FACULDADE DE DIREITO, UNIVERSIDADE NOVA DE LISBOA

Surrogacy in Portugal: A legal perspective

The before, the now and the possible after

Vera Esteves Cardoso

15/05/2014

Declaração de Compromisso Anti-Plágio

Declaro por minha honra que o trabalho que apresento é original e que todas as citações estão corretamente identificadas. Tenho consciência de que a utilização de elementos alheios não identificados constitui grave falta ética e disciplinar.

_____

SUMÁRIO ANALÍTICO

A gestação por substituição é um acordo celebrado por pelo menos três pessoas, para que a mãe de substituição ou gestacional possa levar a termo uma gravidez e dar à luz a uma criança que será entregue a outros que serão considerados os pais sociais e legais da criança.

No entanto, tal método de reprodução apenas começou a ser aceite recentemente devido a desenvolvimentos científicos e tecnológicos modernos que possibilitaram a redução de problemas éticos e morais que desde outrora assombravam o crescimento e reconhecimento deste método subsidiário de reprodução. Consequentemente, existe ainda inquietantes lacunas legais no que toca à regulamentação cuidada, tanto a nível nacional como internacional, da gestação por substituição.

Assim, certos países têm indiretamente forçado os seus cidadãos a procurar celebrar tais acordos no estrangeiro (gerando dessa forma problemas a nível de direito privado internacional no que toca ao reconhecimento da parentalidade e da nacionalidade da criança) ou até a sucumbir à gestação por substituição do mercado negro. Infelizmente, Portugal é um desses países, que tem até sido considerado tanto por partidos políticos, peritos na matéria como por os seus próprios cidadãos como um pais que não tem lidado de forma adequada com a temática em apreço- podendo até, por vezes, ser considerado como inapto para lidar presentemente, no âmbito social e legal, com a gestação por substituição.

O presente trabalho tem como objetivo a análise da posição legal de Portugal, tendo em conta os esforços que têm sido feitos de forma a contrariar o vazio legal existente, de forma a delinear o futuro possível da gestação por substituição altruísta, no nosso país.

De forma a colocar ênfase nas melhorias possíveis, tendo em conta especificamente a total proteção dos direitos humanos relevantes para este efeito e ainda a dignidade humana como um todo, foi também estudado o regime em vigor no Reino Unido. Através de uma comparação direta de ambas as perspetivas sociais e legais, é sugerida uma nova abordagem à problemática em questão com vista a propor uma solução harmoniosa para países que tenham pelo menos reconhecido a necessidade de reconhecer a importância da legalização formal da gestação por substituição altruísta pois tal facto é passível de garantir a proteção da dignidade humana, ao invés do que sido frequentemente argumentado.

ABSTRACT

Surrogacy is the arrangement made by at least three people, in order for a surrogate or gestational mother to carry a pregnancy for the two intended parents, with the objective of the former party relinquishing all rights to the child, once the child is born. As it has only been in recent years that that same reproductive method has begun to be commonly accepted due to certain modern scientific developments that thus diminished ethical and moral negative stances, there is still an unsettling legal void (both at a national and international level) in regards to such subsidiary form of reproduction.

As such, some countries have not only left their citizens with no choice but to travel abroad in order to enter a surrogacy arrangement (leading to private international law issues on establishing parenthood and nationality of the born child) or to resort to surrogacy within black market conditions. Unfortunately, one of those countries is Portugal as it has been considered, both by its political parties and experts in the area, and by its citizens as not dealing adequately with such theme and thus being poorly equipped to deal with surrogacy, at both a legal and social level.

The present paper attempts to analyse Portugal's current legal perspective by looking at the present efforts being made to contradict the current situation, and thus outline altruistic gestational surrogacy's tangible future within such nation. In order to also become aware of possible improvements specifically regarding to the full protection of human rights and human dignity as a whole, the United Kingdom's legal standpoint in relation to surrogacy was also studied. Via direct comparison of both social and legal perspectives, a new approach to altruistic surrogacy is thus proposed with view to suggest a harmonious solution for countries that have at least recognized that the present issue deserves to be duly noticed and that altruistic gestational surrogacy may exist in order to grant protection of human dignity and not to place it in check.

"Birth is the sudden opening of a window, through which you look out upon a stupendous prospect. For what has happened? A miracle. You have exchanged nothing for the possibility of everything."

- WILLIAM MACNEILE DIXON (1866-1946)

CONTENTS

LIST OF ACRONYMS USED

AGS	*Altruistic Gestational Surrogacy*
HFEA 1990	*Human Fertilization and Embryology Act of 1990*
HFEA 2008	*Human Fertilization and Embryology Act of 2008*
HFEA	*Human Fertilization and Embryology Authority*
IVF	*In vitro fertilization*
NCMAP	*National Council of Medically Assisted Procreation*
NCESL	*National Council of Ethics and Sciences of Life*
SAA	*Surrogacy Arrangements Act 1985*
UDHR	*Universal Declaration of Human Rights*
UK	*United Kingdom*
USA	*United States of America*

INTRODUCTION

Surrogacy, by definition, is the arrangement made by at least three people, in order for a surrogate or gestational mother to carry a pregnancy for the two intended parents, with the objective of the former party relinquishing all rights to the child, once the child is born.

Curiously, the phenomenon of entering or creating surrogacy arrangements has been around for centuries. In early days, before modern age scientific reproductive developments, surrogacy took place in a very traditional manner, where a woman would be asked to conceive the child by natural means and then offer the child to the same man and his infertile wife. Evidences of the primordial nature of surrogacy may be seen in the Bible, King James Version [(1)]:

> *"Now Sarai Abram's wife bare him no children: and she had a handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, behold now, the Lord hath restrained me from bearing:*
>
> *I pray thee, go in unto my maid it may be that I may obtain children by her."*

Nonetheless, it has only been in recent years that that same reproductive method has begun to be commonly accepted due to scientific developments that triggered a paradigm shift: surrogacy as a bioethical, moral and sane solution for all couples who had been left with no other procreation possibilities.

However, there is still a disquieting legal void (both at a national and international level) in regards to such subsidiary form of reproduction that unfortunately creates enough space for those same bioethical issues to persevere. One of the countries that has been considered, both by its political parties and experts in the area, and by some of its citizens, as insufficiently equipped to deal with surrogacy, at a legal and social level, is Portugal.

As such, the present paper attempts to not only evaluate Portugal's current legal perspective, but also endeavours to, by means of analysing the present efforts being made to contradict the current situation, outline altruistic gestational surrogacy's tangible future within such nation.

There are various issues that linger over a quick and effective legal response to this matter:

How can surrogacy be regulated in such a way as to not only not offend, but even protect human dignity? Which forms of surrogacy should be legally permissible? Which social and moral values must ultimately be attended to? These are the difficulties faced by all countries in regards to surrogacy and that Portugal, in specific, should soon find a response to.

With the objective of outlining possible areas of improvement in said possible future legal framework, the present paper also attempts to reveal the success behind the UK's legal standpoint in relation to surrogacy as this a country has, for many years, both accepted and regulated such form of medically assisted reproduction, thus conferring a viable solution for all couples who are left with no other reproductive solution. Through the comparison of both legal

[(1)] Genesis, 16:2 Abram, Sarai and Hagar. B.C 1911

perspectives a less ethically problematic approach to altruistic surrogacy has been outlined with view to suggest a harmonious solution for countries which have at least recognized that the present issue deserves to be duly noticed.

PART ONE: DEFINING SURROGACY

I. What *is* Surrogacy

Surrogacy is the situation in which intended parents facing certain fertility issues need to resort to a third party's womb in order to conceive a child who is genetically related to either one or both parents. The third party will carry the embryo throughout the gestational period with the intention of giving the child to the intended parents once the child is born.

As such, surrogacy, as a concept, has been divided into two realities: partial surrogacy and full surrogacy. Partial surrogacy occurs when the surrogate mother's ovum is inseminated with the *commissioning* father's sperm (commissioning being the expression used when referring to the future parents, or those who have the initiative to resort to surrogacy, those who *commission* – authorize, engage in, or allow). This embryo is then placed into the surrogate mother's womb, via IVF, where the foetus will remain for the full gestational period. In olden times, before IVF was in fact possible, partial surrogacy was the only existing form of surrogacy and either the surrogate mother was artificially inseminated or even prior to those scientific developments, sexual intercourse between the commissioning father and the surrogate mother was necessary.

On the other hand, full surrogacy is the type of surrogacy which fully depends on IVF as this method uses both the commissioning mother's ovum, and the commissioning father's sperm. The zygote is then grown into an eight cell (or more) organism and subsequently placed into the gestational mother's uterus.

The former expression refers to the traditional form of surrogacy which raised complex legal questions in regards to the genetic belonging of the child. The commissioning parents would naturally want to register the child as their own after its birth, but not only was the child genetically bound to the surrogate mother, in most cases, these surrogacy contracts were deemed as unenforceable due to their morally questionable contractual subject.

In this form of surrogacy, a contract was previously entered into by the commissioning couple and the surrogate mother, where she would promise to relinquish all rights to the baby and facilitate the commissioning mother's adoption of the child (to assist with adoption formalities). There would also be a payment made, not only for all the expenses pregnancy directly entails but also including a fee that would compensate the surrogate mother's services[2].

The latter expression, that may also be referred to as gestational surrogacy, is the form of surrogacy we will be focusing on. However, it is important to distinguish between full surrogacy, where the commissioning parents do not resort to sperm or ovum donations, and gestational surrogacy, which negatively delimitates the lack of genetic connection between the gestational mother and the child[3].

---

[2] WELDON E HAVINS and JAMES J. DALESSIO, «Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating Non-Traditional Gestational Surrogacy Contracts» *in McGeorge Law Review,* 2000, spring, p. 2.

[3] *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

The term *gestational mother,* instead of *surrogate mother*, will be further used in order to clearly distinguish between full and partial surrogacy and in order to prevent the "*(…) ethical and anthropological ambiguities by tacitly accepting the fragmentation of biological motherhood (genetic and uterine) (…)*"[4].

In the land mark case of Johnson v. Calvert[5] decided by the Supreme Court of California in 1993, the enforceability of gestational surrogacy contracts was decided on for the first time.

In this case, the commissioning couple, Mark and Crispina, who both desired to have a child of their own, had a problem. Crispina had undergone a hysterectomy a few weeks prior to her marrying Mark. The couple therefore entered into a contractual agreement with Ms. Johnson, in which they agreed that this gestational mother would allow an IVF produced embryo to be implanted in her uterus. This embryo fully belonged, genetically, to the commissioning parents.

The issue was that, just before the baby was delivered, some financial disputes began to take place and were based on the contractual terms of the surrogacy agreement. As such, Ms. Johnson threatened that she would not give up the baby to the commissioning couple after it was born and thus sued to have the contract declared as an unenforceable surrogacy contract, as had already been done in other trial cases, but in regards to traditional surrogacy.

The court ruled in favour of the *Calverts* and ordered any parental rights of Ms. Johnson to be terminated, and even held that she was not being deprived of any of her constitutional rights. The Court's decision was based on a simple argument that what the parties had wanted was to bring Mark and Crispina's child into the world, and not to donate their own zygote to Ms. Johnson.

The Court's argument marked a clear difference between traditional surrogacy and gestational surrogacy, as in the latter form of surrogacy all disputes regarding parenting rights would be more easily resolved if the ovum and sperm used to fertilize the embryo via IVF were those belonging to the commissioning parents.

When IVF was made possible, there was an absolute revolution for reproduction issues. It was at this stage that the type of surrogacy we will be focusing on, gestational surrogacy, came into play. Before IVF existed, there was a complicated result of conflicting rights – the contractual right of the commissioning mother and the biological right of the gestational mother.

This was a very delicate issue to deal with, and most courts decided on the unenforceability of such contracts, protecting the biological right of the surrogate mother. Rupturing the traditional bond between the ovum, the womb and motherhood, gestational surrogacy flourished as it reduced the emotional and legal risks that traditional methods of surrogacy had carried for years.

---

[4] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 8.

[5] *Johnson*, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494.

II. Surrogacy's social importance

During the last decades of the 20th century, with the developing of technology, the resorting to surrogacy increased. This did not only occur due to the technological boom, as it may also be said that there was a paradigm shift in our sense of morality that allowed these forms of parenthood to flourish. Some say that, in regards to surrogacy, we are dealing with a *market of maternity*, tainting this method with a derogative connotation. Others embrace this technological advance as a miracle, as it now allows parents with fertile reproductive cells (sperm-ovum) to surpass issues deriving from a non-functioning uterus (or the actual total absence of a uterus), and be able to have a baby that genetically belongs to them.

The arguments in favour of surrogacy will be directly addressed when analysing why certain countries have now legalized this practice, but once aware of what surrogacy actually *is*, it is also important to highlight its social importance. *What good did it bring? What motives impel the decision to resort to surrogacy?*

The right to reproduce may be seen as a fundamental human right – a right that is linked to the innate nature of each human being[6]. Surrogacy is another form of overcoming infertility, allowing previously granted heart breaking situations to be resolved. The social importance behind surrogacy lies within people's deep desire of wanting to give genetic continuity to their generation and to fulfil what some believe to be humans' main function in life – to reproduce, to multiply. Every year intended parents that are not able to naturally conceive, spend exorbitant amounts of money in order to be able to accomplish the aforementioned deed, which may constitute evidence on how it may actually be considered a human necessity, rather than only a mere desire. Additionally, and as stated by the PRELIMINARY REPORT in the issues arising from international surrogacy arrangements, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW *"(…) when comparing 2010 to 2006, the figures demonstrate a percentage increase of nearly 1,000 %(…)"*[7] when analysing the number of agencies involved in international surrogacy arrangements.

The fact that infertility has been affecting a growing number of couples around the world, "*(…) especially in industrialized countries (…)*"[8] (with emphasis on Western Europe), aligned with the new possibilities created by modern science, such as IVF, has called upon the attention of many couples who wish to constitute family based on genetic grounds.

Even though gestational surrogacy should be considered as a last resort mechanism due to the fact that the benefits of conceiving naturally cannot be overlooked (both on a scientific and ethical perspective), this kind of medically assisted procreation has in fact a strong social importance granted that all interests and rights at play are protected.

---

[6] K. SVITNEZ, «Legal Control of Surrogacy – International Perspectives» *in Schenker J: Ethical Dilemmas in Assisted Reproductive Technologies,* 2011, p. 161.

[7] Preliminary Report on the Issues arising from International Surrogacy Arrangements, Hague conference on Private International Law 2012, p. 8.

[8] The World Fact Book by the Central Intelligence Agency of the United States of America, *available at*: https://www.cia.gov/library/publications/the-world-factbook/rankorder/2127rank.html, viewed on the 19th of March 2014.

III. Surrogacy around the World

At this stage in time, there is still no international surrogacy regulation and therefore no conventions that countries must abide to. As such, we are able to denote that all national legislation on the matter is in fact different; some countries consider surrogacy to be legal, others don't. Even within the group of countries where surrogacy has been legalized, the matter is regulated on different terms. What this means is that surrogacy around the world remains in the hands of national legislators and subject to their social and political views. Nevertheless this has not prevented intended parents to either illegally resort to what surrogacy arrangements have to offer, or to flee to countries where surrogacy is in fact permitted.

In the list of countries (and some states) where surrogacy is still illegal, the main players are France, Germany, Austria, Switzerland, China and several states of the USA such as New York and New Jersey.

In these countries, not only is surrogacy held as illegal, there are also severe sanctions that may be applied against doctors who make arrangements for a possible gestational mother to come into contact with future commissioning parents. In countries such as Germany, the prohibition of surrogacy lies on the principle of *bonus mores* (morality), as they are of the opinion that surrogacy violates fundamental ethical principles[9].

As aforementioned, such restrictive approaches to surrogacy have, however, not ceased the demand for surrogacy arrangements. These are done illegally and the issues usually arise when the commissioning parents then want to register the child as their own, or when the parents are then faced with international private law issues due to having resorted to surrogacy in another country where it was in fact legal.

However, in the USA, due to the *full faith and credit* doctrine[10], States have to recognize judgments made in other States, if these have abided to certain standards in the decision making process. This has forced some States in which surrogacy is not accepted, to recognize surrogacy arrangements that were concluded within the jurisdiction of States in which surrogacy is actually allowed.

In Portugal however, notwithstanding some efforts that have been made in order for surrogacy to be legalized, it still is not permitted by law. This is an issue that is dealt with at the end of the paper when looking in detail at our national perspective.

In other countries, surrogacy is not directly regulated. Examples of these countries are the Republic of Ireland, Belgium, Hungary, Romania and the Netherlands.

Taking the Netherlands as an example for what is meant by surrogacy not being regulated, what happens is that, even though surrogacy is not illegal in itself, entering or attempting to enter a surrogacy arrangement is not allowed by law, and may involve a criminal sanction. In the

---

[9] K. SVITNEZ, «Legal control of surrogacy – International Perspectives» *in Schenker J: Ethical Dilemmas in Assisted Reproductive Technologies,* 2011, p. 161.

[10] Information available at: http://www.law.cornell.edu/constitution/articleiv, viewed on April 2013.

Republic of Ireland, the gestational mother is usually treated as the legal mother and has a constitutional guardianship and custody over the child.

On the other side of the surrogacy spectrum lies a significant number of countries that have considered surrogacy as a legal method of reproduction, even though in some of these countries there is still an ongoing issue of lack of direct and careful regulation.

Within the group of countries that have considered surrogacy as legal, there is a distinctive split into two subgroups: *(i)* countries that only allow a non-commercial use of surrogacy, and *(ii)* those who legally accept the existence of commercial surrogacy. In the first subgroup lie the UK, Australia, Canada, Greece, Israel and South Africa, among others. What is meant by non-commercial use of surrogacy is that "*only expenses incurred by the surrogate mother can be reimbursed*"[(11)]. As such, the gestational mother may only receive a financial quantity that is directly related to costs that are normally expected from pregnancy. Such expenses can either be: *(i)* medical expenses, including a health insurance, *(ii)* a reasonable compensation for time loss due to inability to work during parts of the gestational period and *(iii)* compensation for eventual health related complications. What isn't allowed in countries that only accept a non-commercial use of surrogacy is that there is any extraordinary gain for the gestational mother, as outcome of a surrogacy agreement. In other words these countries are in favour of *altruistic surrogacy.*

Furthermore, and using the UK as an example, there may also be strict regulation prohibiting intended parents and future gestational mothers from publicizing either their wishes, or their services, respectively, and surrogacy agencies must act like non-profitable organizations[(12)].

In the second subgroup, as abovementioned, lie countries that consider *commercial surrogacy* as legal. These countries are most of the former countries of the Soviet Union, India and some states in the USA. The state of California, for example, holds the complete opposite perspective when it comes to surrogacy, in comparison to the states of New York and New Jersey. California has become a worldly known centre for surrogacy, along with India. As previously mentioned, the actual starting point for gestational surrogacy took place in California in the *Johnson v. Calvert* case in 1993.

In India, there is no legislation that directly allows commercial surrogacy but the Indian Supreme Court has already established that surrogacy is, in fact, considered lawful. Similarly, Ukraine also considers commercial surrogacy to be lawful, but unlike India, has proceeded to develop more detailed and methodical regulation on the matter, making it easier for all rights of the parties to be respected and consequently making it less likely that either the intended parents or the gestational mother have a risk of being exploited. This is important due to the fact that the main issue around commercial surrogacy is the increase of exploitation risk: either because gestational mothers who are in financial need, will accept to go through the process with

---

(11) K. SVITNEZ, «Legal control of surrogacy – international perspectives» *in Schenker J: Ethical Dilemmas in Assisted Reproductive Technologies,* 2011, p. 152

(12) GALBRAITH, MHAIRI, HUGH V. MCLACHLAN, and J. KIM SWALES, «Commercial agencies and surrogate motherhood: a transaction cost approach» *in Health Care Analysis* 13.1, 2005, pp. 11-31.

insignificant aid, or due to the fact that a gestational mother can take advantage of the desperate state of the commissioning parents and thus demand for an excessive fee to be paid.

In relation to the issues arising posterior to the surrogacy arrangement, these countries have somewhat addressed the matter. In some jurisdictions of the United States, one of the most important breakthroughs was allowing the commissioning parents to make an application for the parental order previously to the child being born. This gave them some comfort and protected them from the possibility of the gestational mother going back on her word on the surrogacy arrangement. In India and in Ukraine similar situations apply[13]: there is no need for an application for parental order as the commissioning parents' names are put automatically on the child's birth certificate, immediately after the child is born.

PART TWO: SURROGACY IN PORTUGAL FROM A LEGAL POINT OF VIEW

I. The first regulation in Portugal – and how it came about

In order to fully comprehend the Portuguese legal point of view in regards to surrogacy, it is first necessary to tell the story of when medically assisted procreation began to be regulated in Portugal and in what terms.

Even though medically assisted procreation was only more thoroughly regulated in Portugal from the year 2006 onwards – via the elaboration of Law no. 32/2006, of the 26th of July ("**Law no. 32/2006**") – before that time existed other legal provisions that constituted an embryonic stage of what we will be further on analysing.

The event that set medically assisted procreation regulation's wheels in motion was the birth of Louise Brown on the year of 1978. The first *in vitro* child was born in Bristol, on the 25th of July and silently announced to couples with serious fertility issues that there was a new hope in the horizon. Not only did Brown's birth demonstrate that *in vitro* techniques were perfected enough to allow couples to resort to *external* conception, but it also set the foundations for gestational surrogacy. Gestational surrogacy strongly depends on *in vitro* fertilisation as it never utilizes the gestational mother's genetic material – as opposed to traditional (partial) surrogacy that solely depended on artificial insemination.

Nevertheless, when Brown was born, *"(…) no regulatory system existed in the UK with regards to reproductive technologies causing widespread concern that the technology could soon be misused (…)"*[14]. The UK wasn't the only country facing such issues and concerns but still it took 7 years to create the

---

[13] MICHAEL EDWARDS and COLIN ROGERSON, «Surrogacy: National Approaches and International Regulation», *in* http://www.familylawweek.co.uk/site.aspx?i=ed87773, 2011.

[14] "The Status of the Human Embryo" – A learning aid for UK medical students, available at:

http://embryo-ethics.smd.qmul.ac.uk/tutorials/in-vitro-fertilisation/present-legislation/, viewed on 22nd of March, 2014.

Voluntary License Authority, which began to set the grounds for a developing regulatory system in regards to medically assisted procreation in the UK.

In vitro fertilisation techniques were only first successfully resorted to, in Portugal, in the year of 1986 with the birth of Carlos Saleiro[(15)]. This technique was employed by doctor António Pereira Coelho who has since then been dedicated to medically assisted procreation. Saleiro was born to the same legal void that Brown experienced, as there was no formal and legal provision specifically regulating *in vitro* fertilisation, in Portugal at that time.

In 1986, the Parliament of the European Council elaborated the European Recommendation no. 1046[(16)] that attempted to incentivize European countries to regulate medically assisted procreation. Portugal reacted by creating the "*Comissão para o enquadramento legislativo*" (Commission for the creation of a legal framework) presided by António Pereira Coelho. This commission elaborated a proposal that was then presented to the Ministry of Justice, suggesting which medically assisted procreation techniques should be legally authorized.

