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Medically Assisted Reproduction according to the Portuguese Legal System

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Introduction

In recent years, Europe has seen dramatic changes in its demography. The low birth rate in conjunction with increasing average life expectancy is causing a significant increase in the ageing population.

Infertility is defined as "the inability to conceive a child or carry a pregnancy to term after one year of sexual intercourse without the use of any method of contraception (Gameiro, Silva & Cristina Canavarro, 2008).

According to the World Health Organization (Cui, 2010), 15% of couples of reproductive ages are affected by the disease, for both women and men.

Southern Europe, Eastern Europe, and Eastern Asia have the lowest fertility rates in the world with an average of 1.5 children per woman (UNFPA, 2018). 1 in 4 couples in developing countries is affected by infertility (Single Care, 2021).

Female infertility is often due to problems with ovulation that may be caused by ovulation disorders like polycystic ovary syndrome (PCOS), primary ovarian insufficiency (POI), or hyperprolactinemia. Female infertility can also be caused by uterine or cervical abnormalities, fallopian tube damage, uterine fibroids, endometriosis, early menopause, pelvic scar tissue, and even cancer treatment or severe psychological distress.

Male infertility is most often caused by the male reproductive gland, testicles that are not working properly. Varicocele is a condition where the veins on a man's testicles are too large, which causes them to heat up, which affects sperm count and shape. The quality of sperm can also be affected by health conditions like diabetes, genetic defects, and undescended testicles. If sperm isn't delivered properly because of premature ejaculation or structural problems, this can also affect fertility. Even environmental exposure to toxic chemicals or pesticides can affect reproductive health and the quality of sperm. Assisted reproductive technology (ART) have been responsible for the birth of more than six million children worldwide since 1978 (Hann et al., 2018).

In 2013, 2091 children were born in Portugal thanks to the use of ART, 43 less than in the previous year, representing 2.5% of all children born that year.

Infertility and infertility complications, like miscarriages, can negatively affect a person's overall health and quality of life. Many couples who want to start a family and are unable to conceive, will experience psychological and interpersonal distress that could negatively impact their quality of life. It is one of the primary reasons for divorce among couples (Single Care, 2021), up to 60% of infertile individuals reported psychiatric symptoms with significantly higher levels of anxiety and depression than fertile individuals. (Single Care, 2021), nearly 41% of infertile women have depression (Single Care, 2021).

And almost 87% of infertile women have anxiety (Single Care, 2021).

Infertility can have a very negative psychological impact and, therefore, cannot and should not be ignored or rejected. The impossibility to conceive and the stress inherent to the treatments can cause harmful feelings, which can be aggravated by family, cultural and social pressures that, when a couple is childless, question the couple's "obligation" to procreate. It is often thought that Medicine has a solution for everything, fertility being no exception.

Often infertile couples become anxious and put all their hope in ART.

In public services, access to these technologies is quite insufficient. Therefore, the vast majority of couples resort to the private sector to realize their desire to have children, making huge sacrifices to pay for the treatments.

Chapter I: RMT Historical Background

1- The Portuguese Reality

The concepts, science, the capacity of human intervention, everything is in constant change and for several years now the press has often reported on some medical-scientific achievements in the area of human reproduction. There are often studies of all kinds in this area (Labrusse-Riou, 1986).

There have been attempts to regulate this issue for many years. In 1986, Member States were advised by the Parliamentary Assembly of the Council of Europe to regulate the matter since what was at stake were human values and their needed legal protection.

As a result, a Commission was then created in our country that would make the legislative framework for the new technologies, chaired by Professor Pereira Coelho. It was proposed to the Ministry of Justice the ART that should be regulated, as well as the authorizations that would be necessary for this. Following this proposal, the DL 319/86, of September 25th, was published, alluding to the artificial insemination, focusing more particularly on the heterologous insemination (due to health and ethical-legal issues). However, this Decree-Law had a provisional and restrictive character. Expressly it was never revoked and had only three articles.

In 1997, several political parties approved a law that, in a more global way, regulated ART. However, the President of the Republic that year, Dr. Jorge Sampaio vetoed the law, arguing that the matter had not matured enough and that the decree-law was not justified in view of the society in which we were living. If, on the one hand, there were supporters in this direction, who argued the lack of maturity of the matter, the uselessness of any law due to its almost immediate outdatedness, the inconvenience of creating a special status for a certain category of children, and the fact that the law special status for a certain category of children, susceptible to discrimination, and the inexistence of agreement as to the matters to be regulated, on the other hand, supporters of the opposite option invoked arguments such as legal security, respect for ethics and human rights.

Since then, the legislature has tried to produce a law that adequately regulated ART, accomplishing this in 2006 with Law no. 32/2006, of July 26.

