

Solidarity and Gamete Donation

Luísa Neto¹

ABSTRACT

The article argues that the gamete donation for reproductive purposes may arise from a solidarity enshrined in the social contract perspective and questions the margin of the State intervention in what concerns legal regulation regarding one's choices.

Keywords: Donation; fundamental rights; gamete; reproduction; solidarity

SOLIDARIEDADE E DOAÇÃO DE GÂMETAS

RESUMO

Questiona-se a relação da doação de gâmetas para efeitos reprodutivos com a solidariedade que funda o contrato social, discutindo o espaço da intervenção da regulação do Estado no que respeita à relação do sujeito consigo mesmo

Palavras-chave: Direitos fundamentais; doação; gâmetas; reprodução; solidariedade

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¹ Faculty of Law of the University of Porto; Centro de Investigação Jurídico Económica. 4050-123 Porto, Portugal.
lneto@direito.up.pt

INTRODUCTION

1. The relation between Law and sexuality or reproduction is somehow recent in academic debates and political forums. In fact, we can find abundant bibliography on sexual and reproductive health, as well as on issues related to family planning, especially when they are linked to demographic problems or women's related issues. But other legal issues within this area are only emerging as debate issues since the second half of the twentieth century, in what seems to be a way of disconnecting sexuality from reproduction, and of setting apart biological and legal determinations.

It is however important to stress that health is a primary constitutional value, comprising a set of subjective situations, structurally related to both negative freedom and positive freedom and to an awareness of self-determination that may produce specific consequences, partly because of people's (lifestyle) choices. In this sense, reproduction and sexuality must be included as specific areas of general public health and fundamental rights policy and we must discuss what is the margin of legal intervention in what concerns the relationship of human dignity and decisions over one's own body. Indeed, the main stream doctrines continue to affirm, in so called definitive terms, the principle that the person is inviolable and that the human body is inalienable.¹⁻⁵ But in what concerns the principle of human dignity, the key concern is to understand if the donation of gamete (or, for instance, to carry a pregnancy for the interest of another person), has to be considered as a violation of body integrity that goes beyond the consent and voluntary agreement of the individual, by pushing the limits of public order.⁶⁻⁹

2. It has been argued that the new methods of assisted procreation anchored in male or female gamete donation, could seek a possible parallelism with the donation of blood for transfusion purposes, or with organ transplants for patients who need them for their health or survival, despite doubts about such comparison, in virtue of the essential character of those last ones.

Does gamete donation reflect the solidarity requirements in nowadays society and are expression of the fundamental right to the free development of the individual? Or is there a legitimacy for the State intervention, regulating – e.g. assessing aims or beneficiaries – or even prohibiting that self-determined choice?

MAIN THEME

1. We must not forget that in order to exist and survive, a political society must satisfy the “functional imperatives of the social system” that Parsons talks about, claiming for an overlapping consensus. One such concept relates very clearly the question of justice with the conditions of political communication in our societies.

In fact, nowadays, a philosophical theory of action conveys political relevance to ethical considerations in the world of everyday life.

Given this perspective, if the Law has a clear mission of conformation of social life and human behaviour, it is important

to not perch itself in a shameless ivory tower. In fact, the tasks of the rule of Law, such as today historically stated, must not point to an ideal model of society, but to the perception of a democratic society that cherishes the *status negativus* transformation of its members in a *status activae civitatis* or *status active processualis*: if the coercive power of Law assumes as accepted the authority of the legislator, this cannot be a closed process.

However, and contrary to the traditional issues raised by contraception – e.g. the controversial access to the “morning after” pill –, the medically assisted procreation techniques bring with them the possibility of a remedy – if not the cure – to infertility, but are not exempted from legal, ethical and moral issues. However, gamete donation must be seen as a legitimate option that entail the consideration figures that in reality overlook the will/availability – situations of agreement, self-placement in danger, self-limitation, consent, self-injury or of allowed hetero-injury.¹⁰

2. Furthermore, if a fundamental right – this time understood in subjective terms – is in a known possible definition, a specific regulatory permission use of a “good”, there will be certainly no better good or subject more essential that a permission can focus on than the “human body”. The traditional subject of Law – the person – comes back today surprisingly also as a simultaneous object to the very same legal ruling.

Hence the issue of the difficult compatibility in some situations, between the alleged unavailability and inviolability of the human body with the possibility of Man to be granted self-determination within rational refusing, for example, of a medical treatment, or within the self-limitation of physical integrity.

In these cases, the human and personal freedom is the “freedom of decision”, not in the sense of choice of one among several possibilities of action, but in the decision of him and over himself: the person develops its sense of being and self-determination through the free decision about himself. “*Maxime*, about our body, should we say”.¹¹

In the terms used after 1891 by the Supreme Court of the United States, this is the right of every individual to have possession and control over his own self. In the constitutional sphere, it is to determine the extent to which the individual should be protected against interference by public authorities and the nuclear sense of privacy that translates in the right to be let alone, or in peace – *the right to be let alone Olmstead v. US*, 277 US 438, pp 478, considered it the most comprehensive and most valued right by civilized men.

3. This broad understanding questions the possible space for a paternalistic attitude of the State. In fact, despite the absolute character of that *right to be let alone*, acts of disposition of the body that cause a permanent diminution of physical integrity – or that are otherwise contrary to Law or morality – are most times prohibited.¹²

According to the almost absolutely majority doctrine, life is unavailable and physical integrity is only available within strict limits, since a permanent decrease of physical integrity prevents the effectiveness of the wishes expressed by the holder.