In a quick and urgent response, the Decree-Law no. 319/86, of the 25th of September, came into effect, summarily regulating *in vitro* fertilisation in Portugal by imposing certain conditions that would hamper the misuse of such technology – such as the necessity of health institutions obtaining a previous authorization from the Ministry of Health for all techniques that did not utilize both the mother's and father's fresh[(17)] genetic material.

This Decree-Law also formally declared that for *in vitro* conception that only resorted to both the parents' fresh reproductive cells, no external authorization would be necessary as it would be considered simple *in vitro* insemination. Nevertheless, for both situations, *in vitro* fertilisation would have to be practiced within a legally authorized establishment under the supervision of a doctor. However, such Decree-Law did not, in any circumstance, create adequate harbouring conditions for future developments in this area, specifically in regards to gestational surrogacy as the subject was never sufficiently regulated.

Even though it was only in 2006 that medically assisted procreation methods began to be more carefully regulated in Portugal, the Proposal of Law no. 135/VII[(18)], proposed by the Government on the 30th of July of 1997, attempted to finally build a legal framework that was based on the corner stone laid out by the Decree-Law no. 319/86. Such was attempted via the proposing of a stronger and more detailed framework for medically assisted procreation.

---

(15) «Primeiro bebé proveta nasceu há 25 anos» *in Expresso*, available at:

http://expresso.sapo.pt/primeiro-bebe-proveta-portugues-nasceu-ha-25-anos=f634119.

(16) Recommendation no. 1046 (1986), Parliamentary Assembly of the Council of Europe, available at:

http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta86/EREC1046.htm, viewed on 19th of March, 2014.

(17) What is meant by "fresh genetic material" is that it may not be frozen before use.

(18) Proposal of Law n.º 135/VII, published in Diário da Assembleia da República, II série-A, no.69,on the 1st of August, 1997, avaliable at:

http://app.parlamento.pt/DARPages/DAR_FS.aspx?Tipo=DAR+II+s%C3%A9rie+A&tp=A&Numero=69&Legislatura=VII&SessaoLegislativa=2&Data=1997-08-01&Paginas=1324-1329&PagIni=0&PagFim=0&Observacoes=&Suplemento=.&PagActual=0&pagFinalDiarioSupl=&idpag=35131&idint=&idact=&iddeb=, viewed on the 25th of March, 2014.

Notwithstanding such efforts, the abovementioned proposal was vetoed by the President of the Portuguese Republic, Jorge Sampaio, on the 30th of July of 1999 – two years after the proposal had entered into Parliament discussion. The President of the Portuguese Republic justified the rejection of the proposal of law as follows: *"(…) the current legislation is of utmost importance, not only due to the intrinsic relevance of the subject but also due to the fact that there does not exist, between us, any specific legal framework. As such, it is important to create such framework in such manner as to protect human dignity. However, the complexity of the subject in discussion may not be forgotten (…) and as such the subject relies on an adequate regulation (…) based on good medical practice and that is also structurally open to being perfected and updated (…)*"[19].

The President of the Portuguese Republic also emphasized the legislator's need to search for flexible solutions that adequately cared for human dignity and that avoided, in order to allow medically assisted procreation legislation to exist, excessive social disagreement.

Notwithstanding many of the valid points brought about by the President's official declaration, it was not until 9 years later that the subject was duly addressed. As such, for nearly a decade, a matter of such heighted importance, as mentioned by the President himself, was left unregulated – consequently leaving Portuguese citizens striped of an adequate solution for a relevant amount of time.

With the objective of highlighting that even though there were various efforts set forth before the currently applicable legislation entered into force, it was only in 2006 that medically assisted procreation was regulated, it is still necessary to address one last relevant point.

Before the formal veto exercised by the President of the Portuguese Republic, the Constitution of the Portuguese Republic of 1976 imposed, since 1997[20], via its article 67(2), certain state obligations. As such, the state became obliged to:

(i) Guarantee the access to methods and techniques that ensured family planning by organizing adequate legal and technical structures (paragraph d); and

(ii) Regulate medically assisted procreation in such a manner as to protect human dignity (paragraph e).

As such, it is safe to say that the Constitution of the Portuguese Republic laid valid grounds for the development of a legal framework, created in such a manner as to simultaneously *(i)* protect human dignity and *(ii)* devise new adequate solutions for couples facing serious fertility issues.

Portugal was one of the last European countries (taking into consideration a 12 member state Europe of 1992) to carefully regulate medically assisted procreation. Such daunting fact was partially due to a lingering unwillingness of accepting new developing technologies and of attributing medically assisted procreation its inherent importance.

---

[19] Decree no. 415/7, by the President of the Portuguese Republic, Jorge Sampaio, published in Diário da Assembleia da República, 11 série-A, no. 82, on the 3rd of August, 1999, available at:

http://app.parlamento.pt/DARPages/DAR_FS.aspx?Tipo=DAR+II+s%C3%A9rie+A&tp=A&Numero=82&Legislatura=VII&SessaoLegislativa=4&Data=1999-08-03&Paginas=2316-2316&PagIni=0&PagFim=0&Observacoes=&Suplemento=.&PagActual=0&pagFinalDiarioSupl=&idpag=119739&idint=&idact=&iddeb= , viewed on the 30th of March, 2014.

[20] Alteration introduced by Constitutional revision no. 1/97 of the 20th of September.

II. Current applicable legislation

Medically assisted procreation in Portugal is currently regulated by Law no. 32/2006, amended by Law no. 59/2007, of the 4th of September, and regulates, via article 2, the following techniques:

(i) *Artificial insemination;*

(ii) *IVF;*

(iii) *Introcytoplasmic sperm injection (ICSI);*

(iv) *The transferring of embryos gametes and zygotes;*

(v) *Preimplantation genetic diagnosis; and*

(vi) *Other laboratorial techniques that manipulate gametes, embryos or those considered as equivalent or subsidiary.*

Article 4 of said Law establishes the subsidiary nature of medically assisted procreation techniques in order to guarantee that reproductive scientific developments are not unconcernedly resorted to and that those who intend to benefit from those techniques are doing so out of lack of other less ethically complex solutions.

This legal diploma was widely restrictive in regards to who can benefit from such medically assisted procreation techniques, as it barred same-sex couples and single persons from resorting to said solutions. Article 6 states that only those who are *(i)* married and not separated; *(ii)* of different gender, living in analogous conditions to a married couple for at least two years; *(iii)* at least 18 years of age and *(iv)* not under judicial disability, may, in fact, legally resort to the aforementioned techniques.

However, due to a recent legislative alteration[21] to the Portuguese Civil Code of 1966, according to article 1577, same-sex couples can currently legally marry within Portuguese territory. Even though Law no. 32/2006 did not allow same-sex couples to resort to medically assisted procreation techniques, the fact that legal marital circumstances were altered now extents said techniques to all those who are married. Even though such solution is less discriminatory, as it no longer fully excludes persons based on sexual orientation, it still creates an unequal solution for those who are of the same sex but live in analogous conditions to married couples.

As such, Law no. 32/2006 is further tainted by an unconstitutional provision as it directly violates article 13(2) of the Constitution of the Portuguese Republic that holds that: "*no person may be (…) harmed, deprived of any right (…) in regards to their (…) sexual orientation*". As article 6 of the aforementioned legal diploma attributes a right to resort to medically assisted procreation techniques and denies such right to those who live in analogous conditions to a married couple but have the same gender, such legal provision holds a drastic unfair discrimination in regards to sexual orientation.

[21] Law no. 9/2010, of the 31st of May, 2010.

However, and in the terms of article 4(2) of that same Law, medically assisted procreation techniques may only be resorted to if infertility is diagnosed and thus confirmed. Same sex couples are not, in all cases, incapable of bearing children due to infertility issues but due to the fact that they carry the same type of sexual reproductive cells. As such, and taking into consideration what is put forth by a declaration emitted by the NCMAP, on the 18th of June, 2010, the access to medically assisted procreation techniques is not extended to same-sex couples. However, such declaration only comes to shine light on a possible interpretation of the Law no. 32/2006 and thus does not resolve the problem of two conflicting legal provisions, existent within the same Law, nor does it cleanse the possible unfair discrimination being imposed on same-sex couples.

III. Surrogacy

One of the biggest limitations of Law no. 32/2006 is the fact that, until this date, it not only criminally punishes those who take part in commercial surrogacy arrangements as it also makes it virtually impossible for AGS to be made. The difference between both types of arrangement resides in the fact that, as was noted by the President of the NCMAP, if the contract entails the payment of a fee, it constitutes a crime, if it is free of charge, it is *merely* considered as null and void. In addition, and taking into consideration how the said Law hampers the resorting to altruistic surrogacy, the mother of the child is, for all legal and social effects, the gestational mother, following the principle of *mater semper certa est*[22].

The absence of the provision of a criminal punishment for those who enter AGS agreements does not demonstrate any permissive stance by the legislator, as is argued by the legal decision elaborated by the Constitutional Court in process no. 101/2009[23]. As all legal effects deriving from AGS arrangements are currently legally denied and the gestational mother is to be considered, for all social and legal purposes, the mother of child, it may be concluded that AGS is in fact as prohibited as commercial surrogacy arrangements.

As a direct result of the abovementioned legal impositions, the current terms of the Law do not offer any viable solution for those facing certain fertility issues to have genetically related children. Furthermore, as there is no formal legalization of AGS (and consequently, it is not regulated and parties are not granted full protection of their human rights), surrogacy arrangements in Portugal tend to be entered into via black market conditions[24].

We use the term "formal legalization" as AGS, in itself, as an isolated action, is not directly prohibited by Law in the same terms that gestational commercial surrogacy is (*i.e.* as it is criminally punishable).

---

[22] Roman law principle that announces that the mother of the child is under every circumstance, known to all. Such principle is said to have the power of *praesumptio iuris et de iure* (no counter evidence can be made against such principle).

[23] Decision by the Constitutional Court no. 101/2009, of the 3rd of March, 2009, regarding Process no. 963/06, available at: http://www.tribunalconstitucional.pt/tc/acordaos/20090101.html, viewed on 3rd of April, 2014.

[24] «Mulheres alugam o utero para combater a crise económica», *in Expresso,* by Agência Lusa, May, 2011, available at: http://expresso.sapo.pt/mulheres-alugam-o-utero-para-combater-a-crise-economica=f652393, viewed on April 2013.

As such, the practical effect that the current legal framework has is that it dissuades[25] all from entering both types of surrogacy arrangements and sets up the perfect circumstances for black market commercial surrogacy to flourish – devoid of any protection of human dignity.

It is quite clear that Portugal lies within the group of countries that are against surrogacy arrangements. There is a dangerous void of regulation that leads to surrogacy arrangements being entered into via black market circumstances. As the Vice-President of the Portuguese Fertility Association, Filomena Gonçalves, has remarked:

"*The fact that this method of reproduction is criminally punishable, only triggers the illegal practice of surrogacy and all the perversity it may entail, be it due to having contractual deals entered into within black market situations, allowing those women or even commissioning parents to suffer serious risks of human exploitation*"[26].

Even in developing countries such as India, where surrogacy is considered legal, the legal void when it comes to regulating this matter has not only urged the country to take measures as to amend their current situation, but has also created unpleasant situations of exploitation of the gestational mother by the commissioning parents[27]. This just comes to show that even when, and ***if*** Portugal formally legalizes AGS, careful regulation is absolutely necessary in order for human dignity to remain intact.

PART THREE: SURROGACY'S TANGIBLE FUTURE IN PORTUGAL

I. Projects of Law

Between 2011 and 2012 some projects of law were put forth, by three different political parties (Left Wing Party, Socialist Party and Social Democratic Party). All four projects of law[28], suggested various alterations to Law 32/2006 but in this present analysis we shall only focus on the proposed alterations that focus on surrogacy and its legal framework.

Such projects of law were all put forth on a similar time line as they were encouraged, on February 2011, by the NCMAP, to alter Law no. 32/2006 in order to both formally legalize and

---

[25] On a similar note: JOSÉ DE OLIVEIRA ASCENSÃO: *"A reacção é extrema e percebe-se o intento: pretende-se desanimar o negócio determinando que terá sempre o efeito contrário ao pretendido(...)"* [JOSÉ DE OLIVEIRA ASCENSÃO, «A Lei nº. 32/06, Sobre Procriação Medicamente Assistida», *in Revista da Ordem dos Advogado ano 67, vol. III,* 2007].

[26] «Há barrigas de aluguer em Portugal», available at:

http://ascoisasdomundo.blogs.sapo.pt/159513.html, viewed on April 2014.

[27] MADHU P. SINGH, «Surrogacy and Surrogacy Laws in India» Women's Studies Centre, Punjabi University, 2012, available at:

http://wscpedia.org/index.php?option=com_content&view=article&id=264%3Asurrogacy-and-surrogacy-laws-in-india&catid=4&Itemid=36), viewed on March 2014.

[28] Two projects of law were put forth by the socialist party – one having only been presented by a specific group of members of the parliament.

properly regulate altruistic surrogacy. NCMAP[29] was founded by Law no. 32/2006 with the objective of having a specialized entity that would pronounce itself on ethical, social, moral and legal issues surrounding medically assisted procreation techniques, only.

Even though all three parties put a significant effort into formally legalizing altruistic surrogacy in Portugal, the projects of law put forth had significant differences regarding *(i)* conditions that made resorting to surrogacy legally admissible and *(ii)* the possible beneficiaries of altruistic surrogacy.

The first to be presented was Project of Law no. 122/XII by the Left Wing Party[30], on the 21st of December 2011. This party in particular had as a main motivation to present the abovementioned proposal the fact that it had been estimated that around 3 million children, around the world, had been born via medically assisted procreation techniques.

The Left Wing Party proposed a wide range of beneficiaries for both medically assisted procreation techniques and surrogacy arrangements – all couples and all women, regardless of their civil status. The main argument behind this "liberalization" lies within the known fact that people in general – who do not have fertility issues – may have children with no conditioned circumstances. As such, it would be discriminatory to demand that only married couples may resort to medically assisted procreation techniques and surrogacy arrangements. However, said Project of Law did not include, as beneficiaries, single males.

The formal legalization of AGS has as a motivational impulse the fact that it is the only solution available for permanent and more serious fertility issues, such as the absence of a uterus or a uterus with lesions that do not allow for the woman to bear children. Nevertheless, and as already previously mentioned, the beneficiaries listed above may only be able to resort to AGS, as commercial surrogacy would still be considered a public criminal offense[31].

The second Project of Law, no. 131/XII, was presented to Parliament on the 6th of January 2012 by the Socialist Party, who intended to address the issues raised by NCMAP. The proposed alteration has four main rules that anticipate counter-arguments for traditional anti-surrogacy perspectives:

(i) Its altruistic nature;

(ii) Specific definition of the conditions allowing surrogacy arrangements to take place;

(iii) Ensure supervision by the NCMAP and the previous hearing by the Medical Barr; and

(iv) Fully determine maternity.

---

[29] Information available at: http://www.cnpma.org.pt/cnpma_atribuicoes.aspx.

[30] Project of Law available at:

http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=36633, viewed on January 2014.

[31] In the terms of articles 49/1, and 242/3 of the Portuguese Criminal Procedure Code, *a contrario sensu*, a criminal offense that does not depend on complaint or private prosecution to be investigated, is considered to be public criminal offense. For all cases where the criminal offense does depend on complaint of private prosecution, such must be included in the text of the article that provisions for said criminal offense. As article 39 of Law no. 32/2006 makes no mention of such reality, it is considered to be a public criminal offense.

Unlike the Left Wing Party, the Socialist Party addressed, within its motives for proposing an alteration to Law no. 32/2006, the rising number of women and intended parents who began to resort to surrogacy in black market conditions – putting all parties' health and morals at stake.

Shortly after, on the 11th of January, a small group of Parliament members of the Socialist Party presented a different Project of Law, no. 137/XII[32]. This project was put forth as a result of a careful analysis of the practical flaws inherent to Law no. 32/2006 and had five main objectives:

(i) *To eliminate application difficulties of Law no. 32/2006;*

(ii) *To adjust the legal framework to recently obtained scientific knowledge;*

(iii) *To amplify the range of possible beneficiaries of both medically assisted procreation techniques and surrogacy;*

(iv) *To eliminate unjustified discriminations; and even*

(v) *To find simpler and more accessible solutions for those who are in substantial needs of resorting to medically assisted procreation techniques and surrogacy arrangements.*

However, the alterations proposed by this Project of Law are only different to the one previously mentioned in regards to certain aspects related to medically assisted procreation techniques, as they proposed certain alterations that would complement and add on to previous suggestions presented by Project of Law 131/XII. As such, both projects of law are identical as far as surrogacy arrangements are concerned.

The Social Democratic Party put forth Project of Law no 138/XII, on the 13th of January 2012. This party based its proposal on the right to family planning granted by the Constitution of the Portuguese Republic. However, said party believes that both medically assisted procreation techniques and surrogacy arrangements may only be resorted to by a family as a whole, as the fundamental right mentioned above is not an absolute right but a social right – that exists in order to protect careful family planning. The main alterations proposed by such party were the following:

(i) *Medically assisted procreation techniques may only be used to treat an illness;*

(ii) *Resorting to medically assisted procreation techniques is only justified if possible beneficiaries are heterosexual couples who have developed a stable relationship; and*

(iii) *Surrogacy arrangements may only be resorted to by couples who are fit to procreate but aren't physically capable due to absence of uterus by the female party or due to other clinically justified complications.*

After the projects of law were presented and discussed in Parliament, two of the projects were rejected by overall discussion on the 20th of January (122/XII and 137/XII)[33]. However,

---

[32] Project of Law available at:

http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=36675, viewed on January 2014.

[33] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 2.

the remaining two projects of law (elaborated by the Social Democratic Party and Socialist Party) were sent to the Health Commission, constituted within Parliament, in order for it to carefully analyze and compare the terms proposed by said projects of law.

As a result, the Health Commission requested that the NCESL[34] and the NCMAP would present their ethical opinion on the legal alterations proposed by the above mentioned political parties. The NCESL was created in 1990[35], as an independent consultant entity allowed to analyse ethical issues deriving from scientific progress in various areas of knowledge: *(i)* biology, *(ii)* general medicine and *(iii)* sciences of life.

II. NCESL and NCMAP deliberations

A. NCESL

After these projects were put forth, the Parliament requested NCESL's view on the matter[36], as it had already pronounced itself on similar issues but this occurred prior to the existence of Law no. 32/2006.

As such, NCESL announced that the two remaining abovementioned projects of law were very similar to the opinions that NCMAP had given on the matter[37], as they had based the content of the proposed law alterations on views and reflections said council had previously put forth:

[34] Created by Law no. 14/90 of the 9th of June, 1990.

[35] Information available at: http://www.cnecv.pt/historial.php, viewed on March, 2014.

[36] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 8, available at: http://www.cnecv.pt/admin/files/data/docs/1333387220-parecer-63-cnecv-2012-apr.pdf, viewed on May 2013.

[37] *Ibidem*, p. 3.

1. The gestational mother and the commissioning parents are fully informed and clarified about all issues related to the surrogacy arrangement, and the signed consent form shall state, in detail, that the parties are in fact completely aware of surrogacy related information;

2. *The consent given by the gestational mother may be revoked at any moment until the beginning of labour;*

3. *The contractual agreement entered into by the commissioning parents and the gestational mother must include provisions that cover all possible situations. i.e.: malformation of the foetus, other illness and even abortion.*

4. *All parties must be aware that the future child has a right to know the conditions in which he or she was gestated.*

5. The gestational mother shall not simultaneously be an egg donor in the gestation to which the surrogacy agreement refers to.

6. The gestational mother must be healthy.

7. The altruistic motives that lead the gestational mother into taking part in a surrogacy arrangement must be previously evaluated by a multidisciplinary team of health experts that is not directly involved in the medically assisted procreation process.

8. Any health related issues that might occur during the gestational period (with the foetus or with the gestational mother) shall be exclusively decided upon by the latter who will be supported on the matter by a multidisciplinary health team.

9. The breast feeding of the baby shall be decided on by the commissioning parents together with the gestational mother. If however there is a conflict on the matter, the commissioning parents' decision shall prevail.

10. A relationship involving any kind of economical subordination between the contracting parties is considered illegal.

11. The contractual agreement entered into by the commissioning parents and the gestational mother (entered into prior to the gestational period) shall not impose restrictions on the gestational mother's daily behavior.

12. The embryo that is transferred to the gestational mother must use at least one of the commissioning parents' gametes.

13. The law regulating this matter and its complementary regulation shall be reevaluated three years after its entry into force.

The NCESL presented its own analysis or the projects of law along with 13 criteria thought to be essential for the legalization of gestational surrogacy in such a manner as to protect bioethical principles and human dignity[38]. The criteria set forth took into consideration all major controversy arisen in relation to gestational surrogacy, in order to attempt to form a stable legal framework that diminishes, if not destroys, all moral and ethical hesitations that shadow our theme of interest. In summary form, the criteria state that:

The NCESL, as a consultant body, emitted its legal opinion, in the terms of article 3(1), paragraph b), and article 6 of Law no. 24/2009, of the 29th of May[39], by requesting that the law to be approved, in the near future, by Parliament, should include the main legal provisions set

[38] *Ibidem*, pp. 9 and 10.

[39] Law no. 24/2009, of the 29th of May, 2009, available at:
http://www.cnecv.pt/admin/files/data/docs/1326368970-lei-cnecv-2009.pdf

forth by two of the projects of law (Socialist Party and Democratic Party) and the 13 criteria it presented. However, the 13 criteria must be cumulatively respected, by all parties, in order for a surrogacy arrangement to be considered legally and ethically viable[40]. Even though the NCESL's legal opinion is non-binding due to its consultative nature, the recommendations set by said entity have a deep impact on the views and possible future decisions made by the Parliament due to the fact that the NCESL was created with the main purpose of analysing ethical issues[41] such as gestational surrogacy.

B. NCMAP

The NCMAP had already proceeded to propose an alteration to Law no. 32/2006, in 2010[42], under the terms of article 30(3), in the sense of formally legalizing AGS in extraordinary circumstances. As such, in a reply to the Parliament who duly requested this body's legal opinion in 2012, the NCMAP declared to generally accept the content of both previously mentioned projects of law. However, it also declared to take a more favourable position in regards to Project of Law no. 138/XII[43].

The Council's position did not, in essence, change from the year 2010, as it presently still considers that *"(…) it is not considered fair or ethically founded, rather being unfair and disproportional, that the possibility of having children is barred from those who are incapacitated to do so (…) even when they have not contributed to the situation they find themselves in*"[44].

Even though the presently mentioned Council did not propose specific criteria to be met, it suggested formal and substantial alterations to both projects of law that will further on be compared to the conditions proposed by the NCESL and the projects of law in order to extract and analyse a general overview of the positions of both Councils and political parties.

---

[40] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 12, available at: http://www.cnecv.pt/admin/files/data/docs/1333387220-parecer-63-cnecv-2012-apr.pdf, viewed on May 2013.