Later, in 2008, the Regulatory Decree no. 5/2008, of February 11, which came to regulate the ARTL, was issued in the form of Dispatch no. 14788/2008, of May 6, approved the Infertility Referral Network and the Infertility Training Program, and also created the 12 Million Euros Vertical Program for the requalification of the public response to infertility.

If 2008 represented an important milestone in this matter, 2009 was also as important, with the approval of the price table for the medically assisted reproduction treatments with the Administrative Rule 154/2009 and an exceptional regime for the recovery of waiting lists for second line ART was approved with Administrative Rule 10789/2009, April 20. In addition, a special co-payment regime for medications intended for the treatment of infertility was created with the Administrative Rule 10910/2009, August 22.

The law in force (ARTL) has defined what can and cannot be done, creating the NCART. This body acts as a regulatory authority, assigning responsibilities in order to ensure legality, defending ethical principles, promoting the development of ART, and suggesting changes to the law in force, in order to adapt the needs to the momentary reality, always respecting the will of those who were democratically elected, never forgetting the constant scientific advances.

We consider it relevant to state that the ART regulated by the Portuguese legislative framework, can under no circumstances be seen as alternative or optional methods of reproduction. In my view, they should be seen as complementary or subsidiary methods to procreation.

2- Foreign Legal Systems

The possibility of preserving spermatozoa in cold temperatures started to be used among humans in 1953, in the United States (Pisetta, 2011). In the last 50 years, the developments in science regarding reproductive technologies have been undeniable.

Firstly, the pill appeared in 1960 and with this contraceptive method, the women's destiny changed, because in this way they were granted the right and option to conceive whenever she wanted, thus having a separation between sexuality and reproduction or affiliation. Later, the first baby was born through in vitro fertilization in 1978 at Oldham General Hospital in England.

Reproductive rights are understood as human rights that stem from the recognition that all people have the right to make their choices free of discrimination, coercion, or violence. One example is the right to freely and responsibly determine the timing and number of one's children (Pereira, 2010).

Currently there is a considerable variety of laws in the different countries that regulate this issue. In addition, today it is very easy to move from country to country, especially between the Schengen Area countries, since the Principle of Free Movement is in force. These two facts together have given rise to the phenomenon of Reproductive Tourism. Reproductive Tourism is when a couple moves from a country or jurisdiction where an ART is not authorized to another one where there are no restrictions on the subject.

The main destinations for Reproductive Tourism are Spain, the United States, South Africa and Mexico. Spain is seen almost as a reproductive tourism paradise. The main reasons for this are the good value for money and the guarantee of anonymity. The vast majority of people who come to this country arrive from Italy, France and the United Kingdom. It is estimated that about 20,000 women in Europe cross the border in search of the dream of motherhood: out of this number between 35% and 40% turn their hopes to Spain. Moreover, in recent years, Spanish clinics have seen an increase in patients from non-European countries (Veloso & Silva, 2009).

This phenomenon, however, leads to certain problems. When the parents return to their countries, they sometimes face the refusal of legal recognition for the children born. In Portugal, the Public Prosecutor's Office has, on several occasions, initiated unofficial paternity investigation proceedings. This happens when an unmarried woman tries to register her child at the civil registry and does not indicate any name as being that of the child's father. However, as a rule, when the donor is anonymous, the case is closed.

The issue of surrogate motherhood is being studied by the Portuguese Parliament, but it is a cause of division among the various parties. This is due to the fragility of the issue: under what terms it may be allowed in Portugal, what breaches of the law may occur, are questions inherent to the division among the various political actors. In fact, all caution is needed to avoid any unconstitutionality.

Chapter II

1- The ART in the Constitution of the Portuguese Republic (CPR):

In 1997 the CPR underwent a change, with the addition in the paragraph e) of the no. 2 from the art. 67, thus making the State responsible for regulating ART, safeguarding the dignity of the Human Person.

Now, if we think about a family, childlessness is often seen as something not so natural. On the other hand, the use of medical and scientific methods to achieve this family project, is also often seen in this way, and frequently couples who resort to ART are viewed with some strangeness and discrimination.

Thus, the protection of the natural character of the family, that is, the pursuit of a parental project that includes having children, is important, but even more crucial than that, is the respect for their autonomy, which includes their intimate life and their legal right to personality, which is in fact untouchable.

Thus, more important than pursuing the desire to build a family, it is to carry forward the personal autonomy of each individual, in which lies their right to legal personality. Without respect for these rights, it is not feasible to carry out each couple's parental project as a family.

