

# Between Legislative Defiance and Legal Security

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In Portugal, a [recent decision](#) of the Constitutional Court rejected another legislative attempt to implement a successful system of surrogacy. For the first time in its 26-year history, the Court faced legislative defiance of its previous case law but asserted its role as the ultimate interpreter of the Constitution. Arguments of “legal security” provided the formal ground to escape the conflict between branches.

## The 2018 decision on surrogacy

Some time ago, I [reported](#) on a [ruling](#) of the Portuguese Constitutional Court on challenges regarding surrogacy (*gestation by substitution*). The Court explicitly affirmed the constitutionality of the *Portuguese model of gestation by substitution*, and the decision seemed like a blessing in disguise for those who had long strived to legalize surrogacy. However, the Court required amendments to some problematic aspects of the regime and detailed some conditions that would have to be met. Significantly, the judges rendered the *Portuguese model of surrogacy* constitutionally valid if a right to regret of the surrogate woman was made available until at least the moment of birth. Following political disagreement over this right and faced with legislative changes that failed to comply with the judicial conditionality, the Court, without allowing for a judicial re-opening of the debate, recently upheld its prior decision and reaffirmed the need for a right to regret.

## The struggle for a new legal regime

Following the 2018 ruling and the subsequent suspension of ongoing treatments and procedures, an amendment proposal was filed, establishing the surrogate’s right to regret and to claim the child as her own until after birth. However, this right caused uneasiness even among supporters of surrogacy.

Several experts expressed strong reservations during parliamentary hearings. The entrenchment of a right to regret until after birth raised not only ethical but also legal doubts as it might collide with fundamental rights of the intending parents who bear a biological connection with the child and, more significantly, the fundamental rights of the baby who would be born into a situation of uncertainty and potential litigation. As the hearings evolved, a majority opinion in favor of rejecting the right to regret as detailed by the Court became more evident.

Following the compelling suggestion of the National Council on Medically Assisted Procreation, the proposal was amended in order to limit the constitutional risks and prevent possible exercises of the right to regret. These changes entailed significant

constraints to surrogacy: Only a close relative of one of the beneficiaries could serve as surrogate (mother, grandmother, first cousin, mother in law or adoptive mother), and if she had already been a mother herself. Moreover, the MPs clarified that gestation by substitution was envisaged as a last resort technique to women unable to carry a viable pregnancy *based on their uterine medical condition* (the previous wording raised doubts regarding transgender women and “problematic cases” such as psychological or mental disorders).

Disagreement over the constitutionality of the right to regret led to it being rejected and replaced by the previous solution that established the right to revoke the consent until the beginning of treatments. The other amendments, including the newly constrained framework of gestation by substitution, succeeded, and the bill was sent to the President of the Republic for promulgation.

## **The challenge to the amending bill**

For the first time, the national legislature defied the Court's previous interpretation and put forward a regime that had been previously nullified by an *erga omnes* decision of unconstitutionality. At the end of August, the President of the Republic, instead of promulgating or vetoing the bill, initiated an *ex ante* constitutional review claiming that the legislative amendment *did not abide by the Constitutional Court's decision*.

*Ex ante* review represents a substantial judicial intrusion on the political process. If the Court issues an opinion of unconstitutionality the President must veto the bill and send it back to parliament. MPs must then excise it from the bill unless there is a 2/3 majority confirming the norm (this confirmation mechanism has never been exercised and was not a serious possibility given the general elections to be held on October 6). The decision must be delivered within 25 days following the request.

Faced with the legislative defiance, would the judges argue for a preclusive effect of the previous *erga omnes* unconstitutionality ruling that would prevent the legislature from reenacting unconstitutional norms? Alternatively, would they re-open the debate even if simply to reinstate their previous arguments and declare the invalidity of a surrogacy model that does not contemplate the right to regret until birth?

## **A case of judicial refusal to re-open the constitutional interpretation process**

In its [decision](#) issued on September 18, the Court stood middle ground. On the merits of the case, the Court qualified the reinstatement of the previously nullified regime “as a new manifestation of the legislative power to determine the discipline of gestation by substitution”. Intriguingly, to this “manifestation of the legislative power” the Court simply added that “there are no objective or subjective circumstances that justify reopening the discussion”, namely technical, scientific, sociological, or political circumstances, considering the “imperatives of legal security and the previous validity criterium”.

The profound debate that this review seemed to open was circumvented by one sentence where legal security emerges as the main argument. On these grounds, the Court, in accordance with its previous ruling, affirmed the unconstitutionality of the challenged norms for breach of the right to the development of personality, in harmony with the principle of human dignity, and the right to form a family.

At first glance, the judges seem to endorse a horizontal relationship with the legislature that leaves untouched the integrity of the legislative power as well as the Court's full jurisdiction to review its previous determination of what fundamental rights require in difficult cases. However, such power of the legislature lacks independent force if the Court holds a discretionary capacity to determine whether the threshold for re-opening the constitutional interpretation debate is met (note that the threshold concerns re-opening the debate and not the burden of justification to reinstate the previous decision).

The first concurring opinion brings to light an underlying judicial claim: that although the Court agrees, in principle, to retaining full jurisdiction to review a legislative defiance of its previous case law, it *can* only exercise said power *under certain circumstances* (such as supervenient factors or arguments or the conviction that the prior decision was severely flawed thus prevailing the need to correct the erroneous understanding). This vote was jointly signed by the rapporteur and three other judges who had all dissented in the 2018 ruling. They claim to be “bound” by the previous judicial determination under the principle of “case law stability”. Although the signatories expressly reject the existence of a rule of precedent, their argumentation echoes unequivocally the doctrine of *stare decisis*, which is not a binding yardstick in Portugal. In any case, balancing the exercise of the sovereign power to legislate against the principle of “stability of judicial decisions” defers the *last word* on constitutional issues to the judicial branch and will ultimately assign that institution the exclusive power to determine if and when the debate can be re-opened. It is important to recall that surrogacy was suspended with the previous ruling, and no viable pregnancies were ever at stake.

Three other separate opinions developed autonomous lines of reasoning that allowed a re-opening of the debate, either to concur or dissent. Eloquently, one of them noted that the Court seems to endorse a self-binding authority of its previous decisions and that giving prevalence to legal security entails an inadmissible judicial superiority and endangers the Court's role as a *forum* for debating central societal problems.

## **The authority of previous case law as a means to close the political debate**

Although previous case law and decisions are unquestionably important and constitute legitimate legal arguments, they are one of several factors a *dedicated* constitutional court must consider when faced with any “manifestation of the legislative power”. In this case, concerns of interinstitutional comity should suffice to re-open the discussion. The mere fact that the defiance came as a result of

serious constitutional doubts raised during the political process regarding the regime proposed by the Court was a compelling reason for a judicial reexamination of the issue. Moreover, the Court's statement that no relevant legal and political facts justified a reassessment is put to doubt by the substantial amendments introduced in the legal regime.

Some weeks ago, Pietro Faraguna [claimed](#) that a paternalistic approach to judicial review might hinder a legislature's prospects of remaining functionally able to respond to social demands. However, apparently less intrusive and more formalist exercises of judicial review can produce similar consequences even when parliaments struggle hard to legislate in ethically and socially sensitive areas.

Instead of [furthering political deliberation](#), the ruling narrowed it down to the conditions initially spelled out by the Court, without allowing for a re-articulation of the problem in light of the constitutional debate held during the legislative process. By doing so, the Court failed to recognize the legislature's currency as the democratic lawmaker.