[41] Article 2, Law no. 24/2009 of the 29th of May, 2009.

[42] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, Annex I, available at:

http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a4c31684a5355786c5a793944543030764f554e544c305276593356745a57353062334e4a626d6c6a6157463061585a685132397461584e7a595738764e4759794d5445794e544d744d4455354d533030595441314c546b7a593251744e6a51794d4468695a6d4534595463304c6e426b5a673d3d&fich=4f211253-0591-4a05-93cd-64208bfa8a74.pdf&Inline=true, viewed on May 2014.

[43] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 7, available at: http://www.cnecv.pt/admin/files/data/docs/1333387220-parecer-63-cnecv-2012-apr.pdf, viewed on May 2013.

[44] *Ibidem,* p. 7 and *Annex I.*

C. Projects of Law – current status

Projects of Law nos. 131/XII and 138/XII are still being discussed in Parliament and the deadline for coming to a decision as to a final legal text to be approved was extended 5 times on the following dates:

(i) On the 19th of April 2012 for 90 days;

(ii) On the 6th of December 2012 for an equal period of time;

(iii) On the 27th of February 2013 also by 90 days;

(iv) On the 2nd of October 2013 for 30 days;

(v) On the 31st of October for 90 days; and

(vi) On the 30th of April 2014, with of the objective of carrying out a comparative law study.

As such, it is clear that, even though the alteration of Law no. 32/2006 was deemed as an essential matter, the issue has been avoided for the past years and is still left unresolved(45).

III. Comparison between Projects of Law and proposals set forth by NCESL and NCMAP

Due to the fact that there are common areas to all efforts that have been made in order to legalize gestational surrogacy, the main issues discussed and addressed, both before and after the projects of law and deliberations had been presented are separated into the following categories:

(i) Beneficiaries (Civil status/sexual orientation and age);

(ii) Parental rights;

(iii) Clinical conditions; and

(iv) Criminal punishments/other sanctions.

Nevertheless, it is necessary to once again emphasize that all projects of law and all deliberations defend carefully regulated AGS that is only resorted to as an exceptional situation. As such, said topics were not object of a direct comparison or treated as independent themes.

A. Beneficiaries and parental rights

With the objective of fully comparing the terms set by the projects of law set forth by all political parties and in regards to the beneficiaries and parental rights the projects of law establish, a comparative table has been devised. Law no. 32/2006 is also included in the table in order to allow for a clear cut distinction of the ways in which these efforts have attempted to evolve the current applicable legal framework.

(45) «Lentidão legislativa sobre maternidade de substituição condena casais a não ter filhos», *in Público,* available at: http://www.publico.pt/sociedade/noticia/lentidao-legislativa-sobre-maternidade-de-substituicao-condena-casais-a-nao-ter-filhos-1623363, viewed on March, 2014.

	CURRENT LEGAL FRAMEWORK (LAW NO. 32/2006, OF JULY 26)	PROPOSAL NO. 122/XII (DECEMBER 21, 2011)- BE	PROPOSAL NO. 131/XII (JANUARY 6, 2012) – PS	PROPOSAL NO. 137/XII (JANUARY 11, 2012) – PS*	PROPOSAL NO. 138/XII (JANUARY 13, 2012) – PSD
Medically assisted procreation beneficiaries	a) Married couples, not separated legally or *de facto;* b) Those of a different gender who have lived in conditions analogous to matrimony for at least 2 (two years); c) In any case, only those who are at least 18 (eighteen) years of age and are not under judicial disability may be beneficiaries. (*vide* article 6/1 and 2)	**Medically assisted procreation techniques & surrogacy:** Those who are at least 18 years of age and who are not under judicial disability and have previously expressed due consent. (*vide* article 6)	**Medically assisted procreation techniques & surrogacy:** a) Married couples, not separated legally or *de facto;* b) Those of a different gender who have lived in conditions analogous to matrimony for at least 2 (two years); c) In any case, only those who are at least 18 (eighteen) years of age and are not under judicial disability may be beneficiaries. (*vide* article 6/1 and 2)	Those who are at least 18 years of age, who are not under judicial disability and have expressed informed consent. (*vide* article 6)	**Medically assisted procreation techniques & surrogacy:** a) Married couples <u>of a different gender</u>, not separated legally or *de facto*; b) Those of a different gender who have lived in conditions analogous to matrimony for at least 2 (two years); c) In any case, only those who are at least 18 (eighteen) years of age and are not under judicial disability may be beneficiaries. (*vide* article 6)
Adoption beneficiaries (Portuguese Civil Code of 1966)**	a) Any couple, regardless of sexual orientation, who has been married for at least 4 years, provided that both members are over 25 years of age; b) Any person, regardless of sexual orientation, who is over 25 years of age and married to the child's parent; c) Any person who is over 30 (thirty) and below 60 (sixty) years of age. (*vide* article 1979 of the Portuguese Civil Code)				
Surrogacy – Holder of parental rights	The gestational mother (*vide* article 8/3)	In any circumstances that disrespect any terms set by Law no. 32/2006, the gestational mother is the legal mother of the child. (*vide* article 8/5)	If in respect to all provisions of Law no. 32/2006, the beneficiaries hold parental rights; otherwise, the gestational mother is to be considered the legal mother of the child. (*vide* article 8/6 and 9)	The gestational mother (*vide* article 8/3)	If in disrespect to any of the provisions held by Law no. 32/2006, the gestational mother is the legal mother of the child. (*vide* article 8/6)

*Project of Law that does not suggest the alteration of Law no. 32/2006 regarding provisions addressing surrogacy.

**In NCESL's opinion, based on conclusions drawn from parliamentary debate, the fact that project of law 131/XII does not alter the beneficiaries of medically assisted procreation techniques and surrogacy, does not mean that those responsible for the elaboration of said project in fact wanted to extend the possibility of resorting to surrogacy arrangements to same-sex couples as Law no.32/2006 was elaborated before same-sex marriages were legalized and thus before the term "married couples" began to address to all those legally married.

B. Clinical Conditions, criminal punishments and other sanctions (articles 8 and 39 of Law no. 32/2006)

The last two common themes that need to be addressed are: *(i)* the clinical conditions that justify the resorting to gestational surrogacy; and *(ii)* criminal punishments and other sanctions that exist in order to dissuade parties from entering into surrogacy arrangements in disrespect of legal provisions, including those applied against those serving as intermediaries or who promote surrogacy arrangements.

Even though the terms of Project of Law no. 122/XII proposed by the Left Wing Party have already been rejected in Parliament, it is still necessary to include a preliminary analysis of the suggested legal alterations. This analysis has been carried out in order to then be able to compare, at a later stage of this paper, the predicable future of altruistic surrogacy in Portugal and a more evolved and bioethically viable legal framework.

As such, the abovementioned Project of Law proposed that articles 8 and 39 of Law no. 32/2006 establish the subsequent terms[(46)]:

"Article 8

[…]

1 - […].

2 - […].

3 - As an exception, free of charge surrogacy contracts are allowed to be entered into in cases where there is an absence of the uterus or lesion or illness of that same organ, that does not allow, in an absolute and definite manner, that the woman cannot sustain pregnancy.

4 - Those same contracts may be entered into, as an exceptional situation, if the NCMAP, after hearing the Medical Association, allows such contract to take place, by deeming that there is a clinical situation that justifies the resorting to surrogacy.

5 – With exception to the cases described in numbers 3 and 4 of this article, a woman who goes through a surrogate pregnancy, will be considered, for all legal effects, as the mother of the child who will be born."

"Article 39

[…]

1 – With the exception of the cases foreseen in numbers 3 and 4 of article 8, whoever enters into surrogacy contracts, be it free of charge or with a payment entailed, shall be punished with a prison penalty of up to 2 years, or with the payment of a fine, lasting up to 240 days.

2 – With the exception of the cases foreseen in numbers 3 and 4 of article 8, whoever promotes surrogacy, via any means, be it through a direct invitation, invitation made by a third party, or a public announcement, shall be punished with a prison penalty of up to 2 years or with a payment of a fine, lasting up to 240 days."

In this project of law, not only is it legally allowed for surrogacy arrangements to be made if, and only if, they are free of charge and are deemed as an exceptional situation in which the commissioning mother either has no uterus or has suffered other lesions to this same organ, preventing her to sustain a normal pregnancy article 8(3), but also, if decided by the NCMAP,

(46) Our translation of the Portuguese versions.

after the Medical Association has been heard on the matter, other exceptional clinical situations may allow such surrogacy arrangements to take place. Following the proposed alterations for article 8, article 39 would, in compliance with what would be permitted by these legal changes, not condemn the publicizing of surrogacy arrangements if these occur within the spectrum set by the proposed nos. 3 and 4 of article 8. What this means is that, in exceptional situations when the commissioning mother is incapable of conceiving a child due to *(i)* lack of an uterus, *(ii)* damage to the uterus or even *(iii)* other clinical situations analysed by the NCMAP, not only surrogacy arrangements are considered legal in these terms, they may be publicized for.

On the 6th of January 2012, the Project of Law no. 131/XII was put forth by the Socialist Party, proposing the following alterations:

"Article 8

[…]

1 – [Previous no. 2]

2 – As an exception, free of charge surrogacy contracts are allowed to be entered into in cases where there is an absence of the uterus or lesion or illness of that same organ, that does not allow, in an absolute and definite manner, the woman to sustain pregnancy.

3 – Surrogate motherhood may only be allowed if the medically assisted procreation method is done by resorting to at least a gamete belonging to one of the commissioning parents.

4 – After the Medical Association has been heard, the entering into of surrogacy contracts needs the previous authorization from the NCMAP who shall supervise the whole process.

5 – Any kind of payment or donation made by the commissioning parents to the gestational mother is prohibited with the exception of medical expenses.

6 – The child that is born by means of surrogacy shall be legally considered as belonging to the commissioning parents.

7 – The law regulates surrogacy by defining, notably, the requirements for considering the consent given by the parties as valid, the legal framework applicable to surrogacy arrangement, the rights and duties of the parties, along with the invention with the NCMAP and the Medical Association.

8 – Surrogacy arrangements, be it free of charge or with a payment entailed, that do not respect what is provided for in the previous numbers, shall be considered as null and void.

9 – In the cases referred to in the previous number, the woman who bears a surrogate pregnancy shall be considered, for all legal effects, as the mother of the child."

"Article 39

[…]

1 – Whoever enters into a surrogacy arrangement with a payment entailed shall be punished with a prison penalty of up to 2 years or with the payment of a fine lasting up to 240 days.

2 – Whoever enters into free of charge surrogacy arrangements in situations outside of those foreseen by numbers 2 to 5 from article 8, shall be punished with a prison penalty up to 1 year, or with the payment of a fine lasting up to 120 days.

3– With the exception of situations foreseen by numbers 2 to 5 of article 8, whoever promotes free of charge surrogacy arrangements, or surrogacy arrangements with a payment entailed, by any means, be it by direct invitation, invitation made my third party or public announcement, shall be punished with a prison penalty up to 2 years, or with the payment of a fine lasting up to 240 days.

Just like in the first described Project of Law, surrogacy arrangements are only legally allowed if they are free of charge and occur in response to an exceptional situation (lack of uterus, or other clinical situations that justify resorting to this sort of medically assisted procreation method). However, the differences between the first and second proposals are:

a) The first project of law makes no reference to payments made to the gestational mother in order to cover for costs related to the pregnancy, whilst the second proposal specifically says that the commissioning parents are allowed to proceed to make payments relating to those costs (paragraph 5 of article 8); and

b) In the second project of law, the NCMAP must authorize the surrogacy arrangement before it takes place, in any circumstances (be it due to lack of uterus, damage to that same organ or other clinical situations) and will supervise the entire process. In the first proposal, however, the intervention of the NCMAP is only necessary to evaluate certain cases that are consistent with what may be deemed as "*other clinical situations*" that justify the resorting to surrogacy.

In the first project of law, if the surrogacy arrangement is made in situations covered by paragraphs 3 and 4 of article 8 (the already mentioned exceptional situations) the legal mother of the to-be born child is the commissioning mother and not the gestational mother.

This is also the position held by those representing the second project of law who only state that the gestational mother will be considered to be the legal mother of the child if: *(i)* the consent given by the gestational mother is considered invalid; *(ii)* any rights of the parties in the contracts are disregarded; *(iii)* the NCMAP or the Medical Association have either not been heard or have not supervised the process [article 8(9)]; or (*iv*) any of the other provisions of the article have not been respected.

The proposed terms for article 39 are identical, and thus, if the surrogacy arrangement is done free of charge and as a response to one of the described exceptional situations, it may be publicized for without the parties being at risk of incurring in a criminal offense.

On the 13th of January, another Project of Law (no. 138/XIII) was proposed, by the Social Democrat Party:

"Article 8

1. …

2. …

3. As an exceptional situation, the entering into of surrogacy arrangements is allowed if they are free of charge and when the female partner does not have a uterus, in the terms of article 6.

4. Besides the situation described in the previous paragraph, and always as an exceptional situation, the NCMAP, after the Medical Association has been heard, may allow surrogacy arrangements to be entered into, if presented with a particular clinical situation that justifies the resorting to surrogacy, and if all conditions provided for in articles 4 and 6 have been respected.

5. Any type of payment, benefit or donation given to the surrogate mother is prohibited, with the exception of financial quantities covering medical expenses that nevertheless need to be fully documented.

6. Besides the cases foreseen in paragraphs 3 and 4, the woman who bears the surrogate pregnancy shall be considered for all legal purposes as the mother of the child."

This Project of Law is in line with the first one, as it refers in its nos. 3 and 4 that for cases of absence of uterus there is no need for the NCMAP to intervene.

However, in the first Project of Law, it is also possible to resort to surrogacy without the intervention of the NCMAP and the Medical Association if there are lesions to the uterus that make the woman incapable of bearing a child. In the second one, all situations, be it an absence of uterus, a lesion, or any other reasonable clinical situations, have to be analysed by the NCMAP and the Medical Association for the surrogacy arrangement to be considered legal. Just as it is stated in the second Project of Law, the payment for costs of pregnancy are allowed but no other donations, benefits or payment of fees may be made to the gestational mother.

The truth is that, even with differences, political parties with substantial national importance are pushing forward in order to legalize altruistic gestational surrogacy in Portugal. The Associação Portuguesa de Fertilidade[47] (*The Portuguese Association of Fertility*) is of the opinion that the way to prevent commercial surrogacy, to put a stop to any kind of exploitation that may occur, is to legalize the practice of altruistic surrogacy and have a legal framework that regulates its terms[48].

It is also unpleasant to realize that parents, who have the deep desire of having a child, are nowadays faced with the double-bladed option of either giving up that desire, or facing the consequences of committing a crime. Having said this, it has also been noted by the media that the percentage of women who via internet contacts decide and offer to become gestational mothers in order to obtain a financial compensation, has risen as a result of the economic and financial crisis Portugal is now facing. Once again, if gestational surrogacy was legalized and thus regulated, the number of such occurrences would probably be reduced.

Even though the facts described above cannot be formally proven, the fact that various newspapers and media agents reported such black market incidents may indicate that surrogacy arrangements are taking place, within black market situations[49].

This is why a strong legal framework is necessary in order to allow legal and AGS to thrive in Portugal, without the inherent risks of exploitation deriving from unregulated surrogacy and without stepping on the thin line that separates gestational surrogacy, a beautiful gesture, from the creation of a baby market.

---

[47] Information available at, http://www.apfertilidade.org/web/index.php, viewed on March 2014.

[48] «Mulheres alugam o utero para combater a crise económica», *in Expresso*, by Agência Lusa, May, 2011, available at: http://expresso.sapo.pt/mulheres-alugam-o-utero-para-combater-a-crise-economica=f652393, viewed on March 2014.

[49] Situations reported by newspapers/entities, each one available at:
http://www.jn.pt/PaginaInicial/Sociedade/Interior.aspx?content_id=1865957,
http://demaeparamae.pt/forum/mulheres-alugam-utero-portugal-crime-barrigas-aluguer-aumenta-com-crise,
http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1867490
http://www.apfertilidade.org/phpBB2/viewtopic.php?t=47809&sid=076d4f5976690bf1c8c38cdf5136200b.

Quoting the President of the abovementioned association, CLÁUDIA VIEIRA:

"We believe that it is imperative to give answers to those women who do not have the possibility of having their own pregnancy either because they were born without a uterus, because they have lost their uterus as result of an oncological disease or even because they have been diagnosed with other clinical conditions that make it impossible for them to gestate a child. Like all infertile couples, the ones who face these mentioned challenges, also deserve to have their reproductive health acknowledged and recognized. As we are faced with an end without any solution in our own country, these couples see themselves being forced to either resign their pursuit of having a child, or to resort to other countries where surrogacy is in fact legal. It makes absolutely no sense in maintaining these couples under the shade of unlawfulness, subject to a colossal financial effort, or even worse, at the mercy of unclear contractual agreements, made by those lacking the sense of morality who take advantage of the state of fragility that these infertile couples are in. We prefer to use the term "benevolent loan of a uterus" instead of speaking of gestational surrogacy as, at the end of the day that is exactly what it is all about: a lending of a uterus out of altruistic motives and never for financial compensation"[(50)].

In an audio commentary, MIGUEL OLIVEIRA DA SILVA, doctor and President of NCESL, declares that there should be a legalization of gestational surrogacy in Portugal, as an exceptional means for medically assisted procreation, but still acknowledges that the gestating of a child has impact on its life, as each different uterus and lifestyle of the gestational mother activates the development of certain genes that might otherwise not be activated [(51)].

Moving on from a solely ethical point of view, MIGUEL OLIVEIRA DA SILVA takes a more scientific approach to the matter. Notwithstanding all complications innate to gestational surrogacy it may not be forgotten that no matter what happens, women will continue to resort to this method whether or not it is legal in their country, as their desire to constitute a family is far too powerful to be put off by the idea that their genetic child will be physically and/or emotionally affected, by being carried by another female's womb, whether in a positive or negative manner.

Alongside with such mentality and deep necessity is the reality that no person has been criminally convicted, in Portugal, for having entered a commercial surrogacy arrangement. Even though there have been suspicions as to the practice of such crime, the Public Prosecutor's office has been forced to close an investigation that had been opened due to a complaint filed by NCMAP, based on the lack of substantial evidence[(52)]. As there is evidence that points in the direction of intended parents entering surrogacy arrangements in black market conditions, it must

---

(50) Our translation. Original version available at:

http://www.rostos.pt/inicio2.asp?cronica=96087&mostra=2&seccao=moldura&titulo=-Maternidade-de-substituicao:-e-urgente – posted on 15.11.2011, 18.17, and viewed on February 2014.

(51) «É preciso alterar a lei de procriação medicamente assistida», audio commentary by Miguel Oliveira da Silva, doctor and president of the National Council of Ethics and Sciences of Life, on surrogacy and anonymous sperm donors, 9th of January, 2012, available at:

http://expresso.sapo.pt/e-preciso-alterar-a-lei-de-procriacao-medicamente-assistida-audio=f698652#ixzz2PJImVHnT, viewed on April 2014.

(52) «Ministério Público arquiva processo sobre barrigas de aluguer por falta de provas», *in Público,* available at: http://www.publico.pt/sociedade/noticia/ministerio-publico-arquiva-processo-sobre-barrigas-de-aluguer-por-falta-de-provas-1530704, viewed on March 2014.

be questioned if the way in which the criminal practice is constructed in Portuguese legislation, together with the inflexibility regarding rules on the gathering of evidence existent in said legal system, does not make it highly improbable that parties will in fact be criminally punished for their unlawful conducts.

As such, the irrational underlying principle of holding a criminal punishment that does not dissuade parties from practicing said crime must be highlighted and a better and more viable option, such as the formal legalization of AGS, must be quickly analysed and considered partly as a measure to stimulate intended parents into entering lawful and regulated surrogacy arrangements that fully protects all human rights at stake.

IV. Conclusion of Part Three

Even though there are various aspects surrounding AGS that have not been able to collect full consensus from all those inputting efforts into its legalization, mainly due to the complex bioethical, moral and social issues it raises, there is a clear cut guiding line that may be extracted from the previous detailed analysis.

The majority of efforts seem to agree that only those over the age of 18, who are of different sex, married or living in analogous conditions, may resort to AGS. This results in not allowing homosexuals and single persons from benefiting from such scientific solution.

Furthermore, the majority also pushes in the direction of basing the possibility of resorting to AGS on a casuistic consent given by the NCMAP after previous hearing of the Medical Association who will analyze the clinical condition the female party is facing (*i.e.* total absence of uterus, damage to that same organ or other related fertility issues). As such, this could give rise to unequal decisions if not properly regulated as the decision could easily become arbitrary. Nevertheless, it has been noted by both the NCMAP[53] and by the Socialist Party in article 8(7) of its Project of Law that a regulatory act should be elaborated in order to legislate and decide on how to deal with specific issues regarding surrogacy arrangements and other AGS related themes.

Both the criminal punishment of commercial surrogacy or AGS arrangements that do not respect the terms and limits set by law are matters that reached consensus. Nevertheless it has been duly noted by the NCMAP that those promoting or acting as intermediaries to surrogacy arrangements (be it commercial or altruistic) should, in fact, receive a higher penalty than intended parents or gestational mothers. The ethical perspective behind this argumentation has a strong logical basis as it is easily deduced that those entering such agreements are usually found in a fragile state ("state of necessity")[54]. Such fragile state may be found among intended parents who may have been faced with a chance of not being able to have children who are genetically related to either parent, or the gestational mother who, due to her financial and economic situation, has resorted to entering a surrogacy arrangement. As such, the promoting or benefitting

---

[53] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 6, available at: http://www.cnecv.pt/admin/files/data/docs/1333387220-parecer-63-cnecv-2012-apr.pdf, viewed on May 2013.

[54] *Ibidem,* p. 4.

in any sort of way from the sensitive and precarious state of others should, both ethically and morally, be seen as deserving a graver punishment, as such act may be considered as deeply exploitative.

Finally, and even though holding maternity as a sanction has been criticized by the NCESL and the NCMAP, all political parties seem to have overlooked this issue. Nevertheless, such issue shall be addressed later on due to its unjustified nature.