The article 36, no. 1 of the CPR tells us that all citizens have the right to constitute a family. But, in this case, the admissibility of ART is in question. ART, because our Fundamental Law does not mention the possibility of using it with the intention of having children, since this hypothesis contrasts with the essence of a conjugal society, which is based on the psychophysical integration of man and woman, that is, to reconcile as a couple ideals, often culminating with the goal of having children (in this case, in principle carrying out the sexual relationship) thus giving continuity to the family.

In the same line, J.J. Gomes Canotilho and Vital Moreira consider the issues addressed in art. 36 of our Fundamental Law problematic, stating that "(...) problematic is to know to what extent the right to have children involves a right to heterologous artificial insemination (with sperm from third parties) or gestation by a "surrogate mother".

It would seem, however, that this constitutional provision can only offer some insight into the question in conjunction with the principles of human dignity and the rule of law, which simultaneously guarantee the irreducible personal autonomy, as well as its limits (...)" (Vital, 2007).

I believe that this article by devoting four of its seven paragraphs to filiation suggests that the right to create a family has an underlying right to establish a life in common, the right to marry, and the right to have children. Thus, the latter right is closely related to the right to found a family, even though it is not an essential element of the concept of family.

In the same line, JJ. Gomes Canotilho and Vital Moreira, stating that "(...) this includes both the freedom to procreate (there is no place for interdictions of procreation, limits on the number of children and forced sterilization, which otherwise would not be compatible with human dignity and personal self-determination that is inherent to it), and the right to a conscious and responsible parenthood (...)".

In light of the above, I argue and believe that art. 36 of the CPR is an attempt to eliminate obstacles to maternity and paternity. However, it is silent as to the admissibility of new scientific techniques, namely using ART.

I believe that jurisprudence and the Law still have a way to go towards modernity, because nowadays scientific and technological evolution is in constant shifting and advancement.

Nevertheless, when the incorporation of the idea of having children with the physical relationship is not achieved through practices other than physical intercourse, is it not considered "*contra natura*"? I believe not. That article of the CRP grants all citizens the right to marry and to procreate, and in this second allusion it is often only possible through medical-scientific means, that is, through ART (Miranda & Medeiros, 2005).

It is not possible to dismiss the idea that the various ART are aimed at the birth of a child, when by the natural route it would not be attainable. Protecting the natural character of the family is important, but respecting its autonomy is fundamental.

In this way, we should analyze article 26 of the CPR, in the part where it protects the right to privacy. This right can and should be understood as a right to use the means of ART without the State or the law intervening. Nonetheless, it is understood that the privacy dimension cannot exclude a public and prior intervention, in order to define in general how the various procreation techniques may be applied.

Both the right to start a family and the right to reproduction are rights that should not be confused, since the right to form a family presents a broader and richer spectrum of meaning than the right to reproduction, which can be seen as one of several corollaries of the former. Note that the holder of the right to start a family does not necessarily have to be the proprietor of a reproductive right, however, the holder of the reproductive right will necessarily be the holder of the right to start a family.

In this regard, it is relevant to point out that this article has also been used to support reproductive rights, especially the right not to reproduce (as is the right to voluntary interruption of pregnancy). By way of example, I refer to a decision by the Court of Appeals, which held, in Judgment no. 288/98 of April 17, that “the right to free development of personality, encompassing individual autonomy and self-determination and ensuring each one, the freedom to draw up their own life plan, particularly when associated with the right to conscious maternity, will have the potential to support a possible legislative option in the sense of excluding the illegality of the voluntary interruption of pregnancy".

On the other hand, in this judgment, it is argued that this right "does not imply the recognition that the woman has complete freedom to control her own reproductive capacity (a constitutional right to freely abort)".

If we look at the core of this article, we see an omission regarding artificial reproduction, since we believe that the CPR has not kept up with the developments in this area. Therefore, the sphere of private life should include the possibility of using ART to realize a parental project without in any way exposing the intimacy of one's private life as a family. This raises some doubts, because if we understand there is a prohibition of artificial reproduction, such prohibition is not pure, but rather the result of an omission. If so, the prohibition covers the creation,

development and use of technologies that lead to the production of "other beings" and this is where ART arises. It is crucial to realize that the dignity of the Human Person and the guarantee of their genetic identity are not jeopardized by ART (Vital, 2007).

Based on the assumption that the right to genetic identity is an integral part and it is indispensable to the personal identity, we argue that the right to genetic identity follows the same constitutional regime as the right to personal identity. The art. 26 of the CPR seems to demonstrate that the guarantee of genetic identity lies in the prohibition of artificial reproduction of the same human genome, covering also cloning, in the prohibition of the use of new technologies for the production of "other beings", such as hybrid beings, in the prohibition of genetic manipulation practices aimed at creating sexless or hermaphroditic human beings, and the prohibition of eugenics (the genetic modification of an embryo with the aim of creating one in order to obtain certain characteristics considered desirable for that couple).

