ethical issues**

**Iniciativa legal per a la gestació subrogada a Portugal: una visió
general de les qüestions legals, reglamentàries i ètiques**

**Iniciativa legal para la gestación subrogada en Portugal: una
visión general de las cuestiones legales, reglamentarias y éticas**

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Abstract

Gestational surrogacy is a controversial ethical issue worldwide. In 2016, Portugal launched a second political attempt to legalize gestational surrogacy, proposing it as: being altruistic; forbidding a biological tie between the surrogate and the child; requiring a biological relationship between one of the legal parents and the child; and demanding a legal contract between the surrogate and the legal parents.

The law was approved, regulated and entered into force. However, months later, the Constitutional Court ruled some of its norms unconstitutional, namely due to the legal ambiguity of the surrogacy contracts; too short a deadline for the surrogate's withdraw of consent; and the need to comply with the children's right to know their biological origin. The law entered a complex political and legal process. It also caused a serious problem in assisted reproductive treatments, with the suspension of those treatments that entailed the anonymity of the donors. The law on surrogacy was, finally, enacted in November 2021, although the introduction of its regulation is still pending.

This paper describes the legal process, within its political context, stressing the ethical issues at stake, and presenting the initiative for legalization of gestational surrogacy in Portugal as a valuable case study analysis: of how a top-down initiative, ideologically driven and politically rushed, and which ignores ethical advice, generates a troubled and penalizing legal process for the people involved.

Keywords: Gestational surrogacy; law; ethics; health policy; altruism; rights and duties of stakeholders; surrogacy contracts; informed consent; anonymity.

Resum

La gestació subrogada és una qüestió ètica controvertida a tot el món. En 2016, Portugal va llançar un segon intent polític per a legalitzar la subrogació gestacional, proposant-la com: altruista; prohibint un vincle biològic entre la subrogada i el nen; exigint una relació biològica entre un dels pares legals i el nen; i exigint un contracte legal entre la subrogada i els pares legals. La llei va ser aprovada, reglamentada i va entrar en vigor. No obstant, mesos després, el Tribunal Constitucional va dictaminar la inconstitucionalitat d'algunes de les seves normes, en concret: l'ambigüitat jurídica dels contractes de gestació subrogada; un termini massa curt per a la retirada del consentiment de la mare de lloguer; i la necessitat de complir amb el dret dels nens a conèixer el seu origen biològic. La llei va entrar en un complex procés polític i jurídic. També va provocar un greu problema en els tractaments de reproducció assistida, amb la suspensió d'aquells que implicaven l'anonimat de les donants. La llei de gestació subrogada va ser, finalment, promulgada al novembre de 2021, si bé encara està pendent la introducció del seu reglament. Aquest treball descriu el procés legal, dins del seu context polític, posant l'accent en les qüestions ètiques en joc, i presentant aquesta iniciativa com una valuosa anàlisi de cas: de com una iniciativa de dalt a baix, ideològicament impulsada i políticament precipitada, i que ignora l'assessorament ètic, genera un procés legal problemàtic i penalitzador per a les persones implicades.

Paraules clau: Subrogació gestacional; dret; ètica; política sanitària; altruisme; drets i deures dels interessats; contractes de subrogació; consentiment informat; anonimat.

Resumen

La gestación subrogada es una cuestión ética controvertida en todo el mundo. En 2016, Portugal lanzó un segundo intento político para legalizar la subrogación gestacional, proponiéndola como: altruista; prohibiendo un vínculo biológico entre la subrogada y el niño; exigiendo una relación biológica entre uno de los padres legales y el niño; y exigiendo un contrato legal entre la subrogada y los padres legales. La ley fue aprobada, reglamentada y entró en vigor. Sin embargo, meses después, el Tribunal Constitucional dictaminó la inconstitucionalidad de algunas de sus normas, en concreto: la ambigüedad jurídica de los contratos de gestación subrogada; un plazo demasiado corto para la retirada del consentimiento de la madre de alquiler; y la necesidad de cumplir con el derecho de los niños a conocer su origen biológico. La ley entró en un complejo proceso político y jurídico. También provocó un grave problema en los tratamientos de reproducción asistida, con la suspensión de aquellos que implicaban el anonimato de las donantes. La ley de gestación subrogada fue, finalmente, promulgada en noviembre de 2021, aunque aún está pendiente la introducción de su reglamento. Este trabajo describe el proceso legal, dentro de su contexto político, haciendo hincapié en las cuestiones éticas que están en juego, y presentando la iniciativa de legalización de la gestación subrogada en Portugal como un valioso análisis de caso: de cómo una iniciativa de arriba abajo, ideológicamente impulsada y políticamente precipitada, y que ignora el asesoramiento ético, genera un proceso legal problemático y penalizador para las personas implicadas.

Palabras clave: Subrogación gestacional; derecho; ética; política sanitaria; altruismo; derechos y deberes de los interesados; contratos de subrogación; consentimiento informado; anonimato.

1. Introduction

The first documented case of gestational surrogacy dates back to 1985, in the wake of the progress of assisted reproductive technology (ART). But it has mostly been in this century that this procedure has started to be more widely known as a reproductive method for women and couples who, due to a variety of different reasons, could not otherwise have a child biologically related to them. At present, gestational surrogacy is seldom available and often only to those who can afford it.

