

Rise and fall of surrogacy arrangements in Portugal (in the aftermath of decision n. 465/2019 of the Portuguese Constitutional Court)

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ABSTRACT: Surrogacy in Portugal have been down a bumpy road. After a situation of legal uncertainty, in 2006 the law came to prohibit it, even criminally. In 2016 an innovative law was enacted, allowing surrogacy under very strict conditions, but the Constitutional Court declared the law unconstitutional and null. Following that ruling, the Parliament amended the law. It addressed every concern of the Court, except for the right of the surrogate to withdraw from the contract, so this regulation was again considered unconstitutional. The surrogate's right to regret has become a sine qua non for the legitimacy of surrogacy in Portugal.

KEYWORDS: Surrogacy contracts; right to regret; contract law; donor's anonymity; Constitutional Court

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1. Rise of surrogacy arrangements in Portugal

1.1. The original solution: Law n. 32/2006

The first law in Portugal to regulate assisted reproduction was enacted in 2006¹, as Law n. 32/2006². Article 8, in the law's original version, contained a clear prohibition against

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¹ Underlying the previous lack of law in this regard, V.L. RAPOSO, A.D. PEREIRA, *Primeiras Notas Sobre a Lei Portuguesa de Procriação Medicamente Assistida (Lei n.º 32/2006, de 26 de Julho)*, in *Lex Medicinæ*, 3, 6, 2006, 89.

² Law n. 32/2006, from 26 July, on Medically Assisted Reproduction.

surrogacy arrangements³. It stated that surrogacy contracts were, in any given situation, null and void of all legal effects (n. 1)⁴. Surrogacy was defined as a situation in which a woman (the surrogate) agrees to bear a child for others and hand over the child after its birth, renouncing the powers and duties of motherhood (n. 2). The law was also clear that the surrogate was, for all legal purposes, the mother of the unborn child (n. 3)⁵. This clarification reinforced the consequences for violating n.1: the child would never be treated as the legal offspring of the contracting parents under the law⁶. The law was particularly severe for paid contracts in which financial benefits accrued to the surrogate. Under Article 39, the parties to such contracts would be punished by imprisonment of up to two years or a fine. The same punishment was also imposed on those who promoted surrogacy arrangements by any means⁷.

All of the articles quoted fall under Law n. 32/2006, unless stated otherwise.

A comment on the regime implanted in 2006 in J.O. ASCENSÃO, *A Lei n.º 32/06, Sobre Procriação Medicamente Assistida*, in *Revista da Ordem dos Advogados*, 67, III, 2007, at http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=30777&idsc=65580&ida=65542; M. COSTA, C.S. LIMA, *A Maternidade de Substituição à Luz dos Direitos Fundamentais de Personalidade*, in *Lusíada*, 2, 10, 2012, 237-289.

³ This was, and still is, the most common regime in Europe (a general overview of surrogacy in Italy, Austria and Germany can be found in D. ROSANI, “*The Best Interests of the Parents*”. *La Maternità Surrogata in Europa tra Interessi del Bambino, Corti Supreme e Silenzio dei Legislatori*, in *BioLaw Journal – Rivista di BioDiritto*, 1, 2017, 109-134), with the exception of the UK (A. ALGHRANI, D. GRIFFITHS, *The Regulation of Surrogacy in the United Kingdom: The Case for Reform*, in *Child and Family Law Quarterly*, 29, 2, 2017, 165-186), Greece and Cyprus (E. ZERVOGIANNI, *Lessons Drawn from the Regulation of Surrogacy in Greece, Cyprus, and Portugal, or a Plea for the Regulation of Commercial Gestational Surrogacy*, in *International Journal of Law, Policy and the Family*, 33, 2, 2019, 160-180).

⁴ This understanding was already in place, even in the absence of an express prohibition. Mainstream scholars (G. OLIVEIRA, *Mãe Há Só Uma, Duas!: O Contrato de Gestação*, Coimbra, 1992) argued that surrogacy contracts were a violation of public order and therefore were null and void of effects, as set forth in Article 280/2 of the Civil Code (CC). However, even then, some authors advocated for the lawfulness of such contracts in light of the existing law (V.L. RAPOSO, *De Mãe para Mãe: Questões Éticas e Legais Suscitadas pela Maternidade de Substituição*, Coimbra, 2005, 28 ff.).

⁵ Criticising this solution for punishing the surrogate, ASCENSÃO, *op. cit.*

⁶ Exposing some arguments against the validity of these contracts, G. OLIVEIRA, *Mãe Há Só Uma*, *cit.*, in particular p. 45; G. OLIVEIRA, *Mães “Hospedeiras”*. *Tópicos para uma Intervenção*, in G. OLIVEIRA (ed.), *Procriação Assistida, Colóquio Interdisciplinar (12-13 de Dezembro de 1991)*, Coimbra, 1993, 59.

After Law n. 32/2006, see J. LOUREIRO, *Outro Útero É Possível: Civilização (da Técnica), Corpo e Procriação: Tópicos de um Roteiro em Torno da Maternidade de Substituição. Direito Penal: Fundamentos Dogmáticos e Político-Criminais*, in M.C. ANDRADE, S.A. SOUSA, M.J. ANTUNES (eds.), *Livro de Homenagem ao Prof. Doutor Peter Hünerfeld*, Coimbra, 2013, 1413 (for being an instrumentalization of the woman); P. PATTO, *Maternidade de Substituição – Um Retrocesso Social*, 14 January 2012, at http://www.federacao-vida.com.pt/index.php?option=com_content&view=article&id=379:maternidade-desubstituicao-um-retrocesso-social-pedro-vaz-patto&catid=6:noticias&Itemid=8.

In favor of surrogacy arrangements, A. BARROS, *Barrigas de Aluguer*, in *Boletim da OA*, 88, Março, 2012, 25; R. CASCÃO, *The Challenges of International Commercial Surrogacy: From Paternalism Towards Realism*, in *Medicine & Law*, 35, 2016, 151-164; M. COSTA, C.S. LIMA, *op. cit.*, 249 ff.; T. DUARTE, *In Vitro Veritas? - A Procriação Medicamente Assistida na Constituição e na Lei*. Coimbra, 2003, 90; V.L. RAPOSO, *De Mãe para Mãe*, 28 ff.; V.L. RAPOSO, *Quando a Cegonha Chega por Contrato*, in *Boletim da Ordem dos Advogados*, 88, 2012, 26-27.