Article 67 of the CPR guarantees the family the fulfilment of all condition's personal gratification of all its members. If we consider that procreation is a fundamental aspect for the personal satisfaction of the couple, it seems obvious that the State has a constitutional obligation to allow and facilitate access to new means of ART. Following this, LC no. 1/97 added paragraph e), thus imposing on the State the regulation of assisted procreation. The fact that this constitutional consecration of the right to have children exists resolves the question of the constitutional admissibility of ART (Vital, 2007).

It can be seen, therefore, that the CPR demonstrates an interpretation that can even be favorable to the admission of new assisted procreation techniques, the fruit of an omission that allows us to formulate our own conclusions. But the limits cannot be disregarded, the extent of which will depend on the scope given to the norms that title the right to life, to personal identity and to the family, so I believe it would be more appropriate and correct to express in what way the CPR admits the use of these techniques.

2- The ART in the Portuguese Civil Code (CC):

The first Portuguese CC already stated in article 1799 that AI could not be invoked in cases of establishing paternity vis-à-vis the sperm donor nor in cases of contesting paternity presumed by law.

The initial wording of the current CC (which came into effectiveness on June 1st of 1967) provided in its art. 1799 that "Artificial fecundation cannot be invoked to establish the paternity of the child procreated thereby nor to challenge paternity presumed by law". Analyzing the legal principle, there were two distinct issues: firstly, it was not possible to establish paternity in relation to the donor who genetically was the progenitor of that child and secondly, the person who due to the presumptions of the law is legally the father of the child could not challenge paternity with the justification of not knowing if genetically was in fact the progenitor. It is in fact true, that DL no. 496/77, of November 25, revoked this rule (Duarte, 2003).

Although, where the reading of the previous article showed that artificial fecundation could not be invoked to establish the paternity of the child generated by this means, Article 1801º, with the aim of accepting the progress of science with forensic relevance, in an open and impartial way, makes it clear that "In actions relating to parentage, blood tests and any other scientifically proven methods are admitted as evidence". This dogma reveals some controversy: if on the one hand, Guilherme de Oliveira considers that this rule has the virtue of ensuring the purpose of the legal system in accepting the progress of science with forensic relevance without prejudice, on the other hand, Antunes Varela argues that, despite its apparent simplicity, this article reveals a monstrous provision, seriously undermining the transcendent dignity of the Human Being. Thus, this article appears without prejudice and with much merit in our Legal System, managing to demonstrate acceptance in the face of scientific progress (Lima & Varela, 1995).

Article 1839, nº 3 of the CC provides that after the spouses have consented to an insemination with a donor sperm, they may not challenge the paternity of the child that "has been attributed" to the husband. In this rule, the legislator intended to reverse the way in which ART was viewed legally, thus granting civil law legal effects and accepting heterologous ART as a ground for establishing family legal relationships as long as there is consent from the husband of the mother. This is because, previously, the 1977 legislature provided in art. 1799 of the CC, it was not allowed to invoke ART to challenge presumed paternity.

Currently, the current CC has replaced this rule, replacing it with art. 1839, paragraph 3, saying that "The impugnation of paternity based on artificial insemination is not allowed to the spouse who consented to it".

In this way, the 1977 Reform proclaimed the legality of heterologous AI and, *afortiori*, of homologous AI, admitting its legal effects at the family level (Duarte, 2003).

3- ART in the Portuguese Penal Code (PC):

The 1982 Penal Code enshrined the crime of artificial insemination in the "Sex Crimes" section of the "Crimes against values and interests of life in society" chapter. This crime was embodied in the art. 214 nº1, which states: "Whoever practices artificial insemination in a woman, without her consent, shall be punished with imprisonment from 1 to 5 years".

The provisions of art. 150 nº 1 of the CP fits this matter, as it expressly states that: "The interventions and treatments that, according to the state of knowledge and experience in medicine, are indicated and are carried out in agreement with the accordance in the *legisartis*, by a physician or other legally authorized person, with the intention of preventing, diagnosing, alleviating, or reducing disease, suffering, physical injury, fatigue, or mental disturbance, are not considered an offense to physical integrity. According to the law, interventions and treatments have to be carried out under certain circumstances. One of these is in case of illness. When considering that infertility is an illness, we can take into account this legal normative (Garcia & Rio, 2018).