It is in this context that the debate on surrogacy is being pursued worldwide, and that the national policies adopted along the way stand as examples for other countries, and case studies for academics and professionals.

Portugal is the country where surrogacy has most recently been legalized. To have a broad view on gestational surrogacy in Portugal we will focus on the legal process, the policy adopted, and the current situation.

2. Gestational Surrogacy: definition and variables

Gestational surrogacy designates the process through which a woman becomes pregnant on behalf of someone else and gives birth to that person's child.

Surrogacy can be established at the biological level: when the surrogate is the oocyte donor becoming the biological mother of the baby. When the oocyte is not from the surrogate, but rather from the woman who contracted the surrogate and who will raise the child, the latter is also the child's biological mother, even though she did not give birth.

Surrogacy should also be established at the legal level: when, with or without a biological tie, there is a formal contract that attributes maternal rights and duties to another woman who is not the gestational mother.

In either case, surrogacy can also be commercial – when it is paid for by whoever hires the service – or altruistic, solidary and compassionate – when it is free of charge, being, at most, compensated exactly for all the financial burdens it entails for the surrogate.

Altruistic surrogacy is considered more or less restrictive/liberal according to the level of accessibility, respectively: to nationals or also to foreigners; to heterosexual couples or also to homosexual couples and to singles; as a subsidiary principle, to overcome infertility considered as a disease; or as a social resource, as a reproductive alternative (e.g. for single men).

All these variables, and their multiple connections, were considered upon during the process of legalization of surrogacy in Portugal: that (1) it is altruistic; (2) it forbids a biological tie between the surrogate and the child; (3) it requires a biological relationship between one of legal parents and the child; and (4) it requires a legal contract between the surrogate and the legal parents. These characteristics define a balanced or moderate profile for the Portuguese framework for surrogacy.

3. Context of the Portuguese legalization of surrogacy

3.1 The earlier prohibition of surrogacy

The majority of countries worldwide do not have a specific law on gestational surrogacy. Nevertheless, most countries that have laws on assisted reproductive technology specify their position on what concerns surrogacy, generally forbidding it. This is the case for most European countries, and it has also been the situation in Portugal since 2006, when the first law on Medically Assisted Procreation was approved¹.

It is worthwhile to stress that before 2006 there had been a few attempts to pass a law on Medically Assisted Procreation, all of which had failed, due to the lack of public debate and of a broad consensus on the issue – as was stated by the President of the Republic, at the time, when he vetoed the law (July 1999) – aspects then considered essential, and which showed the option for a bottom-up approach in axiologically determined legal decisions. Meanwhile, the first Portuguese baby generated by in vitro fertilization was born in 1986. Hence, for 20 years, medically assisted procreation was practiced in Portugal outside of a specific legal regulation.

The 2006 Portuguese Law on Medically Assisted Procreation allowed assisted procreation under specific conditions, to prevent abuses of reproductive technologies, and also to establish quality requirements for professional and clinical centres dedicated to this activity. Reproductive technologies were considered strictly as a subsidiary procedure and were not accepted as an alternative reproductive procedure².

Consequently, reproductive technologies were accepted as a medical treatment for infertility or for severe clinical conditions (e.g. insufficient cardiac function), as well as to prevent the transmission of genetic, infectious (e.g. HIV) or other diseases³.

The law also restricted access to reproductive technologies to heterosexual couples, who were married or living together for more than two years⁴. However, heterologous assisted reproduction – that is, using gametes (ova or sperm) from subjects outside the applicant couple,

from a donor – was seen as a last resort for those cases where it was not possible to produce an offspring with the gametes of the couple⁵.

The 2006 Law also prohibited surrogacy. Article 8 focuses specifically on “surrogate motherhood” and reads:

1 – Juridical businesses of surrogate maternity, gratuitous or onerous, are void.

3 - The woman that carries out a surrogate pregnancy for another person, is accounted, for all legal purposes, as the mother of the child to be born.⁶

3.2 The legislative initiatives for surrogacy

Since 2006, the Portuguese Law on Medically Assisted Procreation has been revised eight times, going through significant amendments⁷. The major revisions involved (1) widening of the accessibility to include all women⁸ – lesbian couples and single women – regardless of their marital status⁹, and also of an infertility diagnosis¹⁰, (2) the legalization of gestational surrogacy¹¹, and (3) also the legalization of post-mortem insemination¹².

These revisions aimed at responding positively to a wider range of different infertility situations, and also to allow women to use reproductive technologies to fulfill their desire of a child, successively overturning previous barriers, in a process that progressively abandoned the subsidiary principle and started to assume medically-assisted procreation as also being a social prerogative, from an increasingly liberal perspective. These changes were said to prevent Portuguese women, who did not meet the requirement of the 2006 law, from going abroad for the reproduction procedures they wanted; similarly, they intended to allow the same opportunities to all Portuguese women, regardless of their financial resources.

