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Richard Albert, David Landau,
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Portugal

Catarina Santos Botelho[1], Assistant Professor and Department Chair of Constitutional Law, Porto Faculty of Law, Universidade Católica Portuguesa

I. INTRODUCTION

2018 was a significant year, as the Portuguese Constitutional Court (PCC) repositioned itself as a non-deferent Court and as a faithful guardian of constitutional fundamental rights and liberties. As Jorge Pereira da Silva provocatively stated, "the Portuguese Constitutional Court is back!"[2] After years of what some labelled the "judicial activism" of the jurisprudence of crisis—during and after the 2011-2014 bailout—that, for better or worse, hit the news and scholarship internationally, the PCC seemed more silent and cautious towards the legislator. With Ruling no. 225/2018, the Court declared that the legislative power can change the legal framework of assisted reproductive techniques if protection to the most vulnerable parties to a contract of gestation by substitution—the children and the surrogate mother—is granted.

We can truly state that 2018 was the year of family rights, since many rulings consisted of major constitutional developments regarding the subjects of family life, development of one's personality, right to personal identity and human dignity.

It was foreseeable that 2018 would be the year of a much-awaited electoral system reform that would create more favourable conditions for a closer relationship between voters and their representatives within constituencies. Yet, the recent rejection of a popular initiative to reform the Portuguese electoral system shows that the main political parties are still strongly divided over the right path towards achieving that goal.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Surrogacy

Ruling no. 225/2018—"surrogacy"/"gestation by substitution"—can be considered a landmark in the Portuguese Constitutional Court's jurisprudence.[3] The rapporteur was Justice Pedro Machete, and out of the twelve remaining Justices, only one did not submit a concurring opinion regarding specific grounds of the decision. This comes as no surprise at all when a Constitutional Court faces very problematic subjects, since it is not immune to societal, religious, ethical and ideological worldviews.

The ruling, in tune with the PCC's ex post abstract review, is exhaustive (almost 100 pages in the publication of the official journal "Diário da República", or, in a normal Word document, around 200 pages[4]) and very well grounded, with significant Comparative Constitutional (case) Law references.[5]

[1] I am grateful to Justice Gonçalo Almeida Ribeiro (Portuguese Constitutional Court) for his helpful suggestions. The usual disclaimers apply.

[2] < https://www.publico.pt/2018/05/06/sociedade/opiniao/barrigas-de-aluguer-o-constitucional-esta-de-volta-1827235 > accessed February 2019.

[3] 24th of April, 2018 < http://www.tribunalconstitucional.pt/tc/en/acordaos/20180225s.html > accessed February 2019.

[4] < https://dre.pt/application/file/a/115227161 > accessed February 2019.

[5] See Catarina Santos Botelho, 'Is there a middle ground between constitutional patriotism and constitutional cosmopolitanism? The Portuguese Constitutional Court and the use of foreign (case) law', in G. F. Ferrari (ed.), *Use of Foreign and Comparative Law by Constitutional/Supreme Courts* (Brill/Nijhoff, 2019) 424. 2.

From 2006 onwards, any woman (regardless of her civil status or sexual orientation) could access assisted reproductive techniques, except surrogacy.[6] Ten years later, the new Law on Medically Assisted Procreation (hereinafter Law on MAP)[7] evolved from conceiving assisted reproduction as "a *subsidiary* conceiving mechanism" to "an *alternative* method of procreation for women."[8]

The first veto of the Portuguese President of the Republic, Marcelo Rebelo de Sousa, was precisely the veto on the introduction of surrogacy, grounded on the opinions of the National Council of Ethics for the Life Sciences and on the insufficiency of the protection of children's rights. After the veto, the President sent the law back to the Parliament for revision. However, many of the President's concerns were not fully taken into consideration. When the law was sent back to the President for promulgation, he neither vetoed the law nor did he start a preventive abstract review of constitutionality.[9]

It was instead a Group of Parliament Deputies from centre-right (PSD) and right (CDS) parties that requested an *ex post* abstract review of the constitutionality of the Law on MAP.[10] In question were the following issues: "(i) the insertion in the Law on 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 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 resorted to MAP techniques."[11]