The table presented below gathers all appreciations made in regards to the efforts put forth by both councils and two political parties in order for a clear overview to be extracted:

CONDITIONS FOR FORMALLY LEGALIZING SURROGACY		**NCESL**	**NCMAP**	**131/XII (PS)**	**138/XII (PSD)**
AGE		At least 18	At least 18	At least 18	At least 18
CIVIL STATUS/SEXUAL ORIENTATION		Heterosexual married couple or those living in analogous conditions	Has no official legal position in this matter but believes that only infertility issues may give rise to the possibility of entering surrogacy agreements (i.e. believe homosexuals may not resort to surrogacy)	Married couples or those, being of different sex, living in analogous conditions for over two years	Heterosexual married couple or those living in analogous conditions for over two years
CLINICAL SITUATIONS (WITHOUT FURTHER CONSENT):	Absence of Uterus	No official position due to lack of unanimous position from bioethics experts	**-**	**-**	**X**
	Absence of uterus &/damage to organ	,,	**-**	**-**	**-**
ABSENCE OF UTERUS, PERMANENT DAMAGE TO THE ORGAN & OTHER CLINICAL SITUATIONS, ONLY WITH CONSENT FROM NCMAP AFTER HEARING MA		,,	**X**	**X**	**X**
GAMETES USED		From at least one of the commissioning parents and cannot resort to gestational mother's ovum	Has no official legal position in this matter	From at least one of the commissioning parents	Not mentioned in the project of law

CRIMINAL PUNISHMENT FOR COMMERCIAL SURROGACY ARRANGEMENTS		Penalty of up to two years in prison or 240 days payment of fine (as they fully accept common provisions in both projects if they don't disregard the 13 criteria proposed)	Penalty of up to two years in prison or 240 days payment of fine	Penalty of up to two years in prison or 240 days payment of fine	Penalty of up to two years in prison or 240 days payment of fine
OTHER CRIMINAL PUNISHMENTS AND WHY		(i)Altruistic surrogacy with disrespect of legal provisions prison penalty of up to one year or 120 days fine (ii)Promotion of both altruistic and commercial surrogacy: prison penalty of up to 2 years or 240 days of fine (same explanation as above)	(i)Altruistic surrogacy with disrespect of legal provisions prison penalty of up to one year or 120 days fine (ii)Promotion of both altruistic and commercial surrogacy: prison penalty of up to 2 years or 240 days of fine	(i)Altruistic surrogacy with disrespect of legal provisions prison penalty of up to one year or 120 days fine (ii)Promotion of both altruistic and commercial surrogacy: prison penalty of up to 2 years or 240 days of fine	(i)Altruistic surrogacy with disrespect of legal provisions prison penalty of up to one year or 120 days fine (ii)Promotion of both altruistic and commercial surrogacy: prison penalty of up to 2 years or 240 days of fine
MATERNITY AS A *SANCTION**	COMMERCIAL SURROGACY	Subject to judicial evaluation that takes into consideration the interest of the child	X	X	X
	DISRESPECT OF OTHER LEGAL PROVISIONS	Subject to judicial evaluation that takes into consideration the interest of the child	X	X	X

X = applicable; **–** = not applicable.

PART FOUR: A CLOSER ETHICAL ANALYSIS – THE "UGLY TRUTH" VS. THE "NEW LIGHT" MODERN SURROGACY BEARS

I. Maternity as a sanction

What happens in countries where gestational surrogacy is still held as formally legal, is that the concept of *maternity* may be applied as a sanction. What this means is that in cases where either legal provisions were not respected, or where surrogacy arrangements were entered into in full violation of the law, the gestational mother may be considered, *"for all legal effects",* as the mother of the child. Even though no legal provision holds direct application for the concept of *maternity* as a sanction, that is the direct consequence found in many national legislations(55).

By utilizing the expression *sanction*, there is no intention to attach a strict legal meaning to such term under the present circumstances, as in order to be considered a criminal sanction, this reality must be defined as such by the Portuguese Criminal Code or adjacent criminal legislation(56). Furthermore a sanction cannot be translated into the burden of a right or a duty to the party – in this case, the right or the duty of being considered, for all legal and social purposes, as the child's mother. However, even though maternity cannot be strictly considered a legal sanction, it is a legal consequence that adopts certain similarities: the imposition of negative and unwanted outcomes, with harmful or unconstructive results to all three parties to a surrogacy arrangement.

A woman who illegally or in disrespect of some legal impositions, enters into a surrogacy arrangement as a gestational mother, may end up having to assume all duties (and rights, even if in this case unwanted) to the child. As these women have no intention of becoming social and legal mothers of the children and, in the case of gestational surrogacy, are not even genetically linked to the embryo, it may be said that they are legally sanctioned by *maternity*.

This is clearly not only an unfair situation, but also utterly disregards the child's rights, which should always be placed above all other interests.

In Portuguese legislation, more specifically in the terms of article 8(3) of Law no. 32/2006, maternity is applied as a sanction whether or not the parties entered into an AGS or a commercial gestational surrogacy agreement, even though only the latter is criminally punishable (article 39 of that same law).

---

(55) Examples are Portugal, Ireland and Germany [MICHAEL EDWARDS and COLIN ROGERSON, «Surrogacy: National Approaches and International Regulation», pp. 2, 3, available at:

http://www.familylawweek.co.uk/site.aspx?i=ed87773, 2011.

(56) Article 1(1) of the Portuguese Criminal Code of 1995.

According to author JOSÉ DE OLIVEIRA ASCENSÃO, article 8(3) of Law no. 32/2006 imposes a *"(…) solution that is gravely incorrect – maternity may not be applied as a sanction. The interest that should have priority is the child's interest – and this is overlooked (…)"*[57].

Furthermore, and taking into consideration that in AGS the ovum would never be genetically related to the gestational mother, it seems that the desire to dissuade parties from entering surrogacy arrangements spoke louder than logic and reason. The sanction imposed by the abovementioned article manages not only disregards the child's best interest[58], but also ignores the will of both parties – the gestational mother and the intended parents, who most likely would agree that the right to the child would be attributed to those who are genetically linked to him/her and only resorted to gestational surrogacy due to serious fertility issues.

The NCESL also shares that same opinion[59] as they believe that the solution is highly inflexible as it may, in practical terms, mean that *"(…) parental affiliation of who rejects and never assumed that same child for their own parental venture, is imposed against the child's best interest (…)"*[60]. Furthermore, and as is also supported by that same Council, article 8(3) may indirectly cause the child to be institutionalized, even though he/she is desired by a stable family to whom he/she is genetically related to, as the gestational mother may be forced to give the child up for adoption due finding herself to be unfit for raising a child, or due to being charged with a prison penalty (article 39 Law no. 32/2006).

Maternity as a sanction is imposed by Portuguese legislation in both forms of surrogacy – altruistic and commercial. However, it is deeply worrying for both situations, even if it is accepted that commercial gestational surrogacy may endanger certain human rights. It seems that gestational surrogacy may be considered to be a victimless *offense* as both forms of surrogacy are frowned upon by the current legal framework in force in Portugal.

Taking into consideration commercial gestational surrogacy and non-compliant AGS, criminally punishable by article 39 of Law no. 32/2006, it must be noted that the objective of Criminal Law is to protect legal interests that deserve that same protection. It may occur that those legal interests are individual, but in other cases the legal interests are considered to be supra-individual. In the latter case, usually what is being protected is the global interest of the community. As was already seen, both forms of surrogacy are prohibited or hampered by legislations of countries where it is considered to be undignifying of human nature, and therefore it seems that the legal interest at stake is a supra-individual interest – the interest of the community as a whole, of protecting human dignity.

It is said to be a victimless offense due to the fact that:

---

[57] JOSÉ DE OLIVEIRA ASCENSÃO, «A Lei nº. 32/06, Sobre Procriação Medicamente Assistida», *in Revista da Ordem dos Advogados* ano 67, vol. III, 2007, available at:

http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=30777&idsc=65580&ida=65542, viewed on May 2014.

[58] View section III of Part Four of the present paper.

[59] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 11, available at: http://www.cnecv.pt/admin/files/data/docs/1333387220-parecer-63-cnecv-2012-apr.pdf, viewed on May 2013,.

[60] *Ibidem, p. 11.*

(i) It may constitute a crime (commercial gestational surrogacy) or go against social views on the matter (AGS); and

(ii) None of the parties can be considered victims.

It is in fact, *victimless* as far as both forms of gestational surrogacy are concerned. Even in relation to commercial gestational surrogacy, if full consent is given by the gestational mother and all rights are respected (via the imposition of a careful regulated legal framework), none of the parties nor the desired child, may be considered victims.

In regards to properly regulated AGS, the inexistence of a victim is even simpler to conclude for – as there is no violation of human dignity due to the certain unexploitative nature of this form of surrogacy and to the protection of human rights a carefully regulation may provide for. Nevertheless, some of those against all forms of gestational surrogacy base their arguments on the fact that surrogacy arrangements fail to respect the child's human dignity as it turns the child into the object of a contract. However, the object of a modern AGS arrangement is the altruistic service provided by the gestational mother and not the baby in itself who, in gestational surrogacy, has no genetic relation to said woman.

As we can see in the European comparative study on Surrogacy(61): "*surrogacy raises ethical issues about the dignity of the child as it turns it into the product of a market relation. A well-known feminist argument condemns 'baby selling', referring mainly to traditional surrogacy, which involves relinquishing not only the babies surrogates carry, but also their genetic material (McDermott 2012). This negative stance has, however, been mitigated since the 1990s with technological developments enabling gestational surrogacy. The lack of genetic link between the surrogate and the baby, together with the shift of emphasis to surrogacy as service, have rendered surrogacy more socially acceptable (…)*".

In relation to the gestational mothers, it has been argued that the legal prohibition of such women exercising their right to decide upon their reproductive future taints their own development(62). Furthermore, such line or argument would result in acknowledging that: "*if a woman is not expected to uphold a contract she enters freely then she is perceived as legally incompetent and unable to act rationally regarding reproduction. This would reinforce social stereotypes that women are less rational than men and that they are ruled by instinct and sentiment*"(63).

In conclusion, and going back to the concept of maternity as a sanction, if the legal interest that is being protected is human dignity and the victim of the offense of entering into a surrogacy arrangement is the community in general (as taking into consideration modern AGS none of the parties may be considered objectively harmed), then how can the concept of *maternity* be applied as a sanction to all parties?

---

(61) *Ibidem,* p. 24.

(62) DIRECTORATE GENERAL FOR INTERNAL POLICIES OF THE EUROPEAN PARLIAMENT "A Comparative Study on the Regime of Surrogacy in EU Member States" May 2013, p. 24 "(….)stressing the right of women to determine their reproductive rights and be perfectly capable of entering legal contracts as they please(…)".

(63) HANNAH MC. DERMOTT, "*Surrogacy Policy in the United States and Germany: Comparing the Historical, Economic and Social Context of two Oposing Policies*", 2012, Senior Capstone Projects, Vassar College, available at: http://digitalwindow.vassar.edu/cgi/viewcontent.cgi?article=1137&context=senior_capstone, viewed on April 2014.

Does that sanction in itself not violate human dignity, as it forces: *(i)* a woman to accept a child, *(ii)* a child to remain with one who does not desire that gift; and even *(iii)* the intended parents to be left without their genetically related child?

Putting aside the founding impossibility of determining in exact terms what human dignity actually is[(64)], it seems safe to say that holding *maternity* as a sanction is not only void of any ethical reasoning, as it is also contradicting – it attempts to defend human dignity by offending human dignity in return.

II. On Human Rights

Portuguese legislation, by barring and/or delaying the formal legalization of carefully regulated AGS[(65)], may be putting at stake the effective protection of certain human rights, as was noted in the previous section. Even though international law and European law[(66)] have not directly granted a right for those who face exceptional yet dramatic fertility issues, they have long granted the respect for general human rights, indirectly related to AGS. As such, such rights shall be addressed in order to illustrate a new perspective on how not allowing carefully regulated AGS may in fact result in obstructing the flourishing of certain basic human rights that are part of the nuclear foundation of the concept of human dignity.

The general rights[(67)] we shall be addressing are the following:

A. The right to not be subject to unfair discrimination;
B. The right to access new scientific developments that do not in themselves jeopardize human dignity; and
C. The right to reproductive health and family planning.

It is imperative to note that all arguments based on the protection of such rights, in order to justify the formal legalization of AGS have as a foundational argument the preparation and entry into force of a legal framework capable of ensuring the effective protection of all human rights, namely those of the parties to the surrogacy arrangement and the respect of public and social order. However, the delineation of said regulation shall be discussed further ahead.

---

(64) ADAM SCHULMAN, «Bioethics and the Question of Human Dignity, *in Human Dignity and Bioethics: Essays commissioned by the President's Council on Bioethics,* March 2008, available at: http://bioethics.georgetown.edu/pcbe/reports/human_dignity/chapter1.html, viewed on April 2013.

(65) BARBARA STARK, «Transnational Surrogacy and International Human Rights», *in ILSA Journal of International and Comparative Law*, vol. 18, number 2, 2012,:*"The argument here is that, at the very least, where surrogacy is allowed, the protections of well-established human rights norms should be assured. In some cases, this may be accomplished through regulations",* p. 4, quoting Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 146 (2009) (noting that, "well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy.").

(66) *A Comparative Study on the Regime of Surrogacy in EU Member States,* by the Director General for Internal Policies of the European Parliament, May 2013, p. 140

(67) By general rights we are referring to certain principles that have been collected from various international law instruments, even though they do not exist, in some cases, as independently predicted rights.

A. The right to not be subject to unfair discrimination

On the Universal Declaration of Human Rights ("UDHR")[68]

In its article 1, it is clearly stated that all ***"(…) are born free and equal in dignity and in rights".*** Even though there is no international right to having a genetically related child, it may be argued that those who have had the misfortune of not being able to bear their own children due to permanent damage or absence of a uterus should be treated with the same dignity and granted the same rights as those who are lucky enough to have never faced such issue. As the resorting to IVF in a subsidiary manner and in respect to other legal provisions, is accepted according to Portuguese legislation, in order to ensure that "*all are equal before the law and are entitled without any discrimination to equal protection of the law (…)*" , in the terms of article 7 of the UDHR, it may be argued that IVF should be allowed to be utilized in cases of AGS, provided that all other legal provisions were also respected and that resorting to AGS was equally done in an exceptional and subsidiary manner.

Due to the fact that, as was seen in Part III of this paper, Law no. 32/2006 protects those who are incapable of naturally conceiving by legally allowing IVF, barring the access to AGS (that fully relies on the use of IVF) may be seen as a discrimination and as a disrespect to articles 1 and 7 of the UDHR.

The differences between those who cannot conceive naturally due to *(i)* fallopian tube blockage, *(ii)* serious uterus malformations, *(iii)* antibody problems that harm sperm cells, *(iv)* endometriosis, *(v)* permanent damage in the uterus or total absence of that same organ, are not sufficiently different to justify the protection of the Law in the former cases, and the general legal prohibition in the latter, regarding that all human rights are protected.

Furthermore, and in light of what is provided for by article 29 of said Declaration, the Law should only limit the exercise of rights and freedoms *"(…) for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".* Taking into consideration that the medically assisted procreation technique that is necessary for AGS (IVF) is legal in Portugal and that no AGS arrangement would be celebrated without the fully informed consent of all parties, choosing to resort to such form of surrogacy constitutes, in fact, a freedom belonging to both the intended parents and the gestational mother. However, it may be argued that such freedom is limited in order to protect public order, morality or the general welfare in a democratic society if any of the arguments put forth against surrogacy still stand and are not properly dealt with when constructing a carefully regulated legal framework.

([68]) The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948.

On the Charter of Fundamental Rights of the European Union ("CFREU")[69]

Furthermore, the right to not be subject to unfair discrimination is also laid down by CFREU in article 21 that specifically prohibits unfair discrimination based on both genetic features, sexual orientation and disability.

Even though the scope of the term "disability" is not directly defined by the CFREU, it has been defined by the European Court of Justice, in the case *Sonia Chacon Navas v Eurest Colectividades Case C-13/05*[70], stating that: "*the concept of "disability" must be understood as referring to a limitation which results in particular from "physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life*".

However, such case dealt directly with the implications of physical, mental or psychological impairments regarding professional life, as the argumentation of said case was based on the European Directive adopted on Equal Treatment in Employment and Occupation[71]. With the absence of a less specific definition, that takes into consideration the impact of other disabilities in other areas of life, the Convention on the Rights of Persons with Disabilities of the United Nations ("**CRPD**") of 2006[72], binding to all its signatory member states (including Portugal[73]), may be applicable, as via its article 2 it defines the scope of the term "disability" as such:

"(...) any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination (...)".

Said definition holds a much wider scope of what may be defined as having a disability, and thus includes women in Portugal who until now have not been able to resort to AGS even though they have had the misfortune of not having a uterus or of having any kind of permanent damage to that same organ.

As such, it is viable to conclude that in the terms of the CFREU and the UN CRPD, not allowing women with ultimate fertility issues to overcome such reality is in fact unfair discrimination.

---

[69] Charter of Fundamental Rights of the European Union, (2000/C 364/01), available at:
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[70] Case available at:
http://curia.europa.eu/juris/document/document.jsf?docid=56459&doclang=EN, viewed on May 2014.

[71] Council Directive 2000/78/EC of 27 November 2000.

[72] The UN Convention on the Rights of Persons with Disabilities, December 2006, available at:
http://www.un.org/disabilities/convention/conventionfull.shtml, viewed on May 2014.

[73] As may be seen by the Parliamentary Resolution no. 56/2009, available at:
http://dre.pt/pdf1s/2009/07/14600/0490604929.pdf, viewed on May 2014.

On the Convention for the Protection of Human Rights and Dignity of the Human Being with regards to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[74]

The above mentioned convention stipulates the protection of specific rights in regards to biology and medicine but stems from what was already seen on the UDHR. In the terms of article 1 of said Convention, "*parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine*".

In addition, the CHRB also vouches for the *Primacy of the human being* in relation to society as a whole, via its article 2 that states that: "*the interests and welfare of the human being shall prevail over the sole interest of society or science*". As such, not only the UDHR but also the CHRB attempt to ensure that only certain exceptional circumstances may serve as a justification to limit any rights and that if said exceptional conditions do not place themselves, then the interest of the individual and the protection of their rights should prevail[75]. The exceptional nature of such limitations is provisioned for in article 26 of the CHRB that states as follows:

"*No restrictions shall be placed on the exercise of the rights and protective provisions contained in this Convention other than such as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others*".

With the intention of demonstrating how carefully regulated AGS would not constitute a menace to public order or morality, the main arguments put forth against surrogacy must be addressed and responded to.

i) <u>What countries against surrogacy say</u>

Surrogacy as exploitative

Surrogacy may be seen as exploitative <u>only</u> in those countries where commercial surrogacy is allowed, such as in India, and some states in the USA.

In countries where commercial surrogacy is banned, such as the UK, it has been said, more specifically by the Brazier Report[76], that *"the use of a woman's uterus for financial profit is inconsistent with human dignity*"[77]. It is believed to be potentially exploitative as the usual target of commercial

---

[74] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4.IV.1997, available at:

http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm, viewed on May, 2014.

[75] Such Primacy of the human being is also seen in article 3, part two of the Universal Declaration on Bioethics and Human Rights, of October, 2005 as will be seen further on.

[76] UK Parliamentary report of 1997.

[77] EMILY JACKSON, *Regulating Reproduction – Law Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford and Portland, Oregon, 2001, p. 291.

surrogacy arrangements are women in less advantageous financial positions[78] who lend off their uteruses to wealthy commissioning couples[79].

Standing close to this line of argumentation is the Kantian imperative that no human being shall be used as a means to an end. Even in the case of gestational surrogacy, and even in situations where the surrogacy arrangement contains no provision for an excessive financial compensation to be paid, the gestational mother is being a "means" to obtaining a child that would otherwise never be able to exist (the end in itself). Even if the gestational mother has allowed herself to be put in that position, this may still be morally objectionable[80].

It has also been said that surrogacy arrangements force women into degrading positions, as they have to abolish all maternal instincts, thus violating their human rights. Women may feel anxious when having to relinquish all rights to a child they have carried for nine months, and find it hard to bare the cease of relationship between gestational mother and child, once the commissioning parents have gone forwards with their family life[81].

At the core of the UDHR is the protection of human dignity, and as such it may derive from such principles that having a gestational mother and a baby reduced to commodities of a contract is unlawful and undignifying of their human nature.

However, this argument is in no manner applicable to AGS.

Surrogacy as the splitting of Motherhood – consequent harming of child's rights

As the German government once claimed, and some countries that deem surrogacy as unethical have supported, *"surrogacy splits motherhood between a genetic and biological mother (…)*"[82]. The splitting of motherhood may create *(i)* identity crisis for the child, as the developing of his/her personality depends on an exclusive relationship with one sole mother and *(ii)* emotional damage for the gestational mother who has to relinquish all rights to the child.

---

[78] "*Generally the fee paid to a surrogate mother is $10,000 to a woman who is economically disadvantaged, this standard fee may be a sufficient inducement to enter into such an agreement. Some have expressed concern that eventually women from third world countries will be hired as cheap labour to bear children for couples (…)*" - DALE ELIZABETH LAWRENCE, « Surrogacy in California: Genetic and Gestational Rights », *in Golden Gate University Law Review*, vol. 21, 1991, p. 545, available at:

http://digitalcommons.law.ggu.edu/ggulrev/vol21/iss3/3, viewed on April 2013.

[79] Iona Institute Press Release, *High Court surrogacy case shows why we must not "split" motherhood*, January 30, 2013, available at:

http://www.mediacontact.ie/mediahq/ionainstitute/46674/press-release-from-the-iona-institute-high-court-surrogacy-case-shows-why-motherhood-must-not-be-split.html, viewed on April 2013.

[80] EMILY JACKSON, *Regulating Reproduction – Law Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford and Portland, Oregon, 2001, p. 297.

[81] THE IONA INSTITUTE, *The Ethical case against Surrogate Motherhood: What we can learn from the Law of other European countries*, 2013, p. 10.

[82] THE IONA INSTITUTE, Press Release, *High Court surrogacy case shows why we must not "split" motherhood*, January 30, 2013, available at:

http://www.mediacontact.ie/mediahq/ionainstitute/46674/press-release-from-the-iona-institute-high-court-surrogacy-case-shows-why-motherhood-must-not-be-split.html, viewed on April 2013.

Children may also be psychologically traumatized when knowing that they were voluntarily abandoned by their gestational mother and this may be more traumatizing than having an adopted child know he/she is adopted, as the decision for "letting-go" of the child, in a surrogacy arrangement, is done prior to the birth of the baby.

It is also possible that gestational mothers, who have to adopt a cold attitude and may require psychological help throughout the pregnancy, may experience long term emotional damages. This has not yet been proven, but may be predicted due to the known bond that is created between a gestational mother and the foetus.

It is also believed that a child is better off being raised in a typical familiar situation – normal offspring to a married couple, without the interference of a third party. Even though gestational surrogacy may be provided for, it does not directly mean that a State should facilitate its existence[83].

As the birth mother is presumed to be the legal mother in accordance with the latin saying and principles of paternity in force in various countries *"Mater semper certa est",* the splitting of motherhood innate to a surrogacy arrangement puts this principle at stake, and consequentially shakes important grounds that have for centuries been held stable.

Due to the fact that modern developments are responsible for the possible lack of applicability of this principle, it may be questioned if such legal imposition should not be re written in order to become better adapted to social and scientific evolutions.