Subsequently, art. 156º punishes arbitrary medical and surgical interventions and treatments. The criminal protection of the legal interest provided for in this article is, as a rule, at the cost of sacrificing life and health. In the case of this article, what is at stake is the disposal of the body and of life itself. The patient, in this case the woman, gives an agreement that it is only effective if it is clear and free from any error or defect (Dias, 2012). This article protects the right to self-determination, in the sense of acceptance or refusal of a surgical intervention or treatment but does not deal with bodily integrity as such. The typicality of this article is excluded on the basis of the patient's consent, which is given prior to the treatment. However, this consent or agreement can be withdrawn as long as it is objectively possible.

The art. 168º provides for non-consensual artificial procreation stating that "Whoever performs an act of artificial procreation on a woman without her consent is punished with imprisonment from one to eight years". The penalty foreseen here is aggravated under art. 177º of the CP if in the case there is a special relationship between the victim and the agent (kinship or hierarchy), if the perpetrator has a sexually transmitted disease, or if the behavior of the perpetrator results in pregnancy, physical injury, transmission of AIDS, suicide or death of the victim. If the victim is under 14 years of age, there is also aggravation. According to the provisions of art. 178º, the criminal offense foreseen in art. 168 depends on a complaint.

We can also mention the issue of professional secrecy to which physicians are legally bound, as shown in art. 195º. Currently, the violation of professional secrecy is punished regardless of any danger or material damage, since such a violation also entails a disturbance of the patient's intimacy. The penalty regarding the revelation of the secret, however, only happens when this revelation is arbitrary, that is, without the consent of those involved, it is seen as an intentional crime.
Therefore, this crime in the Penal Code emerges as a violation of privacy since it exposes the intimacy of the patient's private life.

At the base of the legal type of the crime of violation of professional secrecy is the duty of confidentiality in which it is intended to protect the patient's privacy. In the sphere of the patient-physician relationship, the medical professional has data at his disposal that may, in addition to violation of professional secrecy, constitute

another crime, such as invasion of privacy, foreseen and punished by art. 192º of the CPR.

4- ART Law (ARTL):

Medicine is constantly evolving and, consequently, so are ART. Although, in Portugal, such techniques have been used for more than twenty years, the reality is that only in 2006 it was approved a global and unitary legislation, able to regulate the subject: Law no. 32/2006, of July 26th (Costa & Silva, 2011). This law arose due to the need for legislative intervention that, in fact, was being discussed worldwide.

ARTL does not prove sufficient to resolve all relevant questions, since there will always be gaps in this domain. Moreover, its validity is conditioned by the norms and principles of the CPR. Associated to this law is the National Council for ART, foreseen in arts. 30º to 33º. It is composed of 9 members, 5 chosen by the Parliament and 4 chosen by the Government. The NCART is responsible for pronouncing on ethical, social and legal issues of ART.

In ARTL there are several manifestations of the subsidiary character attributed to ART.

But ARTL manifests its subsidiary character in two ways. On the one hand, ART assume their subsidiary character in relation to natural procreation. Art.4/1ºARTL states that ART has a subsidiary character with regard to natural procreation. So apparently ART is not an addition to human reproduction. Art.4/2 allows the use of ART when there is a diagnosis of infertility and also "for treatment of serious illness or the risk of transmission of diseases of genetic, infectious of other origin". With the amendment of Law No. 32/2006, and Law No. 17/2016 the subsidiary nature ended, although article 4/1 of the ARTL states that the use of ART is subsidiary. With the legislative change, the no. 3 was added to article 4 referring that the techniques can be used by all women regardless of their infertility diagnosis. Thus, the law confers an alternative access to ART to women who resort to it alone, and it is not necessary to verify the infertility scenario. The author JORGE PINHEIRO understands that the principle of subsidiarity becomes incompatible with article 4/3

of ARTL, since a woman can decide between procreation through sexual intercourse or procreation through ART.

On the other hand, ARTL manifests its subsidiary character to Heterologous ART, in relation to homologous ART is manifested in arts. 19 and 27 of the ARTL. Art. 19 allows AI with semen from a donor when pregnancy cannot be achieved otherwise. In art.27 it states that IVF can be performed with donor gametes. Therefore, arts. 19 and 27 from the ARTL reveal that a donor should only be used when it is not possible through homologous ART to obtain a pregnancy.

Therefore, the subsidiarity of ART assumes two levels. The use of ART is presented as an aid to natural reproduction and, on the other hand, by making the decision to use ART, one resorts to heterologous AI only when it is not possible to achieve a pregnancy with the genetic material of the recipients' beneficiaries.

With the legislative change, a single woman is allowed to use ART, thus providing an alternative to natural procreation.