The widening of medically-assisted reproduction to all women, without restrictions, was disapproved of by the more traditional sectors, for moral reasons: medically-assisted procreation was considered acceptable only as a subsidiary method of reproduction, homologous (without gamete donation), and not producing surplus embryos. In order to comply with these moral requirements, one reproduction clinic in Portugal adopted the procedure to cryopreserve the potential surplus embryos during the syngamy process; that is, just before the end of the fusion process between oocyte and sperm, which is, the completion of fertilization and the formation of the zygote.

Extending the access to reproductive technologies to all women also raised concerns among some professionals given the already long waiting lists for assisted reproduction in public centres (sometimes over a year). In addition, the Portuguese public system has always been based, and

still is, on the ‘first come first served’ rule, and some physicians consider that they should be allowed to establish a hierarchy of priorities based on clinical factors, as they do in other medical fields – e.g. diagnosed infertility; personal characteristics – e.g. the woman’s age; and social conditions – e.g. single or with children. Some critics of this ‘first come first served’ system also point out that, due to the long waiting lists, and to the women’s age-limit (of less than 40 years-old to receive free assistance from the National Health Service), many women are being pressurized into going to the private sector for assistance.

Gestational surrogacy started to be discussed in Portugal in late 2011, under a legislative proposal of the far left-wing party. Other political parties followed this initiative and presented three different legal frameworks for surrogacy¹³. However, none of the proposals were ever voted upon due to a lack of consensus within Parliament.

In 2016, there was a second parliamentary initiative to legalize surrogacy, which was approved in August 2016¹⁴, and came into effect a month later; a year later, the regulation was also published, allowing gestational surrogacy in Portugal¹⁵. From this day onwards – 31st July 2017 – gestational surrogacy became part of Portuguese public health policy, being provided, to all persons meeting the legal requirements, free of charge, in public centres specially certified for the procedure. However, the law was suspended – 7th May 2018 – for constitutional reasons, and those clinical procedures that had begun, but were prior to implantation of the embryo, had to be terminated.

The legislative process had to be restarted by a third parliamentary initiative. The law was amended, in line with the objections raised by the Constitutional Court and was later approved and enacted in November 2021. Its regulation is not yet concluded (August 2022). Meanwhile, the widening of the scope of medically-assisted reproduction continued, enabling the use of increasingly diverse and extensive means, not only covering surrogacy, but also post-mortem insemination.

This process, so long and troubled, reinforces the Portuguese initiative for gestational surrogacy as being an interesting case study, from political, ethical and legal perspectives.

3.3 The ethical advice on surrogacy

The legalization of gestational surrogacy in Portugal was accompanied by the National Ethics Council for the Life Sciences presenting several contributions to improve the bill. Most of these proposals were not taken into account and the Opinion of the National Ethics Council for the Life Sciences on surrogacy ended up being negative.

From 2011 to 2017, the National Ethics Council issued three Opinions on surrogacy¹⁶. The first one was produced in 2012¹⁷, at the request of the National Parliament, when the first legislative initiatives were presented in the Parliament, and it is favorable to surrogacy under 13 detailed conditions. They refer to: altruistic surrogacy, and also to the requirement of a biological bond between the child and the parents, as well as the prohibition of a biological tie between the surrogate and the child; to the right of the child to learn about his/her gestational process; and to a detailed legal contract between the surrogate and the parents-to-be, protecting all parties, including the children. This Opinion is of major importance because it establishes the guidelines for a broad acceptance of surrogacy in Portuguese society.

In 2016, the National Ethics Council issued a second Opinion¹⁸, on the occasion of the second legislative initiative, also at the request of the National Parliament, upon its new proposals for the legalization of surrogacy, disapproving of them mostly due to: the lack of provisions to safeguard the rights of the child-to-be, and of the surrogate; and the insufficiency of a legal framework for the contract between the parents-to-be and the surrogate. This Opinion also referred to the lack of satisfactory answers from the Parliament to the objections formerly raised, in 2012, on the same issue.

In 2017, the National Ethics Council, at the request of the Minister of Health, issued a third Opinion¹⁹ on the subject, and specifically on the Decree over the conditions for the implementation of the approved Law, disapproving of it due to the lack of satisfactory answers to the objections raised in 2016.

In the context of the third legislative initiative, the National Ethics Council issued two more Opinions on gestational surrogacy²⁰ (2019 and 2020), both of them highly critical, concluding that the legislative proposals did not establish the desirable and necessary balance between all the interests involved: those of the children-to-be, of the parents-to-be or beneficiaries, and of the surrogate. In January 2021, a member of the Council was heard by the Parliament at a joint hearing. Nevertheless, the final version of the law that was enacted in November 2021 was not presented by the Parliament, to the National Ethics Council.

3.4 The lack of public involvement

Although the first legal initiative for the legalization of gestational surrogacy dates back to 2011 – the first approval was reached some five years later, in 2016, and the final one only in 2021, some 10 years later – the debate stayed within the Portuguese Parliament, and some institutions that had been formerly asked to present their opinions, did so behind closed doors. There was no public debate in Portugal on gestational surrogacy. In addition, those institutions that issued

opinions on gestational surrogacy, and that were representative of society, were quite critical. They were consulted, but their recommendations were not actually incorporated.

