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JORNAL BRASILEIRO DE REPRODUÇÃO ASSISTIDA



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Reprodução assistida

Dois modelos de regulação: Portugal vs. Espanha

Assisted reproduction

Two models of regulation: Portugal v. Spain

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RESUMO

As leis portuguesa e espanhola sobre reprodução assistida situam-se algures entre a regulamentação norte-americana, particularmente liberal, e a os regimes legais vigentes na Alemanha e na Itália, extremamente restritivos.

Objetivo: descrever os traços principais destas duas leis, comprando as respetivas soluções e sublinhando as suas diferenças, de forma a apontar os aspetos que poderiam ser aperfeiçoados em cada uma delas.

Método: análise comparativa.

Resultado: as soluções legais de Portugal e Espanha nesta matéria não diferem substancialmente. Apesar de a lei espanhola ter adotado respostas mais abertas em aspetos particulares, o facto é que previsivelmente estas irão ser igualmente acolhidas na lei portuguesa, por força da pressão da doutrina jurídica, dos partidos liberais de esquerda e do Conselho Nacional de Procriação Medicamente Assistida.

Palavras-chave: Reprodução assistida, regime legal, embriões, Portugal, Espanha

ABSTRACT

Portuguese and Spanish laws on assisted reproduction are located somewhere between the particularly liberal regulation of the United States, and the extremely restricted current legal regimes of Germany and Italy.

Objective: The aim of his short study is to describe in its main features these two laws, comparing their solutions and focusing their differences, in order to point out the aspects that could be improved in each one of them.

Method: a comparative analysis

Results: Legal solutions in Portugal and Spain on this topic do not differ substantially. Though Spanish law adopted more open-minded answers in particular aspects, the fact is that those solutions probably will be also welcomed in Portuguese law, due to the pressure of legal thinkers, left-wing liberal politicians and the National Council of Medically Assisted Reproduction.

Keywords: Assisted reproduction, legal regulation, embryos, Portugal, Spain

1. The two main models of regulation

Artificial reproductive techniques (ART) can basically follow two models of regulation: the one considered restrictive and the one considered liberal. These extreme survive along with hybrid models.

The restrictive model can be found in Germany, Austria, France and Italy.

German law - *Gesetz zum Schutz von Embryonen - Embryonenschutzgesetz-ESchG* (EschG) - is one of the more restrictive existing acts in this domain, a trait which may found a plausible explanation in the intention to react against the horrors of the Nazi past. Nonetheless, this feature became the target of severe criticism, pointing the excessive use of punitive power (Benítez Ortúzar, 1998). In Austria is in force the Federal law n. 275, of 4th July 1992 (*Fortpflanzungsmedizingesetz - FMedG*), qualified as well as restrictive. An issue that has been very controversial within the FMedG is the prohibition, thereby stated, of oocyte donation and sperm donation, but this last one only in case of in vitro fertilization because, strangely enough, sperm donation is allowed in artificial insemination (Novak, 2000; Stormann, 2002). The Austrian Constitutional Court confirmed the constitutionality of this regime in its decision from 14th October 1999, considering that the state interference in private life and in private decisions of infertile couples was not unjustified. However, the discussion arrived to the European Court of Human Rights, which condemned the Austrian government for violation of article 8 of the European Convention of Human Rights (the right for private and family life), in case *S. H. and Others v. Austria*, n.º 57813/00, from 15th November 2007.

In the French system two of the most important diplomas are law n. 94-653, of 29th July 1994, concerning the respect for the human body, and law n. 94-654, of 29th 1994, about donation and use of elements of the human body, medical assistance to procreation and prenatal diagnosis (Byk, 1992). However, nowadays the regulation of assisted procreation is primarily stated on the Public Health Code (*Code de la Santé Public*) and, to some extent, in the Civil Code and in the Criminal Code. It is also a conservative regulation, more directed for communitarian values than for individual interests, and very compromised with the safeguard of traditional principles, under the designation of public order, the famous "*ordre public*".

Italian legislation is much more recent than the laws in force in other European countries, because for quite some time the only existing dispositions came from ministerial guidelines and from the Code of Deontological Medicine. Only in 2004 law n. 40, of 19th February, imposed legal norms in this domain (Cassonato, 2005; Manetti, 2004; Tripodina, 2004). Since the very beginning this law was much criticized because of its restraining nature. As a result, decision n. 151/2009 of the Italian Constitutional Court, from 1st April 2009, substantially changed some of its provisions in order

to render it more congruent with the recent scientific achievements, namely regarding the number of embryos that may be transferred to the woman uterus. The liberal model is typical of the United Kingdom and Spain. British regulation is closer to the north-American model than the pattern typical of European countries, namely because of the primacy conferred to individualism and to self-determination. Nonetheless, in United States regulation is very scarce and there is a lack of control of what private do, especially due to the absence of an entity able to carry out that supervision. On the contrary, in the United Kingdom, though the law is quite permissive, the Human Fertilisation and Embryology Authority performs his duty to control the many pretension not expressly regulated in the Human Fertilisation and Embryology Act, the HFEA (Blyth, 2004; Garwood-Gowers, 2004).

But the main target of this study will be the legal regimes of Iberian countries, which do not entirely coincide with each other, since Spain presents a regulation (law n. 14/2006, from 26th May) unanimously considered a "broadminded" one (Berrocal Lanzarot, 2008, 2009; Raposo, 2006), while Portugal can be qualified as a mixed model. To be more precise if fair to say that Portuguese law (law n. 32/2006, from 26th July) also follows the liberal line, though in some issues is more restrictive than Spain (Raposo & Pereira, 2006).