As for consent, the law gives a "couple of different sexes or couples of women, married or not, as well as all women regardless of sexual orientation or marital status" the possibility to use ART, consent being required. When consent is given by the beneficiaries, they may resort to a specialized medical center. According to the ARTL in its article 14, consent must be "free, informed, expressed, and in writing form, before the attendance of a physician. In order for beneficiaries to give informed consent, they must be educated about the benefits and risks about the benefits and risks that may result from the use of ART.

They also have to know the ethical, social and legal implications. Consent can be revoked at any time before the therapeutic process begins. When can we consider the therapeutic process to begin? Is it the moment that precedes the use of ART? Does it begin with the consultation for fertility consultation? The law does not specify what is understood by therapeutic process, not clarifying the precise moment in which it is possible to revoke consent.

As for the beneficiaries, law 32/2006 in its original wording required a bi-parental structure, which was believed to safeguard the child.

The Law 9/2010 allowed the celebration of marriage between people of the same sex, changing the notion of marriage. Art.6/1 of the ARTL in its original version

denied access to ART to people other than heterosexual couples. Thus, this new concept of marriage in art.1577 brought new hope to homosexual couples. With the amendment to law nº32/2006 introduced by law nº17/2016, article 6º/1 started allowing beneficiaries to be couples of different sexes or couples of women, allowing all women to have access to ART, regardless of marital status. If this were not the case, we would be facing a violation of constitutional principles, such as the principle of equal treatment, considering art.13/2 CPR, which prohibits discrimination on the basis of sexual orientation. The principle of equality encompasses several dimensions, namely, the prohibition of discrimination "whereby any differentiation in treatment between citizens is not legitimate", but it does not mean that there is absolute equality. Thus, in sexual orientation one seeks to avoid direct or indirect discrimination. Restricting ART access to couples of women or to women regardless of their marital status or sexual orientation disrespected the principle of prohibition of discrimination on the basis of sexual orientation, which is found in art.14 of the European Commission of Human Rights.

As the law evolved, access to ART was now denied only to male couples and single men. Compared to maternity pregnancy, this group is also denied access.

Chapter III: Portuguese Constitutional Court (PCC)

1- THE RULING Nº 109/2009:

In 2009, a group of 31 deputies at the Assembly of the Republic requested the PCC to declare the unconstitutionality of various provisions of Law No. 32/2006, particularly those relating to the admissibility of heterologous procreation, the secrecy regime inherent in it, as well as in relation to the establishment of legal relationships of affiliation. In the successive review, ruling 109/09 was handed down, in which the unconstitutionality of any of these norms was not declared.

As for the admissibility of heterologous procreation, the PCC considered that the possibility of resorting to heterologous ART is justified when "in light of the medical and scientific knowledge objectively available, pregnancy cannot be achieved through any other technique that uses the gametes of the recipients,

stipulating that the donors cannot be considered the parents of the child to be born. The unconstitutionality of this rule had been invoked for not ensuring the ''fundamental right to knowledge and legal recognition of paternity, nor the right to identity, in terms of the right to personal history, besides facilitating single parenthood situations''.

The PCC stressed the fact that law 32/2006 enshrines a principle of subsidiarity in relation to the application of heterologous procreation techniques, for which reason the legislator has not ceased to privilege the correspondence between social and biological progeny and only admitting heterologous procreation in exceptional cases in which it is not possible to overcome a situation of infertility without these exceptional cases are sufficiently justified by the superiority of the interest in having children, protected by the constitutional rights to the development of personality and the constitution of a family (Mariano, 2013).

In relation to the anonymity surrounding the donor, the PCC stressed that the legally foreseen regime is not closed, insofar as information of a genetic nature, but also related to the possible existence of a legal obstruction to a projected marriage, may be provided to people born as a result of the application of ART. Another exception legally established refers to the hypothesis of the identification of the donor being lifted, when "ponderous reasons" are verified and always by means of a judicial decision. These limits are found when other constitutionally consecrated values are raised and claim protection, namely the right to intimacy and privacy and the protection of the family.

As for establishing the paternity of the child born from this process, it is considered the child of the husband or the one living in a consensual union with the inseminated woman, as long as there was consent to the insemination. This presumption of paternity may be challenged by the husband or unmarried partner if it is proven that there was no consent or that the child was not born from the insemination for which consent was given. The semen donor can never be regarded as the father of the child to be born and has no powers or duties in relation to the child. This regime was invoked because it admits single parenthood situations.

2- THE RULING Nº 225/18:

In 2017, some Members of Parliament from the political parties CDS-PP and PSD submitted to the PCC a request for successive abstract monitoring of the legislation that proceeded to ART access, which came to approve the gestation of substitution.

The deputies considered that the art. 8, on the institute of gestation of substitution, does not adequately safeguard the rights of the child and the pregnant woman, and may be faced with a possible violation of the principle of respect for human dignity, the principle of proportionality, the right of the State to protect children, the right to personal identity and to the free development of personality and genetic identity.