On the first topic, the PCC had to decide on the admissibility of the right to start a family with recourse to surrogate gestation in cases where becoming a parent could not otherwise occur due to clinical grounds that were an impediment to pregnancy. In other words, the Court had to stand either in favour or against surrogate gestation. The PCC held that surrogate gestation did not 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", since surrogacy is legalised 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." More bluntly, surrogacy, which shares some similarities with the adoption figure (being, in this case, a "scheduled adoption") was considered constitutionally valid.[12]

Nevertheless, although surrogacy per se was not considered unconstitutional, the PCC invalidated several norms of MAP: (a) the norms that established the limits for the autonomy of the parties as well as the restrictions that could be imposed on the behaviour of the surrogate mother in the surrogate gestation agreement were too indeterminate, therefore violating the *principle of determinability of the law,* which is a corollary of the principle of the democratic rule of law;[13] (b) the norm that did not allow for the revoking of the consent of the surrogate mother from the beginning of MAP therapeutic procedures until the child was delivered to the beneficiaries was in 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 start a family;[14] (c) as the legal regime did not allow for a consolidation of legal positions of persons as a result of a surrogate gestation agreement being declared null and void—as parents, as son/daughter—nor differentiate according to the time or seriousness of the grounds invoked in order for the agreement to be declared invalid, it violated the *right to personal identity* and the *principle of legal certainty* arising from the principle of democratic rule of law.[15]

The Court therefore stated that the right to regret needed to be granted. If not, the surrogate mother would be shadowed and objectified to a mere live "incubator". This would degrade women's dignity as inferior to men's and therefore violate the equality principle.[16] It is worth mentioning that besides sanctioning the fact that the Law on MAP did not foresee a right to regret, the PCC also provided some guidelines for future legislative amendments that would be in tune with the Portuguese Constitution. If the separation of powers is the bulwark of democratic and balanced societies, it is not at stake when constitutional courts interact with sovereign organs (such as the legislator) in order to offer (and not to impose), in a cooperative dialogue, some guidelines or even a "guiding compass"[17] for hard cases.

As I have written elsewhere: "It is quite an illusion or a fallacy to separate, with a perfect dividing line, law from politics. We can perform conceptual divisions and undertake complex line-drawing manoeuvres, but in the end there will always be some kind of in-

[6] Law 17/2006, of 20 June.

[7] Law 32/2006, of 26 July.

[8] Teresa Violante, '(Not) Striking Down Surrogate Motherhood in Portugal' (*Verfassungsblog*, 2018), < https://verfassungsblog.de/not-striking-down-surrogate-motherhood-in-portugal/ > accessed February 2019.

[9] That could be possible through Articles 278 and 279 of the Portuguese Constitution.

[10] In accordance with Articles 281 and 282 of the Portuguese Constitution.

[11] < Available at: http://www.tribunalconstitucional.pt/tc/en/acordaos/20180225s.html > accessed February 2019.

[12] Paras. 12 to 17.

[13] Articles 8 (4), (10) and (11) and, therefore, Article 8 (2) and (3) of the MAP.

[14] Article 8 (8) in conjunction with Article 14 (5).

[15] Article 8 (12).

[16] See the articles of Paulo Otero and João Carlos Loureiro cited in the PCC ruling.

[17] Fernando Alves Correia, *Justiça Constitucional* (Almedina, 2019) 414.

tersection.[18] Notwithstanding areas of significant blurriness, the reign of politics should refrain from overpowering the reign of law. Macro-economic decision-making pertains to democratic deliberation and popular sovereignty, albeit fertile exchanges of ideas amongst state powers is always welcome".[19]

Regarding the rule of donor/surrogate mother anonymity, the PCC found no violation of the dignity of the human person. However, and in contrast with the position it had defended in Ruling no. 101/2009 and in tune with the dissenting opinion of Justice Benjamim Rodrigues,[20] the PCC highlighted the growing importance attributed to the right to know one's origins. In this sense, it ruled that "the legislator's option for the rule of the anonymity of the donors in the case of heterologous procreation, as well as that of the surrogate mother (...) although not absolute, imposed 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 gametes or embryos, namely in cases of surrogate gestation." In my perspective, this ruling should be praised for not ignoring children's right to their identity in order to protect donors or surrogates' anonymity. Furthermore, several North European states (except Denmark) and Anglo-Saxon states have either already reversed their legislation on donors/surrogates anonymity or altered it, adopting dual systems with the possibility of identification.