Remarkably, but in accordance with the Portuguese conservative tradition, the law was even accused of being too liberal, and consequently brought in front of the Constitutional Court by a group of parliamentarians, asking for more caution and restrictiveness in some topics, namely the absence of a maximum limit of age for female beneficiaries and the admission of many various contested practices, such as the pre-implantation genetic diagnosis, the savior sibling, embryo's investigation, heterologous reproduction, the existence of surplus embryos and surrogacy. The legal solution for revelation of donor's identity, filiation rules and reproductive cloning was also invoked to sustain the unconstitutionality of the law. However, the Constitutional Court, in its decision n. 101/2009, of 3rd March, declined all the suspicions of unconstitutionality (Raposo & Reis, 2009) and, curiously enough, the changes that presently are being discussed intend to impose a further opening to autonomy and science. In other words, the anticipated changes go precisely against the remarks pointed at that time in order to ask for the declaration of unconstitutionality of law n. 32/2006.

Therefore, we are going to proceed to the analysis of some of the main features of both regulations on assisted reproductions, and evaluate how Spanish and Portuguese laws responds to these challenges.

2. The juridical status of the embryo

Fecundation is the very beginning of a new human life. But, and notwithstanding the vital role of fecundation, nidation appears as a decisive moment, which increases exponentially the possibility of the embryo become a person (it must be underlined that it is not a person already). The relevance of nidation is founded on several events that take place precisely because the embryo survives enough time to nidate in the uterus, around approximately 14/15 days after fecundation. First and foremost, by that period the embryo acquires the characteristics of unity and unicity, in other words, loses the possibility to divide into twins or, in the opposite, to join together with another embryo and to create a chimera. But this moment is extremely relevant also because after nidation we assist to the emergence of the primate streak, the first sign of the central nervous system. Finally, and

as a result of the referred notes, the existence of the embryo becomes more certain, since before nidation the risk of embryonic loss is much high (Abellán-García Sánchez, 2001; Hetz, 2005). For much of the juridical doctrine – this author included – these biological events are decisive in order to confer to the nidated embryo a different juridical status.

As previously referred, the embryo is not a person. Nor it is a thing, in the classical juridical sense of "res" (Raposo & Osuna, 2007; Raposo et al. 2010). Actually, is quite complex to provide the embryo with an accurate juridical categorization, because of the poverty of concepts which characterizes the juridical world. Probably the classification that suits it better is the one of *tertium genus*, in the sense of an entity in between a person and a thing. But we can certainly say that the embryo is a potential person, since it has the potentiality to become one once the adequate conditions are fulfilled. Nevertheless, note that the designation of "potential person" intends to underline that, right now, it is something different from a person, and it may never actually turn into one.

The potentiality that typifies the embryo dictates one of the decisive notes of its status: the reinforcement of juridical protection according to the level of embryonic development (Mazonni, 2005; Warnock, 1998). In other words, the protection granted to eight weeks embryos is less than the one provided to eight months fetus, because it increases as the potential person gets closer to an actual person. This same understanding was firm in the known decision *Roe v. Wade* (410 U.S. 113 [1973]), from the north-American jurisprudence, though in *Roe* the Supreme Court declared that in the first trimester the mother can freely decide, according to her wishes, if she wants to terminate the pregnancy, and therefore may exercise her "right to abort" (in itself a contested juridical figure), while we defend (as usually stated by Constitutional Courts around Europe) that the mother is not entitled with an absolute and totally free power to decide, not even in the first period of gestation, since human life has always a constitutional objective value (though the present laws on abortion seem to overrule this basic principle by freely admitting abortion in first months of pregnancy).

There are certainly legal texts that seem to contradict this supra described understanding, and defends that embryos possess the juridical status of persons and own fundamental rights. In international terms the most problematic norm is article 4/1 of the American Convention on Human Rights (ACHR), which states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life". According to the middle sentence, the right to life can be entitled from the moment of conception; therefore, it seems like the embryo is a person from that very moment, since only persons can be entitled with rights. Nevertheless, this is a rushed and legally unjustified interpretation of the norm (Raposo, 2009a; Raposo et al. 2010). First of all, regarding the level of protection. Is commonly accepted in the legal doctrine that fundamental rights present two separate dimensions: the objective one and the subjective one. Embryos can only apply to the objective dimension, since the subjective dimension requires the presence of a person and embryos are not persons. This statement is not a merely personal standing, but the consolidated position of many constitutional jurisdictions in Europe.

It started with the German Constitutional Court in its decision from 1975 (BVerfGE 39, 1) regarding §. 2 Abs.

2 of the German Constitutional Law. This norm states: "Jeder hat das Recht auf Leben", which can be roughly translated as all have the right to life, or everyone has the right to life. Some years later the same position was once again affirmed in a decision from 1993 (BVerfGE 88, 203) with minor differences.

Afterwards this understanding was upheld by other judicial authorities, such as the Spanish Constitutional Court (the first time in decision n. 53/1985, from 11th April 1985) and the Portuguese Constitutional Court. In Portugal this has been the consistent position of the Court at least since the decision n. 25/84, from 19th March. It was also proclaimed in decision n. 85/85, from 29th May; decision n. 288/98, from 17th April; decision n. 617/06, from 15th November; and decision n. 75/2010, from 23rd February, all concerning uterine embryos. But the same idea can be found also in decision n. 143/2007, from 28th February, about in vitro embryos.