Surrogacy has always been a political project, a parliamentary initiative, which has unfolded from the top-down.

4. Surrogacy policy in Portugal

4.1 The altruistic profile of surrogacy in Portugal

We have broadly presented gestational surrogacy in Portugal as being altruistic²¹, establishing a biological bond with the parents-to-be and only a legal relationship with the surrogate – characteristics that outline its general profile.

The altruistic relationship between the parents-to-be and the surrogate is quite detailed:

*k) The gratuitousness of the legal business and the absence of any type of imposition, payment or donation by the beneficiary couple in favour of the surrogate mother because of the pregnancy of the child, in addition to the amount corresponding to the expenses arising from the monitoring of health effectively provided, including in transport.*²²

Payments are limited to documented costs directly related to the pregnancy. It is also acknowledged that asymmetric relations favor different kinds of revenues, beyond the financial one, which are also prevented.

Also, the biological relationships within surrogacy are clearly considered and foreseen:

*4 – Gestation surrogacy can only be authorized through a medically assisted procreation technique using gametes from, at least, one of the respective beneficiaries, in no instance allowing the surrogate pregnant to donate any oocyte used in the actual procedure in which she participates.*²³

These biological relationships tend to strengthen the bond between the parents-to-be and the child-to-be, and to weaken the tie of the surrogate to the child.

There are also some other important features that identify Portuguese policy on surrogacy. The most significant of these refers to the rights and duties of the stakeholders involved and to the authorization procedure, defined in the 2016 Law, detailed in the 2017 Decree, and revised in the 2021 Law.

4.2 Lingering ethical concerns

The major ethical problems broadly concerning surrogacy are well known: the exploitation of the women, the surrogates – the poorest and the most vulnerable women are the ones who accept to be pregnant on behalf of others in exchange for payment – and the commercialization of the children – richer individuals are the ones who can afford to hire a surrogate.

Opting for an altruistic surrogacy, the Portuguese legislation intends to tackle both criticisms. However, the difficulty or impossibility of effectively and fully preventing these two ethical violations of human rights (even under an altruistic regime), has led the wide majority of countries to reject surrogacy. The Portuguese legislation on surrogacy is no exception and shortcomings can be soundly pointed out when considering the four stakeholders involved in gestational surrogacy: the beneficiaries (or parents-to-be), the surrogates, the institutions involved, and (indeed, last but not least) the children-to be.

4.3 Beneficiaries

The potential beneficiaries are women over 18 years old in a situation of absence of uterus, of injury or of disease of this organ that hinders pregnancy absolutely and definitively²⁴, and as long as there is no follow-up ruling prohibiting the use of such techniques²⁵. At the beneficiaries' level there are no problematic issues that stand out.

The non-exclusion of foreigners in the gestational surrogacy process could be considered a problem. When national legislation does not exclude foreigners, it can allow and promote reproductive tourism, which is invariably linked to business: thus, facilitating the exploitation of national women by foreigners, or of women from other nationalities who can travel to the country in question. This, in turn, may make legal control, namely the altruistic nature of surrogacy, more difficult for local authorities to conduct; and strongly present surrogacy as a substantial source of income for private clinics, where the procedures have to take place given the difficulty for foreigners in accessing National Health Services. However, Portuguese law, with regard to the access of foreigners to assisted reproductive technology (ART), restricts it to those who have permanent residence in the country²⁶, thus eliminating what could be an ethical problem.

Another potential ethical problem that has been resolved, concerned the legal conditions required for women to access surrogacy. In the revision of 2017, reference was made not only to the impossibility to bear a child (absence of uterus), but also in clinical cases that can justify it²⁷. This last hypothesis foreseen by the law could be morally justifiable – hosting unpredictable clinical circumstances – but could also open the door to different situations surreptitiously managed by other interests, namely those which are economic. However, this prerogative was

eliminated in the current law, which reads: "the execution of legal transactions of surrogacy is only admissible ... in cases of absence of uterus, injury or disease of this organ or other clinical situation that prevents absolutely and definitively the woman's pregnancy." ²⁸

4.4 Surrogates

There are no specifications made in the legislation about who can apply to be a surrogate, except that they should be preferably a woman who has already been a mother²⁹. Once again, an attempt is made to weaken the potential emotional link between the surrogate and the child; however, this is just a preference, with no obligation or weighting factor.

At the surrogates' level, there are two tricky issues to consider. The first one concerns the prohibition of payment. The law was thorough, forbidding donation of goods or money³⁰ as well as legal contracts between parties under an economic dependence³¹. Nevertheless, the altruistic act of a woman, to bear the child of a strange couple, to whom she has no significant bond (or an interest to preserve), is, in itself, questionable, especially given the physical, psychological, affective and social burdens involved. The absolute lack of associated interests, required for a true altruistic surrogacy, or the total absence of any form of payment, although in violation of the law, is highly implausible.

At the same time, it can be argued that, in this case of strictest gratuitousness, it will only be the surrogate, the party that bears the greatest burden, not to objectively benefit from surrogacy: parents-to-be benefit from having a child; professionals benefit from having employment and from their salary, and clinics benefit from social and economic activity.