Regarding ART, specifically the issue of donor anonymity, the deputies assumed that the current law conflicts with the principle of respect for the dignity of the human person human, insofar as the identity of the donor could only be known through judicial process.

Through a judgment dated April 24, 2018, the PPC surprised with the content of its decision, as it came to declare the unconstitutionality of some rules contained in the law regulating ARTL. Regarding the anonymity of the donor, the ruling states that "it is hard to understand that anonymity (...) is still the rule today, precisely because it "constitutes (...) an undoubtedly burdensome impact on the rights to personal identity and the development of personality", adding that "such an option is unnecessary", even with regard to safeguarding the "right to start a family" and the "right to privacy and family life".

In order to uphold these rights, the Portuguese Con admits that the anonymity of the donor and the surrogate mother can be safeguarded only in cases where there are compelling reasons for doing so, and this has to be assessed on a case-by-case base.

Thus, the CCP completely reversed a rule that had already been questioned in a previous decision, and it is questionable what impact this change will have. In practice, as the CCP ended up not making any reference to the moment from which the end of anonymity takes effect, a limbo is created here.

Therefore, "the CCP could have limited the effects by saying that the end of anonymity was effective only from now on. By not doing so, it is as if anonymity had never existed, (...) considering that there should have been some limitation of the effects of the decision of the CCP, to avoid that past donations were covered (...) Only the legislator now can create a transitional regime. I think this is not impossible. In a way, maybe only for the future, the donations from now on will be not ruled by the anonymity.

Chapter IV

1- The Donor's Right:

The right to privacy is disclosed as a fundamental right in our constitution. A donor has the right to his confidentiality. But on the other hand, will the human being generated through ART have the right to know his genetic identity?

The heterologous Artificial Insemination brings with it the problem of donor anonymity, the discussion that if the child born through this technique should know the donor.

The donor's right to anonymity and personal historic has led to different results.

In establishing parentage, it is necessary to understand arts.10 and 21 from the ARTL. Article 10(2) of the ARTL states that in heterologous ART, donors cannot be considered the parents of the unborn child. Art.21 expresses the same understanding, the confidentiality of the semen donor does not allow the establishment of parentage in relation to the donor, the child born is considered to be the child of the mother's partner or herhusband or will only have parentage established.

One of the requirements for the donation of genetic material is the anonymity of both parties. The donor is recognized as having the confidentiality of his identity, not having anyrelationship with the person receiving the genetic material and there is a total absence of relationship with the possible being generated.

Thus, to ensure the right to filiation violates the right to know one's genetic origin.

Another issue is confidentiality about the identity of the donor, the ART participants and the act of ART itself, established on art 15. Therefore, people born through the donation of gametes or embryos will not be able to identify the donor. This rule is not absolute, admitting exceptions. Thus, namely, when information of a

genetic nature persists (art.15/2), impediments to marriage (art.15/3) and "weighty reasons recognized by a court sentence" (art.15/4). Human beings generated through heterologous ART who wish to contract marriage must request information to check if a genetic link exists with the National ART Council. The body competent to provide such information cannot allow the disclosure of the donor's identity unless the donor consents. Therefore, this second exception always involves the consent of the donor.

On the issue of the donor's right to anonymity, there is doctrinal divergence. One part of the doctrine is against donor anonymity, and another part is in favor of donor anonymity.

2- The Confrontation of the new alterations of the ARTL with the Principle of Equality:

In recent years, there has been a proliferation of households whose composition differs from the traditional family, as more and more individuals are planning their lives away from the "conventional family".

Law No. 17/2016, of June 20, expanded the beneficiaries of ART. Now, all women, regardless of their marital status, sexual orientation or infertility diagnosis, can access them. Unmarried men and married couples, as well as homosexual couples. What are the reasons for this exclusion? Why are they available to some but not to all?

In light of a reflection on the principle of equality, expressly consecrated in

article 13 of the CRP. The article 13, nº1 proclaims that "all citizens have the same social dignity and are equal before the law'', adding, nº2, that "no one may be privileged benefited, prejudiced, deprived of any right or exempted from any duty by reason of ancestry, sex, race, language, place of origin, religion, political or ideological convictions, education, economic situation, or social condition.''

The principle of equality is one of the structuring principles of the global constitutional system, dialectically conjugating the liberal, democratic and social dimensions inherent in the concept of democratic and social rule of law (Medeiros & Miranda, 2005).

One wonders if sexual orientation is a criterion that should be considered, per se, when we talk about access to ART. Surely there are more differentiating elements.