Despite not being a person the embryo is not, certainly, a bunch of cells, a *res*, i.e., a thing. It represents a constitutional value – the objective value of human life – therefore, deserves a relevant constitutional defense, expressed, for instance, in the prohibition of creating embryos solely for experimental purposes. However, it can only aspire to an objective protection, which is necessarily weaker than the subjective one.

Another comment that can be made to article 4/1 of ACHR relates with the expression "conception". Traditionally this term was referred to the moment of fecundation, but nowadays is usually understood (especially by the majority of scientists) as nidation, for the reason that before nidation is completed the existence of the embryo is very fragile, and chances are it never born and ends up being expelled by the female body. This thesis is in complete consonance with the theory of the gradual protection of the embryo and the foetus. An accurate concretization of its principles can be found in the legal regime of abortion dominant in European countries, according to which before nidation the destruction of uterine embryos is not even prohibited. In other words, the second day pill is allowed and freely sold in pharmacies because its use is not considered a modality of abortion, while after nidation the level of prohibition increases as the pregnancy develops (Romeo Casabona, 2003).

In sum, there are not delimited barriers able to define the limits between the absence of protection and the absolute protection (Romeo Casabona, 1994). But we do have, certainly, relevant moments in the development of the embryo: first of all, fertilization, when a new human being gains existence; afterwards, nidation, that confers to the human being a level of certainty and determination (unity and unicity) inexistent until then; and finally birth, which marks the beginning of a human person and the entitlement of rights

3. Acces to reproductive techniques

Access to ART becomes predominantly problematic in light of the consideration of reproduction (either by sexual intercourse either with medical assistance) as a fundamental right or a human right (Raposo, 2005, 2007b, 2010c), just like recognized by many legal authors and also by judicial decisions. If it is a fundamental right, then, it must be demanded a particularly stringent justification in order to restrict the possibilities to use reproductive techniques, a requirement not consistent with the mere invocation of moral conceptions.

According to Portuguese law (article 6/1 law n. 32/2006), only heterosexual marriages and heterosexual stable relationships can use ART (Raposo, 2007b).

Actually, the law only demands the requisite of heterosexually for non married couples, because when it was redacted marriages were, necessarily, between a man and a woman. However, since than the Portuguese legal order allowed marriages between people of the same sex (law n. 9/2010, from 31st May), but the legislation enacted to admit same sex marriage "forgot" to circumvent the situations foreseen in law n. 32/2006, nor this last law was modified in accordance. Therefore, it was the National Council of Medically Assisted Reproduction (CNPMA) which clarified the current interpretation of article 6/1 of law n. 32/2006, but we have many reserves about the legitimacy of the Council to do so, especially because it is restricting fundamental rights, a task only available to the legislator.

Some legal scholars in Portugal have sustained that the text of law n. 32/2006 was still consistent with the prohibition of access to ART by gay married couples, especially when also considered a systematic interpretation of the entire regulation (Loureiro, 2010a). This is indeed correct. But the fact is that the opposite legal interpretation has also some strong grounds on its favor (Raposo, 2010a, 2010b). Therefore, it is required a subsequent legislative intervention to clarify the legal solution, in view of the fact that the explanation of the CNPMA does not have enough authority to solve the dilemma.

Notwithstanding the doubts that still remain, the development which is being witnessed in Portuguese law is notable and well-received. Actually, this is a tendency spreading around Europe, where same sex couples are allowed to use ART also in Belgian, Iceland, Norwegian, The Netherlands, Sweden and Denmark.

On the contrary, the Spanish law uses the expression "every woman" (article 6/1 law n. 14/2006) to delimitate the beneficiaries of reproductive techniques. In other words, those techniques are for women, not for couples, and the target women may be married or single, heterosexual or homosexual. The norm even clarifies that it disregards civil status and sexual orientation.

Pretty much the same applies to English law, the HFEA. Until 2008 the HFEA allowed the access by a single woman or by a lesbian female couple (the use of ART by single men or gay male couples was always more problematic because of the necessary use of surrogacy, admitted with restrictions in English law, therefore, another set of norm applies to this particular case). But imposed a safeguard: the well-being of the future child had to be necessarily contemplated, especially the need for a father, as it was stipulated in § 13(5) of HFEA: "A woman shall not be provided with treatment services, other than basic partner treatment services, unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth". Thus, although the norm did not impose the presence of a man, it did demand the evaluation of the consequences of his absence for the child. Nonetheless, in 2008 this imposition was modified and today it only states "the need for supportive parenting", which is a less demanding formula and eases the use of ART by same sex couples. However, questions still arise: the norm refers to economic or affective support? Support to the child or to the other parent? Who evaluates this requisite: the physician, the Human Fertilisation and Embryology Authority or a court of law?

4. Justifying reasons to use ART

Under Portuguese law ART is addressed as a subsidiary mechanism. Only three classes of reasons are admitted

to justify the use of ART (article 4 law n. 32/2006): infertility, treatment of a serious health condition and the risk of transmitting a genetic disease, as infectious diseases or some other kind of pathologies.

Infertility is the less problematic motivation, though it remains the doubt about infertility derived from age, there is, the use of ART in post-menopause women. The so-called "social infertility" – there is, the one that characterizes same sex couples – is also a problematic dimension on the various understandings of infertility.