With regard to the fourth and last topic, the waiver of the *ex-officio* investigation of paternity in respect of a child born to a woman who has engaged in MAP individually (outside the context of a marriage or of a non-marital partnership) in order to get pregnant, the PCC found no violation of the constitutional principles and rights invoked (principle of the dignity of the human person, principle of equality and right to personal identity). It held that "in the specific circumstances where it was envisaged, such investigation would be pointless since the donor could not legally become the father of the born child even in the case where his identity was known".

It is very important to stress that the elimination of the norms deemed unconstitutional with a general binding force (Article 282 (1) of the Portuguese Constitution) would imply that all surrogate gestation agreements already authorised by the National Council for Medically Assisted Procreation (NCMAP) would have to be subsequently overruled. Nevertheless, using the possibility of restriction of effects given by the following paragraphs of Article 282, the PCC unanimously decided, on grounds of legal certainty and in compliance with the State's obligation to protect children, that "the effects of the declaration of unconstitutionality would not apply to the surrogate gestation agreements authorised by the NCMAP in execution of which the medically assisted procreation procedures referred to in Article 14 (4) of Law 32/2006, of July 26 had already been initiated."

This confusion could have been avoided if the President of the Republic had exercised his right to ask for a preventive constitutional review before the Law on MAP entered into force, in accordance with Articles 278 and 279 of the Portuguese Constitution.

2. Failed electoral reform in Portugal

The increasing level of electoral abstention and the declining levels of confidence in the political system and political actors are related to the citizens' lack of identification with the current party system.[21]

The debate over electoral system reform has gone on since the Portuguese transition to democracy (1976/78), but it has become more intense over the last two decades. Portugal has a "proportional representation system", and this proportional representation system is also found in an entrenchment clause, as stated in Article 288, *h*).[22]

Although the constitutional amendment of 1997 allowed proposals for a closer relationship between constituents and their representatives within constituencies that would change a *stricto sensu* proportional system to a mixed one (with single-member districts and a national constituency as compensation), there seems to be an obstacle. The main critique is the closed list system and the fact that some districts return a very large number of deputies.

The major political parties agree that the system must change, but in the end, they cannot reach consensus on the appropriate electoral reform path: A mixed-member system with some single member districts or a multiple-tier system with small multimember constituencies at the lower tier? Reduce the number of Deputies or maintain it (180 to 230 Deputies)? Studies show that the personalization of the vote raises political fears, such as "parochialism, clientelism and party-political polarization"; the fear of "losing control of the selection of candidates"; "intra-party divisions"; and the 'fear of the unknown'". As any constitutional amendment must be approved by "a majority of two-thirds of the Members of the Assembly of the Republic in full exercise of their office" (Article 286/1 of the Portuguese Constitution), a wide political consensus is needed.[23]

[18] Jutta Limbach, 'The Law-Making Power of the Legislature and Judicial Review', *Law Making, Law Finding and Law Shaping: The Diverse Influences* 174 (Oxford University Press, 1997).

[19] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?' (2017) 3 (4) CALQ 87.

[20] < http://www.tribunalconstitucional.pt/tc/en/acordaos/20090101s.html > accessed February 2019. The Court stated that "the option which the legislative authorities chose when they established a mitigated regime governing donor anonymity cannot be criticised from a constitutional point of view".

[21] The think-action tank 'Portugal Talks' theme for 2018 was 'Voter Turnout in Portugal: diagnosis and possible solutions'. See < https://www.pttalks.pt/en/homepage-2/ > accessed February 2019.

[22] For a deeper understanding of the Portuguese entrenchment clauses, see Catarina Santos Botelho, 'Constitutional Narcissism on the Couch of Psychoanalysis: Constitutional Unamendability in Portugal and Spain' ((2019) 21 (3) EJLR 346) *European Journal of Law Reform*. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242023 > accessed February 2019.

In 2018, the Association for Economic and Social Development and the Association for a Quality Democracy presented a popular initiative to reform the electoral system.[24] This new channel of political participation must be praised. A concrete avenue of change, it also had a major advantage: all the electoral reform proposals were designed to not require a constitutional amendment. In other words, the proposals were conceived within the Portuguese constitutional framework. Not surprisingly, though, the Parliament just recently rejected it and delayed this discussion until after the legislative elections.[25]

III. CONSTITUTIONAL CASES

1. Ruling 242/2018: Right of for-profit (or limited liability) legal persons to legal aid

At the request of the Public Prosecutor, the Constitutional Court declared Article 7(3) of the Law on Access to the Law and the Courts unconstitutional.[26] The norm under appreciation denies legal protection, which encompasses legal advice and legal aid, to for-profit (or limited liability) legal persons regardless of their specific economic situation.[27] No inquiry is done in order to understand if they objectively are in a condition to pay the proceedings costs in a timely manner.