The only situation where unconditional free surrogacy is credible is the one performed by the mother (generally going through a high-risk pregnancy) or the sister (or, less likely, other family member) of the mother-to-be. Nevertheless – and this is the second situation worth underlining – familial surrogacy presents different but no less serious problems, such as: psychological pressure to become a surrogate (non-existent in the absence of the law), the complexity of emotions and plurality of affective ties to deal with (towards the parents-to-be and mostly for the child to bear, in a long-term situation), and tensions or emotional blackmail throughout the family life. ´

4.5 Institutions involved

There are two institutions directly and mandatorily involved in the surrogacy process: the Medically Assisted National Procreation Council (CNPMA), and the Portuguese Medical Association (OM), through its Board of subspecialty in reproductive medicine. A third institution also concerned with the process is the reproductive center, whether public or private.

There are at least two major concerns when considering the institutions involved.

The first one refers to conflicts of interest. There are, among the members of the CNPMA, professionals who own and/or are responsible for private fertility clinics, as the law that established this body does not prevent it. The same professionals were also members of the Committee responsible for the regulation of the Law 32/2006, after its 3rd revision, and have been members of the Board of subspecialty in reproductive medicine of the Portuguese Medical Association. In addition, about half of the members of the CNPMA have held a seat since the beginning of this National Council, in 2007, which is unprecedented in national bodies of this nature where, as a general rule, only two mandates are authorized. These facts testify to the existence of conflicts of interest throughout the process of legalization of gestational surrogacy in Portugal, a totally unacceptable situation, both from an ethical and also from a legal perspective.

The second concern is the competency of the CNPMA to supervise legal contracts – as contestation of validity can have dramatic consequences for all those involved, including the child – as well as the human, technological, legal and administrative resources required to guarantee the gratuity of surrogacy. The CNPMA was established and its competencies attributed by the Law 32/2006, as being generally responsible for ruling on the ethical, social and legal issues of the PMA³². It is extremely doubtful that the CNPMA can performed the new, very important and sensitive competencies derived from the approval of gestational surrogacy, particularly to ensure the effective gratuitousness of surrogacy – which is the touchstone of the ethical issues concerning surrogacy.

4.6 Children-to-be

The children-to-be, although they are not yet born, must undoubtedly, and in advance of their birth, be considered as subjects of human rights. However, the common rule in assisted reproduction seems to consider them as goods to be claimed as a right by autonomous adults. Yet, reproductive rights cannot include the right to a child, as the child would then be, by the very nature of the claim, reduced to being an object to be owned by someone. Surrogacy falls into the common rule of assisted reproduction and the specific law on gestational surrogacy does not allow for any special protection or specific rights for the children-to-be. The only legal

specification regarding conception via assisted reproductive technologies (ART), and specifically from a gestational surrogacy, is that such information will not be registered in any legal document³³.

Article 15, paragraph 1, of the Law 58/2017, establishes that “All those that, by any way, have learned about the use of reproductive technologies, including surrogacy, or about the identity of any of the participants in their respective processes, are obliged to keep confidentiality over their identity and over the reproductive technology itself.” It is, of course, highly doubtful that this statement can be applied to anyone beyond those who are healthcare professionals. In any case, where surrogacy is concerned, many other people who are not healthcare professionals can obtain the relevant information. What ought to be underlined is the intention to ensure the confidentiality of the information regarding the child’s biological identity, and also of the procedure of fertilization and gestation. Paragraph 5 of the same article also states that information on surrogacy cannot be detailed within the child’s file. Therefore, unless someone unveils the truth by other means, there is no way for the child to obtain such information in the future.

The obvious problem that arises from this is that of the deliberate concealment of the birth conditions of people born through reproductive technologies and, thus, of surrogacy, denying them the right to relevant personal information regarding their origins. This is yet another aspect that highlights the preponderance of the interests of adults to the detriment of those of the child, the most vulnerable individuals involved in the process.

4.7 Authorization procedure

The authorization procedure to undertake a gestational surrogacy project unfolds in two stages: the first concerns the official permission for surrogacy, while the second stage concerns the approval of the legal contract. Overall, the procedure to obtain authorization for surrogacy is quite easy and fast.

The first step in this process is the selection of a surrogate. The parents-to-be have to find a surrogate themselves. When the surrogate is a family member, the choice should be faster and also more trustworthy; but if this is not an option, parents-to-be can contract the services of specialized agencies or centers, or they may opt to navigate the internet, to choose an individual who they consider to be a suitable surrogate. In the latter case, once again, the gratuitous nature of surrogacy is quite unlikely: if specialized agencies are used, they will have to charge for their services and it will only be the woman who makes the uterus available who will not obtain any benefit; the contact of a woman who makes herself available to strangers, through the internet,

and free of charge, will necessarily be exceptional and not a common way in which to start a surrogate pregnancy process.

The next step is for the parents-to-be, together with the surrogate, to formally request authorization for a gestational surrogacy from the Medically Assisted National Procreation Council (CNPMA), through an online application form. This application should be accompanied by a declaration from a reproductive center (public or private) certifying that the clinical situation of the mother-to-be complies with the law.