Adoption v. Surrogacy

Those in favour of surrogacy have elaborated arguments to validate their opinion that lie on a direct comparison with adoption. One example of this may be the fact that in the notorious *Baby M case*, already referred, the payment made by Mr. William Stern, the commissioning parent, was of 25,000 dollars, which does in fact amount to a substantial quantity. However, at that same year, it was verified that the average cost of a private adoption was of 12,000 dollars[84]. It was thus put forth by some that if what was denying surrogacy of its legal acknowledgement was the risk of turning babies into commodities or its possible exploitative nature, then such arguments should fall when closely analysing the reality behind adoption: as they both involve children and may involve the payment of a certain quantity for that same child. Nevertheless, there are substantial differences between surrogacy arrangements and adoption that are called out in reply to those who equal the two in order to benefit from the social acceptance already given to adoption as a whole.

Unlike in surrogacy arrangements, the Council of Europe has legally obliged mothers giving up their children for adoption, to have to wait a certain reasonable time after the child has been born, prior to giving their consent. In surrogacy, however, consent to fertility treatment is

---

[83] THE IONA INSTITUTE, *The Ethical case against Surrogate Motherhood: What we can learn from the Law of other European countries*, 2013, p.6.

[84] STEPHAN COLEMAN, *The Ethics of Artificial Uteruses – implications for Reproduction and Abortion,* Charles Sturt University, Ashgate Publishing Limited, England, 2004, p. 37.

given prior to the birth of the child, meaning that the mother cannot wait until she recovers sufficiently from the effects of giving birth to the child, before giving her consent[85].

Furthermore, adoption is based on the protection of an existing child who, for some reason, is left without a social mother. On the other hand, surrogacy is based on the desire of commissioning parents to create, and allow to exist, a future child: *"(…) whereas surrogacy starts with the wishes of adults, adoption starts with the rights of the child"*[86]. As such, arguments in favour of surrogacy must not be based on the arguments put forth for the legalizing of adoption, as they carry distinct differences.

It has been argued if article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("**CPHRFF**") may be applicable to adoption. However, in the case *E.B v. France*[87], the Court established that the *ratio legis* of article 8 is to protect existing families, and does not grant a right to adopt a child, and thus create a future family[88]. As such, those in favour of banning surrogacy, have argued that this line of argumentation should be applied to surrogacy also, and thus "a right" to resort to surrogacy in order to be able to have a child, should not be claimed.

In conclusion, the abovementioned and analysed arguments against surrogacy are mainly based on its exploitative nature, and how it strongly violates human dignity. Furthermore, in countries like the UK, the consent for IVF is obviously given prior to the birth of the child but the signing of the parental order that would recognize the rights of the intended parents is only granted after the child is born. As such, it cannot be argued that in all countries, the gestational mother is forced to grant her consent prior to the birth of the child.

It is also necessary to point out that most of these arguments lose their vigour once standing in front of altruistic surrogacy, founded on a strong and carefully thought out legal framework. As such, and after collecting the most common arguments put forth against surrogacy in general (both commercial and altruistic), such arguments have been deconstructed in order to analyse if, in fact, carefully regulated AGS puts at stake any human rights or presents a menace to general public order and morality.

---

[85] European Convention on the Adoption of Children, Strasbourg 27, XI.2008, article 5(5), that states: "*A mother's consent to the adoption of her child shall not be accepted unless it is given at such a time after the birth of the child, not being less than six weeks (...)".*

[86] THE IONA INSTITUTE, *The Ethical case against Surrogate Motherhood: What we can learn from the Law of other European countries*, 2013, p.18.

[87] Available at:

http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84571#{"itemid":["001-84571"]}, viewed on May 2013.

[88] THE IONA INSTITUTE, *The Ethical case against Surrogate Motherhood: What we can learn from the Law of other European countries*, 2013, p.17.

ii) Responses

Does payment necessarily result in exploitation?

In some countries, the only payment made to the gestational mother was an amount that covered all pregnancy expenses. In the UK, for example*, "no money other than 'reasonable expenses' should be paid to the surrogate*"[89][90]. This was legally imposed as it could prevent surrogacy from being seen as an exploitative reality and also ensure that there is no room for interpreting surrogacy as the commodification of babies, and consequently be deemed as unethical.

Even in countries where this requisite is not legally enforced, and thus certain fees are paid to the gestational mothers as compensation for their services, the fact that a gestational mother is earning money with the arrangement she has made, does not directly turn the baby into a commodity or mean that the woman is being exploited.

If a comparison is held between the services of a gestational mother, and a career option of becoming a ballerina, we can see how both activities take advantage of a woman's physical attributes and how only the former is ethically criticized (due to the fact that what is being "used" is the female reproductive system). Considering surrogacy arrangements as exploitative, only basing a perspective on the abovementioned facts (payment – use of body), is unfounded[91].

Taking prostitution as an example – it is not deemed as illegal in some countries that actually prohibit gestational surrogacy, such as Portugal[92]. This does not seem logical as what both *professions* (if parting from the premise that surrogacy arrangements include the payment of a fee exceeding what is considered to be *reasonable costs*) are based on, is in the direct advantage taken from the female body and its attributes. The difference between both, however, is that surrogacy exists in order to grant a deep desire and intrinsic need of having a child when parents are incapable of doing so, whilst prostitution exists to satisfy sexual desires (socially considered as less important and also more likely to be seen as unethical).

It has also been considered that the mere fact of being paid to do something that isn't considered as entirely pleasant does not make that same activity coercive[93]. It is common occurrence to witness less fortunate women being faced with both financially and morally unattractive professional alternatives. It is a sad social reality, but even so, it might not always mean that those same women are being exploited.

---

[89] Available at:

http://www.surrogacy.org.uk/FAQ1.htm, viewed on April 2013.

[90] *People Science and Policy Ltd*, "Report on The Consultation on the Review of the Human Fertilisation & Embryology Act 1990, (prepared for the department of Health)", March 2006, available at:

http://www.peoplescienceandpolicy.com/downloads/FINAL_HFEA_reportDH.pdf, viewed on May, 2014.

[91] MARTHA NUSSBAUM, *"Whether from reason or prejudice – taking money for bodily services"*, available at: http://philosophy.uchicago.edu/faculty/files/nussbaum/Whether%20From%20Reason%20or%20Prejudice.pdf

[92] Article 169 of the Portuguese Criminal Code, that only criminally charges those who incite prostitution and not prostitution in itself.

[93] EMILY JACKSON, *Regulating Reproduction – Law Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford and Portland, Oregon, 2001, p. 304.

When payment is provisioned for in a surrogacy arrangement, what is being paid for, the service or the baby?

Kentucky Courts[94], in 1986, decided that, in regards to full surrogacy, it could not be considered as the selling of babies if the surrogacy arrangement was entered into before the conception of the child. This can be extended to gestational surrogacy as in this case the child never genetically belongs to the gestational mother[95].

The principal of private autonomy when entering into surrogacy arrangements can only make sense if it is concluded that the subject of the contract is not the child but the use of the uterus in itself[96], as, if this was not the case, having a child as the subject of a contract would be offensive to human dignity and integrity (putting aside cases of adoption). However, as in gestational surrogacy the gestational mother is not taking part, directly, in the conception of the child, the selling of the child could never be an issue, as the embryo comes from the commissioning parents who are therefore the natural parents of the to be born baby.

Such fact comes in respect of what is stipulated by article 3(2) of CFREU: "*In the fields of medicine and biology, the following must be respected in particular: (…) - the prohibition on making the human body and its parts as such a source of financial gain*".

Not only there is no payment entailed in AGS arrangements, *per se*, as even regarding gestational commercial surrogacy, it is not the human body and its parts (in this case the woman's uterus) that is a source of financial gain, for the source of a potential profit, in this case, is the service granted by the gestational mother of carrying the embryo throughout the gestational period and not the uterus in itself.

Both these arguments are used in order to conclude that if the gestational mother's consent is in fact informed and thus valid, the payment of a fee does not directly result in her being exploited by the commissioning parents.

In any case, when dealing with AGS, there is no possibility of the gestational mother being exploited if her consent is fully informed, as was already previously mentioned. Such fact therefore respects what is also granted by article 3(2) of the CFREU": "*In the fields of medicine and biology, the following must be respected in particular: (…) - the free and informed consent of the person concerned, according to procedures laid down by the law*".

The Gestational Mothers' Incentives

In most cases, especially in those countries where, like in the UK, only reasonable costs are paid to the gestational mother, the gestational mother is impelled to enter into such arrangement by an altruistic motive. Even when an extra fee is being paid, money may be a secondary

---

(94) Surrogate Parenting Associates, Inc. v. Commonwealth ex rel. Armstrong, - 704 S.W.2d 209 (Ky. 1986).

(95) DEBORA L. SPAR, *O negócio de bebés – como o dinheiro, a ciência e a política comandam o comércio da concepção,* Almedina, Coimbra, Maio 2007, p. 120.

(96) DALE ELIZABETH LAWRENCE, «Surrogacy in California: Genetic and Gestational Rights», *in Golden Gate University Law Review*, vol. 21, 1991, p. 545, available at:

http://digitalcommons.law.ggu.edu/ggulrev/vol21/iss3/3, viewed on April 2013.

incentive, but is seldom the only reason why the gestational mother has consented to take on such task[97].

Some women may decide to enter into a surrogacy arrangement out of pure compassion or due to the fact they search for a psychological gain from helping others. It is unfair to push aside the claim that certain human actions may be utterly altruistic when we live amid a society that depends on blood and bone marrow *donations*. If those donations are not made altruistically, even though they are physically invasive, then what could the incentive possibly be? It is true that altruistic doings cannot be considered as common, but it is irrefutable that they do occur.

In addition, women who have an easy pregnancy have claimed that there are no true costs deriving from being a gestational mother and actually embrace the experience. This has been seen in various interviews where gestational mothers explained their motives and incentives behind entering such agreements[98].

Some gestational mothers have also claimed that what impelled them into wanting to enter a surrogacy agreement was the fact that they personally witnessed the intrinsic need for a woman to have her own child. Either due to having being mothers themselves, and cherishing that life changing opportunity, or due to having witnessed close relatives or loved ones, being incapable of doing so themselves (either due to living in a country where surrogacy is still considered illegal, or due to more complex infertility issues)[99].

To further support what has been said, it can be seen by the family studies carried out by Jadva *et al* in 2002[100], that examined the *motivations, experiences and psychological consequences of* surrogacy on 34 women who had given birth to a surrogate child during the previous year to the study, that the most common motivation for gestational mothers was the *"(…) wish to help couples that would not otherwise be able to conceive or carry a child normally*"[101].

The Screening Process and consequent Valid Consent

Once women who voluntarily decide they want to become gestational mothers have been screened, very few of those women actually finished the process and entered into a surrogacy arrangement. This shows how by the time gestational mothers have entered into a contract with the commissioning parents, their mind is absolutely set and clear and thus the above mentioned article 3(2) of the CFREU, regarding the importance of consent, is granted.

As part of the screening process, some countries that allow surrogacy arrangements to take place, have as a legal requisite that the gestational mother has, in fact, had children of her own

---

[97] EMILY JACKSON, *Regulating Reproduction – Law Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford and Portland, Oregon, 2001, p. 299.

[98] Available at: http://www.youtube.com/watch?v=0FwUe1tlOVE, viewed on April 2013.

[99] Available at: http://www.youtube.com/watch?v=505b3TiPf-M, viewed on April 2013.

[100] VASANTI JADVA, CLARE MURRAY, EMMA LYCETT, FIONA MACCALLUM AND SUSAN GOLOMBOK, «Surrogacy: the experiences of surrogate mothers», 2002, available at:

http://humrep.oxfordjournals.org/content/18/10/2196.short, viewed on April 2014

[101] PETER R. BRINSDEN, "Gestational surrogacy", *in Human Reproduction Update,* vol.9 No.5 p. 487, 2003, available at: http://humupd.oxfordjournals.org/content/9/5/483.full.pdf, viewed on April 2014.

and knows what the experience of bearing a child entails, which allows the woman to have a clear knowledge of the bond felt by carrying a child in her womb[102].

Consequentially, if the problem is that the consent given by the gestational mother prior to giving birth to the baby is considered invalid as she has no capacity of rendering a clear and informed decision before feeling the bond created between herself and the child, then all other consents, given to a range of other inexperienced things such as sterilization or gender-reassignment surgery maybe also be considered invalid[103]. The validity of the consent given by future gestational mothers, when entering into a surrogacy arrangement, is founded on the fact that said consent has been given after all information of what the process entails has been made available. As most screening processes involve carefully designed questionnaires, and even include meetings both with the commissioning parents and with psychologists who are experts on the matter, it is clear that after all that process has terminated, the consent that is given is informed, clear and therefore must be considered valid.

As all main arguments against surrogacy have been addressed, we conclude that, as far as articles 1, 7 and 29 of the UDHR, articles 1, 2 and 26 of the CHRB and finally articles 1, 3 and 21 of the CFREU go, carefully regulated AGS can, in no manner, put at stake human rights or public order, morality or the health of a democratic state, provided that certain aspects are taken into consideration in order to prevent most possible arguments against surrogacy to subsist.

B. The right to access new scientific developments that do not in themselves jeopardize human dignity

One of the main principles of modern bioethics, held by article 3, part two (on Human dignity and Human rights) of the Universal Declaration on Bioethics and Human Rights, of October, 2005, states that: *"The interests and welfare of the individual should have priority over the sole interest of science or society"*. Having said this, not allowing people to be able to benefit from being parents, via AGS, is in fact discriminatory[104] as it attributes a bigger importance to Portuguese society's unwillingness to accept this "new" solution for infertility issues in detriment of those individuals who are faced with no other equal solutions.

As is highlighted by K. SVITNEZ, *"People who desperately want to become parents are excluded from reproduction and deprived of existing reproductive technologies"*[105].

Such fact places in jeopardy what is granted by the CHRB in its article 3 that attempts to ensure the right to an equitable access to health care: "*Parties, taking into account health needs and*

---

[102] This is the case in the UK and India, for example.

[103] EMILY JACKSON, *Regulating Reproduction – Law Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford and Portland, Oregon, 2001, p. 301.

[104] K. SVITNEZ, «Legal control of Surrogacy – International Perspectives» *in Schenker J: Ethical Dilemmas in Assisted Reproductive Technologies,* 2011, p.150.

[105] *Ibidem*, p. 150.

available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality".

It is known that in Portugal, the available resources regarding AGS exist (in regards to IVF techniques necessary for implanting the embryo within the gestational mother's uterus) and have been used, as was already seen, since late 1980's.

The fact that science has developed to the point of being able to fully aid those who cannot conceive naturally in such a manner as to ensure the protection of human dignity, alongside with the subsisting reluctance to deal with the surrogacy phenomenon turns out to be a violation of the abovementioned principles and consequently allows those who have little or no knowledge of the issue to press against the formal legal acceptance of a life changing solution such as AGS.

Furthermore, and as is mentioned in the Report of the Fourth World Conference on Women of Beijing, in 1995, both men and women have the right to *"(…) have access to safe, effective (…) methods of their choice for regulation of fertility which are not against the law(…)*"[(106)]. It may not be deemed as reasonable that such a widespread of infertility issues are offered medically assisted procreation solutions and that AGS, even though it is not a new solution, is still not legally permitted, taking into account that there is no justifiable foundation for excluding persons with said infertility issues from being granted access to such reproductive methods.

We further highlight the fact that the abovementioned report directly states *"(…) methods of their choice (…)"*. If public order, morality and human dignity are not put at stake, why should women and men not be able to resort to methods of their choice which allow them to have genetically related children?

As such, we believe that not only is the right to access to scientific developments such as IVF (and consequently AGS) imprinted in various international principles, but we also support the direct application of said principles to AGS due to the loss of vigour of all attempts at arguing that such form of surrogacy, as a concept, jeopardizes the effective protection of human dignity.

C. The right to reproductive health and family planning

Even though the abovementioned right does not exist independently, it can be extracted, as a principle from various international instruments.

To begin with, the "Family" social structure is attributed a specific importance by article 16(3) of the UDHR and article 10(1) of the International Covenant on Economic Social and Cultural Rights ("**ICESCR**")[(107)], the former stating that: "*the family is the natural and fundamental group unit of society and is entitled to protection by society and by the State"*.

---

(106) Report of the Fourth World Conference on Women of Beijing, in 1995, Point 94, "*the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant(…)".*

(107) The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the General Assembly in December 1966 and entered into force in 1976. It elaborates the principles laid out in UDHR and is legally binding on all states who have signed and ratified its provisions.

We see similar protection offered by the European Convention on Human Rights (**"ECHR"**)[108], in its article 12 that states the following: *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right"*.

It is true that from such right it is not possible to extract any direct relation to AGS as there are other forms of constituting a family, namely via adoption. However, all are free to choose how they form their own families and, consequently, what viable solutions they opt for in case of infertility, as was seen in the previous section.

In 1979, the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**") was adopted by the UN General Assembly, and by guaranteeing a certain level of protection of the gestational mother, it reduces certain oppositions commonly placed against both forms of gestational surrogacy.

When it comes to reproductive rights in specific, it is safe to conclude on how recent they are when it comes to international law. Until the World Conference on Population, in 1994, in Cairo ("**Cairo Conference**") some reproductive rights were not properly laid down.

"*The aim should be to assist couples and individuals to achieve their reproductive goals and given the full opportunity to exercise the right to have children by choice*"[109].

Such aim would also aid to lay down fundamental aspects related to the human right to constitute a family. Surrogacy, in general, was not directly spoken of at this conference. However, as surrogacy allows couples who could otherwise not have *"the full opportunity to exercise the right to have children by choice"*, it might be said that what was decided at Cairo Conference aids the efforts being made towards the legalization of AGS in various countries[110]. At such conference, it was recognized that reproductive rights include *"(…) the right to attain the highest standard of sexual and reproductive health*"[111] which can be argued entail the possibility of being able to use their own genetic material (or at least gametes belonging to one of the intended parents) to create their own child (and as such, constitute a family) even if faced with a certain infertility issue which cannot, by itself, be solved by medically assisted procreation techniques.

Even though AGS was not directly addressed at such conference, as was already mentioned, it has been said that *"(…) at the very least, it would weigh against an outright government ban of the practice*"[112], which is, in practice, what occurs in Portugal, even though there is no criminal punishment applicable to AGS. Needless it is to say that nearly 20 years have gone by since the Cairo Conference took place and yet no legal adjustments have been made in order to allow citizens to achieve their full reproductive health.

---

[108] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, articles 9 and 12.

[109] BARBARA STARK, «Transnational Surrogacy and International Human Rights», *in ILSA Journal of International and Comparative Law*, vol. 18, number 2, 2012, p. 9.

[110] *Ibidem,* p. 10.

[111] Set by the 1994 Cairo Programme of Action, available at: http://www.iisd.ca/Cairo/program/p07002.html, visited on April 2014.

[112] BARBARA STARK, «Transnational Surrogacy and International Human Rights», *in ILSA Journal of International and Comparative Law*, vol. 18, number 2, 2012, p. 11.

III. The child's best interest

Even though most European countries that still ban surrogacy arrangements to take place base their reasoning on the importance of ensuring the child's best interests are protected[113], most end up giving more importance to the *mater semper certa est* principle and thus impose maternity as a sanction. Along with all social and ethical issues inherent to imposing maternity that have already been discussed, it is important to still question how the child's best interest is being protected in those situations and how in fact it can be harmed via the formal legalization of AGS.

On one hand, it is clear that the child's best interest can't ever be protected if the one to be considered mother of that same child, for all legal and social purposes, does not wish to be attributed that duty/right. On the other, for the child's best interest to be protected, said child should be raised by those considered to be more capable for such task and by those who desire the child the most. Obviously the desire for a child cannot be reduced to quantitative figures but it is safe to say that intended parents faced with serious fertility issues and that are left with no other solutions for constituting a genetically related family have a deep and unimaginable desire for having the child to be born. It does not make much sense to give more importance to a gestational bond, in detriment of a genetic bond, for even if the child is only related to one of the intended parents it still (according to the proposed AGS legal framework) has no genetic connection to the gestational mother. Even if both bonds were attributed the same significance, what has to be analysed is the intentions of both parties to the surrogacy arrangement: the intentions which set off the surrogacy process in the first place.

In AGS, the gestational mother's intention is never to keep the child. In other words, there is no deep and considerable maternal desire for that same woman to be mother, for all social and legal purposes, of the child to be born. On the other hand, and due to the fact that AGS would only be legally permissible as a subsidiary and exceptional measure, intended parents would have, most likely, spent the last years of their lives attempting to have, via other means, a child of their own. On one side of the scale there is a fertile woman, capable of bearing her own children in her own womb and who had no intention or desire of having (as a mother) that same child, and on the other we have two people who are desperate to constitute a family.

Furthermore, and in the terms of article 8 of the Convention on the Rights of the Child[114], every child has the right "*to know and be cared for by his or her parents*". It may be argued that the gestational mother may be also considered a "parent" to the child, but by analysing the intentions and desires that set motion to an AGS arrangement, it is unfair to give higher importance and thus attribute parenthood to the gestational mother only.

It is hard to even begin to attempt to understand how the child's best interests are protected if intended parents are left with no possibility of being formally considered the child's

---

[113] THE IONA INSTITUTE, *The Ethical case against Surrogate Motherhood: What we can learn from the Law of other European countries*, 2013, p. 16.

[114] Convention on the Rights of the Child, signed on the 20th of November 1989, ratified by 193 countries.

care takers. However, it has been argued that even though the child's filiation is not recognized *de iure*, it may still be recognized *de facto*, as the child may still be allowed to live with the intended parents. Such situation was seen in the case *Sylvie Mennesson and others v. France, in 2011*[115]: *"the de facto situation of these two families is recognised: that is, while the children are not recognised as the children of the commissioning couple, they nonetheless live in France with their social parents just like any other family"*[116]. Nevertheless, such legal consequence (of considering genetically related intended parents as mere social parents) is only applied by countries in order to dissuade infertile couples from entering into surrogacy arrangements. Such solution does not, in any way, give priority to the best interest of the child, who may be even more confused as to why his/her own parents (both genetically and socially) may not be formally designated as parents for all legal effects.

The principle of the best interests of the child should influence law-making, and all other circumstances that may affect the child, be it directly or indirectly[117], and as such imposing maternity as a sanction should never be considered a viable solution for dissuasion.

The formal legalization of AGS does not protect the child's best interest as there is no existing child prior to a surrogacy arrangement but it does not disregard those same interests either merely by being legalized. However, what must be cautioned for is that the legal framework surrounding AGS agreements protects the interests of the child to be born, and that can certainly be done as will be further discussed when analysing the current legal framework for AGS arrangements in the UK.

IV. Conclusion of Part Four:

The abovementioned international rights and principles, together, construct a relatively strong premise on the existing legal support carefully regulated AGS already has. Due to the fact that such rights and principles are applicable to Portugal[118] it is safe to say that leaving couples suffering from grave infertility issues with no viable solution of having genetically related children, may in fact result in the disrespect of such legal and ethical constructions. There may not be a right for having genetically related children that is binding to all UN or EU Member States, but offering the viable means for the accomplishment of such yearning to such a ranging variety of citizens and yet still disregard those who, not by personal choice, were left in a more critical circumstance, is in the very least, devoid of social justice.

Furthermore, Portuguese legislation contains specific admissions for the formally legalization of AGS, and those have also, until now, been disregarded, namely in article 67(2), subparagraphs d) and e) of the Constitution of the Portuguese Republic – as has been previously analysed in Part II of the present paper.