⁷ Paid contracts have always been especially controversial in light of Portuguese law. However, some authors have advocated in their favour: R. CASCÃO, *op. cit.*, 153-158; V.L. RAPOSO, *O Direito à Imortalidade: O Exercício de Direitos Reprodutivos Mediante Técnicas de Reprodução Assistida e o Estatuto Jurídico do Embrião In Vitro*, Coimbra, 2014, 1078.

This legal regime was amended in 2016 by Law n. 25/2016, taking effect from 22 August 2016. The amended law came to allow surrogacy arrangements under very strict conditions.

1.2. The first decision of the Constitutional Court: Decision n. 101/2009

The first time Law n. 32/2006 was challenged in the Constitutional Court (CtC) was in 2009. Several of its norms were questioned, including those pertaining to surrogacy. By then, surrogacy was disallowed. Nonetheless, some members of Parliament were dissatisfied with the level of legal censure, because surrogacy was only considered a criminal offense if it involved a payment. They argued that all surrogacy contracts should be sanctioned under the criminal law. The limited intervention of the criminal law was considered a violation of human dignity and human rights. However, it was unclear whose dignity and whose rights were affected. In addition, it was argued that a lack of full criminalisation would encourage fraudulent contracts, allegedly because people would enter into paid contracts claiming they were free from any payment.

These arguments were doomed to fail. As the CtC shrewdly pointed out, any contract, paid or not, was considered null. Thus, the contracting parties would never be able to achieve the contract's objective. The CtC noted that surrogacy involves legal interests that require criminal protection (a very dubious conclusion, contradicted by scholars)⁸. However, it also stated that this is not enough to impose on lawmakers a duty to criminalise such conduct. In light of the CtC' view, there are no implicit constitutional obligations to criminalise any given conduct⁹. Lawmakers have the power to analyse the value of each legal interest at stake and the best way (with or without criminal law) to protect it. In this case, the lawmakers concluded that civil sanctions would be enough to prevent these contracts and to frustrate their legal consequences, except for paid contracts, considered a more severe violation of the values at stake. The authority to evaluate this belongs to the lawmakers. Therefore, the CtC concluded that «the legislator's choice not to criminalise, in an autonomous way, non-paid surrogacy, does not merit constitutional censorship»¹⁰.

⁸ Againts the use of criminal law to restrict surrogacy, M.J. ANTUNES, *Procriação Medicamente Assistida: Questões Novas ou Questões Renovadas para o Direito Penal*, in M.C. ANDRADE, M.J. ANTUNES, S.A. SOUSA (coords.), *Livro de Homenagem a Jorge de Figueiredo Dias*, Coimbra, 2010, 91; CONSELHO SUPERIOR DE MAGISTRATURA, *Pareceres Referentes aos Projectos de Lei 131/XII/1ª (PS); 137/XII/1ª (PS); 122/XII/1ª (BE); 138/XII/1ª (PSD) e 173/XII/1ª*, 21.03.2012; M. COSTA, C.S. LIMA, *op. cit.*, 247; V.L. RAPOSO, *Quando a Cegonha Chega por Contrato*, *cit.*, 26-27; V.L. RAPOSO, *O Direito à Imortalidade*, *cit.*, 1148-1149; R. VALE E REIS, *Responsabilidade Penal na Procriação Medicamente Assistida – A Criminalização do Recurso à Maternidade de Substituição e Outras Soluções Criminalmente Duvidosas*, in *Lex Medicinæ*, 7, 13, 2010, 87-92.

In favor of using criminal law in this regard see P. PATTO, *op. cit.*; A. SASSI, S. STEFANELLI, *Nuovi Modelli Procreativi, Diritto allo Status e Principi di Ordine Pubblico*, in *BioLaw Journal – Rivista di BioDiritto*, 1, 2019, 682.

⁹ In this regard, the CtC invoked the findings of Jorge de Figueiredo Dias (J.F. DIAS, *Direito Penal: Parte Geral*, Tomo I, 2nd edition. Coimbra, 2007, 129) a leading Portuguese criminal scholar. This a position shared by the vast majority of constitutional and criminal law scholars in Portugal.

¹⁰ Portuguese Constitutional Court, Decision n. 101/2009, from 03/03/2009.

A comment on this decision in V.L. RAPOSO, R. VALE E REIS, *Assisted Reproductive Technologies in Portuguese Law-Commentary to the Judgment No. 101/2009, of March the 3rd of the Portuguese Constitutional Court, in Law and the Human Genome Review / Revista de Derecho y Genoma Humano*, 31, 2009, 125-138.

1.3. Law n. 25/2016 and the authorisation of surrogacy arrangements

Law 25/2016 introduced substantial changes in Law n. 32/2016, authorising surrogacy contracts¹¹. The authorisation is limited to very restricted and exceptional situations and it is subject to various requirements, established by Article 8, in its 2016 version. The contracting woman must be born without a uterus, or suffer from a serious lesion or disease of the uterus that prevents the gestation of a child, or other justifiable clinical conditions (n. 2), though the law does not clarify what is considered justified in this regard. The gametes used must come from at least one of the contracting parents (n. 3). The surrogate cannot provide her own oocytes (n. 3). The procedure must be approved by the entity in charge of controlling the use of reproductive techniques, the National Council of Medically Assisted Reproduction (CNPMA), after a hearing by the Medical Association (n. 4). Surrogacy contracts cannot involve any kind of payment or donation to the surrogate, except for her actual expenses, certified by invoice (ns. 2 and 5). The surrogacy arrangements cannot take place when there is a relationship of economic dependency between the parties (n. 6). The parties must give their free and informed written consent (the information required is included in a document to be prepared by the CNPMA) in the presence of the attending physician (n. 8 and article 14). A written contract is required, signed by the parties and supervised by the CNPMA (n. 10)¹². This contract must clarify, in accordance with the law in force, what shall happen in case the unborn child is diagnosed with a malformation or a disease or in case of voluntary abortion¹³ (n. 10). Surrogacy contracts cannot impose restrictions on the surrogate's conduct or undermine her rights, freedoms and dignity (n. 11).

Under this law, a child born through a surrogacy contract is considered to be the child of the contracting parents (n. 7). However, non-compliance with any of the law's provisions (as set forth above) nullifies the contract (n. 12). The relationship between these two last provisions still requires clarification. This is analysed below.