Article 20 (1) of the Portuguese Constitution grants all subjects of law the right of access to the courts. A fundamental dimension of this right is, therefore, the prohibition of the denial of justice on account of one's insufficient financial resources.

If, previously, the PCC had excluded for-profit legal persons from the scope of protection of Article 20 (1) solely on the basis of their legal nature,[28] the PCC reversed its jurisprudence and applied the EU law and international regional law (European Convention on Human Rights) as more than *obiter dicta.* In fact, the PPC stated that "nothing in the case-law of the European Court of Human Rights (ECHR) precludes the granting of legal aid to for-profit legal persons" and then interpreted the Portuguese Constitution in consonance with the Charter of Fundamental Rights of the European Union, in particular "the latest developments in the interpretation of Article 47 (1) of the Charter of Fundamental Rights of the European Union (hereinafter Charter), on the right to an effective remedy and to a fair trial". In this sense, "the right to effective judicial protection guaranteed by Article 47 of the Charter may require (...) the granting of legal aid to for-profit legal persons, without this being considered as dysfunctional in relation to the competition rules in an efficient market".

2. Ruling 242/2018: Mental disabilities and equality principle

In a concrete review case, the PCC decided that the rule of Article 131 (1) of the Code of Criminal Procedure, which establishes the absolute incapacity to testify of a person with mental disability, even as a victim or offender of a crime, infringes the principle of equality (Article 13 of the Constitution) with regard to the prohibition of discrimination and the right to a fair trial, enshrined in Article 20 (4) of the Constitution in conjunction with the principle of proportionality (Article 2 of the Constitution).[29]

The Court considered that Article 131 (1) treats "all psychic anomalies radically and in the same way, regardless of the specific and concrete degree of their respective capacity to testify on any event in criminal proceedings, which is not subject to verification specified in the interdiction process.(…) It happens, however, that in many situations, the mental health of the person, and the respective degree of affection of cognition or volition, taken into account in the evaluation of the presuppositions of judicial interdiction, do not project relevantly on the capacity (…) to understand and respond with truth to the questions put to him, in order to obtain a reliable account of facts that he observed or experienced.(…) We are therefore faced with a legislative measure which not only violates the principle of proportionality, in its first two tests—suitability and necessity—but also proves to be discriminatory in relation to a category of persons—the victims of research crimes declared to be prohibited by psychic anomalies—showing as we have seen, lacking sufficient grounds for the different treatment that operates".[30]

3. Ruling 488/2018: Dismissal of paternity proceedings

In its Ruling no. 23/2006, the PCC ruled that the previous text of Article 1817 § 1 of the Civil Code,[31] which established a two-year time limit from the date of reaching the age of majority or the date of emancipation of the minor for the exercise of his or her right

[23] André Freire and Manuel Meirinho, 'Institutional Reform in Portugal: From the Perspective of Deputies and Voters Perspectives' (2012) *Pôle Sud* 107-125.

[24] < https://www.dn.pt/lusa/interior/associacoes-sedes-e-apdq-lancam-iniciativa-de-cidadaos-e-peticao-para-reforma-eleitoral--9945172.html > accessed February 2019.

[25] < https://www.dn.pt/edicao-do-dia/05-fev-2019/interior/ps-e-psd-chumbam-reforma-do-sistema-eleitoral--10534047.html > accessed February 2019.

[26] Law 34/2004 of July 29, amended with the wording of conferred by Law 47/2007 of 28 August.

[27] 8 May 2018. < http://www.tribunalconstitucional.pt/tc/en/acordaos/20180242s.html > accessed February 2019.

[28] Ruling 216/10. < http://www.tribunalconstitucional.pt/tc/acordaos/20100216.html > accessed February 2019.

[29] < http://www.tribunalconstitucional.pt/tc/acordaos/20180486.html > accessed February 2019.

[30] Para. 7.

[31] Adopted by Decree-law no. 496/77 of 25 November 1977.