The CNPMA is the official body that approves gestational surrogacy on a case-by-case basis. This National Council has to accept or reject the request within 60 days; if accepted it is sent to the Portuguese Medical Association (OM), who should, in turn, confirm the clinical situation of the mother-to-be. The Portuguese Medical Association has 60 more days in which to respond. The CNPMA will then take a final decision 60 days after that. Overall, the process takes 180 days at most.

Only at the end of this process, if successful, can the parents-to-be and the surrogate woman celebrate the required legal contract. This is the second stage of the procedure. The legal contract between the parents-to-be and the surrogate woman must necessarily include “the provisions to be observed in the event of a possible voluntary termination of pregnancy in accordance with the legislation in force”³⁴, and “cannot impose behavior restrictions to the gestational women, neither rules that go against the surrogate’s rights”³⁵. These are two important and controversial issues that are properly addressed by the Portuguese Law.

Once these steps have been successfully completed, gestational surrogacy can be performed free of charge via the National Health Service (NHS), on a ‘first come first served’ basis.

5. The current status of surrogacy in Portugal

During the nine months in which the Portuguese gestational surrogacy law was effective, nine formal requests for surrogacy were presented to the CNPMA: two were approved (the first was the case of a mother who will carry her daughter’s child); one was withdrawn; and the other seven remained under evaluation. There were also about 100 statements of intention, half of which came from foreigners, before the law was suspended by the Portuguese Constitutional Court’s ruling.

5.1 The Constitutional Court's late ruling

Straight after the approval, in 2016, of Law 17, extending the scope of beneficiaries of ART (and 2nd amendment to Law 32/2006), and Law 25, regulating access to gestational surrogacy (and 3rd amendment to Law 32/2006), a group of 30 members of the Portuguese Parliament addressed the Constitutional Court, requesting the evaluation of some articles which they considered infringed the Portuguese Constitution, violating the principles of human dignity, equity, proportionality, the State's duty to protect childhood, and the right to personal and genetic identity.

The ruling of the Portuguese Constitutional Court was publicly presented on the 24th April 2018, and published on the 7th May 2018, stating that, although surrogacy, in itself, does not violate the dignity of the surrogate or of the child-to-be, or even the State's duty to protect childhood, some rules were indeed unconstitutional, namely:

- ◆ the legal ambiguity in what concerns surrogacy contracts, **overruling** the principle of determinability of laws. The Court considered that the law does not set sufficient parameters to guide the possible actions of the persons involved, or to enable the due supervision (the legal contracts are too vague)³⁶;
- ◆ the legal impossibility of the surrogate to withdraw her consent after the beginning of the therapeutic phase, **overruling** the right to personality development. The Court considered that the surrogate, under her fundamental right to the development of her personality, should be able to change her decision after the child's birth and before giving the child to the parents-to-be³⁷;
- ◆ the legal paternity uncertainty of the child born under a surrogacy contract later declared invalid, overruling the principle of legal certainty. The Court considered that if a surrogacy legal contract is to be declared invalid, it is not clear who the legal parents will be³⁸;
- ◆ the child's right to know its biological origin, that is, the gametes donors (although their anonymity is not absolute), and the surrogate (where the anonymity is ruled as absolute). The Court did not consider that anonymity violates human dignity but deliberated that the knowledge of one's own genetic origins is ever more important and cannot be withheld from the children-to-be. Besides, these children have the right to their own personal identity³⁹.

The Constitutional Court explicitly stated that the two processes already under the therapeutic stage were not affected by this ruling⁴⁰. In the wake of this ruling, the CNPMA decided to dismiss the seven processes already submitted and under evaluation, due to the lack of a legal framework.

Therefore, although gestational surrogacy was approved in Portugal, in 2017, and the therapeutic procedure was already developing in two cases, the law was suspended in 2018, triggering its revision by Parliament.

Furthermore, when the Constitutional Court ruled against the anonymity of donation – gametes, embryos and surrogacy – due to the constitutional right of the children-to-be to know their own genetic origins – all assisted reproductive treatments (including those that did not resort to surrogacy) that entailed the anonymity of the donors, were also suspended. Expectations were frustrated, particularly for those who had already started the treatments. In addition, the age limits applied to free assisted reproductive technologies – 50 for women and 60 for men – had also been exceeded for many applicants. There was also an expectation that the number of gametes donors would decrease given the lack of the anonymity norm. However, this suspicion did not become a reality.

5.2 The Parliament's revision

In the aftermath of the Portuguese Constitutional Court's ruling, Parliament organized a working group to revise the gestational surrogacy law, duly addressing the unconstitutional norms pointed out by the Court, proceeding to hearings of experts and specialized institutions, such as the CNPMA, and thus starting the process of the 5th amendment to Law 32/2006, on Medically Assisted Procreation.