The second motive is quite obscure, and almost nobody refers it, but it seems that the legislator was referring to the use of ART to provide the so called savior sibling, though it can also be understood as the possibility to use ART in order to apply to genetic therapy.

The last motivation is almost consensual, although neither the law neither a subsequent regulation defines what kind of sicknesses are here included. This silence leaves particularly relevant doubts, namely because not even is demanded the gravity of the disease. The use of reproductive techniques by people with HIV/AIDS was, at some point, a very discussed question in Portuguese legal order, especially because of an opinion issued by the National Council of Ethics and Life Sciences (CNECV), affirming that their access should not be allowed, since persons suffering for HIV/AIDS were going to die in a short period of time, thus leaving a young child without parents (opinion 44/CNECV/04). This was clearly a misleading argument used to hide the real concern of CNECV. The content of the mentioned opinion can only be explained because CNECV was disturbed with some kind of moral prejudice regarding the sexual conduct of people with HIV/AIDS. Nowadays – and this was already true in 2004 – patients with HIV/AIDS can aspire to a life expectancy not much different from that of everyone else. In addition, the CNECV never rejected the use of reproductive techniques by patients suffering from other illnesses, even with a lower life expectancy, but which are not associated to recriminatory behaviors. This note demonstrates that what was at issue was the evaluation of some people's behavior in order to become a parent, in an illegitimate and discriminatory way (Raposo, 2010d). Inversely, the Spanish law does not require any particular reason in order to use ART, and uniquely states that "every woman" (article 6 law n. 14/2006) in good mental and physical conditions may use reproductive techniques. This regulation presents the following particularity: nothing, in its text, demands a specific motivation to access ART, as opposed to what happens in Portuguese law.

In the field of the previous statute (law n. 35/1988, from 22nd November) the solution was similar to the Portuguese one, given that article 1/2 stipulated that the techniques of assisted reproduction had, as main objective, "to medically assist the problems of human sterility in order to facilitate procreation when other therapeutic methods have been discarded for inadequate or ineffective". Nevertheless, and since the norm referred only a main objective, not a exclusive objective, it could be defended at that time that the law did not strictly forbade the use of ART grounded on other motivations, an interpretation actually reinforced by the actual redaction of the norm (Romeo Casabona, 1996).

Therefore, it seems that, at the present time, those techniques are addressed as an alternative way of reproduce in Spanish legal order. Effectively, since the law does not impose any requisite – infertility, or any other – it looks as if a woman may require the use of the techniques for the single fact that she does not have a partner and needs a sperm donor. However, scholars are divided in this issue,

and some of them require female infertility even in cases of single women (Herrera Campos, 1991), while others omit the referred requirement (Romeo Casabona, 1994). This last interpretation seems to be the most accurate in our opinion, for the reason that we cannot "invent" a requisite that the law, itself, does not demand, nor even by means of a systematic interpretation, since we are dealing with fundamental rights.

5. Destiny of surplus embryos

Portuguese law does not dictated a specific number of embryos to be created or to be transferred, nor imposes a maximum limit for it. Instead, the legislator decided – an option that entirely collects our support – to refer the decision to physicians, who shall decide according with medical *legis artis* and in consideration of the particularities of the concrete situation. The only imposition enforced by the law relates with the aim of preventing multiple pregnancies and the respect for informed consent of the parties (article 24 law n. 32/2006).

The described solution is wiser than the one foreseen in Spanish law (article 6/2 law n. 14/2006), which determinates that the maximum number of embryos to transfer in each reproductive cycle is three, but afterwards forgets to define the maximum number of embryos to be created. By not demanding any kind of evaluation on this matter the law is leaving a dangerous open door to create an excessive quantity of embryos, perhaps deliberately to be used in scientific investigation.

Nevertheless, and despite the prudence mentioned in most regulations on this subject, in the majority of cases the number of created embryos exceeds the amount allowed, or recommend, to uterine transference. This failure is due to limitation intrinsic to the technique. When this happens the surplus embryos are cryopreserved until some other destiny is determinate to them, usually requiring the free and informed consent of the beneficiaries of the techniques (Raposo, 2010c; Sozou et al., 2010). The silence of the beneficiaries, or the inability to achieve a consensus, refers the decision to a court, especially when a member of the couple (usually the woman) desires to transfer the embryos while the other asks for their destruction, opposing the right to reproduce to the right to not reproduce (Raposo, 2008).

The following destinations are foreseen in Portuguese law to surplus embryos when immediate uterine transference is not an option: embryo donation, cryopreservation until further use by the beneficiaries of the techniques and scientific experimentation, all under the previous informed consent of the beneficiaries (articles 9 and 25 law n. 32/2006).

The supra mentioned destinations must be decided in a certain time period, since embryos cannot be everlasting preserved, not as much for scientific reasons but mainly for juridical and ethical motifs. Portuguese legislation imposes the term of three years (article 25/1 law n. 32/2006), during which the beneficiaries have to take a decision, otherwise embryos will be destructed. In practical terms what happens is that the beneficiaries systematically refuse to carry the weight of such a pronouncement, and remain in silent. Though this is an unsustainable situation – because they should be demanded to take the responsibility for their reproductive decisions – the fact is that reproductive centers fear to destroy the embryos without an explicit decision by the beneficiaries, and usually maintain the cryopreservation, frequently at their own expenses. Consequently, the legislator should intervene in this topic in order to clarify the accountability of the beneficiaries concerning the destiny of their embryos.