There are several shortcomings in Law n. 25/2016. First, it treats surrogacy arrangements the same as any other contract, failing to recognise the specificities of these particular contracts¹⁴. The lack of understanding of such specificities explains why lawmakers have barely established any regulation for these contracts, merely referring to the general regime of contract law. Specifically, the law fails to recognise the close connection between surrogacy contracts and family law, as demonstrated by the

¹¹ A comment on this new regime in V.L. RAPOSO, *Tudo Aquilo que Você Sempre Quis Saber Sobre Contratos de Gestação (Mas o Legislador Teve Medo de Responder)*, in *Revista do Ministério Público*, 149, 2017, 9-51 and V.L. RAPOSO, *The New Portuguese Law on Surrogacy – The Story of How a Promising Law Does not Really Regulate Surrogacy Arrangements*, in *JBRA Assisted Reproduction*, 21, 3, 2017, 230-239.

¹² Assigning this task to the CNPMA was criticised by the Portuguese Bar (ORDEM DOS ADVOGADOS, *Pareceres sobre os Projectos de Lei 122/XII/1ª (BE); 127/XII/1ª (BE); 131/XII/1ª (PS); 137/XII/1ª (PSD) e 138/XII/1ª (PSD)*, 08/02/2012), in its legal opinion on this law, but the CNPMA is obviously the most suitable entity to carry out this task.

¹³ The expression «voluntary abortion» seems to refer to abortion by request.

¹⁴ Emphasising the specificities of these contracts, J.D. PINHEIRO, *O Direito da Família Contemporâneo – Lições*, 3.ª Ed., Lisboa, 2011, 263-264; V.L. RAPOSO, *Surrogacy Contracts Are not just Another Contract*, in *Medicine and Law*, 38, 3, 2019, 536 ff.



total absence of any reference to the child's best interest, which should be the cornerstone of any surrogacy regulation¹⁵.

Second, and in connection with the previous comment, the law fails to provide solutions to many issues, and particularly those related to the contract's content. There are some specifications regarding the clauses to be (or not to be) included in these contracts, but they are sparse and contradictory, thereby leading to incongruous solutions. A regulatory act, Decree n. 6/2017, from 31/07, was issued to clarify some parts of the legal regime, and it contains interesting solutions. For example, this Decree states that the contract must establish the conditions under which each party can withdraw, a wise solution that leaves the decision to the parties. In light of this regulation, the parties can include in the contract a wide right to regret for both of them, or only for one of them (e.g. let us suppose that the contracting parents agree that the surrogate can change her mind until the 6th week). Alternatively, the parties can simply reject any possibility to withdraw. In any case, they must specifically state this in the contract. Still, the lawmaker should have defined some legal boundaries for the right to regret, many other aspects of the law have remained unresolved and the overall existing regulation has been deemed insufficient.

2. Fall of surrogacy arrangements in Portugal

2.1. The second decision of the Constitutional Court: Decision n. 225/2018

In 2018, the CtC was asked to assess the constitutional conformity of the new surrogacy law. The request, presented by a group of members of the Parliament, included many aspects related with the new regulation on surrogacy, but also matters of anonymity, not exclusively related with surrogacy. In 2016 there had been a (not) substantial modification to the law. Until that moment, assisted reproduction was considered a subsidiary reproductive mechanism, only available for heterosexual couples (that is, a man and a woman, legally married or living in a de facto relationship), facing infertility problems or the risk of having a child with a severe disease or malformation. Law n. 17/2016, from 20/06, allowed these techniques to be used by single women and gay female couples, thereby turning the techniques into an alternative method of reproduction. Surprisingly, this particular feature of the law was not challenged in this legal procedure.¹⁶ *Rectius*, it was not directly challenged, but it has been stated that the issue of anonymity was an indirect attack to this solution¹⁷.

¹⁵ See B.C. LEWIS, *Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child*, in *St. John's Law Review*, 87, 2013, 900-952; M. COSTA, C.S. LIMA, *op. cit.*, 276-278; A.D. PEREIRA, *Declaração de Voto ao Parecer N.º 104/CNECV/2019 do Conselho Nacional de Ética para as Ciências da Vida sobre a Alteração ao Regime Jurídico da Gestaçã de Substituição*, 2019, at http://www.cneqv.pt/admin/files/data/docs/1555499673_p_cneqv_104_2019_declaracao_andre_dias_pereira.pdf; J.D. PINHEIRO, *Mãe Portadora – A Problemática da Maternidade de Substituição*, in J.O. ASCENSÃO (ed.), *Estudos de Direito da Bioética*, II. Coimbra, 2008, 337. Criticising the lack of reference to the child's best interest in Law n. 32/2006, V.L. RAPOSO, *The New Portuguese Law on Surrogacy*, *cit.*, 28-29.

¹⁶ According to Teresa Violante, «the Court clearly left open the possibility of a future new challenge to the law» (T. VIOLANTE, *(Not) Striking Down Surrogate Motherhood in Portugal*, in *Verfassungsblog*, 28 Apr 2018, at <https://verfassungsblog.de/not-striking-down-surrogate-motherhood-in-portugal/>).

¹⁷ Comment of deputy Isabel Moreira, in an interview with *Jornal Expresso*, on 29/04/2018 (<https://expresso.pt/sociedade/2018-04-29-Dadores-anonimos-continuam-prottegidos#gs.e6sj67>).

Decision n. 225/2018¹⁸ was a long and detailed ruling, with many dissenting votes. The CtC started by explaining that surrogacy does not violate the dignity of a pregnant woman or her child¹⁹, neither the state's duty to protect the infant²⁰. Although it rejected the argument that there is a constitutional right to surrogacy, the CtC recognised that the legal decision to legalise this practice was grounded in relevant constitutional values. These include the protection of individuals with disabilities, the right to constitute a family (the right to have children) and the surrogate's right to the development of personality²¹. Nonetheless, it concluded that some aspects of the existing legal discipline undermined constitutional rights and principles. Thus, the CtC declared several norms of Law n. 32/2006 pertaining (mostly, but not exclusively) to surrogacy to be unconstitutional, with general mandatory force²².

2.1.1. Insufficient clarification regarding the duties and restrictions to be imposed by the contract

Article 8, n. 4, n. 10 and n. 11 were declared unconstitutional to the extent that they allow surrogacy agreements, exceptionally and by prior authorisation, but lacking legal clarification regarding the limits that can be imposed on the autonomy of the contracting parties²³. This was viewed as a breach of the principle that laws must be clear and precise. Consequently, the CtC stated that these provisions of Article 8 violated the surrogate's right to the development of personality and her right to constitute a family, based on the fact that the restrictions on her behaviour are uncertain and undefined²⁴. The vote on unconstitutionality was unanimous.

