

Subject matter:

The Constitutional Court examined in its Ruling no. 225/2018 a request for *ex post* abstract review of constitutionality made by a Group of Deputies to the Assembly of the Republic concerning: (i) the insertion in the Law on Medically Assisted Procreation (Law of the MAP) of a number of norms with regard to surrogate gestation; (II) the rule of anonymity of donors (and that of the surrogate mother) vis-à-vis those born as a result of the MAP methods; and (iii) the rule that waives the *ex-officio* investigation of the paternity of a child whose mother, regardless of her marital status and sexual orientation, has had recourse to MAP techniques.

Keywords:

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Plenary

1. The Constitutional Court examined in its Ruling no. 225/2018 a request for *ex post* abstract review of constitutionality made by a Group of Deputies to the Assembly of the Republic concerning: (i) the insertion in the Law on Medically Assisted Procreation (Law of the MAP) of a number of norms with regard to surrogate gestation; (II) the rule of anonymity of donors (and that of the surrogate mother) vis-à-vis those born as a result of the MAP methods; and (iii) the rule that waives the *ex-officio* investigation of the paternity of a child whose mother, regardless of her marital status and sexual orientation, has had recourse to MAP techniques.

2. As far as surrogate gestation is concerned, the Court considered that the fact that the Portuguese legislator had envisaged it as an exceptional method of procreation, subject to the autonomous consent of the interested parties and decided upon by means of an altruistic agreement, subject to the prior authorisation of an administrative authority, did not, *per se*, violate the dignity of the pregnant woman, of the child born as a result of this method or the

obligations of the State towards the protection of children. Notwithstanding, pronouncing itself on specific aspects of the MAP legal framework, the Court found that certain principles and fundamental rights enshrined in the Constitution had been breached, namely:

2.1. The excessive indeterminacy of the law – see Article 8 (4), (10) and (11) – with regards to the limits set for the autonomy of the parties as well as to the restrictions that could be imposed on the behaviour of the surrogate mother in the surrogate gestation agreement. The precise definition of such limits is required in order to validly allow for the definition of the rules of conduct applicable both to the beneficiaries and to the surrogate mother as well as of the standards that are to be used by the Nacional Council of Medicaly Assisted Procreation (NCMAP) in the authorisation of the surrogate gestation agreement (breach of the principle of determinability of the law, which is a corollary of the principle of the democratic rule of law - see point (a) of the Ruling, voted unanimously).

2.2. The restriction of the possibility to withdraw the consent given by the surrogate mother from the beginning of the MAP therapeutic procedures (see Article 8 (8) in conjunction with Article 14 (5)), which prevents the full exercise of the fundamental right to the development of one's personality that confers constitutional legitimacy to the interventions performed within the framework of the surrogate gestation until the execution of the final essential obligation underlying the surrogate gestation agreement, that is, delivering the child to the beneficiaries (breach of the fundamental right to the development of one's personality, interpreted in accordance with the principle of the dignity of the human person, and of the right to found a family - see points (b) and (c) of the Decision, adopted by a majority vote).

2.3. The legal uncertainty as to the civil status of persons as a result of a surrogate gestation agreement being declared null and void (see Article 8 (12)), due to the fact that the legal regime does not allow for a consolidation of legal positions in this case - as parents, as son or as daughter – nor does it differentiate according to the time or seriousness of the grounds invoked in order for the agreement to be declared invalid (violation of the right to personal identity and of the principle of legal certainty arising from the principle of democratic rule of law - see point (d) of the Decision, voted unanimously).

3. With regard to the rule of donor anonymity (as well as to that of the surrogate mother), the Court recognised that the dignity of the human person had not been breached. Nevertheless, and also considering the growing importance attributed to the right to know one's origins, in contrast with the position it had defended in Ruling No. 101/2009, the Court considered that the legislator's option for the rule of the anonymity of the donors in the case of heterologous procreation, although not in absolute terms, as well as for the rule of the anonymity of the surrogate mother - in absolute terms – in Article 15 (1) and (4) of the MAP Law imposes an unnecessary limitation on the fundamental rights to personal identity and to the development

of the personality of persons born as a result of MAP techniques using donated of gametes or embryos, namely in cases of surrogate gestation (see point e) adopted by majority).

4. With regard to the waiver of the *ex-officio* investigation of paternity, the Court found that, in the specific circumstances where it is envisaged, such investigation would be pointless since the donor cannot be legally considered to be the father of the born child even when his identity is known. The constitutional standards invoked (principle of the dignity of the human person, principle of equality and right to personal identity) were therefore not breached.

5. Bearing in mind that the elimination of the norms deemed unconstitutional with a general binding force would imply that all surrogate gestation agreements that had already been favourably appreciated by the NCMAP would have to be subsequently unauthorised - with negative legal consequences to the legitimacy of the therapeutic procedures of the MAP (including the collection of gametes and the breeding of embryos) and to the establishment of the filiation of children born as a result of these treatments - , the Court unanimously decided on grounds of legal certainty and in compliance with the State's obligation to protect children, to limit the effects of its decision in order to safeguard the situations where the therapeutic processes of MAP referred to in Article 14 (1) of the MAP Law have already begun, in execution of surrogate gestation agreements authorised by the NCMAP (see point g) of the Decision). In these situations, the aforementioned declarations of unconstitutionality will have no effect, with the exception of the one mentioned in Article 8 (12).