Spanish law is more flexible regarding this issue, and allows embryos to be preserved until the beneficiary woman maintains her physical conditions, clinically attested, to carry on a pregnancy (article 11/3 law n. 14/2006), which coincides usually, but not necessarily, with her fertile period. Insofar they are preserved the woman can decide what to do with them (if she is married the power to decide belongs equally to her husband, but the laws does not mention the male or female companion), namely if she intends to donate the embryos or to use them in scientific experimentation (articles 11/5 law n. 14/2006). Regarding the possible uses of surplus embryos the solution is similar to the Portuguese one (article 11/4 law n. 14/2006). From a certain perspective in the Spanish regime the possibility of destroying embryos seems more congruent with the remaining legal aspects of the regulation, since this law qualifies the in vitro embryo as a pre-embryo, there is, an entity that is not an embryo yet. According with article 1/2 of law n. 14/2006, the pre-embryo is the in vitro embryo constituted by a group of cells resulting from the progressive division of the oocyte, from the moment of fecundation until the 14th day, therefore distinguishable from the embryo *proprio sensu*, which corresponds to the next step of the embryonic development until fifty six days after fecundation. Spanish law is one of the few legislations that uses this expression in legal norms. Indeed, in the last couple of years criticism rained down from many quarters to the concept of pre-embryo, accusing this concept of degrading the protection granted to every single kind of human life and, as a result, legal texts and even scientific studies have been abandoning the expression "pre-embryo".

6. Scientific use of embryos

One of the objectives of ART regulation is to prevent that embryo's cryopreservation be maintained *ad eternum*. Not only because scientifically we still have doubts about their conditions to develop after some time of preservation, but also because juridically and ethically the maintenance of a human life in stand by raises severe problems, due to the valor and protection conferred to every kind of human life. Because of all the supra mentioned reasons, at same point embryos need to be destroyed.

Since we cannot force a woman to carry a pregnancy without her will, and also considering that in vitro fertilization cannot be performed presently without that lateral negative effect of creating an excessive number of embryos, destruction is accepted as a kind of lesser evil and, paradoxically, some authors do prefer immediate destruction than the scientific use of embryos (Loureiro, 1997; Serrão, 2003).

Nevertheless, it is a waste of valuable resources to simply destroy the embryos without previously withdraw some benefits from them. In fact, scientific studies and experimentation on embryos may be a precious mechanism to understand the functioning of the human body, to solve some of the present limitations of ART, and even to find new ways of combating illnesses that attack humanity. Therefore, in our published works we have been strongly recommending that, before being destroyed, embryos should be used in scientific purposes, as for instance the recollection of stem cells (Raposo & Osuna, 2007).

This is not a purely pragmatic consideration. On the contrary, it is a conclusion justified in the idea of respect for the embryo, since the best way to honor and respect its life is to allow it to contribute in some way to the well-being of mankind, thereby fulfilling the principle of human solidarity.

The kantian principle of non instrumentalization cannot be understood as a total prohibition of using human life in order to obtain benefits to other human life, as long as that use does not impose a death which in not a previous consequence of some other event. Actually, if the kantian principle were to be understood in such an absolute way even organ donation will be prohibited, just as Kant himself advocated (Munzer, 1993). Therefore, the wisest interpretation of the kantian thinking is to forbid only the mere - in the sense of exclusive and without anything more - use of the person as means, but not treating a person as means as long as collaterally treating her as an end in itself. Finally, but not less important, note that all Kantian theory is referred to "persons", there is, born human beings, while here we are talking about non-persons (Devolder, 2005; Ford, 2002; Raposo, 2010c; Raposo & Osuna 2007).

Portuguese law was sensitive to these considerations. As a result, though prohibiting the creation of embryos solely for scientific purposes, does allow embryo experimentation under certain conditions (article 9 law n. 32/2006): i) benefits to mankind must be expected; ii) the scientific project needs the approval of the CNPMA; iii) prohibition of subsequent uterine transfer of the embryos, after their scientific use. Furthermore, only some kind of embryos may be considered: surplus embryos to which no parental project is available; embryos with genetic abnormalities, properly detected by a pre-implantation genetic diagnosis; embryos that, for other reasons, are not fit to uterine transfer; embryos not resulting from the fertilization of an oocyte by a spermatozoa (presumably, embryos obtained by cloning). Note that, in the first two hypotheses, the consent of the beneficiaries of the techniques is required.

Embryo investigation is also allowed by Spanish law and, once again, some conditions must be fulfilled (article 15 law n. 14/2006): i) prohibition of uterine transference of embryos used in experimentation; ii) written consent of the woman, or of the couple; iii) approval of the scientific project by a public entity; iv) implementation of the project in an authorized centre. A further requisite - not expressly demanded in Portuguese law, though we can sustain that it is an implicit one - is that embryos do not surpass the 14th day after fertilization, which actually coincides with the already mentioned period of weaker protection (some people even talk about a pre-embryo during this time, as something which is not effectively an embryo), and that assumes special relevance in criminal law.