Curiously, in what regards the duties and limitations imposed on the surrogate, the CtC failed to explore the content and contradictions of the relevant norms. Article 8/10 states that the contract «must obligatorily state, in accordance with the legislation in force, the provisions to be observed in case [of] malformations or foetal diseases and in the event of any voluntary termination of pregnancy». The law

¹⁸ Portuguese Constitutional Court, Decision n. 225/2018, from 24/04/18.

¹⁹ Unlike what has been advocated by J. LOUREIRO, *op. cit.*, 1387 ff., 1413; P. OTERO, *A Dimensão Ética da Maternidade de Substituição*, in *Direito e Política*, 1, 2012, 85-86; E. CHABY, *Direito de Constituir Família, Filiação e Adoção – Notas à Luz Da Jurisprudência do Tribunal Constitucional e do Tribunal Europeu dos Direitos do Homem*, in M.L. AMARAL (org.), *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos*, vol. II, Coimbra, 2016, 353-355.

²⁰ This statement from the CtC is in clear contradiction with judicial pronouncements from other Constitutional Courts around Europe. For instance, in 2017, in decision 272/2017, the Italian Constitutional Court (Corte costituzionale) was faced with a case of surrogacy (transnational surrogacy) and stated that surrogacy violates in an unacceptable way the woman's [the surrogate] dignity and the profound respect by human relations («quale è la maternità surrogata, che offende in modo intollerabile la dignità della donna e mina nel profondo le relazioni umane»). Commenting this decision, S. CECCHINI, *Il Divieto di Maternità Surrogata Osservato da una Prospettiva Costituzionale*, in *BioLaw Journal – Rivista di BioDiritto*, 2, 2019, 342 ff.

²¹ This right, proclaimed in Article 26/1 of the Portuguese Constitution (CPR), is based on the German figure of *Allgemeine Persönlichkeitsrecht*, phrased in article 2(1) of the *Grundgesetz* (German Constitution). See E.J. EBERLE, *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview*, in *Liverpool Law Review*, 33, 3, 2012, 201-233.

²² A comment on this decision in T. VIOLANTE, *(Not) Striking Down Surrogate Motherhood*, *cit.*

²³ The importance of knowing those limits in advance in V.L. RAPOSO, «A Parte Gestante Está Proibida de Pintar as Unhas»: *Direito Contratual e Contratos de Gestação*, in L. NETO, R.T. PEDRO (coord.), *Debatendo a Procriação Medicamentada Assistida*, Porto, 2018, 169-188.

²⁴ Analysing the various obligations that can be imposed on the surrogate, J.D. PINHEIRO, *Mãe Portadora*, *cit.*, 329-330.

in force is Article 142/1 of the Penal Code (PC), which allows the lawful termination of pregnancy under the circumstances therein specified: when it constitutes the only way of removing the risk of death or serious and irreversible injury to the pregnant woman's body or physical or mental health (Article 142/1/a PC); when it is indicated to prevent a risk of death or serious and lasting injury to the pregnant woman's body or physical or mental health and it is performed within the first 12 weeks of pregnancy (Article 142/1/b PC); when there are reasonable grounds to predict that the unborn child will suffer from a serious and incurable disease or congenital malformation and it is carried out within the first 24 weeks of pregnancy, but with no temporal limit in the case of unviable fetuses (Article 142/1/c PC); when the pregnancy results from a crime against sexual freedom and sexual self-determination and the interruption is made within the first 16 weeks of pregnancy (Article 142/1/d PC); and when termination takes place at the pregnant woman's request within the first 10 weeks of pregnancy (Article 142/1/e PC)²⁵. The PC is very clear on the person who is entitled to determine whether to terminate the pregnancy: the carrier. In surrogacy arrangements, it is the surrogate. If Article 142 of the PC had granted the «mother» the power to decide, perhaps a different solution could be envisaged. It could be argued that in surrogacy arrangements the legal mother is the contracting woman, thus, she should be the one to decide on a hypothetical abortion. However, the formula used in the PC, the «carrier», leaves no space for this interpretation.

The provisions of Article 8/10 might seem useless in view of Article 142 of the PC. The latter clearly identifies who is entitled to decide on abortion. Therefore, what is the purpose of the clauses imposed by the former? Contract clauses cannot overrule dispositions of the PC, so, Article 8/10 seems pointless.

I contend that Article 8, n. 10 has two very useful purposes. First, the clauses therein referred to can establish beforehand what would happen under the different scenarios in which a lawful termination of pregnancy can be envisaged. If for no other reason, the drafting of such clauses is important to encourage the parties to think carefully about the conditions, duties and limitations contained in the contract that are applicable to each of them. In this way, their decision on whether to contract under such conditions is fully informed and thoughtful. Secondly, these clauses are decisive in defining the liabilities. The surrogate cannot be compelled to abort or be prevented from doing so if that is not her wish. However, if she agrees to voluntarily limit her personal freedom and reproductive decisions in the surrogacy contract, and afterwards she does not comply with her contract obligations, she may be held accountable under contract law. The surrogate can be required to pay compensation to the contracting parents for an abortion performed in compliance with criminal law, but in violation of her contractual obligations. Law n. 32/2006 does not refer to contract liability, but it seems to be a logical consequence of including such clauses. However, further legal clarification is required in this regard. However, Article 8/10 raises some difficulties because this norm contradicts Article 8/11. The latter states that the surrogacy contract «cannot impose restrictions on the surrogate's conduct, nor impose norms that restrict her rights, freedom and dignity». The problem is that any clause regarding a

²⁵ About the regime of abortion in Portugal see J.F. DIAS, *Antes do Art. 142º*, in J.F. DIAS (coord.), *Comentário Conimbricense do Código Penal*, Parte especial, Tomo 1, 2nd ed., Coimbra, 2012, 243-265; J.F. DIAS, N. BRANDÃO, *Artigo 142º*, in J.F. DIAS (coord.), *Comentário Conimbricense do Código Penal*, Parte especial, Tomo 1, 2nd ed., Coimbra, 2012, 266-297.

hypothetical abortion clearly restricts the rights and freedom of the surrogate. Even though she voluntarily (with no coercion) agrees to be bound by such clauses, they clearly limit her free reproductive decisions. Thus, we have a paradoxical situation in which the clauses imposed by n. 10 are forbidden by n. 11, and likewise, complying with n. 11 means failing to comply with n. 10²⁶.