Three political parties proposed amendments⁴¹, agreeing in two fundamental aspects. The first one concerns confidentiality. The members of the Parliament decided, on the one hand, to maintain both the prohibition to register someone's conception via assisted **reproductive technologies** (ART), and specifically from a gestational surrogacy, and the obligation of confidentiality addressed to all people aware of the situation. On the other hand, they also decided to allow requests, by persons born via ART, for the civil identification of donors and of the surrogate, considering the potential need for information regarding genetic heritage, and also for matrimonial purposes. A transitional period was also foreseen for donations prior to the Constitutional Court's ruling, whose anonymity remains. It should be pointed out that, under this norm of confidentiality, the persons born via ART might never be aware of the situation (in the extreme, questions could be asked whether the parents are also under the confidentiality ruling or if they are able to disclose the information to the children born via ART). Therefore, the possibility of requesting further information is probably quite a remote one. The combination of these parliamentary options can be seen as a strategy, to respond formally and positively to the requirements expressed by the Court, whilst avoiding the practice actually changing.

The second consensual amendment related to a more detailed surrogacy contract in the spirit of the law. There was also a third unconstitutional point underlined by the Constitutional Court, referring to the regime of declaration of invalidity of the surrogacy contract, which was then deleted given the principle of legal uncertainty.

A fourth and last constitutional objection was still pending: the surrogate's consent revocability. In the Law 25/2016 on Gestational Surrogacy, the surrogate could withdraw her consent until the beginning of the ART procedure, just as the beneficiaries could; the proposal of the far-left wing party was to allow the revocability of consent until the registration of the child's birth.

There was no political agreement on this proposal, and when, on the 19th July 2019, the 5th amendment to Law on Medically Assisted Procreation was voted on and generally approved, the proposal of an extended period for the revocability of consent was rejected. Hence, although the new Law was indeed approved by the National Parliament, it did not prove to have full compliance with the country's Constitution, and thus remaining unconstitutional. The 5th amendment to Law 32/2006 on Medically Assisted Procreation, which should have restored and improved the Law 25/2016 on Gestational Surrogacy, ended up being ineffective, and the Law on Gestational Surrogacy, formerly approved and implemented for nine months, continued to be suspended, or rather to be null and void.

5.3 The enactment of the Law

In 2021, another attempt was made to pass a gestational surrogacy law in Portugal. The occasion was the collapse of the State budget, and the consequential fall of the government and the dissolution of the parliament, which, before finishing the legislature, rushed to vote on bills that were still being finalized. This time the proposal included the extension of the deadline for the surrogate to, potentially, revoke consent. The new Law reads: the consent of the surrogate is "freely revocable until the moment of registration of the child born, established in paragraph 10 of article 8"⁴², that is, until the 20th day after delivery.

This amendment, directly responding to the demands of the Constitutional Court, led to the approval of the law in November 2021.

At the same time, it raised new and very complex problems, such as: after the birth of the child, to whom is he given, who takes care of him? It should not be the surrogate because she probably does not want to keep the child. If she does not intend to keep the child, it is unlikely that she would want to take care of it until the registration. In fact, the law is careful not to promote the emotional bond between the surrogate and the child. The law says that "the child born through

the use of surrogacy is considered as the child of the respective beneficiaries”⁴³. Therefore, from the outset, the child will be handed over to them after the birth. However, they can only register it on the 20th day, so as not to contradict the surrogate's right to revoke her consent. In this situation, the child, who would be with the beneficiaries, would be taken from them to be handed over to the surrogate, with an inevitably strong emotional trauma. Consequently, the child would have the surrogate as a mother, although she is not biologically related and not the beneficiary woman or man, one of whom is the biological parent of the child, but yet is deprived of rights and duties.

This extended period for the revocability of consent, added a great uncertainty concerning parenthood: the parents-to-be will not know, for sure, if they will be the legal parents until the registration day, although one of them will be, in fact, the biological parent; and the surrogate, who can claim that baby as her child, will not have a biological tie. The situation remains highly controversial from an ethical perspective and is still pending on due regulation.

This 8th amendment to the law was approved without the National Ethics Council being asked or having the opportunity to issue any advice or opinion.

6. Conclusion

The Portuguese legal initiative for gestational surrogacy was too long: ten years; too winding: progressing aimlessly, only guided by the attempt to overcome, one by one, the political, constitutional, and legal obstacles that popped up along the way; too troubled: attentive to particular cases and the emotions they generated; and deeply unsuccessful: entailing additional problems in assisted reproductive treatments and in the future practice of gestational surrogacy. It seems that the only political objective was to get a law that would allow surrogacy in Portugal. Thus, instead of drafting a law proposal that would respond to the real expectations of the population; that would obtain a broad social consensus, integrating the opinions of the consulted institutions; that would previously consider the consequences of the proposals made, together with its evaluation, in accordance with the Constitution; there was a sequence of specific legislative interventions to amend the Medically Assisted Procreation law in order to allow surrogacy, without a global strategy considered regarding the use of reproductive techniques. Therefore, it required a developed and accurate case study, in order to draw due consequences from this example, and to learn from it.

Looking back across the whole process, there are three facts that stand out: gestational surrogacy was a political initiative; it was an initiative that did not follow the requested ethical advice; and it did not engage citizens in the policy-making process.