The previous law - law n. 35/1988 - provided a stronger protection to surplus embryos, inasmuch restricted pure experimentation (in other words, experimentation without diagnostic, therapeutic or preventive aims regarding the embryo) to non viable embryos. The concept of viability was central under this legal regime. The problem was - and this was actually the main target of criticism - that the law did not provide any definition of viability. Nevertheless, and notwithstanding the mentioned uncertainty, the prohibition of experimentation in viable embryos was the decisive note that made possible to escape to a judgment of unconstitutionality by the Spanish Constitutional Court (Lema Añón, 2000). Differently, the regulation of 2006 came to allow the scientific use of viable embryos, in the supra described conditions, and thus generated complex problems to a constitutional jurisdiction that for almost two decades grounded its decisions in the restriction of experimentation to non viable embryos (Abellán-García Sánchez, 2008). Nevertheless, and until the present day, law n. 14/2006 has not been reported as unconstitutional by the Spanish Constitutional Court.

In Portugal embryonic investigation outside the legal parameters is a criminal activity, sanctioned in article 40 of law n. 32/2006 which, because of its broad terms, criminalizes also the creation of embryos for exclusively scientific purposes. Differently, the Spanish law on assisted reproduction only deals with experimentation without the necessary requirements, labeling it as an administrative infraction, while is the Spanish Criminal Code, in its article 160/2, that punishes as a criminal offense the creation of embryos devoid of reproductive aims.

Therefore, neither Spain nor Portugal allow the creation of embryos exclusively to be used in scientific purposes (Devolder, 2005; Harris, 1998; Pattinson, 2002), as permitted in the United Kingdom by the HFEA. Among us embryonic experimentation and the recollection of stem cells can only take place on embryos previously generated with reproductive aims but which afterwards became superfluous. The prohibition of this conduct is grounded in several legal interests, some of them more legitimate and consensual than others: the respect for the fundamental rights of the embryo in itself, human dignity, intangibility of the genetic patrimony and the genetic identity of the human species (Romeo Casabona, 2001; Gracia Martín & Escuchuri Aisa, 2005).

7. Gamete donation

In Portuguese law gamete donation is performed by means of a secret, irrevocable and gratuitous contract (articles 15 and 18 law n. 32/2006). The last qualifier does not ban every single payment, since some amounts are allowed in order to compensate the donor for the inconveniences of the donation (Raposo, 2009b). Such a possibility is not expressly foreseen in law n. 32/2006, but instead in the law that establishes the legal regime concerning the quality and safety of donation, collecting, testing, processing, preservation, storage, distribution and application of tissues and cells of human origin (article 22/3 of law n. 12/2009, from 26th March). Furthermore, the compensation is mentioned in the forms of informed consent prepared by CNPMA and available in its website.

The law is silent about the procedure of embryo donation, but everything indicated that it is processed in the same manner. The only remaining doubt involves the existence of the referred compensation, which does not make much sense in this particular point.

The configuration of the contract of gamete donation is quite similar in Spanish law. The contract is also gratuitous, but a compensation is admitted, and in fact foreseen in the law in itself (article 3 law n. 14/2006). Nonetheless, here with a specificity worthy of discussion, related with the revocability of the contract (Gomez Sanchez, 1994; Pantaleón Prieto, 1993). In fact, under Spanish legal order the contract of gamete donation may be revoked in the event the donor needs the gametes for himself/herself – supposedly only because he/she became infertile meanwhile – on the condition he/she reimburses the gamete bank for the costs incurred (article 5/2 law n. 14/2006).

In both legislations the note of gratuity – with the mentioned exceptions in order to compensate some inconvenience of the donor – is imperative, in accordance with the traditional rule that the human body, its parts and fluids, cannot be used for lucrative purposes. This ban is also stated in article 21 of the European Convention on Human Rights and Biomedicine (prohibition of financial gain from the human body).

The Kantian understating of human dignity is one of the main grounds of this rule, but nowadays, with the increasing coincidence between dignity and autonomy, impor-

tant breaches are being open in this rule, also in the field of gamete donation, which actually is more of a selling than a donation in some countries (Raposo, 2009b, 2011). In none of the laws is permitted to the beneficiaries of the techniques to select the characteristics of the donors. It rests with the medical team to operate that selection, which is exclusively oriented by legal and medical criteria. Consequently, the choice of the donor will have in consideration its state of health, since gametes are carriers of sicknesses and abnormalities. Gametes that are not in good conditions cannot, evidently, be chosen, or the reproductive centre risks a case of medical liability. Furthermore, is also considered the phenotypic similarity between the donor and the future parents, given that the ultimate aim of ART is to give rise to a family where the child looks like its parents, as if they all were genetically connected. This last caution is explicitly mentioned in article 6/4 of law n. 14/2006, but not in the Portuguese law, where is absent a norm forbidding the selection of the donor genetic features or even imposing the need to indicate their features. But since law n. 32/2006 forbids the selection of the embryo's characteristics (article 7/2 law n. 32/2006), and even makes incur the doctor in medical liability when this prohibition is ignored, everything points to the conclusion that the same prohibition applies to the selection of gametes.

8. Donor anonymity

According to Portuguese law gamete donation is anonymous, with the exception some particular circumstances circumvented by law (article 15 law n. 32/2006). One of those exceptions allows the access to genetic information unable to identify the donor. On the other hand, it is also legally permitted to be informed about impediments to marriage in order to avoid consanguineous unions, but also maintaining the anonymity. Finally, an as the only possibility of breaking anonymity, the law admits that the person born by means of gamete donation gets to know the donor when serious reasons – thereby confirmed by a judicial decision – are at stake. It is not completely clear the exact meaning of this safeguard, but it is reasonable to understand that the "serious reasons" mentioned in the norm are related to the health condition of the child. Let's suppose, for instance, that the child born through gamete donation requires an organ transplant or a bone marrow transplant, and only close relatives are suitable candidates to save its life. In our opinion it is undoubtful that in the described situation anonymity must cede. But the mentioned "serious reasons" are not imperiously restricted to physical health, since another legitimate possibility is to allow the breach of anonymity in case of mental health condition, as for instance a severe depression caused by the uncertainty on the personal identity and the loss of social belonging.