I think that the current legal regime of ART presents some inconsistencies in that, if we were to consider sexual orientation as a valid criterion that could be considered in this matter, then it would have to be applied as a whole, and the current law points in the opposite direction.

Nevertheless, this is a very recent legislative solution. The subject has been timidly gaining space and evolving in our society.

On the one hand, given current scientific knowledge, it is indisputable that men are prevented from reproducing biologically, so that if they wanted to exercise their right to procreate, they would necessarily have to resort to surrogate pregnancy, which is currently forbidden to them. On the other hand, given the difficulties and the resistance that ARTL has been facing up to the date it came into force, perhaps it is still too early to the possibility of single men and male couples being able to procreate through this "mechanism" is still too early.

However, I have doubts about whether the sexual orientation criterion, if it is only this one, should operate as the ultimate and guiding foundation for this exclusion. If this is the guideline, there is, as has already been said, an incoherence in the law, because "women can, but men cannot".

3- Postmortem Artificial Insemination:

According to art. 22 of the ARTL, after the death of the husband or the man with whom the woman lived in a de facto union, she cannot be inseminated with semen of the deceased, even if the deceased had consented to the act of insemination. Semen that, for fear of future sterility, is collected for the purpose of insemination from the spouse or woman with whom the man lives in a non-marital union is destroyed if the latter dies during the period established for the conservation of semen.

Although, the new post-mortem insemination regime will allow a woman who currently wants to get pregnant by her deceased partner who has left preserved semen, to do so within the next three years. That is, the new law covers the cases of

couples whose man is still alive and will have to declare in writing the consent for the use of his genetic material after his death, but also cases whose husband has already died in 2018 when both were trying for a pregnancy, but in which the woman can prove that it was her partner's intention that she get pregnant even after he passed away. In other words, a case where there was a "clearly consented and established parental project."

This genetic material can only be used six months after the man's death, unless there is a clinical reason for a shorter period, and the procedures have to start no later than three years after the death, with the maximum number of attempts being the same as those set for public ART centers, which at the moment is three cycles.

The law also establishes that post-mortem embryo insemination or implantation can only be performed for the achievement of "a single pregnancy from which a complete and live birth will result. If, the woman desires, she can request psychological accompaniment during the entire process.

The child born through this technique is considered the deceased's child, but if a woman uses post-mortem insemination without the donor's express consent and if this damages other people's inheritances, she will have to compensate the donor's family and may incur a prison sentence of up to two years or a fine of 240 days. It was also established that, in cases where there is express consent, the deceased parent's inheritance remains undivided for three years after death, and this period may be extended if the insemination procedures are still being carried out and until the complete and live birth of the child. During this period the inheritance remains in administration.

However, if at the time of insemination, the woman has been married or living for at least two years with another man and the latter gives consent for the process, then the child is registered as his daughter - as stipulated in the Civil Code.

Conclusion

In the last decades, the world has seen a rapid technological evolution in the scientific field, namely, in this case, in medicine and biotechnology, facts that have originated some repercussions in the life of humanity. One of the sectors of society where these advances have been reflected in the field of human health, for what matters here, the reproductive health. Through scientific research, new methods were discovered that made it possible to overcome certain scenarios in which it seemed impossible to conceive a child.

From this point of view, scientific progress in the field of reproductive medicine has brought many benefits to people's lives, allowing them to realize long-awaited life plans. Nevertheless, this frenetic evolutionary speed should go hand in hand with responsibility. This must be outlined in law, through legislation for this purpose.

In Portugal, in 2006, the law started regulating ART. Both the law in its original version, as well as after the amendments made by the Laws nº 17/2016 and nº 25/2016, have raised moral discussions in the ethical, legal, and social fields. Focusing on the recent changes introduced, the law opened doors to the possibility of access to ART for a certain group of people who until then could not do so, bringing the reality of having children closer. Access to ART was widened and surrogate gestation was legalized, although only gestation was legalized, it is only allowed in exceptional circumstances.

However, this change was not peaceful. Several voices were raised against the legislative changes, invoking concepts such as the traditional family, arguing that a child has the right to have a biological mother and father. Thus, under the current law, this would not be possible or admissible, due to constitutionally protected rights that should be imposed on the child.

Focusing on the law, the so-called "new families" were able to claim the right to procreate and have children, a right contested by others. On one hand, the intention of the law in allowing single women and married couples to have children through ART is welcomed, but it is well known that there are new ways for people to live, to be, and to relate in society, organizing and making life plans together. The sexual orientation or the option of living alone of some people cannot and should not be the only guiding criteria when we are talking about parental capabilities, as these are not defined or conditioned by those factors.

The legislative process must seek to accompany the evolution of society, in order not to delay people's dreams as well as their hopes and their most profound wishes.

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