Legislative initiatives can, and sometimes should, be triggered by the political power, but only when there is a previous ethical consensus in existence. Particularly when moral values are involved, the legislative politics should have a wide public support, thus granting the full force of law to social needs and expectations. The right conditions ought to be created for an extensive and inclusive public debate on the issues at stake; this was not the case in the process concerning the legalization of gestational surrogacy. A sustainable legislation is a grassroots process.

Furthermore, the political power asked for ethical advice, but (it seems that) it did this to comply with a formality, without duly considering it in order to improve the legal proposal. Political interests override ethical concerns. A sustainable legislation addresses citizens' values and aims.

The Portuguese legal initiative for gestational surrogacy, disregarded the ethical issues involved, and neglected public engagement; thus, it remained a top-down initiative and therefore it is still quite flawed.

¹ Law 32/2006, 26th of July, on Medically Assisted Procreation.

² Law 32/2006, 26th of July, Article 4, Paragraph 1.

³ Law 32/2006, 26th of July, Article 4, Paragraph 2.

⁴ Law 32/2006, 26th of July, Article 6, Paragraph 1.

⁵ Law 32/2006, 26th of July, Article 10, Paragraph 1.

⁶ Law 32/2006, 26th of July, Article 8, Paragraphs 1, and 3.

⁷ There were eight amendments to Law 32/2006: Law 59/2007, 4th September; Law 17/2016, 20th June, Extends the scope of beneficiaries of the medically assisted procreation techniques; Law 25/2016, 22nd August, Rules access to gestational surrogacy; Law 58/2017, 25th July; Law 49/2018, 14th August; Law 48/2019, 8th July; Law 72/2021, 12th November Allows the use of medically assisted procreation techniques through insemination with semen after the death of the donor, in cases of expressly consented parental projects; Law 90/2021, 16th December.

⁸ Law 17/2016, Article 1.

⁹ Law 17/2016, Article 6, Paragraph Opinion 92/CNECV/2017, on the **1**.

¹⁰ Law 17/2016, Article 4, Paragraph **3**.

¹¹ Law 25/2016, Article 8.

¹² Law 72/2021, Articles 22 and 23.

¹³ There were four Bills intended to review the Law 32/2006: n.º 122/XII, presented on the 21st, 2011; n.º 131/XII, presented on the 6th, 2012; n.º 137/XII, on the 11st, 2012; and n.º 138/XII, on the 13th, 2012. They preview surrogacy, except n.º 137/XII.

¹⁴ Law 25/2016, 22nd August, Rules access to gestational surrogacy, introducing the third amendment to the Law 32/2006.

¹⁵ The conditions for the implementation of Law 25/2016 were legally established by the Decree 6/2017, 31st July.

¹⁶ The National Ethics Council for the Life Sciences, had already pronounced three times about medically assisted procreation, also referring to gestational surrogacy, before the Law 32/2006.

¹⁷ Opinion 63/CNECV/2012, on Medically Assisted Procreation and Gestational Surrogacy, on the Bills 131/XII e 138/XII.

¹⁸ Opinion 87/CNECV/2016, on the Bills 6/XIII, 29/XIII, 36/XIII on Medically Assisted Procreation and Gestational Surrogacy, and 51/XIII on Medically Assisted Procreation (PMA), and 36/XIII on Gestational Surrogacy (GDS).

¹⁹ Project of Decree to rule the access to gestational surrogacy.

²⁰ Opinion 104/CNECV/2019, on the amendment to the legal regime of surrogacy; Opinion 111/CNECV/2020, on the Bills No. 71/XIV (BE) and No. 247/XIV (PAN) on surrogacy.

²¹ Law 90/2021, Article 8, Paragraph 2.

²² Law 90/2021, Article 8, Paragraph 13, k).

²³ Law 90/2021, Article 8, Paragraph 4.

²⁴ Law 90/2021, Article 8, Paragraph 2.

²⁵ Law 90/2021, Article 6, Paragraph 2.

²⁶ Law 90/2021, Article 2.

²⁷ Law 58/2017, Article 8, Paragraph 2.

²⁸ Law 90/2021, Article 8, Paragraph 2.

²⁹ Law 90/2021, Article 8, Paragraph 3.

³⁰ Law 90/2021, Article 8, Paragraph 7.

³¹ Law 90/2021, Article 8, Paragraph 8.

³² Law 32/2006, Article 30.

³³ Law 25/2016, Article 15, Paragraph 5.

³⁴ Law 90/2021, Article 8, Paragraph 13, h).

³⁵ Law 90/2021, Article 14.

³⁶ Judgment of the Constitutional Court 225/2018, III, a).

³⁷ Judgment of the Constitutional Court 225/2018, III, b).

³⁸ Judgment of the Constitutional Court 225/2018, III, d).

³⁹ Judgment of the Constitutional Court 225/2018, III, e).

⁴⁰ Judgment of the Constitutional Court 225/2018, III, g).

⁴¹ Drafts Law: 1007/XIII; 1010/XIII; 1024/XIII; 1030/XIII; 1031/XIII.

⁴² Law 90/2021, Article 14, Paragraph 5 (and Article 8, Paragraph 10).

⁴³ Law 90/2021, Article 8, Paragraph 9.

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