---

[115] *Sylvie MENNESSON and others v. France*[115], request no. 65192/11, of October, 2011.

[116] THE IONA INSTITUTE, *The Ethical case against Surrogate Motherhood: What we can learn from the Law of other European countries*, 2013, p. 21.

[117] «The Principle of the Best Interests of the Child» lecture by Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, Warsaw, 30th of May, 2008, available at: https://wcd.coe.int/ViewDoc.jsp?id=1304019– last visited, 22nd March, 2014.

[118] Via article 8 of the Constitution of the Portuguese Republic of 1976.

In order to comprehend the new light modern AGS bears and the way in which it may be the voice for human dignity in this specific situation, there is yet one more right that must be mentioned: the right to equality (article 1 of the UDHR and article 13 of the Constitution of the Portuguese Republic).

The aforementioned rights are not solely applicable to those intended parents who are of different gender but to all persons. Taking into consideration the criteria put forth by the NCESL that states that the embryo must have been fertilized by at least one of the parents gametes, same gender couples may also, by resorting to a sperm or ovum donor, be parties to an AGS agreement.

Furthermore, all the above mentioned rights are also extensible to same gender intended parents including those directed at the constituting of a family, in all nations where same gender marriage has become legally admissible. As such, all conclusions extracted from the analysis of the included legal instruments, are applicable to both different gender and same gender couples.

By embracing the positive light carefully regulated AGS has to offer not only may public order and good costumes be left untainted, but also the effective protection of certain human rights may be granted, including the best interest of the child to be born.

PART FIVE: COMPARATIVE LAW ANALYSIS - POSSIBLE INSPIRATION FOR PORTUGAL'S LEGAL STANDPOINT ON AGS

In line with the main directives proposed by political parties, NCESL and NCMAP is the legal regime currently applicable in the UK. As such, it is therefore necessary to firstly analyse said legal framework, taking into account its origins and its *success* rate in order to attempt to conclude if Portugal would benefit from taking a closer look at how a delicate issue, such as AGS, is being dealt with in the UK.

Such comparative law analysis shall therefore be broken down into three separate stages:

a) *General overview of current legal framework in the UK and its requirements of applicability;*

b) *How the legal framework in the UK is based on the same principles as those included in the proposals that we have already analysed; and*

c) *What issues have been identified with the legal framework in force in the UK and in what manner such issues may be avoided when a legal framework for AGS is devised for, in Portugal.*

I. General overview of UK's AGS legal framework

In the UK surrogacy is regulated by the SAA, amended by the HFEA 1990 and HFEA 2008[119].

AGS in the UK is not only formally legalized as there are numerous non-profit bodies which facilitate the process for intended parents and future gestational mothers. Commercial surrogacy in essence, however, is considered to be an offense in the terms of sections 2 and 4 of the SAA, as are all acts related to commercial surrogacy, such as the direct advertising for initiating a commercial surrogacy arrangement. Commercial surrogacy is defined by the SAA as the receiving of any payment as a consequence of either entering, negotiating or facilitating the making of any surrogacy arrangement, with four distinct exclusions:

(i) If the payment is made to, or for the benefit of, a surrogate mother or prospective surrogate mother (i.e. payment that covers reasonable costs directly deriving from the AGS arrangement);

(ii) If the payment was received before the act and the entity receiving the payment had no knowledge or could not suspect that any payment had been received;

(iii) If the payment was received and the entity receiving such payment did not do the act with the objective of receiving such payment; and lastly

(iv) If the payment is being received by an authorized non-profitable entity to cover for reasonable costs to both allow for and facilitate parties entering into AGS arrangements.

As such, reasonable expenses may be paid to the surrogate mother, and those may cover for all costs related to the pregnancy the gestational mother is carrying for the intended parents. There is no fixed legal definition of "reasonable costs" and as such, the circumstances of the case are evaluated by the judge when granting the parental order to the intended parents. In every case, the judge will analyse where he believes the costs to have been disproportional (and thus the surrogacy arrangement was made on a commercial basis) or in line with what is considered to be reasonable pregnancy related costs[120].

Taking into consideration what was previously seen when analysing Portugal's efforts for formally legalizing AGS, only two of the projects of law make direct references to such possibility: Project of Law no. 131/XII put forth by the Socialist Party and Project of Law no. 138/XII, put forth by the Socialist Democratic Party. In both projects there is a mere mention to medical expenses only – and the former project demands that such expenses are carefully documented in a formal and official manner. There is therefore no mention to other pregnancy related costs such as transportation, food or even clothing expenses for the gestational mother.

Notwithstanding such reality, the 13 criteria put forth by the NCESL hold that no economical subordination (from the gestational mother in relation to the intended parents) is

---

[119] Human Fertilisation and Embryology Act 2008, available at:

http://www.legislation.gov.uk/ukpga/2008/22/contents, viewed on March 2014.

[120] Children and Family Court Advisory and Support Service, «Guidance for Parental Order Reporters»: "*Whether expenses are deemed reasonable will depend on the circumstances of the case, and any concerns regarding expenses that may not have been reasonably incurred should be set out in the report to the Court.*", p. 7 available at:
http://www.cafcass.gov.uk/media/6721/Parental%20Order%20Guidance%20050412.pdf, viewed on March 2014.

admissible, leaving way for an extensive interpretation that the NCESL would allow for other types of costs, besides mere medical expenses, to be covered.

A. Offenses

Similarly to what has been proposed by the projects of law that have been analysed, those who, with the exception of the intended parents and the surrogate mother[121], violate legal provisions found in the SAA may, in the terms of section 4, be liable to certain convictions, ranging from a maximum prison penalty of 3 months to the payment of a fine[122]. However, there is a substantial difference in regards to the scope of possible offenses between the Portuguese legislation and the UK Law, when it comes to:

a) **The quality of the penalty** that is applied to those who, for example, enter a commercial surrogacy arrangement, in comparison to what is legally provided for by the previously mentioned projects of law – as in Portugal parties may be imprisoned for up to 2 years;

b) **The subjects of the legal offense** – as in Portugal those who advertise for commercial surrogacy arrangements, the surrogate mother and the intended parents may be liable to such an offense, but, on the other hand, and in accordance with the UK Law, only those who *(i)* advertise, *(ii)* facilitate or *(iii)* promote commercial surrogacy arrangements, may be criminally punished.

B. Beneficiaries

In the UK, the most common identified reasons for resorting to AGS are:

(i) Recurrent miscarriage in spite of all possible treatment;
(ii) Repeated failure of IVF treatment;
(iii) Premature menopause, often as a result of cancer treatment; or
(iv) A hysterectomy, or an absent or abnormal uterus[123].

In the projects of law and criteria proposed by those making an effort to formally legalize AGS, the only situation that is directly mentioned for and is included in the list presented above is situation *(iv)*. Even though "*other clinical situations*" may be considered, after an evaluation carried out by the NCMAP (after hearing the Medical Association), there is currently a legal instability due to the fact that no other concrete circumstance, such as the ones enlisted above, are ever mentioned in any of the proposals made.

Furthermore, AGS in the UK is a viable solution for nearly everyone: heterosexual couples and same-sex couples. Even though it isn't illegal for single parents to resort to AGS, they do not

---

[121] In accordance with, Section 2 subsection 2 paragraphs a) and b) of the SAA 1985.

[122] According to section 4, subsection 1, subparagraph a) and b) of SAA 1985, such fine cannot exceed level 5 on the standard scale (£5,000, according to Criminal Justice Act 1991).

[123] Information available at: http://www.surrogacyuk.org/about_surrogacy, viewed on April 2014.

fill the necessary legal requirements for applying for a parental order, thus denying the child the right to have their family legally recognized. This is one of the issues that shall be addressed further on.

Finally, there is no legal minimum age limit for intended parents applying to enter an AGS agreement, as every case is dealt with individually. However, the age profile of the intended parents is taken into consideration by the Court that, after the child is born, grants the parental order. As such, most surrogacy agencies take into consideration the relationship both intended parents have with each other, their maturity, and their capability of taking care of a newly born child. These are, among others, some of the details that are analysed by non-profit organizations in the UK, in order to be able to decide if they accept the application made by intended parents.

C. Non-binding agreements

Even though AGS agreements are admissible in the UK, they are not legally binding for either of the parties involved. As such, intended parents aren't able to secure their parental rights with total certainty prior to the birth of the child, even in situations where the child is genetically related to one or both parents and not to the gestational mother[(124)]. It may be questioned if this legal effect, or lack thereof, does not ensue in feelings of uncertainty for the intended parents. However, due to the fact that if a surrogacy arrangement dispute arises, the court shall take into consideration all relevant facts, it is guaranteed that the child's best interest shall be given primordial importance even if in detriment of legal security. The court shall also take into consideration the seriousness of all parties, regarding the granting for the parental order and thus shall not disregard the intended parent's will and the child's best interest due solely to the gestational mother changing her mind about the arrangement.

D. Parental orders

A parental order is an act that reassigns parenthood and thus extinguishes previous parental status belonging to the surrogate parents[(125)].

The Parental Orders (Human Fertilisation and Embryology) Regulations 1994, brought into effect by the HFEA 1990, section 30, created parental orders *"(…) which provided for a consensual 'fast-track' means for the transfer of legal parenthood to a couple where the child in question was conceived using the gametes of at least one of the couple (…) s30 HFEA 1990 was subsequently repealed and replaced with new provisions for parental orders found in s54, 2008 Act which expanded the categories of*

---

(124) This distinction is made as in the UK, as opposed to what is being worked on in Portugal, traditional surrogacy is also legally admissible, and as such, the child may be genetically related to the gestational mother.

(125) Due to the fact that, in accordance with Section 33, Human Fertilisation and Embryology Act 2008, the surrogate mother, even if she is not the biological mother of the child, will be considered the legal mother of the child at the moment of birth. Additionally, if the gestational mother is married or has a civil partner at the time of the birth, that same person will be treated as the child's legal parent, even if one of the intended parents is genetically related to the child, with the exception that he/she did not consent to treatment or did not support the gestational mother during pregnancy.

individuals in respect of whom parental orders could be made so as to include married couples, civil partners, unmarried opposite- sex couples and same sex couples not in a civil partnership"[126].

Even though the SAA 1985 does not impose many direct limitations to the possible beneficiaries of surrogacy arrangements, most limitations are met by intended parents when applying for a parental order.

In accordance with section 54 of the HFEA 2008, the court will, within six months of the birth of the child born from a surrogacy agreement, grant a parental order for the intended parents. The deadline of six months has the purpose of rapidly settling legal parental status of those who will be taking care of the child to be born, and as such, it is considered that "*Such a policy does not fit comfortably with extensions of time which inevitably result in the continued involvement over a protracted period of the surrogate mother in the lives of the commissioning couple and their child*"[127].

However, such order will only be granted if the subsequent requirements are met:

a) The child was born through surrogacy and conception took place artificially;

b) One of the applicants is biologically related to the child; and

c) The applicants are over the age of 18 and are:

i) husband and wife;

ii) civil partners of each other[128]; or

iii) living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

d) At least one of the applicants is domiciled in a part of the UK;

e) The child is in the care of the intended parents at the time of the application of the parental order;

f) The gestational mother and her husband/civil partner give their free, informed and full consent for the parental order to be granted; and

g) The intended parents have not paid more than reasonable expenses to the gestational mother.

If all requirements are met, the court shall grant a parental order to the intended parents and therefore a new birth certificate will be elaborated – naming the intended parents as the child's legal parents[129].

Due to the strict requirements associated with parental orders, most surrogacy agencies in the UK will not aid intended parents in the entering of a surrogacy arrangement if they do not meet all of the criteria as the possibility of the child having a complex social situation is a non-desirable outcome of a surrogacy arrangement. However, as an exceptional situation and in the

---

[126] CASE JP V LP & ORS (Rev 1), Family Division, [2014] EWHC 595 (Fam), 2 July 2013, paragraph 25.

[127] CASE JP V LP & ORS (Rev 1), Family Division, [2014] EWHC 595 (Fam), 2 July 2013, paragraph 30.

[128] Since April 2010, and in the terms of HFEA Act 2008 and the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 all couples (heterosexual and homosexual) are eligible for being granted a parental order.

[129] Practical steps necessary for having a court grant a parental order, available at: https://www.gov.uk/become-a-childs-legal-parent.

terms of Section 54(8) of the HFEA 2008 intended parents may still apply for a parental order even if the surrogacy arrangement was of a commercial nature as in some cases the parental order will be granted in the name of protecting the child's best interests[130]: *"The welfare of the child is the Court's paramount consideration in Parental Order*"[131].

However, it has been made clear that precedent cases allowing certain exceptions will not open doors to all commercial surrogacy arrangements as judges will only appreciate each situation casuistically in order to attempt to dissuade such practice.

Finally, the only persons excluded from being able to apply for a parental order are single parents, which is one of the issues we shall be addressing further on.

For the purpose of being able to directly compare the main differences between the current legal framework in the UK and the tangible future for AGS in Portugal, the following table has been assembled:

[130] BIANCA JACKSON, «Surrogacy: a guide to the current law (part two) – issues arising», *in Family Law Week*: "(...)The court has been willing to do so where it is in the best interests of the child, especially since the child's welfare became the "paramount consideration" of the court [HFER 2010, Schedule 1, Section 1 (consideration applying to the exercise of powers), (i)], so long as the payments are not so disproportionate to expenses reasonably incurred to be an affront to public policy and the commissioning parents acted in good faith.", available at:

http://www.familylawweek.co.uk/site.aspx?i=ed127234, last visited on April 2014.

[131] Children and Family Court Advisory and Support Service, «Guidance for Parental Order Reporters»: pg 2 ("*The 2010 Regulations apply selected provisions of the Adoption and Children Act 2002, and modify them to cater for Parental Orders rather than Adoption Orders, notably the welfare checklist and the legal effect of the Parental Order (…)* and 5, available at:

http://www.cafcass.gov.uk/media/6721/Parental%20Order%20Guidance%20050412.pdf, last viewed on April 2014.

AGS Legal Frameworks – Comparative table

	PORTUGAL – GENERAL OUTLINE OF PROJECTS OF LAW AND NCESL CRITERIA	UNITED KINGDOM
Type of surrogacy allowed	AGS only	Altruistic surrogacy – both gestational and traditional
Characteristics	Always as a last resort (subsidiary and exceptional nature of AGS)	Not legally restricted to exceptional circumstances (although conditions of application are appreciated in a case by case manner, by surrogacy clinics).
Criminal Offenses	(i) Whoever enters into an AGS arrangement without fulfilling the legal requirements is guilty of an offense; (ii) Whoever enters into, negotiates, promotes or advertises commercial surrogacy arrangements is guilty of an offense.	(i) The gestational mother and the intended parents are not guilty of an offense if a payment is made relating to a surrogacy arrangement (even though the Court will not, as a rule, grant a parental order unless it concludes that the surrogacy arrangement was altruistic, with the exception deriving from protecting the child's best interest); (ii) Any other persons who negotiates, facilitates, promotes (on a commercial basis, with the exceptions of section 2(4)) or advertises surrogacy arrangements - may be guilty of an offense (including bodies of persons, with the exception of non-profit agencies if not in contravention of section 2(1) of the SAA 1985).
Age of Beneficiaries	Over 18 years old.	No age limit for entering a surrogacy arrangement *per se* but the age limit of 18 years old is a necessary requirement for a Court to grant a parental order.
Physical Conditions of Beneficiaries	Absence of or damaged uterus or any other justifiable clinical situations after being appreciated by the NCMAP (after hearing the Medical Association)	No specific legal restrictions, even though more futile reasons (such as aesthetics or lack of time to be pregnant) will usually not be accepted as viable application for a surrogacy process, by surrogacy clinics.
Enforceability of Surrogacy Arrangements	Legally enforceable if all legal requirements are complied with Null and void if the legal requirements are not fulfilled.	Legally unenforceable (dependable on free and fully informed consent given after 6 weeks[132] of the birth of the child, by both the gestational mother and if applicable, her husband/civil partner, with the exception that he/she did not consent to the treatment or did not support the gestational mother during pregnancy).
Payments allowed	Only justifiable medical expenses.	*Reasonable expenses* – costs considered proportional taking into consideration specific aspects of the pregnancy. These may include all health related costs, transportation fees, clothing fees and others.
Holder of parental rights	Intended parents if the legal requirements are fulfilled. Procedures for parental orders have not yet been formally discussed.	*Mater semper certa est principle* is maintained: at the moment of birth the legal parents of the child are the gestational mother and her husband/civil partner if he/she gave consent to the treatment and supporter her during pregnancy. However, if all legal requirements are fulfilled, during the 6 months after the child is born, a family court shall grant a parental order, transferring all parental rights and responsibilities to the applicants of said order.

[132] In the terms of Sections 54(6) and 54(7) of the HFEA 2008.

II. Specific requirements established for both gestational mothers and intended parents

In order for both types of surrogacy to be legally admissible (even though we shall only be focusing on AGS, due to the fact that traditional/straight surrogacy will not, taking into account what is logically foreseeable, be permitted by Portuguese Law), there are various mandatory requirements[133] and guidance practices surrounding the entire surrogacy arrangement.

Such guidance practices and interpretation of mandatory requirements are elaborated by the HFEA in order for such statutory body being able to carry out its regulatory powers in an effective manner, by ensuring that entities licensed by the HFEA or persons to whom the license is applicable to (in this specific case, non-profit surrogacy agencies or centres) are compliant with all relevant legal provisions. The HFEA also strives to accomplish or ensure, among other objectives, to:*(i) inform patient choice (ii) maximize public understanding of available and developing treatments; (iii) encourage consistently high quality standards of treatment and research*[134].

Said guidance practices for surrogacy are included in HFEA's Code of Practice, 8th edition, which received its latest revision in October 2013[135]. Said Code is considered to be legally binding, not only due to HFEA's regulatory power within the field in question (assisted reproduction), but also in respect of articles 25 and 26 section 4 of HFEA 1990, which states that the HFEA must elaborate a Code of Practice that *"(…) gives guidance about the proper conduct of activities carried on in pursuance of a license of this Act (…)"* and that said Code will only enter into force after being laid before Parliament by the Secretary of State for Health and thus approved.

The HFEA was set up in August 1991 as a direct result of the 1984 *Committee of Inquiry into Human Fertilisation and Embryology*[136], also known as the "Warnock Report" that recommended that such statutory body was created in order to *"(…) regulate human embryo research and assisted reproduction treatment(…)"*[137].

Before beginning to analyse the guidance and interpretations set forth by the HFEA, regarding AGS agreements, it is first necessary to acknowledge the importance of having such an entity set up in order to directly regulate matters such as AGS and thus guarantee the protection of human dignity. In order for AGS to be fully ethical and legally viable in Portugal, similar powers must be attributed either to *(i)* the existing NCMAP or NCESL or to *(ii)* a new body to be created. It is important that surrogacy agencies that lay within the core of successful and ethically viable AGS agreements are legally bound to a certain set of practice rules and guidelines.

---

[133] Mandatory requirements set forth by HFEA 1990 and 2008.

[134] Information available at: http://www.hfea.gov.uk/133.html, last visited on March 2014.

[135] HFEA Code of Practice,8th edition, available at: http://www.hfea.gov.uk/code. html.

[136] Information available at:

http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf, last visited April 2014.

[137] Information available at: http://www.hfea.gov.uk/hfea-questions.html#, last visited on March 2014.

In order to comply with all guidelines and correct legal interpretations, licensed surrogacy centres/agencies, devise a carefully thought out application procedure for both gestational mothers and intended parents, each containing specific questions that only slightly differ from agency to agency.

Taking the example set out by the agency "SURROGACY UK"[138], the way such agency ensures that all parties have received all relevant information, begins by the handing out of an application pack that includes questions that delineate the personal profile of each applicant and indirectly brings out most emotional and practical issues resulting from surrogacy in order to ensure every party is aware of what AGS arrangements entail.

After such application is completed, and the agency ensures that the applicants are both apt and viable parties to a possible AGS arrangement in accordance with the *welfare of the child assessment process*[139], the agency then only sets up ways of communication between intended parents and gestational mothers with similar profiles, while offering full support from their staff members both before, during and after the surrogate pregnancy. In addition, a specific form elaborated by the HFEA that focuses on the welfare of the child, must be filled out by the gestational mother, the intended parents and the centre, before any fertility treatment is initiated[140]. This is yet another precaution measure that has as an objective the protection of the child's best interest – vital to all bioethically viable AGS arrangements.

Before the entering of an AGS arrangement, agencies mainly ensure that:

(i) The gestational mother (and her husband/partner, if applicable) does not change her mind and exercise her right to keep the child, born as a result of the AGS arrangement;

(ii) No disputes between the parties arise during pregnancy or after the birth of the child by defining all aspects and details of the AGS arrangement before the fertility treatment is initiated; and

(iii) Both the commissioning parents and the gestational mother are fit and apt for entering an AGS arrangement, taking into consideration:

a) Health;
b) How the child's best interest will be protected;
c) Criminal background; and
d) The motives behind the desire to enter such an arrangement.

A. Gestational mothers

For gestational mothers, the main focus of the first application form sets on the following areas:

(i) Husband/partner cooperation, if applicable;

---

[138] Information about Surrogacy UK, available at:

http://www.surrogacyuk.org/home, last visited March 2014.

[139] Section 8 of HFEA's Code of Practice, 8th edition, (October 2013).

[140] Example of form available at: http://www.hfea.gov.uk/docs/WelfareofthechildformV2.pdf, viewed on May 2014..

(ii) *Analysis of motives for becoming a gestational mother, in order to ensure that all motives are fully altruistic and that no payment will be sought out;*

(iii) *General health and results of recent health checkups;*

(iv) *Previous children and family prospects – in order to ensure that the gestational mother, by not wanting more children or being content with her present family constitution, will not change her mind after the child is born;*

(v) *Fertility history – in order to be aware if the gestational mother had healthy and successful previous pregnancies and had no post natal depression;*

(vi) *Work arrangements – if the gestational mother is able to establish adequate maternity and sick leave;*

(vii) *Previous criminal convictions;*

(viii) *Expectations and preferences for surrogate relationship (during and after pregnancy) – in order to facilitate the establishing of a relationship between gestational mothers and intended parents with similar, if not identical, profiles;*

(ix) *Related expenses – once again, in order to attempt to extinguish all possibilities of parties entering a commercial surrogacy arrangement; and*

(x) *Final paperwork – which includes the gestational mother agreeing to sign the parental order once the child is 6 months old, thus transferring all legal rights to the child to the intended parents, and the signing of a declaration that ensures the gestational mother shall accept all the agency's principles and policies and that all information given by said party is truthful.*

Taking into consideration the variety and detail of all questions asked to all possible gestational mothers, it is safe to say that agencies perform a wide range *screening test* that attempts to guarantee fully successful AGS arrangements. The full analysis of the answers submitted by the gestational mother along with the results of other required tests[(141)], will result in the agency accepting or declining the application, taking into consideration if said party is fully apt to enter a legally sound AGS arrangement.