[32] < http://www.tribunalconstitucional.pt/tc/acordaos/20060023.html > accessed February 2019.

to start paternity proceedings, violated the right to family and to know one's biological parents (Articles 26 § 1 and 36 § 1 of the Constitution).[32] Articles 1873 and 1817 § 1 of the Civil Code now determine that a claim for establishing paternity can be brought at any time until the child reaches the age of majority.[33] However, the right to seek paternity recognition by judicial decision lapses ten years after the person has attained the age of majority.[34]

After the legislative amendment of the previous short-time limit (the two-year time limit was upgraded to a ten-year time limit), the PCC was again called upon to rule on whether Article 1817 § 1 of the Civil Code was compatible with the Constitution.[35] The Court ruled (by seven votes to six) that the provision in question was not disproportionate in that it did not violate the constitutional right to know one's biological parents. The Court argued that "there was a public interest in having both biological and legal paternity established as soon as possible" and that "there was an interest in ensuring legal certainty in respect of the putative father and his family due to the personal and patrimonial consequences of the recognition of paternity".

In the case of *Silva and Mondim Correia v. Portugal,* the applicants alleged that the dismissal of the paternity proceedings constituted a breach of their rights under Article 8 of the Convention.[36] The European Court of Human Rights ruled that the applicants "had shown an unjustifiable lack of diligence in instituting paternity proceedings in that they had waited fifty and twenty-six years, respectively, since reaching the age of majority to seek to have their paternity legally established".[37] The Court found no violation of the right to respect for their private and family life under Article 8 of the Convention, "given the margin of appreciation afforded to States in respect of paternity proceedings legislation, the non absolute nature of Article 1817 § 1 of the Portuguese Civil Court, and the case-law of the Portuguese Constitutional Court".

In the recent Ruling 488/2018, the PCC, in a concrete review case, stated that Articles 1873 and 1817 § 1 of the Civil Code violated Articles 18 § 2, 26 § 1 and 36 § 1 of the Constitution on the grounds that the requirement for protection of the interests pertaining to the investigating party should not be limited, and that even if it were, such limitation was not justified when the proportionality of the various conflicting interests was weighed.[38]

According to Article 79 § 1 of the Law of the Constitutional Court, since in this concrete review ruling the Court decided "there has been unconstitutionality (…) in a manner different to what was previously adopted for the same rule by any of the Court's sections" (in the case, contrary to Ruling 401/2011), "an appeal can be made on this decision before the Court's plenary, compulsory for the State Attorney when he intervenes in the case as appellant or respondent".[39]

IV. LOOKING AHEAD

In 2019, there will be three main elections: the European Parliament elections (in May), the regional elections for the Parliament of Madeira (in September), and the elections for the Parliament of the Portuguese Republic (in October). Also, the Portuguese Constitutional Court will most likely decide on recent legislation (or legislative projects) regarding the following issues: (a) access to metadata (data about data) by information services of the Portuguese Republic; (b) legalisation of cannabis; and (c) legalisation of prostitution.

V. FURTHER READING

Catarina Santos Botelho, 'O Lugar do Tribunal Constitucional no século XXI: os limites funcionais da justiça constitucional na relação com os demais tribunais e com o legislador' (2018) JULGAR 111

Gonçalo Almeida Ribeiro, 'Constituição' (2018) *Dicionário de Filosofia Moral e Política*

Jorge Miranda, *Direito Eleitoral* (Almedina, 2018)

Jorge Pereira da Silva, *Direitos Fundamentais – Teoria Geral* (Universidade Católica Editora, 2018)

Jorge Reis Novais, *Direitos Fundamentais nas Relações entre Particulares – do dever de protecção à proibição do défice* (Almedina, 2018)

[33] Law no. 14/2009 of 1 April 2009, which amended the text of Article 1817 § 1 to its current version.

[34] Article 1817 § 3 of the Civil Code adds a supplementary three-year period in addition to the general ten-year time limit within which paternity proceedings can be instituted.

[35] Ruling no. 401/2011 of 22 September 2011. < http://www.tribunalconstitucional.pt/tc/acordaos/20110401.html > accessed February 2019.

[36] 3 October 2017. Applications nos. 72105/14 and 20415/15. < https://hudoc.echr.coe.int > accessed February 2019.

[37] Para. 68.

[38] < http://www.tribunalconstitucional.pt/tc/acordaos/20180488.html > accessed February 2019.

[39] < http://www.tribunalconstitucional.pt/tc/en/tclaw.html > accessed February 2019.