2.1.2. The (too wide) imposition of nullity for non-compliance with legal requisites

Article 8, n. 13, was declared unconstitutional in the part where it states that contracts that are not in compliance with the legal requirements are null. Non-compliance with any of the relevant legal requirements nullifies the contract (n. 12), regardless of how irrelevant the violated requirement is. For instance, if consent was not obtained in the presence of the attending physician (as imposed by Article 14/1, applicable via Article 8/8), but another physician, the contract is null. This contradicts the principle of legal security. Furthermore, nullity precludes the consolidation of legal kinship, a particularly severe outcome for the legal status of the child and a violation of its right to personal identity. The vote on the unconstitutionality of this provision was unanimous.

In spite of the CtC's conclusions, the legal solution in this regard is ambiguous. A child born through a surrogacy arrangement is considered to be the child of the contracting parents (Article 8/7). This rule was established with no exception. Accordingly, one possible interpretation is that this outcome is valid even if the contract is invalid, and even if the contracting parents have committed a crime by entering into a paid contract²⁷. The CtC viewed this differently, stating that if the contract is null the child will not be treated as the legal child of the contracting parents, but of the surrogate mother (following the rule of Article 1776/1 of the CC, which states that the mother is the woman who gives birth to the child)²⁸. The law is dubious in this regard and legal uncertainty is particularly detrimental to the status of a child born under a null contract.

2.1.3. The absence of the surrogate's right to regret

Articles 8, n. 8 and 14, n. 5, were declared unconstitutional because they do not allow the consent of the surrogate to be revoked after birth. The absence of the surrogate's right to regret - that is, the possibility of a surrogate terminating a contract at any stage of the pregnancy and after birth, without

²⁶ This contradiction cannot be solved by resorting to the dichotomy *lex generalis/lex specialis*, because the relationship between both standards cannot be configured under this dichotomy.

²⁷ See V.L. RAPOSO, *The New Portuguese Law on Surrogacy*, cit., 13-14.

²⁸ If the surrogate is married, her husband is the father (Articles 1796/2 and 1826 of the CC: if the mother is married, the husband is presumed to be the father). However, if the contracting man provided his own sperm, and he can demonstrate, by means of a DNA test, that he is the «natural father», his paternity will be legally recognised (Articles 1832 and subsequent of the CC). If there is the case, the court will establish child custody, and thus the contracting father and the surrogate will share parental power over the child. The contacting mother will have no say in that. If a donor was used, determining fatherhood becomes more complicated. Donors are never legal fathers. Eventually the surrogate's husband can become the father under the rules of fatherhood presumption (Articles 1796/2 and 1826 of the CC). If the surrogate is not married, or her husband manages to destroy the presumption, the child will be fatherless.

On the Portuguese norms about filiation see F.P. COELHO, G. OLIVEIRA, *Curso de Direito da Família, Direito da Filiação*, volume II. Coimbra, 2006, 49 ff.

incurring legal consequences²⁹ - was considered a violation of her right to the development of personality, interpreted in accordance with the principle of human dignity and the right to constitute a family. This vote was approved only by majority³⁰.

The law is silent in this regard. Article 8/8, pertaining to consent, defers the solution to Article 14, which regulates informed consent for reproductive procedures. Article 14/4 provides that consent can be freely withdrawn until the beginning of reproductive therapeutic procedures. This provision was originally created to regulate the relationship between the members of a couple seeking reproductive treatment in case they disagree over whether to continue the procedure, not to regulate surrogacy arrangements.

The statement «the beginning of reproductive therapeutic procedures» has been understood by the CNPMA as the moment of uterine transfer, in line with the general solution implemented in other jurisdictions³¹. Thus, the informed consent forms provided by the CNPMA, and used in all reproductive centres, allow consent to be withdrawn until the embryos are transferred. However, the law clearly does not say that. The beginning of reproductive therapeutic procedures takes place much earlier, when sperm is collected, or drugs are administered to stimulate ovulation, or even when the patient's first medical exams are performed. Therefore, there is a clear contradiction between the content of Article 14/4 and its current interpretation.

Furthermore, whether a surrogate can rely on Article 14/4 is controversial. Even though Article 8/8 expressly states that its informed consent requirements are applicable to surrogacy arrangements, *mutatis mutandis*, it can be argued that Article 14/4 is only applicable to the contracting parents. They are the «beneficiaries of the techniques», the term used in Law n. 32/2006 to refer to patients undergoing reproductive treatments, and the ones to which Article 14/4 is directly applicable. The surrogate is a mere intervenient that helps the contracting parents become parents. In this regard, her status is similar to a donor, and it is thus excluded from this solution. Under this interpretation, the only option

²⁹ In general, about this figure see S.F. APPLETON, *Reproduction and Regret*, in *Yale Journal of Law & Feminism*, 23, 2, 2011, 255-333; Y. MARGALIT, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, in *William & Mary Journal of Women and the Law*, 20, 2014, 433. Specifically about the right to regret under Portuguese law, see V.L. RAPOSO, *Tudo Aquilo que Você Sempre Quis Saber*, cit., 232-234; V.L. RAPOSO, *The New Portuguese Law on Surrogacy*, cit., 15-23.

³⁰ The matter has divided scholars. In support of the surrogate's right to regret, M.M.S. PEREIRA, *Uma Gestaçao Inconstitucional: O Descaminho da Lei da Gestaçao de Substituiçao*, in *Julgar Online*, 2017, at <http://julgar.pt/uma-gestacao-inconstitucional-o-descaminho-da-lei-da-gestacao-de-substituicao-2/>, 3; R. VALE E REIS, *Erro Crasso na Maternidade de Substituiçao*, in *Publico*, 20/07/2016, at <https://www.publico.pt/sociedade/noticia/erro-crasso-na-maternidade-de-substituicao-1738773>; R. VALE E REIS, *Gestaçao de Substituiçao: a Arte de Procrastinar*, in *Jornal O Pùblico*, 29/08/2019, at <https://www.publico.pt/2019/08/29/sociedade/opiniao/gestacao-substituicao-arte-procrastinar-1884682>; A.D. PEREIRA, *Declaraçao de Voto ao Parecer N.º 104/CNECV/2019*, cit., against it, CNPMA, *Comunicado de Imprensa*, 27 April 2018, at http://www.cnpma.org.pt/cnpma/Documents/Comunicacao/CNPMA_COM27ABR2018.pdf, 11-12 (at least against an «unjustified regret»); V.L. RAPOSO, *Tudo Aquilo que Você Sempre Quis Saber*, cit., 232-234; V.L. RAPOSO, *The New Portuguese Law on Surrogacy*, cit., 21-24 (though not applauding the overall legal solution).