Under no circumstance is foreseen the opposite situation, there is, the possibility for the donor to know its genetic child. The problem with this provision is that the Portuguese Constitution (CRP) includes, in its list of fundamental rights, the right to personal identity (article 26/1 CRP) and to genetic identity (article 26/3 CRP), both of them acting as a constitutional base for a right to each one know his personal history, in other words, a right to know the genetic origin. As a result, the solution of donor anonymity is unconstitutional, even when joined by the referred exceptions (Reis, 2008; Loureiro 1999 and 2010b). Nevertheless, in its decision from 2007, the Constitutional Court adopted a different position, and considered acceptable the solution of article 15, arguing that it establishes a healthy balance between conflicting

rights: the right to private life of the beneficiaries of the techniques and of the donor, and the right to personal and genetic identity of the child.

Similarly, only in exceptional circumstances the Spanish law admits the break of donor anonymity. Those circumstances must necessarily be related with a danger for the life and health of the child (article 5/5 law n. 14/2006). But even when this occurs is not possible to legally establish fatherhood (article 8/3 law n. 14/2006). Just as in Portugal, also in Spain this solution has been much contested, based on article 10/1 of the Spanish Constitution, a norm about personal rights (Carcaba Fernández, 1995).

Despite the legal solution of Iberian countries, around the world we assist to a movement of progressive withdrawal of the anonymity rule in favor of the right to know the donor identity (Bernstein, 2010).

9. Surrogate motherhood

Surrogacy intends to express the contract whereby a woman commits herself to carry out a pregnancy, in the end of which the child is delivered to other contracting part, usually a couple, but theoretically we may also be talking of a single person. Surrogacy was classically applied by women without capacity to get pregnant, but nowadays is also frequently used by gay male couples. The child may be generated with gametes from any of the contracting parts or from donors, but evidently the desirable situation will be to use gametes of at least one of the members of the contracting couple. Concerning female gametes is highly recommended to apply to a donor in order to obtain the oocytes in case the contracting woman is unable to do so, instead of using the oocytes of the surrogate (Raposo, 2003 and 2005).

Portuguese law determinates that the contract of surrogacy is null and void of any legal effect. In other words, it is like it never existed (article 8/1 law n. 32/2006). Therefore, legal motherhood is established according to article 1796/1 of the Civil Code, which stipulates that the legal mother is the woman that gives birth. Thus, the surrogate is always considered the mother, even in cases of purely gestational surrogacy, i.e., when the oocyte belongs to another woman, which may be the contracting part. In Portuguese legal order this fact is irrelevant to the determination of motherhood (article 8/3 law n. 32/2006).

Since filiation is established as prescribed by the general rules of civil law, it also operates the legal presumption that the father is the man married with the woman that gave birth, there is, the husband of the surrogate (articles 1796/2 and 1826/1 of the Civil Code), though this presumption may be overturned by a genetic test presented by the biological father.

Furthermore, surrogacy is a criminal practice when it takes place through a payment. The parties to the contract risk a fine, or even a jail sentence, and the same applies to the one that promoted the celebration of the contract, usually a lawyer (article 39 law n. 32/2006).

The request to the Constitutional Court to declare law n. 32/2006 unconstitutional was based – among many other arguments, as referred – on the solely criminalization of paid surrogacy, leaving outside gratuitous surrogacy, but the Court found that it was not necessary to use criminal law in both cases. However, the constitutional problem does not lie in the option for a limited criminalization, but in the criminalization in itself (Antunes, 2010; Reis, 2010). Indeed, criminal law is illegitimated applied when the aim is to secure a certain moral belief, as it happens in the case of surrogacy, since no legal interest may be envisaged in this criminalization.

The Spanish legal solution (article 10 law n. 14/2006) is similar to the Portuguese one, with the difference – but a very relevant and decisive difference – that Spanish law considers surrogacy merely as an administrative infraction (article 24 n. 14/2006), but not as a crime, which clearly represents a wiser legal solution (even because law n. 14/2006 only contains administrative sanctions, and any criminal penalty related with these questions is contained in the Penal Code).

10. Post-mortem reproduction

Under Portuguese law artificial insemination and in vitro fertilization are forbidden when executed after the death of the man, i.e., post-mortem (Raposo & Dantas, 2010). Conversely, post-mortem embryo transfer is allowed (article 22 law n. 32/2006). The difference in legal regimes may be justified by two different motivations.

In one hand, because the law presumes that in post-mortem embryo transfer the man has previously given his consent to become a father, for the reason that the reproductive process had its beginning when he was still alive.

However, if the acceptance of this practice is founded in the supposed existence of the consent, we have to face a possible obstacle to this argumentation, because we cannot be sure if he merely consented to be a father or, more than that, if he consented to be a posthumous father. In effect, the man may have decided to have a child, but only assuming he would be alive to raise it, and, in the opposite, he would not have consented to bring to the world a child without the presence of a father.

But this argument can easily be contradicted by arguing that in natural reproduction no man is sure that he will be present to see his child born and grow and, obviously, pregnancies are not aborted because of the death of the father.