If the application is accepted, the next step is usually the scheduling of an "in person information session" that will allow for doubts to be clarified between the gestational mother and experienced staff members from the chosen agency.

B. Intended parents

Even though most questions posed to intended parents are very similar to those asked to future gestational mothers, there are some differences, such as:

(i) *Eligibility for a parental order – this is very important as most surrogacy agencies will only accept applications from intended parents who are eligible to be granted a parental order once the born child is 6 months old. What is analysed in this section is if the intended parents fulfil all legal requirements (discussed in Part V, subparagraph "parental order" of the present paper);*

(141) Such as a full and updated medical report, criminal and sexual health checks.

(ii) Capability and adequacy for taking care of future child – the agency assesses if the intended parents are capable of fully protecting the child's best interest throughout that same child's life;

(iii) Social support and lifestyle – these aspects are also taken into consideration when assessing the parents capacity (both financial and emotional) for taking full care of a child; and

(iv) Information on the specifics of gestational surrogacy – focusing on health and fertility status of both intended parents.

Besides addressing the abovementioned topics, the application forms for intended parents (using the example of those made available by SURROGACY UK) also expect them to sign a declaration verifying the veracity of the information given in the application form and accepting to respect the agency's policies and principles. Furthermore, intended parents are also required to submit, along with the filled application, the same documents as gestational mothers.

Thorough *screening processes* are one of the important steps for ensuring that AGS arrangements are not only legally sound, but have a right rate of success also.

III. Surrogacy Arrangements success rate in the UK

Currently there have only been two reported cases of surrogacy, in the UK, to have led to legal disputes between the intended parents and the gestational mother, strictly regarding the change of spirit of the latter party:

(i) In the Matter of N (a child) 2007; and

(ii) Re TT (Surrogacy) 2011.

In both cases, however, the gestational mother was also the biological mother of the child as, in both situations, the embryo was fertilized via artificial insemination. As such, there have been no reported cases of unsuccessful AGS arrangements in the UK, allowing the formal AGS success rate to be of 100%, in terms of attributing legal parenthood to the intended parents. Nevertheless, it is still important to note that in the case *In the Matter of N (a child) 2007*, even though the surrogate mother was genetically related to the child and surrogacy arrangements are unenforceable under the UK law, the Court awarded care of the child to the intended parents due to unfaithful and untruthful behaviour of said person, in the name of protecting the child's best interest.

Notably, even in relation to partial surrogacy, the official success rate in the UK, only regarding parental status disputes, is close to 100% percent, having only the case been unsuccessful as far as attributing parental rights to the intended parents goes. However, such a case was a complex situation where the Court, in the name of the child's best interests, decided to deny the possible rights of the intended parents due to unlawful behaviour on their behalf.

According to NATALIE GAMBLE ASSOCIATES, the UK's only firm of solicitors to specialize exclusively in fertility and parenting law, "*(…) these are the only two reported cases of surrogacy*

arrangements going wrong, contrasted with many hundreds of successful orders made ratifying surrogacy arrangements after birth"[142].

Conclusively, the existence of regulated agencies that ensure that both parties are in sync with each other and are willing to enter a legally sound AGS arrangement, is of extraordinary importance as it significantly reduces all risks associated with surrogacy arrangements, be it: *(i)* the risk of violating any human right, *(ii)* the risk of disregarding the child's best interest, or even *(iii)* the risk of having unsuccessful surrogacy arrangements, either in terms of the gestational mother changing her mind and using the non binding nature of the surrogacy arrangement, or other related issues such as the necessity of respecting the deadline for applying for a parental order.

IV. Main issues with the current applicable Law in the UK, regarding AGS

According to PETER DODSON FERTILITY & PARENTING LAW firm[143], *"Surrogacy laws in the UK have not kept pace with the growing numbers of people embracing surrogacy either domestically or abroad (…)"*. Even though the law was revised in 2008 with HFEA 2008, it was almost entirely written in the 1980's and, as such, there are still issues arising with certain aspects of the current legal framework in force in the UK. Focusing only on the issues we believe to have a greater urgency of change, the following list has been assembled:

(i) Recognition of the right people as parents;
(ii) Non-extendable six month deadline for applying for a parental order;
(iii) Problem with what can be defined as reasonable expenses; and
(iv) Exclusion of single parents from being able to obtain a parental order.

Some of these issues have already been brought up in this paper but shall now be further analysed, taking into consideration that all suggestions for revision/alteration should also be applicable to Portugal's future standing on AGS arrangements.

A. Recognition of the right people as parents

Due to the legal imposition that intended parents may have to wait for the child to be 6 months old before applying for a parental order, during that period the gestational mother and her partner have to assume full responsibility (both legally and socially) for the baby. This may seem an unfair solution not only for the intended parents but also for the gestational mother and her partner due to the fact that such outcome is not the ultimate desired situation, only a mere temporary solution. Furthermore, it does not seem right, only in the name of maintaining the principle *mater semper certa est*, that the legal parents of the child are automatically the two people

---

[142] NATALIE GAMBLE «Your surrogate will end up keeping your baby, won't she?", available at: http://www.nataliegambleassociates.com/assets/assets/11%20-%20Winter%202011%20-%20INUK%20-%20Your%20surrogate%20will%20keep%20baby.pdf-

[143] "*An award winning UK team of experts in fertility and parenting law"* information available at: *http://www.porterdodsonfertility.com/*

who are not genetically related to the child (as in AGS the gestational mother's ovum is never used).

If parenthood is going to be transferred after 6 months, and this process takes months, a faster and more adequate solution should be thought out, specifically for those cases such as AGS where the gestational mother has no genetic link to the child. In AGS, the intended (and genetic) parents of the born child are left with no power to accept or decline certain treatments or immunizations the baby might need, as this decision lies solely with the gestational mother and her partner.

It is in fact true that "*the UK law needs to recognize the right people as the parents much earlier*"[144], especially when dealing with AGS arrangements rather than partial surrogacy. It is an issue that must be addressed and thought over due to the impositions that lie behind a legal and informed consent on behalf of the gestational mother.

B. Non-extendable six month deadline for applying for a parental order

As was seen in Case *JP V LP & ORS, JULY 2013*, it is very hard to legally accept the extensibility of the 6 month deadline due to the necessity of stabilizing parenthood as fast as possible in order to grant the child the most comfortable solution. However, even though the principle behind the non-extendable deadline is correct, the consequence of missing that same deadline is unfounded and exaggerated.

There should be a flexible margin around such deadline in order to be able to protect the child's best interests at all times, and thus accept certain delays that may be resultant from lack of knowledge of legal provisions. Clearly such extension would have to be decided, in a case by case manner, by the judge and exaggerated delays may have as a consequence the child remaining, for all social and legal purposes, as the child of the gestational mother and her partner. Nevertheless, when dealing with such fragile and important rights and emotions as occurs in this specific situation, it is best to opt for a more flexible solution in order to thwart unfair and illogical outcomes.

C. Issue with what can be defined as *reasonable expenses*

As was seen earlier, there is no fixed legal definition of "reasonable costs" and as such, the appreciation of such concept is casuistically carried out by the judge when deciding whether or not to grant the parental order to the intended parents. Even so, there is an underlying necessity to define the amplitude of what can be considered a reasonable cost in order to properly

---

[144] NATALIE GAMBLE ASSOCIATES, «Why the surrogacy Law needs revising», available at:

http://www.nataliegambleassociates.co.uk/page/Why-surrogacy-law-needs-reviewing/39/, last visited on March 2014.

safeguard the interests of the parties in a preventive manner, rather than only being able to act upon it after the child is born, when applying for the parental order.

Many intended parents and gestational mothers may not be interested in participating in a commercial surrogacy arrangement but may, by way of example, feel entitled to agree on the payment of "*inconvenience costs*" if the gestational mother's usual job was unfit for a pregnant woman, throughout the 9 months of gestation. However, they might be forced not to risk such payment with fear that, at a later stage, the judge will not grant the parental order to the intended parents.

It is true that such a concept may not be rigid and inflexible due to the vast number of situations it needs to cover, but there should be a direct acceptance of certain costs that even though may increase normal payments made to gestational mothers, do not taint the surrogacy arrangement with the characteristic of commerciality. Such a measure would not only facilitate the definition of what expenses should or could be paid, but would also clear part of the fog cloud that currently hovers over AGS arrangements and, consequently, allow it to become an adequate solution for more couples who suffer from serious infertility issues that may not be resolved by merely resorting to traditional IVF treatments.

D. Exclusion of single parents from being able to obtain a parental order

In respect of the current legal framework applicable to AGS in the UK, single parents are not directly prohibited from entering into a surrogacy arrangement, but they will not, at a later stage, be granted a parental order by a judge, as they do not fulfil the necessary legal requirements. As such, the vast majority of (if not all) regulated surrogacy agencies do not accept the membership of single parents as they will never be a part of a "successful" AGS arrangement (as the child is left without the right to have the intended parent formally recognized as his/her parent).

The problem with this solution is that single parents can apply for adoption and single parents of the female gender may conceive through donor insemination. If such rights are extensive to single parents, especially the latter option for single women, then the current legal solution seems to discriminate whoever falls into such category. It is true that adoption may not be compared to AGS, as in those situations the legal framework is constructed around the rights of a child who already exists and needs a caring home, but it makes little sense to allow single women to conceive through sperm donors and not have their own genetic child via AGS if their uteruses are incapacitated in any manner.

V. How the legal framework applicable to AGS in the UK could positively influence Portugal's future standpoint on the matter

As has already been seen in summary form in the beginning of Part Five of this paper, there are many ways in which the Portuguese future legal framework[145] could benefit from being inspired by the manner in which AGS is regulated in the UK. However, there are two defined groups of exceptions to such statement:

a) Clashes in social policies[146] regarding surrogacy that differ from country to country making it impossible for certain aspects of the legal framework in the UK to be applicable in Portugal's future regulation on AGS; and

b) The issues/problems within UK's regulation on AGS, highlighted in the section above, that need urgent reviewing.

A. Clashes in social policies

Taking into consideration the direction chosen by the projects of law and the criteria put forth by the NCESL and NCMAP, there is one aspect of surrogacy, in general, that is legal in the UK but would be very hard, due to the ethical and moral issues it raises, to make it permissible according to Portuguese legislation: allowing partial surrogacy.

In line with what has been discussed during the last years, in Portugal, it is believed that the only way to allow for an ethically viable surrogacy framework is to not allow situations where the gestational mother is genetically related to the child to be born. The reason for this is that with IVF and ovum and sperm donors in the picture, it becomes hard to accept the complications that arise when the gestational mother, who is also the baby's biological mother, will give her baby to the intended parents once the child is born.

Even though the projects of law currently in discussion in Parliament do not mention this issue, the NCESL has pronounced itself on the matter stating, in one of its 13 criteria (criteria no. 5) for allowing altruistic surrogacy, that the gestational mother cannot have any genetic bond to the child to be born.

This fear of allowing partial surrogacy does have some reasoning, and such argumentation can even be supported by indirect criticism laid out by a judge assessing a partial surrogacy arrangement:

"This case however highlights the real dangers which can arise as a consequence of private 'partial' surrogacy arrangements where assistance is not sought at a regulated fertility clinic (…). At a licensed clinic consideration will be given to the welfare of a child born as a result of the surrogacy arrangement and counselling services will be

---

(145) Taking into consideration the direction in which it is headed, as has been delineated by the comparative analysis of the projects of law , the perspectives laid out by the NCMAP and finally the criteria put forth by the NCESL.

(146) By social policies we are referring primarily to guidelines, principles and current legislation on the matter.

provided to the parties which will include the provision of information about the likely repercussions of a surrogacy arrangement (…)"[147].

The truth is that, by allowing partial surrogacy, the Law allows couples to not go through regulated clinics or agencies as the surrogacy process may be initiated by sexual intercourse or artificial insemination (the latter which can be done at home). As such, that kind of permission may provide leeway for couples who are not willing to abide by all necessary legal requirements and may thus result in complications during pregnancy or once the child is born. As was seen in the UK, surrogacy agencies and fertility clinics[148] verify that intended parents and gestational mothers are eligible for obtaining a parental order (with all that entails) and that all parties have given fully informed consent to the process. If there is no need to go through an agency or a fertility clinic, not only it is impossible to control whether or not the surrogacy arrangement was of a commercial nature of not, but also if all the parties' rights are being respected and protected.

It is an evident fact that such cases of partial surrogacy are more liable for raising issues, as was seen in subparagraph "*Surrogacy Arrangements success rate in the UK*" of this paper, where the only two reported unsuccessful surrogacy arrangements where the surrogate mother changed her mind and decided she wanted to keep the child, were cases of partial surrogacy and not AGS. It is true that, in one of those cases, a parental order was granted to the intended parents, but nevertheless, it demonstrates that within these specific circumstances, there is a higher probability of complications occurring.

B. The issues/problems within UK's regulation on AGS

It is clear that Portugal would not benefit from basing its future legal framework on those particular legal provisions that are in urgent need of reviewing. As such, the highlighted areas that need to be reviewed will not be considered as possible areas of inspiration for the up and coming formal legalizing of AGS in Portugal.

As such, what are the specific areas which would positively influence Portugal's future legal perspective on AGS in order to ensure human dignity remains, at all times, intact?

a) Creation of a body such as the HFEA with the regular production of guidelines and legal interpretations aimed not only at fertility clinics and surrogacy agencies but also at parties who may be interested in taking part in a AGS arrangement;

b) Allowing and stimulating the creation of regulated non-profit bodies with the objective of acting as surrogacy agencies;

---

[147] Case JP v LP & Ors (Rev 1), Family Division, [2014] EWHC 595 (Fam),July 2013, paragraph 39.

[148] Information available at: http://www.nataliegambleassociates.co.uk/page/Fertility-clinics-and-surrogacy/110/, viewed on May 2014.

c) *Screening processes carried out by agencies via applications and in person interviews to gestational mothers and intended parents in order to be able to verify if both parties are apt, according to various perspectives, to enter an AGS agreement;*

d) *Extension of the situation in which intended parents are able to resort to AGS arrangements by elaborating a more flexible list of situations that may be considered*[149] *as comprising an ethical motive for an AGS solution, even if other less common cases could be analysed by NCMAP after hearing the Medical Association and consequently also be considered as permissible;*

e) *Extension of AGS beneficiaries – to same-sex partners living in analogous conditions to married couples;*

f) *Exclude the criminalization of the intended parents and the gestational mother when such parties enter a commercial surrogacy agreement or even when such parties enter an AGS agreement but do not respect certain legal provisions, and thus base the dissuasion method on the difficulty of obtaining a parental order from a certified legal authority, soon after the child is born; and*

g) *Exclude the application of maternity as a sanction as a consequence of parties entering into a commercial surrogacy arrangement or disrespecting other legal provisions and thus give priority to the principle of safeguarding the child's best interest at all times.*

Due to the fact that the last three possible inspiration points are more complex and have not been sufficiently dealt with yet, they shall be object of further analysis:

i) Extension of AGS beneficiaries – to same-sex partners living in analogous conditions to married couples

Even though both projects of law do not include, as beneficiaries, same-sex couples, it seems illegitimate, as has already been referred, that same-sex couples are legally allowed to marry in Portugal but may not benefit from the same rights heterosexual couples do (as far as medically assisted procreation techniques and surrogacy are concerned). Furthermore, in article 6 of Project of Law no. 122/XII, presented by the leftist party, the reference to sexual orientation and marriage was excluded and thus if said project had been approved, all persons would be able to resort to both medically assisted procreation techniques and AGS – both same-sex and heterosexual couples *and* single parents.

Even though NCESL, other projects of law and the NCMAP seem to all agree that surrogacy should not be a viable solution for single parents, the argumentation used against this exclusion in relation to the UK law may not be the same. The issue is that in the UK single

[149] Such as, as has already been previously noted: Recurrent miscarriage in spite of all possible treatment; Repeated failure of IVF treatment; Premature menopause, often as a result of cancer treatment; A hysterectomy, or an absent or abnormal uterus.

females may conceive through sperm donors (be it via artificial insemination or IVF) that same reality is not possible in Portugal, according to articles 2 and 6 of Law no. 32/2006[150].

Furthermore, that possibility was not addressed by both projects of law that are still being discussed in parliament, but only the project of law presented by the leftist party that has already been rejected.

As such, it seems unrealistic to suggest that Portugal opens its doors to allowing single parents to resort to AGS when, at this point in time, they aren't even legally allowed to resort to any medically assisted procreation techniques. However, the same cannot be said for barring same-sex couples who are either married or living in analogous conditions to a married couple, from resorting to AGS even though current article 6 of Law no. 32/2006 specifically states that only those who are married or living in analogous conditions, who are of a different sex, may resort to medically assisted procreation techniques. The reasoning behind this is that same-sex couples are equally capable of constructing a stable family unit capable of raising a child, as can be verified by the fact that since 2010 the UK surrogacy Law has allowed same-sex couples to resort to altruistic surrogacy.

Furthermore, the NCESL, in its legal opinion of 2012[151], states that even though same-sex couples are not currently allowed to resort to medically assisted procreation techniques, no logical or founded reasons have been given that justify such an exclusion of rights. As such, the NCESL is of the opinion that due to the lack or reasoning behind barring same-sex couples from benefitting from the solutions AGS has to offer, such a legal consequence may be discriminatory.

ii) Exclude the criminalization of the intended parents and the gestational mother when such parties enter a commercial or non-compliant AGS agreement

Even though such means of dissuasion is very effective due to the fact that intended parents are not capable of formally recognizing their rights as parents, it is necessary to highlight that the judicial system in the UK and in Portugal act in a very different manner[152]. Nevertheless, by attributing power to grant parental orders to certain authorities who are also capable or registering children would be a way of going around such an issue. In this scenario, such a public authority would analyse the circumstances and if both the intended parents and the gestational mother had respected all legal provisions, the parental order would be granted.

This could be done, in Portugal, by the same services that analyse and take care of adoption processes, such as the Social Security[153]. In order to be able to quickly obtain a parental order,

---

[150] Article 2 determines which Medically Assisted Procreation techniques Law no. 32/2006 is applicable to, and article 6 determines the beneficiaries of such law.

[151] Legal Opinion no. 63/CNECV/2012, of the NCESL on Medically Assisted Procreation and Surrogacy, p. 4.

[152] While in Common-Law systems the main source of law is jurisprudence and the judge plays the most important role in the development of rules (precedents set by high Courts are extremely important and abided by lower Courts), in Civil-Law systems, codes and statutes intend to cover all eventualities and judges are in principle limited to apply the law to the cases in question.

[153] Information available at: http://www4.seg-social.pt/adocao, last visited on April 2014.

the Social Security would then remit the process with all necessary documents to a family court which could then grant the formalization of the intended parents' rights. However, it would be absolutely vital to allow the Social Security, whilst consulting the NCMAP, to carefully analyse if all legal requirements for the parental order were fulfilled in order to reduce the time lapse between the family court receiving the documents, setting up an interview and granting the parental order.

For the abovementioned to be possible, a new process for such cases would have to be created due to the fact that in the case of adoption, Social Security spends a vast amount of time verifying parents are fit for taking care of the child(154). Due to the fact that, for the child's best interest, the child should not stay too long with the gestational mother and her partner, this process would have to be shortened to around 3 months maximum, and be initiated immediately after the child was born and registered at the hospital as belonging to the gestational mother and her partner. It is important that the child is registered firstly, as belonging to the mentioned couple, due to the fact that the consent given by both(155) needs to be given a specific period after the child is born in order for it to be considered legal and fully informed(156).

However, according to both projects of law, if the AGS arrangement was done in respect of all relevant legal provisions, the legal and social mother of the child to be born would be, in fact, the intended mother [article (8(6) of project of law no. 131/XII(157) and article 8(6) of project of law no. 138/XII(158)].

It is necessary to carefully think if such immediacy is compliant with the legal demand for obtaining a fully informed consent and if it allows for a full analysis of the AGS arrangement to be made in order to conclude if all parties respected all legal provisions and thus all human rights remained intact. It is true that the NCESL states that the consent given by the gestational mother may be revoked until the beginning of labour(159)(160).

---

(154) A decree of law such as the decree of law no. 185/93, 22 de May, 1993 (Legal framework for adoption) would have to be elaborated for AGS arrangements or the former decree of law would have to be altered and adapted to fit certain particularities inherent to processes following AGS agreements. As such, articles such as articles 5, 6, 8 11, 11A and 12 (for example) of such decree of law should be adapted in the sense that those who are interested in the parental order should communicate such fact to the social security(art 5), the social security should also have people with enough knowledge and skills to deal with AGS arrangements (art 11A), the requirements for filling the parental order should be thus analyzed by the competent personnel working at the competent department within the social security (art 6), and then if no problems were found, parental rights should then be formalized by the competent court (art 8 and 12).

(155) Or even solely by the gestational mother if she has no partner, isn't married or her partner did not consent to the AGS arrangement or did not provide his full support, as was already mentioned.

(156) Taking into consideration, what was laid out by the European Convention on the Adoption of Children, Strasbourg 27,XI.2008, article 5(5), even though it is not directly applicable to such situation that states: "*A mother's consent to the adoption of her child shall not be accepted unless it is given at such a time after the birth of the child, not being less than six week, as may be prescribed by law, or if, no such time has been prescribed, at such time as, in the opinion of the competent authority, will have enabled her to recover sufficiently from the effects of giving birth to the child.*"

(157) Article 8(6) states that: *"The child that is born by means of surrogacy shall be legally considered as belonging to the commissioning parents."*

(158) Article 8(6), *a contrario* states that: "*Besides the cases foreseen in paragraphs 3 and 4, the woman who bears the surrogate pregnancy shall be considered for all legal purposes as the mother of the child."*

(159) In the terms of criteria no. 2 presented by the NCESL.

(160) Such criteria largely differs to what is imposed by the legal framework in the UK where the gestational mother may not give her consent once the child is born and even deny signing the parental order. However, the validity of

However, taking the UK as a direct example, it is best to have a competent authority deciding upon compliance or non-compliance of the relevant legal provisions. Due to the fact that it has been proposed that if all requirements are met, the AGS agreement is enforceable, such enforceability would only be recognized and thus approved by the competent authority, which in Portugal's situation, could be the NCMAP along with the Social Security before formal approval by the competent court.

iii) Exclude the application of maternity as a sanction as a consequence of parties entering a commercial surrogacy arrangement

As was seen in Part Four of the present paper, the application of maternity as a sanction is a perverse legal consequence resultant from Law no. 32/2006. However, such provision has not been altered by any of the projects of law. Even though in the UK the parental order may not be granted to the gestational mother if the requirements for requesting such order are not fulfilled, the courts always have the possibility of taking into account the child's best interest. As such, in case the gestational mother has no wish of keeping the child or having her parental rights remain formally recognized, the court would be forced to recognize the intended parent's right to the child in the name of the child's welfare. Even though this is a way of allowing parties to go around the legal framework for surrogacy and thus not comply with the necessary requirements, it is not suitable to put at stake the safeguard of the child in the name of imposing a legal method of dissuasion against intended parents and gestational mothers.