³¹ Analysing the solution in Portugal and comparing it with other jurisdictions, V.L. RAPOSO, *O Dilema do Rei Salomão: Conflitos de Vontade quanto ao Destino dos Embriões Excedentários*, in *Lex Medicinæ*, 5, 9, 2008, 55-79.

is to use contract law and allow the surrogate to change her mind only until the moment the contract is concluded. Any change of heart after that would give rise to legal consequences.

Hypothetically, even if Article 14/4 is deemed applicable to surrogates, regret will only be allowed until uterine transfer (according to the current interpretation of that norm). After that, her rights and obligations will fall under the contract clauses and she can be held to account if she violates such clauses. Despite the absence of a right to regret, a surrogate cannot be coerced into undergoing embryo uterine transference, just as a pregnancy cannot be imposed on her by force. A surrogate can refuse embryo transfer and can also refuse to continue with the pregnancy. However, there are legal consequences. Non-compliance with the contract is a breach, unless it is considered justifiable noncompliance, pursuant to the general terms of contract law.

A crucial problem occurs when a surrogate refuses to relinquish the child after delivery. The law is not clear, but the lack of a right to regret, combined with the legal recognition of the contracting parents as the legal parents, undoubtedly leads to the conclusion that the surrogate is obliged to deliver the child to the contracting parents. She does not have the right to keep the child, who legally belongs to the contracting parents. Even if they rejected the child and decided to give him/her up for adoption, the surrogate would have to follow the adoption procedures to keep the child. Nonetheless, lacking explicit legal grounds in this regard (i.e., a norm stating that the surrogate is compelled to deliver the child to the contracting parents), it is doubtful that any court would issue an order forcing the surrogate to do so.

The CtC concluded that the protection of the surrogate's rights should include a period of time, subsequent to birth, during which she could refuse to deliver the child to the contracting parents. The exact duration of that period was left to the lawmakers. The CNPMA had proposed a deadline of 48 hours³², whereas others have suggested six weeks, following the legal arrangement in the UK and also in analogy with the legal solution for adoption in Portugal (Article 1982/3 CC only allows consent for adoption to be given six weeks after birth)³³. The CtC did not define a specific time-lapse, but did require that a reasonable time be given to the surrogate to withdraw from the contract with no legal consequences.

2.1.4. Donor's and surrogate's anonymity

Articles 15, ns. 1 and 4, were declared unconstitutional because they imposed secrecy on reproductive procedures and anonymity on surrogates and gamete donors. This rule was considered a violation of the right to personal identity and the right to the development of the unborn child's personality. This was approved only by a majority.

This part of the decision was received with great surprise and severe criticism. The surprise was related to Decision n. 101/2009, back in 2009, when the CtC found the anonymity rule to be constitutional. In the words of the CtC, «this limitation [anonymity] to the knowledge of the progeny [...] is justified [...] by the need to preserve other constitutionally protected values. Therefore, it cannot be understood

³² CNPMA, *Declaração Interpretativa (n. 1 do Artigo 30 da Lei n. 32/2006, de 26 de Julho, alterada pelas Leis n. 17/2016, de 20 de Junho, e 25/2016, de 22 de Agosto)*, Setembro 2016.

³³ This solution was sustained by R. VALE E REIS, *Responsabilidade Penal*, cit., 88, and it was suggested by the CtC itself.

as arbitrary discrimination to undermine the principle of equality between citizens». Why then did the CtC rule these provisions in Article 15 to be unconstitutional in 2018?

Critics immediately pointed out that the CtC was hypocritical and moralistic³⁴. It allowed anonymity when reproductive techniques could only be used by opposite sex couples, which was the original solution under Law n. 32/2006 and the one in place in 2009. However, in 2018, it rejected the same rule after the 2016 amendment came to allow reproductive techniques to be used to create different types of families³⁵, including those with single women and same sex female couples (Article 6 of Law n. 32/2006, in the version introduced by Law n. 17/2016).

However, the reason might simply be that the CtC changed its perspective, which is only natural because its composition in 2018 was different than it was in 2009. Moreover, despite the desirable jurisprudential uniformity, the rule of precedent is not applicable in Portugal, a jurisdiction affiliated with civilian law. Even in common law jurisdictions, where the rule of precedent is in place, courts can diverge from previous rulings, so long as proper justification is provided³⁶. Thus, *a maiori ad minus*, the civilian courts can also change positions. It should also be noted that the right to personal identity and to know one's genetic ancestors, although important in 2009³⁷, is currently much more relevant to constitutional discussions³⁸, mandating a different assessment.

2.2. Consequences of decision n. 225/2018

When a law is declared unconstitutional with general mandatory force, as it was in this case, it is considered null and void of effects since the very moment it came into place, as stated in Article 282/1 of the Constitution of the Portuguese Republic (CRP). Based on this provision, the ruling would take any effect from the relevant provisions of Law n. 32/2006 since the moment these provisions came into force, as if they had never existed.

This outcome would have dramatic effects. The contracts already concluded would have to be treated as illegal, with severe legal consequences for the parties involved and for the determination of affiliation for children born after these arrangements.

Aware of this scenario, the CtC used a prerogative granted by the Constitution (Article 282/4 CRP) and declared that the statement of unconstitutionality would not affect the contracts whose therapeutic procedures had already been initiated at the time of the decision. It remains to be seen what will be considered the beginning of the therapeutic procedures in this regard. In line with the interpretation in place for Article 14/4, it might be uterine transference. If that is the case, only those contracts in which uterine transference already took place will be safeguarded.

³⁴ See the criticism of deputy Isabel Moreira, in an interview with Jornal Expresso, on 29/04/2018 (<https://expresso.pt/sociedade/2018-04-29-Dadores-anonimos-continuam-protegidos#gs.e6sj67>).

See also the questions raised by the CNPMA in CNPMA, *Comunicado de Imprensa*, cit.

³⁵ By Law n. 17/2016, of 20 June.

³⁶ W.N. JR. ESKRIDGE, *Overruling Statutory Precedents*, in *Faculty Scholarship Series*, 3825, 1988, at https://digital-commons.law.yale.edu/fss_papers/3825.

³⁷ I contend that the CtC should have considered anonymity unconstitutional in its first ruling. Also sustaining this position, R. VALE E REIS, *O Direito ao Conhecimento das Origens Genéticas*, Coimbra, 2008, 24-25.

³⁸ See, for instance, V. RAVITSKY, *The Right to Know One's Genetic Origins and Cross-Border Medically Assisted Reproduction*, in *Israel Journal of Health Policy Research*, 6, 3, 2017.