The other argument related with the analogy between a pregnancy and the uterine transference of already existing embryos has indeed some strong basis, since in both cases we have a new human being, while in artificial insemination and in vitro fertilization we are going to create the new human being at that moment. Of course some differences can be pointed out between the existence of a uterine embryo and the existence of a in vitro embryo, namely the fact that in abortion we have a previously nidated embryo, maybe even a fetus, in a more developed state, whereas in the uterine transference of embryos the creature is in a very early stage, and effectively before nidation legal protection is much weaker. Even so, the legislator considered that the existence of an actual human life was not to be unvalued, on the contrary, deserved enough legal protection in order to allow its uterine transference, a solution enforced by the presumption of an existing consent to reproduce on behalf of the man.

The legal solution in Spain is quite different, since every modality of post-mortem reproduction is permitted (article 9 law n. 14/2006), as long as the treatment already started when the male element is deceased or, in alternative, if the man has given his consent in a written form (a document similar to an advance directive to medical treatment). In this last hypothesis the reproductive process must be performed in the twelve months after his death, in order to not disturb the succession on his property. A curious note is that article 9/2 states that the beginning of the reproductive process allows the presumption that the man gave his consent, but since the norm does not clarify if it is a *juris tantum* presumption or a *iure et de iure* presumption – there is, if the presump-

tion can or cannot be overruled - we have to consider that it belongs to the first type and, consequently, admit the destruction of the presumption by relevant facts.

11. Preimplantation genetic diagnosis

Preimplantation genetic diagnosis is a genetic study of the embryo, aimed to detect the presence of genetic or chromosomal abnormalities (Coskun & Qubbaj, 2010). The objective is to perceive relevant genetic diseases before the implantation of the embryo in the mother's uterus and, therefore, transfer only healthy embryos or, at least, embryos that do not carry genes of known genetic diseases running in the family. With this kind of pre-natal exam is possible to choose the embryo or embryos with more chances to survive and, consequently, be born. Thereby, it is feasible to achieve a diminution in the risk of failed pregnancies, still-births, and children with severe abnormalities (Raposo, 2010e).

The Portuguese law and the Spanish law are quite similar regarding their regulations. Preimplantation genetic diagnosis is admitted by both of them in specific circumstances (article 7 of law n. 32/2006 and article 12 law n. 14/2006).

Primarily, to detect which embryos are not in conditions to be transferred to the woman's uterus whenever the legal ground to apply to ART (more precisely, to in vitro fertilization in its multiple modalities) was the concern about the embryo's health, because of a genetic or hereditary disease of the parents.

Besides, it can also be used to select the sex of the embryo, but only when the objective is to prevent the transmission of a genetic or hereditary disease connected with a certain sex (like haemophilia, for instance).

Finally, preimplantation genetic diagnosis may also be a solution to obtain the so called saviour sibling, i.e., a child that is healthy and, in addition, can operate as a compatible donor of genetic material (bone marrow, for instance) to a pre-existing sick sibling (Raposo, 2007a).

The general ban of the choice of the sex of the future child has been a much contested legal solution. In Portugal we still do not have any judicial case on this topic, but in Spain, some years ago, when the law from 1988 was still in force, courts were confronted with a request of this kind that become a case study. The final decision of this case, known as the Mataró case (Carcaba Fernández, 1995; Vidal Martínez, 1991), denied the request of a mother of four boys that claimed for a baby girl, grounded on a risk for its emotional health, since the anguish for a daughter was taking her into a severe depression. Since Spanish law admitted at the time (as it does today) sex selection for therapeutic purposes, the woman invoked a therapeutic aim for her own. However, the Court concluded that the therapeutic purpose mentioned in the law was referred to the born child, not to the parents, and finally stated that, ultimately, the mother is for the child not the child for the mother.

12. A final overview

When compared with the European counterparts, Portuguese and Spanish laws may be classified as liberal regulations, thought the Spanish is more broadminded in its solutions, namely regarding the opening of reproductive techniques to single women and the larger admissibility of post-mortem reproduction.

A note that highlights in both regulations is the trust in the wise judgment of physicians, who are in charge to make medical decisions having in consideration the particularities of each concrete case, instead of being the legislator himself to define, necessarily in abstract

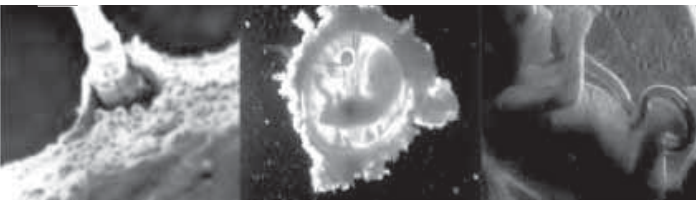
terms, the best solution to situations where a medical judgment is in order. Is a position to be applauded, since the law cannot have the pretension of dictating every single step of science and medicine. This self-limitation is quite evident in the Portuguese law, especially concerning the resolution of questions related with the number of embryos to be created and to be transferred.

Despite of some fragilities, and a few concessions to a narrow understanding of personal autonomy (well exemplified in the prohibition of surrogacy), both these laws have proven to be admirable, having in mind that they born in countries where traditionally religion dominated many of the legal solutions. Even more remarkable is the fact that they remained in force, in spite of severe criticism, and nowadays the intended reforms do not claim for more restriction but for more openness.

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