Notwithstanding, nowadays - that the human body has no role in the enforcement of the obligations -, when we speak of services that the human body can render to the others, we are essentially talking about a new chapter opened by the progress of medicine and biology, and whose end we almost dare not to see.

In fact, we must address more precisely the human body as an element of the Law framework, and approaching the freedom/availability of the subject to his body in the face of core values or Law, in what concerns the principle of self-determination in reproductive choices, understood as the ability to decide consciously and with maturity of one's own fate in terms of health and reproductive choices.

Therefore, the limits to self-determination, especially if it is an absolute prohibition, must be adequately and reasonably justified by the inability to otherwise protect interests of equal value. The legislator has the task of striking a balance between the different interests at stake, verifying that the balance of meeting the criteria of reasonableness and proportionality must not operate an absolute prohibition unless this is not the only mean of protecting other constitutional interests.

And this is even truer as we stand in a specific context, framed by certain notions of the State and constitution, natural Law, and of the challenges facing our society today. It is in this context that ethics stands out, considering the person as the basis and ultimate purpose of the Law, subject of fundamental rights which should be exploited as legal category of legitimation of political power and of the (material) Constitution as rationalization of social space and personal experience.

4. The identification of an area of operative rationality challenges the so called natural Law in a demanding new era: the "Bioethics", as positive reference for legal solutions and of the subject-object instance.

In fact, nowadays, this so-called "Bioethics" focuses on autonomy as a condition for whom the author sets its own rules. Since the principle of autonomy - also called the principle of freedom - prescribes the respect for the legitimate autonomy of the people, for their choices and decisions that are truly autonomous and free.

The principle that a person may request assistance in order to carry out a breeding or reproductive project has also been progressively considered by the European Court of Human Rights (ECHR), which has curiously inserted the matter in the field of protection of the right to privacy and family privacy referred to in its Article 8.

The Court has understood that the challenges posed by developments in the biomedical sciences have also brought new challenges arising from the modification and broadening of the notion of family life, ranging from activism to the adoption of self-restraint practices.¹³

In the case *Evans vs United Kingdom* (2006/2007), ECHR has decided that the right of privacy - or, in another formulation, the right to be let alone - has a wide scope and may consider, *inter alia*, aspects of the physical and social identity, including the right of personal autonomy, free personal development and

the right of establishing relations with other human beings.

5. How to regulate the donation of gametes (male or female)? Or, on another level, collaboration on surrogacy projects?

Three principles are at stake and must be considered: the individual freedom that gives each one the availability of his own body, the beyond-economic character of the body that bans costly businesses, and the intangibility of human body, although this latter may not appear as an absolute principle.

The definition of a particular set of beneficiaries or donors seems to fulfill the objective of safeguarding the maintenance of these *extra commercium* relationships but not an inevitable or exclusive way of achieving such an outcome.

But is it up to the State to define the relationships that are woven - especially when altruistically determined?

In another aspect, gratuitousness seems to be a requirement. If some argue that obtaining an economic reward would aggravate the character of the act - *De Cupis*, Santosuosso -, others comfortably understand that, compensation, as in blood donation, would just follow the requirements of elementary commutative justice - as Carnelutti, Lojaco. The same discussion can be held in what concerns the anonymity and possible consequences of its disclosure.

Although altruistically determined - and therefore an expression of a solidarity that, moreover, is not limited, should be fostered and object of pedagogy - personal choices in these matters question and defy Law as a systematic science. Not so much because of the subjective aspect of personal entitlement to a right, but because of the objective dimension that it provides for a particular State. But perhaps even in this latter sense, educating people to come to understand the values of solidarity demands the assessment of the so called "quality of life", rather than applying coercion through non thorough prohibitions.

DISCUSSION/CONCLUSIONS

1. A public health policy committed to the full promotion of reproductive and sexual rights will represent a political achievement for democracy and it will strengthen the process of democratization of society. It will also contribute to changing the limits imposed by the State to private life and thus contribute to a citizenship that extends to everyday life.

Paradoxically, this autonomy allows perhaps the most radical of universals: "[A] democratic experience of our humanity, or rather the experience that is the cause of democratization is formed, indeed, when all other seem nonessential belongings, except belonging to humanity".¹⁴ This would be what Matthias Mahlmann refers to as a 'substantive normative universalism', holding that "the only identity that falls within the political and legal level of determination is the one that focuses on the significant normative contents of a universalist vision. (...) Today this perspective is shaped by a culture of human dignity and human rights and democracy institutionalized in accordance with the rule of law, and reinforced by social solidarity".¹⁵ Following the same path, Mahlmann continues: "The purpose of a constitution is (...) to determine, at least in the territory to which

it applies, the principles of human rights, democracy, rule of law and social solidarity, and engage its citizens in the drafting of a normative civilization.”

2. In fact, fair and unjust behavior can consist of the enactment of norms that establish benefits to classes of individuals, and may consist in the application of such norms in particular cases, as well as in their observance. In the present context, distributive justice will be one that is externalized in the distribution of rights, material goods or anything else divisible, among those who participate in the political system. The progressive recognition of new fundamental rights – or of new dimensions of other rights - has the character of a cumulative process. What is happening today is that the attitude towards the human body confirms one of the oxymora of the history of Law, which is the tension between the definition of a private and public sphere. Such tension demands a new way of setting standards for the assessment of the choices upon self-dignity and demands that a more flexible logic should be enshrined into Law, in order to convey the purpose of justice.

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