Unlike its ruling on surrogacy, Decision n. 225/2018 did not limit the temporal effects of unconstitutionality in matters of anonymity. Article 282/4 CRP was only invoked by the CtC on matters of surrogacy, not anonymity. Therefore, the decision resulted in a breach of secrecy for all gamete donations ever performed since the entry into force of Law n. 32/2006.

Immediately critics argued that Decision n. 225/2018 constituted a gross violation of expectations for those involved in reproductive procedures (prospective parents, gamete donors, embryo donors), because until that moment they trusted that the donors' identity would not be disclosed and their privacy, including family privacy, would be absolutely protected. This reasoning is fallacious. None of these people could ever claim a legitimate expectation of having their privacy fully protected³⁹. Law 32/2006 never enshrined a pure anonymity regime. From the very beginning, Article 15/4 stated that «information may also be obtained on the identity of the donor for significant reasons recognised by court decision». The exact meaning of the language «significant reasons» was never clarified, but some have asserted that this clause includes situations of severe emotional distress caused by the lack of knowledge of the child's genetic origins⁴⁰. This interpretation (or any interpretation, for that matter) was never tested in a court of law, but in any case it can be stated that the Portuguese law always had a mitigated regime of anonymity. Therefore, the allegation that the breach of anonymity would severely decrease the number of donations because 58% of the donors would never donate under that scenario is disturbing⁴¹. It raises the question of how informed the donors were about the legal regime in place and whether someone had explained them the possible consequences of the above-mentioned Article 15/4.

Moreover, the desire for secrecy is nothing but illusory. In a world of genetic data and big data it is impossible to guarantee genetic privacy⁴². Several companies offer their services (to track family members, to build genealogic trees) online and one simply has to send his/her DNA to track genetic ancestors (eventually the donor or the donor's relatives).

2.2.1. A new legal solution of (non) anonymity

Pressured by the CtC's ruling on anonymity, the Parliament enacted a new regulation in this domain. Law n. 48/2019, from 08/07, included a new number in Article 15 (currently Article 15/2), which states as follows:

«The people born as a result of reproductive procedures through the use of gametes or embryos may obtain, from the competent health services, genetic information concerning them, as well as

³⁹ Unlike the claim of ISABEL MOREIRA, in an interview to *Jornal Expresso*, on 29/04/2018 (<https://expresso.pt/sociedade/2018-04-29-Dadores-anonimos-continuam-protegidos#gs.e6sj67>).

⁴⁰ R. VALE E REIS, *O Direito ao Conhecimento das Origens Genéticas*, cit., 442; D.L. CAMPOS, *A Procriação Medicamentada Assistida Heteróloga e o Sigilo sobre o Dador – ou a Omnipotência do Sujeito*, in *Estudos de Direito da Bioética*, 66, III, 2008, 83. This is an interpretation to which I also agree.

⁴¹ Data provided by the clinical director of a reproductive clinic, in *Jornal Expresso*, on 29/04/2018 (<https://expresso.pt/sociedade/2018-04-29-Dadores-anonimos-continuam-protegidos#gs.e6sj67>).

⁴² J.C. HARPER, D. KENNETT, D. REISEL, *The End of Donor Anonymity: How Genetic Testing Is Likely to Drive Anonymous Gamete Donation Out of Business*, in *Human Reproduction*, 31, 6, 2016, 1135-1140; M.R. SADEGHI, *Coming Soon: Disclosing the Identity of Donors by Genealogical Tests of Donor Offspring*, in *Journal of Reproduction & Infertility*, 20, 3, 2019, 119-120.

information on the donor's civil identification, obtained from the National Council for Medically Assisted Procreation, provided that they are over 18 years old».

Law n. 48/2019 established a transitory regimen for the disclosure of donors' identity to protect the privacy of those (donors and legal parents) involved with donations prior to the CtC's ruling. Nonetheless, it is unclear whether the law can create this type of transitory solution. Had the CtC believed that previous situations deserved legal safeguard, it could have done this itself, by limiting the retroactive effects of its decision (as it did for surrogacy contracts). The CtC decided not to do so, leading to the conclusion that every single person born by means of these procedures now has full and unlimited access to the donor's civil identification, without having to offer any compelling reason or relying on judicial procedures, regardless of when the donation was made.

Moreover, the rule remains that donors are not the child's legal parent, but are mere contributors to the reproductive project of the beneficiaries. The disclosure of donor's identity does not entail any parental duty, nor any ethical or moral obligation to «take care» of such children.

2.2.2. A new legal solution for surrogacy

Faced with decision n. 225/2018 of the CtC, the Portuguese Parliament suggested a slightly different regulation for surrogacy: Decree n. 383/XIII. This legal proposal has positives and negatives.

It includes a problematic solution regarding the relationship between the parties. According to this regulation, Article 8/8 would state as follows:

«The surrogate shall be, preferentially, a relative in the straight line up to the second degree or in the collateral line up to the fourth degree, relative by law up to the second degree or the adoptive child, of at least one of the beneficiaries».

The use of the adverb «preferentially» is strange, to say the least. It is not the law's task to provide advices. Either it is imposed, or it is not. Moreover, this «advice» goes against the basic idea of the original regulation, which was to avoid any kind of pressure on the surrogate. This was the reason justifying the prohibition on any relation of economic dependency between the parties. Surprisingly, in this subsequent version the lawmakers encouraged the use of a close relative, which obviously would create even more pressure on the surrogate.

Apart from this unseemly solution, the Decree included several improvements. In compliance with the constitutional assessment, it added clarifications regarding the contracts' content (Article 8/15), and the surrogates' rights (Article 13A) and duties (Article 13B). This Decree was also intended to incorporate into Law n. 32/2006 the solution established in Decree n. 6/2017 on the possibility of withdrawing from the contract, requiring contract clauses in this domain to be included in the contract. Nonetheless, there was no provision assigning a right to regret to the surrogate (that is, a right to regret recognised by law and not merely by contract clauses), which was a clear problem to the CtC.

2.3. The third decision of the Constitutional Court: Decision n. 465/2019

In 2019 the CtC was once again asked to analyse the constitutional conformity of surrogacy regulations, as provided by Decree n. 383/XIII. This time the issue was exclusively about (the absence of) the right to regret. It was a preventive control of constitutionality, a constitutional procedure which can be put

into place before a law comes into force. A pronouncement of unconstitutionality prevents that outcome.