Furthermore, and taking into consideration what would be imposed by article 8(8) of project of law no. 131/XII[161], the same principle applies. A lack of compliance for what is provided in the previous numbers of such article should not result in the agreement being null and void but should give rise to the court analysing the extent of such legal disrespect and deciding on who should be given parental rights whilst always taking into consideration the child's welfare.

Finally, it is important to note that clashes between both the current legal framework in the UK and Portugal's efforts to formally legalize AGS do not necessarily mean that one system is better than the other as a whole. However, it is always beneficial to analyse and look at frameworks which are based on similar principles and values and see how they work in practice, before deciding on how to regulate a new theme such as AGS.

---

such decline is at a later stage, analyzed by the court who then decides if the parental order should be granted to the intended parents.

[161] Article 8(8) states that: "*Surrogacy arrangements, be it free of charge or with a payment entailed, that do not respect what is provided for in the previous numbers, shall be considered as null and void*".

QUESTIONNAIRE SUMMARY ANALYSIS

In order to comprehend what people from ages 20-60 thought about various issues surrounding AGS arrangements, a small survey was elaborated and distributed (available on Annex I to this paper), during the time lapse of 3 days. 31 people answered, 55% of the respondents being of the female gender and 45% of the male gender.

All respondents are Portuguese even though some may be living abroad. The questionnaire was made available via a virtual link and was anonymous. This aspect was deemed as important due to the fact that some of the issues asked are particularly sensitive and honest answers may not be given if the questionnaire was not anonymous.

Even though 31 people aren't enough to construct a strong statistical analysis of the average person's opinion, it is still interesting to note the statistical variability in the answers to some of the questions and, on the other hand, the statistical concentration in others.

On the age of the respondents:

2. Age group: Required

20-25	39%		12
25-30	35%		11
30-40	3%		1
40-50	6%		2
50-60	16%		5
60+	0%		0
		Total respondents	31
		Respondents who skipped this question	0

Even though no one from the age above 60 responded to the questionnaire, the majority of the respondents (74%) are of ages between 20-30, making up the biggest section of the most advised fertile ages. On the other hand, the remainder 25% of the respondents are of ages when it is more likely they have had their own children and are thus aware of the importance of constituting a family.

On the knowledge of Portugal and UK's legal standpoint on AGS

3. From what you know, is exceptional altruistic gestational surrogacy permissible according to Portuguese legislation? Required

No	23%	7
Yes	10%	3
It is not criminally punishable but gives rise to civil liability	10%	3
It used to be, but isn't anymore	0%	0
Don't know	58%	18
Total respondents		31
Respondents who skipped this question		0

8. From what you know, is exceptional altruistic gestational surrogacy legal in the UK? Required

Yes	23%	7
No	0%	0
Yes, as is commercial gestational surrogacy	3%	1
Don't know	74%	23
Total respondents		31
Respondents who skipped this question		0

On the first question, 78% of respondents (24 people), a grand majority, demonstrated lack of knowledge regarding the current legal framework for AGS in Portugal. Such lack of knowledge also indirectly demonstrates that the majority of respondents are not informed of technological possibilities for overcoming serious fertility issues, even though the majority of such respondents are of a fertile age. Furthermore, 77% of respondents also are not aware of the legal framework for AGS applicable in the UK, even though surrogacy has been positively dealt with, in that same country, for the past 28 years.

On the harmful consequences of formally legalizing AGS

6. Do you believe any one is harmed by the legalization and consequent careful regulation of consented altruistic gestational surrogacy? Required

All parties, morally	3%	1
All parties, physically	0%	0
Haven't thought about it	26%	8
The intended parents, morally	0%	0
The gestational mother, morally	13%	4
No one is harmed both physically or morally	52%	16
The gestational mother, physically	3%	1
The child to be born, morally	3%	1
All parties, physically and morally	0%	0
Total respondents		31
Respondents who skipped this question		0

Even though 78% of respondents either haven't thought about it or do not believe anyone is harmed by the legalizing of AGS, the remainder 22% believe at least one of the parties is harmed either physically or morally. It is hard to interpret such results due to the lack of knowledge demonstrated by the respondents of both the currently applicable legal framework and details regarding AGS.

On having genetically related children

7. In your personal opinion, how important is it to have your own genetically related child? Required

Very. I would resort to all available scientific developments in order to be able to have a genetically related child.	39%	12
Very. However, if my partner and I were incapable of doing so, I wouldn't want to go through any fertility treatments and opt for adoption	26%	8
It is not that important. If my partner and I were capable of naturally conceiving a child, we would, however, I would not want to resort to any fertility treatments.	16%	5
It is important but if my partner and I could not conceive naturally I would rather not have children.	10%	3
It is very important but I always wanted to have a genetically related child and adopt another	13%	4
Total respondents		31
Respondents who skipped this question		0

Even though those who are facing serious infertility issues should not have their destiny determined by other people's opinion (specifically those who cannot fully grasp the weight and problems surrounding definite infertility), 39% of respondents would resort to all available scientific developments in order to have a genetically related child and 13% also consider having a genetically related child very important but would also want to adopt. As such, 52% of respondents give utmost importance to having at least one genetically related child. This final aspect is relevant due to the fact that resorting to AGS must have as a foundation, the deep desire or even necessity of having a genetically related child or else adoption of a young child would be an easier and already accepted solution.

CONCLUSIONS

After having analysed both the legal framework for AGS in Portugal and in the UK, we are faced with enough factual information to firmly conclude that Portugal needs to quickly address said issue by constructing robust regulation that safeguards all human rights at stake.

It is not enough to exclude couples who, even though are a minority, would benefit from AGS as what is being dealt with is the creation of a life that otherwise would not exist. Portugal may opt for only legally allowing AGS and, by doing so, *(i)* bar full surrogacy that utilizes the surrogate mother's genetic material, and also *(ii)* exclude commercial surrogacy.

Even though full surrogacy is legally permitted in the UK, and commercial surrogacy is permitted, for example, in various states in the USA, if Portugal's political and social structures do not allow for a widespread acceptance of surrogacy, then AGS already offers a substantial and important solution that has the advantage of being the form of surrogacy that raises less (if not none) moral and ethical issues.

It is also not enough to overlook the importance AGS may have to couples who have no other way of having genetically related children. Even though it may be hard to understand what these couples go through, it is not acceptable, without any substantial legal or social cause, to withhold the joy and lifelong accomplishment of constituting your own direct family.

Furthermore, Portugal needs to extend the benefits regarding AGS to a greater number of people, by accepting that same-sex couples which are capable of constituting a stable family, should be entitled to the same rights heterosexual couples are. There are no outstanding reasons that justify such discrimination, as was seen during the development of the present paper.

For such achievement to become palpable, the current efforts being made to formally legalize AGS need to be enhanced. Even though said efforts undoubtedly shed a positive light on AGS's future in Portugal, they still impose unjustified limitations to the legal framework, such as barring certain possible beneficiaries from resorting to AGS, and making certain couples with specific infertility issues depend on the previous approval from the NCMAP after hearing the Medical Association.

Finally, the aim of the present paper was to expose both strengths and weaknesses of Portugal's current and tangible position regarding AGS, by way of a direct comparison with a more perfected and functioning legal framework (that belonging to the UK), hoping that by doing so, misunderstandings or unclear issues regarding the studied phenomenon would be diminished.

Let there be hope for Portuguese couples who have been forced in the past to either succumb to black market conditions or to flee to other countries in order to have genetically related children.

There is a way of materializing that hope without offending human rights. In fact there is a way of further protecting human dignity by conferring the mechanisms necessary for the exercising of certain fundamental freedoms.

AGS may go hand in hand with the flourishment of human dignity and the perfecting of both legal and social structures in a manner that allows countries to respond to old problems, with newly founded solutions.

AGS and human dignity: they are not mutually exclusive.

BIBLIOGRAPHY

1. ADAM SCHULMAN, «Bioethics and the Question of Human Dignity», *in Human Dignity and Bioethics: Essays commissioned by the President's Council on Bioethics,* March 2008, available at: http://bioethics.georgetown.edu/pcbe/reports/human_dignity/chapter1.html, viewed on April 2013;

2. BARBARA STARK, «Transnational Surrogacy and International Human Rights», *in ILSA Journal of International and Comparative Law*, vol. 18, number 2, 2012;

3. BIANCA JACKSON, «Surrogacy: a guide to the current law (part two) – issues arising», in Family Law Week, available at:

   http://www.familylawweek.co.uk/site.aspx?i=ed127234;

4. BREDA O'BRIEN, «Surrogacy can be just another form of slavery», *in The Irish Times,* February 2012.

5. DALE ELIZABETH LAWRENCE, «Surrogacy in California: Genetic and Gestational Rights », *in Golden Gate University Law Review*, vol. 21, 1991, available at:

   http://digitalcommons.law.ggu.edu/ggulrev/vol21/iss3/3, viewed on April 2013;

6. DEBORA L. SPAR, *O negócio de bebés – como o dinheiro, a ciência e a política comandam o comércio da concepção,* Almedina, Coimbra, May 2007;

7. DIRECTORATE GENERAL FOR INTERNAL POLICIES OF THE EUROPEAN PARLIAMENT «A Comparative Study on the Regime of Surrogacy in EU Member States», May 2013;

8. EMILY JACKSON, *Regulating Reproduction – Law Technology and Autonomy*, London School of Economics, Hart Publishing, Oxford and Portland, Oregon, 2001;

9. HANNAH MCDERMOTT *Surrogacy policy in the United States and Germany: comparing the historical, economic and social context of two opposing policies*, Senior Capstone Projects, Paper 137, 2012;

10. HUGH V. MCLACHLAN and J. KIM SWALES, «Surrogate Motherhood: Beyond the Warnock and the Brazier Reports», *in Human Reproduction and Genetic Ethics,* vol. 11, number 1, 2005;

11. JOSÉ DE OLIVEIRA ASCENSÃO, «A Lei nº. 32/06, Sobre Procriação Medicamente Assistida», *in Revista da Ordem dos Advogados,* ano 67, vol. III, 2007;

12. K. SVITNEZ, «Legal control of surrogacy – international perspectives» *in Schenker J: Ethical Dilemmas in Assisted Reproductive Technologies*, 2011;

13. LAW REFORM COMMISSION 1988, *Artificial Conception: Surrogate Motherhood, Discussion Paper 18,* available at:

   http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP18CHP6, viewed on April 2013;

14. MADHU P. SINGH, *Surrogacy and Surrogacy Laws in India,* Women's Studies Centre, Punjabi University, 2012, available at:

   http://wscpedia.org/index.php?option=com_content&view=article&id=264%3Asurrogacy-and-surrogacy-laws-in-india&catid=4&Itemid=36);

15. MARIA DO CÉU PATRÃO NEVES, «Mudam-se os tempos, manda a vontade, o desejo e o direito a ter

um filho», *in Estudos de Direito da Bioética,* vol. 3, APDI (coord. de José de Oliveira Ascensão), Almedina, Coimbra, October, 2009;

16. MARTHA NUSSBAUM, «Whether from reason or prejudice – taking money for bodily services», available at:

    http://philosophy.uchicago.edu/faculty/files/nussbaum/Whether%20From%20Reason%20or%20Prejudice.pdf;

17. MHAIRI GALBRAITH, HUGH V. MCLACHLAN, and J. KIM SWALES, «Commercial agencies and surrogate motherhood: a transaction cost approach» *in Health Care Analysis* 13.1, 2005;

18. MICHAEL EDWARDS and COLIN ROGERSON, «Surrogacy: National Approaches and International Regulation», available at:

    http://www.familylawweek.co.uk/site.aspx?i=ed87773, 2011;

19. MIGUEL OLIVEIRA DA SILVA, *Relatório sobre Procriação Medicamente Assistida,(PMA) e Gravidez de Substituição,* Comissão Nacional de Ética e Ciências da Vida, March 2012;

20. NATALIE GAMBLE, «Jumping to inclusion», *in Family Law Journal*, December 2008;

21. NATALIE GAMBLE ASSOCIATES, «Why the surrogacy Law needs revising», available at:

    http://www.nataliegambleassociates.co.uk/page/Why-surrogacy-law-needs-reviewing/39/;

22. NOA BEN-ASHER, «The Curing Law: On the Evolution of Baby-Making Markets», (*Pace Law Faculty Publications*), *in Cardozo Law Review,* vol.30, 2009;

23. PEOPLE SCIENCE AND POLICY LTD, «Report on The Consultation on the Review of the Human Fertilization & Embryology Act 1990, (prepared for the department of Health)», March 2006, available at:

    http://www.peoplescienceandpolicy.com/downloads/FINAL_HFEA_reportDH.pdf, viewed on April 2013;

24. PETER R. BRINSDEN, «Gestational surrogacy», *in Human Reproduction Update*, vol. 9, no. 5, 2003, available at:

    http://humupd.oxfordjournals.org/content/9/5/483.full.pdf, viewed on April 2014;

25. STEPHAN COLEMAN, *The Ethics of Artificial Uteruses – implications for Reproduction and Abortion,* Charles Sturt University, Ashgate Publishing Limited, England, 2004;

26. THE IONA INSTITUTE, *The Ethical case against Surrogate Motherhood: What we can learn from the Law of other European countries*, 2013, available at:

    http://ionainstitute.org/assets/files/Surrogacy%20final%20PDF.pdf, viewed on April 2013;

27. THE IONA INSTITUTE (Press Release), *High Court surrogacy case shows why we must not "split" motherhood*, January 30, 2013, available at:

    http://www.mediacontact.ie/mediahq/ionainstitute/46674/press-release-from-the-iona-institute-high-court-surrogacy-case-shows-why-motherhood-must-not-be-split.html, viewed on April 2013;

28. THOMAS HAMMARBERG, «The Principle of the Best Interests of the Child» (Lecture by the Commissioner for Human Rights, Council of Europe), Warsaw, 30th of May, 2008;

29. VASANTI JADVA, CLARE MURRAY, EMMA LYCETT, FIONA MACCALLUM AND SUSAN GOLOMBOK, «Surrogacy: the experiences of surrogate mothers», 2002, available at:

http://humrep.oxfordjournals.org/content/18/10/2196.short, viewed on April 2014;

30. VERA LÚCIA RAPOSO, *De Mãe para Mãe*, Coimbra Editora, Coimbra, 2005;

31. WELDON E HAVINS, and JAMES J. DALESSIO, «Reproductive surrogacy at the Millennium: Proposed Model Legislation Regulating Non-traditional gestational Surrogacy Contracts», *in McGeorge Law Review,* 2000, Spring.

Legislation and Related Documents

32. «Parecer n.º 63/CNCV/2012 sobre Procriação Medicamente Assistida e Maternidade de Substituição», Conselho Nacional de Procriação Medicamente Assistida;

33. Cairo Conference, 1994;

34. Charter of Fundamental Rights of the European Union, 2000;

35. Constitution of the Portuguese Republic of 1976;

36. Convention on the Elimination of All Forms of Discrimination against Women, 1979;

37. Convention on Human Rights and Biomedicine, 1997;

38. Convention for the Protection of Human Rights and Fundamental Freedom, 1950;

39. Convention on the Rights of the Child, 1989;

40. Convention on the Rights of Persons with Disabilities,2006;

41. Criminal Justice Act 1991;

42. Decision by the Constitutional Court no. 101/2009, of the 3rd of March, 2009, regarding Process no. 963/06. Decision by the Constitutional Court no. 101/2009, of the 3rd of March, 2009, regarding Process no. 963/06;

43. Declaration NCMAP of the 18th of June, 2010;

44. Decree no. 415/7, by the President of the Portuguese Republic, Jorge Sampaio, 1999;

45. European Convention on Human Rights, 1953;

46. European Convention on the Adoption of Children, 2008;

47. Human Fertilization and Embryology Authority, Code of Practice, 8th edition, 2013;

48. Human Fertilisation and Embryology Act 2008;

49. Human Fertilisation and Embryology Act, 1990;

50. International Covenant on Economical, Social and Cultural Rights, 1976;

51. Law no. 32/2006, of the 26th of July;

52. Law no. 9/2010 of the 31st of May;

53. Law no. 14/90 of the 9th of June;

54. Parliamentary Resolution no. 56/2009;

55. Portuguese Criminal Code;

56. Preliminary Report on the Issues arising from International Surrogacy Arrangements, Hague Conference on Private International Law, 2012;

57. Project of Law no. 122/XII, 21st of December, 2011;

58. Project of Law no. 131/XII, 6th of January 2012;

59. Project of Law no. 137/XII, 11th of January, 2012;

60. Project of Law no. 138/XII, 13th of January 2012;

61. Proposal of Law no. 135/VII, 30th of July, 1997;

62. Recommendation no. 1046 (1986), Parliamentary Assembly of the Council of Europe;

63. Report of the Fourth World Conference on Women of Beijing, in 1995;

64. Surrogacy Arrangements Act 1985;

65. Universal Declaration on Bioethics and Human Rights, 2005;

66. Universal Declaration of Human Rights, 1948.

Jurisprudence

67. Case Buzzanca v. Buzzanca, 1998;

68. Case in the Matter of Baby M, 1988;

69. Case In the Matter of N (a child) 2007;

70. Case Johnson v. Calvert, 1993;

71. Case JP V LP & ORS, July 2013;

72. Case Re TT (Surrogacy) 2011;

73. Case C-13/05, Sonia Chacon Navas v Eurest Colectividades, 2006;

74. Case Sylvie Mennesson and others v. France, request no. 65192/11, of October, 2011.

Online news and reports

75. «Guidance for Parental Order Reporters», CHILDREN AND FAMILY COURT ADVISORY AND SUPPORT SERVICE, available at:

http://www.cafcass.gov.uk/media/6721/Parental%20Order%20Guidance%20050412.pdf.

76. «Há barrigas de aluguer em Portugal», available at:

http://ascoisasdomundo.blogs.sapo.pt/159513.html

77. «Ministério Público arquiva processo sobre barrigas de aluguer por falta de provas», *in* PÚBLICO, available at:

http://www.publico.pt/sociedade/noticia/ministerio-publico-arquiva-processo-sobre-barrigas-de-

aluguer-por-falta-de-provas-1530704

78. «Mulheres alugam o útero para combater a crise económica», *in* EXPRESSO, by Agência Lusa, May, 2011, available at:

http://expresso.sapo.pt/mulheres-alugam-o-utero-para-combater-a-crise-economica=f652393

79. «Primeiro bebé proveta nasceu há 25 anos» *in* EXPRESSO, available at:

http://expresso.sapo.pt/primeiro-bebe-proveta-portugues-nasceu-ha-25-anos=f634119

80. «The Status of the Human Embryo» – A LEARNING AID FOR UK MEDICAL STUDENTS, available at:

http://embryo-ethics.smd.qmul.ac.uk/tutorials/in-vitro-fertilisation/present-legislation/;

Other Websites

81. http://embryo-ethics.smd.qmul.ac.uk/tutorials/in-vitro-fertilisation/present-legislation/

82. http://expresso.sapo.pt/primeiro-bebe-proveta-portugues-nasceu-ha-25-anos=f634119

83. http://www.apfertilidade.org/web/index.php

84. http://www.brilliantbeginnings.co.uk/

85. http://www.britishsurrogacycentre.com/legalissues/

86. https://www.cia.gov/library/publications/the-world-factbook/rankorder/2127rank.html,

87. http://www.cnecv.pt/historial.php

88. http://www.cnpma.org.pt/cnpma_atribuicoes.aspx

89. http://www.hfea.gov.uk/133.html

90. http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf

91. http://www.hfea.gov.uk/docs/WelfareofthechildformV2.pdf

92. http://www.hfea.gov.uk/hfea-questions.html#

93. http://www.law.cornell.edu/constitution/articleiv

94. http://www.nataliegambleassociates.co.uk/page/Fertility-clinics-and-surrogacy/110

95. http://www.parlamento.pt/ActividadeParlamentar

96. http://www.porterdodsonfertility.com

97. https://www.stonewall.org.uk/at_home/parenting/3558.asp

98. http://www.surrogacyuk.org/home

99. http://www4.seg-social.pt/adocao

Note: Characters (with spaces): 222,010

ANNEX I

On altruistic gestational surrogacy (AGS)

Gestational surrogacy: "A gestational mother is a woman who functions as a host or a gestational carrier for a child who is not genetically her own. Her pregnancy is a result of a transfer of a genetically unrelated embryo using In Vitro Fertilization techniques. After birth, it is intended that the baby is reunited with the intended parents."

Altruistic gestational surrogacy is a surrogacy arrangement in which the gestational mother receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

Altruistic gestational surrogacy, on the contrary to commercial gestational surrogacy, eliminates all risks of exploitation - both of the intended parents and the gestational mother.

Please do not check anything with friends or online - the purpose of the questionnaire is obtain a realistic idea about what YOU think about the topic.

1.Gender: *

- ☐ Female
- ☐ Male

2. Age group: *

- ☐ 20-25
- ☐ 25-30
- ☐ 30-40
- ☐ 40-50
- ☐ 50-60
- ☐ 60+

3.From what you know, is exceptional altruistic gestational surrogacy permissible according to Portuguese legislation? *

- ☐ No
- ☐ Yes
- ☐ It is not criminally punishable but gives rise to civil liability

☐ It used to be, but isn't anymore

☐ Don't know

4. In your opinion, should all parties entering an altruistic gestational surrogacy arrangement be criminally punished? *

☐ Both the intended parents and the gestational mother

☐ Only the fertility clinic who takes part in process

☐ Only the gestational mother

☐ Only the surrogacy agency

☐ No parties should be criminally punished

☐ Only the intended parents

☐ Both the fertility clinic and the surrogacy agency

☐ All parties involved should be criminally punished

5.Who should be considered, for all social and legal purposes, as the mother of the child? (once the child is born) *

☐ The gestational mother (even though in AGS there is no genetic link between her and the child)

☐ The intended mother in all circumstances

☐ The intended mother, if the sperm cell that was used was the intended fathers and the ovum belonged to an anonymous donor

☐ The intended mother when the ovum that was used during IVF was hers

6. Do you believe any one is harmed by the legalization and consequent careful regulation of consented altruistic gestational surrogacy? *

○ The intended parents, morally

○ The child to be born, morally

○ All parties, physically

○ All parties, physically and morally

Haven't thought about it

The gestational mother, physically

No one is harmed both physically or morally

All parties, morally

The gestational mother, morally

7.In your personal opinion, how important is it to have your own genetically related child? *

Very. I would resort to all available scientific developments in order to be able to have a genetically related child.

It is not that important. If my partner and I were capable of naturally conceiving a child, we would, however, I would not want to resort to any fertility treatments.

It is important but if my partner and I could not conceive naturally I would rather not have children.

It is very important but I always wanted to have a genetically related child and adopt another

Very. However, if my partner and I were incapable of doing so, I wouldn't want to go through any fertility treatments and opt for adoption

8.From what you know, is exceptional altruistic gestational surrogacy legal in the UK? *

Yes

No

Yes, as is commercial gestational surrogacy

Don't know

9. Do you agree with the legal framework in force in the UK regarding gestational surrogacy? *

Don't know

No

Yes