# (Not) Striking Down Surrogate Motherhood in Portugal

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Last Tuesday, on the eve of celebrating the country's democratic revolution, the Portuguese Constitutional Court ("PCC") struck down some provisions of the Law on Medically Assisted Procreation. In a quite long and carefully grounded ruling that included several partially dissenting opinions (summary note available here), drawing extensively on comparative and international law, the Court declared the unconstitutionality of some provisions of the regime on surrogacy ("gestation by substitution" is the legal terminology), as well as the prohibition to disclose the identity of gamete donors and gestational (surrogate) mothers.

Surrogate motherhood was introduced by Law 25/2016, of 22 August, after having been expressly forbidden since 2006. Previously, Law 17/2006, of 20 June, had granted female couples, as well as any woman, regardless of her civil status or sexual orientation, access to assisted reproductive technique (ART) (except surrogacy). This amendment introduced a revolutionary change of paradigm: instead of a subsidiary means to achieve procreation, ART is now available to any woman regardless of infertility causes. Assisted reproduction has thus evolved from being a *subsidiary* mechanism to conceive to becoming an *alternative* method of procreation for women (and women only). This paradigmatic shift, however, was not questioned by the petitioners to the case. By stressing the fact that the legal option to allow the deliberate creation of single-parent families by means of ART had not been questioned – despite the constitutional relevance of the paradigm shift – the Court clearly left open the possibility of a future new challenge to the law.

In Decision 225/2018, the PCC ruled on essentially three different questions: *(i)* surrogacy in cases where medical conditions prevent a viable pregnancy; *(ii)* the right of the child conceived through gamete or embryo donations to know the identity of the donor(s), as well as the identity of the gestational mother in case of surrogacy; *(iii)* the validity of discharging formal investigations of paternity in case a single mother has resorted to ART to get pregnant. This last challenge was easily rejected by the PCC. Since those persons could never be established as parents of the child, a formal inquiry would in any case be irrelevant. The unconstitutionality rulings were delivered on the first two sets of problems: gestation by substitution and the disclosure of identity of donors and surrogate mothers.

Surrogacy was introduced as a last-resort option for couples facing serious medical conditions. It must be governed by an exclusively altruistic and written contractual agreement between the "beneficiaries" (the intending parents) and the gestational mother, previously authorized by the National Council on Medically Assisted Procreation (NCMAP). In any case, the gamete of at least one of the beneficiaries must be used (either the oocyte or the sperm).

Regarding surrogacy, the most striking aspect of this decision is not what the PCC ruled unconstitutional but rather what the judges expressly accepted as being constitutionally valid. The PCC ruled the admissibility of surrogate motherhood *per se*, rejecting the claims that it breaches human dignity and the State's duty to protect the children. In line with the Portuguese Constitution's openness on matters that link sensitive moral and ethical issues, and the corresponding judicial tradition to defer such matters to the democratic legislature's margin of appreciation in each historical context, the Court easily accepted surrogacy as a valid political option. Although rejecting a constitutional right to surrogacy, the PCC recognized that the legal option to legalize this practice is grounded on relevant constitutional values (such as the protection of individuals with disabilities, the right to constitute a family, which includes the right to have children, and the right to the development of personality of the

surrogate, whose altruistic motives also enjoy constitutional protection). The Court assumed that the instrumentalization of the surrogate mother is dully restricted and added that pregnancy is not in any way a kind of incapacity since the pregnant woman remains essentially as physically and intellectually free as before.

However, some concrete legal aspects were declared unconstitutional. First, the judges sanctioned the fact that the law did not foresee a right to regret. The surrogate mother could only revoke her consent until the beginning of therapeutic procedures. For the Court, this is a disproportional breach of the surrogate's right to development of personality, in accordance with the principle of human dignity (Articles 18(2), 26(1) and 1 of the Constitution). This reasoning was based on strong concerns for the need to protect the vulnerability of the gestational mother since her will may change during the long period of time that elapses between the beginning of the treatments and the birth of the child. To guarantee that her consent is entirely *free*, the law must grant the surrogate mother a right to regret until after the child has been born. In these cases, the decision on the dispute regarding the child must be adopted on a case-by-case analysis, in accordance with the child's best interests. Not only the Court detailed the reasons for rejecting the legislation, it also provided careful guidelines that the legislature should follow to render it compatible with the Constitution.

Second, the Court rejected the framework governing a possible invalidity of the gestational contract. The legislature had introduced a *nullity* regime, without further clarifications on possible time limits or different causes for breach of contract. This uncertainty carried a serious undefinition regarding the status of the child born out of a possibly invalid contract and was rejected for violating the fundamental duty of the State to protect the children (Article 69(1) of the Constitution).

Third, the Court also rejected the framework provided for surrogacy contracts due to its indeterminacy. The law basically deferred to the will of the parties the power to define the contractual clauses, which implied a breach of the principle of determinability of the law as a dimension of the rule of law. The effects of the unconstitutionality decisions in surrogacy cases were limited in order to protect the cases in which the medical procedures have already been initiated.

Finally, the Court also struck down the legal regime that provided for the anonymity of gamete donors and of the gestational mother. On the first case, anonymity was set forth as a general rule, subject to possible reversal by the courts. Anonymity of the gestational mother was, however, enshrined as an absolute rule. The Court considered that in both cases anonymity entails a disproportionate breach of the child's fundamental rights to personal identity and free development of personality (Articles 18(2) and 26(1) of the Constitution). The decision on the anonymity of donors took many by surprise since it partly represents a turn in the case law. The Court specifically acknowledged this turn, employing a dynamic interpretation of the right to personal identity based on its increasing prevalence upon other interests (namely, of the donors in remaining anonymous). The Court stressed the rights of the child, claiming – again, with a certain degree of detail – the enactment of a rule that, in principle, allows access to the identity of donors and surrogates unless strong reasons demand otherwise.

This ruling proves the Court's willingness to uphold strong constitutional values, specially the need to protect the more vulnerable parties to a contract of gestation by substitution. Those parties are, without question, surrogate mothers and the children. The decision has received strong criticism not only from advocates of more liberal regimes of ART (leading, for example, to the resignation of the previous president of the NCMAP), but also from feminist groups that accuse the Court of adopting a gender-biased perspective against women. These criticisms ignore basically three things: first, that there is a strong judicial empowerment of the condition of pregnant women and of the role of gestational mothers as autonomous and free persons whose constitutional protection must also be enforced. Second, that surrogacy involves the

rights of two women – the intending mother and the surrogate – both in need of protection. There can hardly be any good argument to counter the fact that it is the surrogate who is placed in a more vulnerable position and, therefore, in greater need of protection. Third, that ART also affect the rights of the children. To ignore the children's rights, namely their right to identity, at the sole cost of the adults' right to procreate and to keep the donors or surrogates' anonymity, is too much to be asked from a Constitutional Court well known for its proactive stance regarding the protection of fundamental rights.

From a Portuguese constitutional law perspective, however, the most remarkable distinctiveness of the judgement is perhaps the profound degree to which the Court details the possible legal options to render future amendments constitutionally valid. Whereas there may not be anything unusual to such practice in other jurisdictions, the absence of dialogic mechanisms in Portugal, both formal and doctrinal, is well known. The clear messages sent by the PCC to the legislature show a careful self-repositioning of the Court in its role as a constitutional interpreter in a democracy, an exciting move that must be welcomed with enthusiasm.

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