In this last decision, the CtC found that the rule contained in Article 2 of Decree n. 383/XIII was unconstitutional, for breach of the right to the development of personality of the surrogate. The “problem” is that this new regulation still failed to guarantee the right of the surrogate to revoke her consent.

This ruling was not surprising in the sense that the CtC had previously required the right to regret, and despite such a clear commination, the new draft did not include it. However, I find it striking the way the CtC made its assessment, *rectius*, the way it simply repeated its previous assessment. Implementing a kind of «cut and paste» strategy, the CtC failed to meaningfully reconsider the new regulation, as it was obligated to do. The CtC’s carelessness is particularly debatable given that the matter at stake - whether the surrogate could change her mind after birth - failed to achieve consensus in Portuguese society.

Both the CtC and the defenders of this solution⁴³ have claimed that ignoring the surrogate’s right to regret is a crass violation of her rights and women’s rights in general. Nonetheless, it remains to be explained why the right of a single individual - the surrogate - should undermine the rights of every other participant in this procedure⁴⁴, including the child, who might be prevented from being raised by individuals who are genetically connected to him/her⁴⁵. Is it that the condition of being pregnant allows the contractor to change her mind in situations where non-pregnant contractors are prevented from doing so?⁴⁶ The women’s rights argument is especially feeble. The carrier is not the only woman intervening in the process. Likewise, the contracting woman (intended mother and frequently the genetic mother) has rights and interests that deserve legal protection. Moreover, the gender of the rights holder cannot become a shield against any constriction. To argue for women’s rights in this regard makes us wonder whether the solution would be different if the surrogate was a man instead of a woman. Would the CtC be so keen to defend the male surrogate’s right to regret under that scenario? In the aftermath of that decision, and to circumvent the objection of the CtC, on the 12 November 2019, the left-wing party Bloco de Esquerda, an advocate of surrogacy, presented another legal project, project 71/XIV/1.³. The project closely follows Decree n. 383/XIII, but it contains a major modification: it introduces the right to regret. It states that the surrogate can decide not to deliver the child to the contracting parents until the child is registered, an event that happens (or should happen) immediately after birth.

⁴³ A.D. PEREIRA, *Uma Gestação Inconstitucional*, cit., 3; A.D. PEREIRA, *Declaração de Voto ao Parecer N.º 104/CNECV/2019*, cit.; R. VALE E REIS, *Erro Crasso na Maternidade de Substituição*, cit.; R. VALE E REIS, *Gestação de Substituição*, cit.

⁴⁴ Also pointing out the clamorous imbalance of the solution demanded by the CtC, see the opinion of the Portuguese national ethics council (CNECV, 104/CNECV/2019 *Parecer sobre a Alteração ao Regime Jurídico da Gestação de Substituição*, 8 April 2019, at http://www.cnecv.pt/ad-min/files/data/docs/1555499641_parecer_104_cnecv_2019_gestacao%20substituicao.pdf, in particular p. 12).

⁴⁵ On the relevance of genetic connections in reproduction, V.L. RAPOSO, *Wrongful Genetic Connection: Neither Blood of my Blood, nor Flesh of my Flesh*, in *Medicine, Health Care and Philosophy*, 2019.

⁴⁶ The CtC itself seems to refute this thesis: «pregnancy, implying vulnerability and requiring special care, does not correspond to a disability. The pregnant woman, in essence, remains so free and self-determined intellectually and physically (including the sexual dimension) as before» (Decision n. 225/2018).

However, this draft will probably face two obstacles. On the one hand, it might be rejected by the political parties which previously opposed to the inclusion of the surrogate's right to regret: the PSD, the CDS (both right wing parties) and the PCP (a left-wing party). It is unclear whether their opposition is grounded in effective legal arguments, or is simply because they realise that without the surrogate's right to regret the law will be barred by the CtC, so they use their opposition to the possibility of withdrawal as a way to prevent legal surrogacy. On the other hand, this draft will probably face another ruling of unconstitutionality by the CtC, which might treat the deadline for the surrogate to withdraw as being too short and thus incompatible with its (excessively and unjustified) perception of the surrogate's rights and freedoms. Time will reveal the outcome of this regulation.

3. What does the future hold?

Portugal has returned to its departure point on the issue of surrogacy: surrogacy contracts are not allowed because the law that authorised them was declared unconstitutional, therefore null, and no other legal proposal presented by the Parliament had managed to be approved by the CtC.

Besides the discussion of surrogacy, the Portuguese case reveals another controversial issue: the battle between legislative and judicial powers. The CtC is the guardian of the Constitution. However, it is not a democratically elected body; only the Parliament is⁴⁷. Given the disagreement between the two institutions, this issue merited further consideration in the 2019 judgement. Instead, the CtC merely repeated its 2018 ruling. However, the solution imposed (not proposed) by the CtC is far from consensual.

In the author's view, a more decisive factor than the hypothetical existence of a right to regret is the legal clarification of the duties, limitations and rights of the contracting parties. Each one of them must clearly understand what is expected from him/her and what he/she can expect from the counterpart. Law n. 25/2016 failed to achieve this goal. Most of the issues were blurred. In particular, in what regards to the right to withdraw from the contract, the law was not clear on what conditions that right could emerge and what the legal consequences would be. Decree n. 383/XIII had the virtue of clarifying many issues, mostly by referring to contractual freedom its definition, but it lacked legally established boundaries to which such clauses should be subject⁴⁸.

The right to regret has become the condition *sine qua non* for allowing surrogacy arrangements in Portugal. It has also become a symbol for the power game between two different institutions. Meanwhile, many families are in standby mode, waiting for a law that would allow them to have the children they desperately want, but can only have through surrogacy.

⁴⁷ An accurate criticism in this regard was expressed by Teresa Violante: «At first glance, the judges seem to endorse a horizontal relationship with the legislature that leaves untouched the integrity of the legislative power as well as the Court's full jurisdiction to review its previous determination of what fundamental rights require in difficult cases. However, such power of the legislature lacks independent force if the Court holds a discretionary capacity to determine whether the threshold for re-opening the constitutional interpretation debate is met (note that the threshold concerns re-opening the debate and not the burden of justification to reinstate the previous decision)» (T. VIOLANTE, *Between Legislative Defiance and Legal Security*, in *Verfassungsblog*. 24 Okt 2019, at <https://verfassungsblog.de/between-legislative-defiance-and-legal-security/>).

⁴⁸ V.L. RAPOSO, *Surrogacy Contracts Are not just Another Contract*, cit., 536 ff.