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Regulating Lesbian Motherhood: Gender, Sexuality and Medically Assisted Reproduction in Portugal¹

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Abstract: This article analyses juridical discourses about Medically Assisted Reproduction (MAR) in Portugal, focusing specifically on the access of lesbians to this type of intervention. Empirical data refer to an exploratory research that combined the analysis of legislation with non-directive interviews to five judges from Family and Juvenile Courts of Law of the Northern Region of Portugal. One argues that the representation of motherhood present in the law reinforces and reproduces normative sexuality and femininity while simultaneously justifies the exclusion of lesbians from MAR. As such, although Portuguese legislation emerges as a mechanism of partial deregulation of the gender regime since it appears to weaken the practical and causal association between sexuality and procreation, in fact, it ends up reinforcing dominant ideas of femininity and family. As for the judges who were interviewed, their representations of motherhood are broad enough to encompass medically assisted motherhood and/or motherhood accomplished within a lesbian couple. This is achieved through a process of normalisation of the lesbian and/or of lesbian motherhood, which may resort to five different assumptions: (i) parenthood as a desire inherent to every human being; (ii) motherhood as a defining element of femininity; (iii) motherhood as a project framed by a stable conjugal relationship; (iv) lesbian motherhood as something that can be accomplished through “natural” means; (v) parenthood as a mechanism of social reproduction of the gender regime. These assumptions are

¹ This text is based on empirical data gathered by the first author for her master thesis in Sociology entitled “*They should find a man*”: Representations of medical doctors and judges about medically assisted lesbian motherhood, developed under the supervision of Professor Alexandra Lopes and publicly defended on November 2012 at the Faculty of Arts of the University of Porto (Portugal).

differently combined and support different positions regarding lesbian motherhood: although some judges seem to concur with the preservation of heteronormativity, most favour legal changes to encompass other models of sexuality and family.

Keywords: lesbian motherhood; medically assisted reproduction; juridical discourses; representations; gender

1. Introduction

Law holds a fundamental role in the social (re)production of the gender and sexuality regimes [1,2]. The need to ensure gender conformity has led the State to develop coercive mechanisms of reproduction of a gendered regime—namely, mandatory gender declaration in official documents or access to certain juridical institutes according to gender, such as marriage [3]. As “a form of discourse and [...] a system through which meanings are reflected and constructed and cultural practices organized” ([4], p. 888), law contributes to the social construction and to the naturalisation of gender, namely the idea according to which involvement in heterosexual relations and consequently the creation of a conjugal family is one component of masculinity/femininity [5]. This leads to a special association between making law and reinforcing hegemonic masculinity [1]. Since the law has been made according to the subjective meanings men assign to phenomena, it has also contributed to the juridical—and consequently social—marginalisation of those who do not fit the profile of normative masculinity [4]: women and those who are erotically attracted to their own sex. Male notions of masculinity and femininity have thus moulded fields such as family law [1] and led to gender and sexual inequalities regarding, e.g., conjugality, reproduction or parenthood.

In western societies, hegemonic masculinity has been defined by characteristics such as aggressiveness, domination, independency or self-sufficiency [6]. Comparatively, femininity has been based on four assumptions: the “proper” woman is the one that is (i) married, (ii) a mother, (iii) dependent on her husband and (iv) vowed to domesticity [4]. Juridical discourse tends to favour the *status quo*, which means that gender identity definitions that seem to contradict pre-existent, dominant and traditional ones are considered unviable and impossible to express in juridical terms (*idem*). The set of juridical-social meanings assigned to “woman” and “man” has supported a gender regime whose dominant pole is “naturally” male. The latter exerts its power over the other, dominated pole, thus (re)producing gender inequalities.

However, law, namely Portuguese law, has also contributed to social change, promoting and enforcing the principle of gender equality in different fields of life [7]. Since formal equality does not exist without some gender regulation, such tasks involve instituting normative understandings of gender and therefore the imposition of certain forms of expressing the feminine and the masculine [3]. In other words, the regulation of the gender regime to ensure equality between men and women requires reproducing some ideas of what it means *to be a man* or *a woman*. Paradoxically, then, it has also led to the (re)production of normative notions of femininity, masculinity and sexuality. Femininities, masculinities and sexualities that fall out of such notions belong to the non-normative; they have no juridical expression or are otherwise defined by their distance towards the first.

This is the case of the law that regulates Medically Assisted Reproduction (MAR) in Portugal. It is framed by a patriarchal ideology aimed at the vigilance and regulation of reproductive behaviours—particularly, female ones—in an effort of conformity to stable heterosexuality [8]. It reinforces what Costa [9] has called the “duo-genetic theory of reproduction” since medical assistance to procreate is only allowed in a situation that replicates—as much as possible—the “natural” procreative model, *i.e.*, reproduction achieved through heterosexual intercourse and resting on the transmission of bodily fluids (semen and blood). Techniques of medical assistance to procreate are hence designed and legally regulated to reproduce the idea of gender complementarity [10]. Divergence from this ideal regime implicitly denounces one’s “inadequacy” as a parent [11]. In Portugal, this is the particular case of both lesbians and single women who are excluded from the set of potential beneficiaries of MAR.

This article is based on an exploratory case-study. It accounts for the juridical representations of parenthood that underlie the MAR law in Portugal. Such representations support juridical practices of gender regulation, especially regarding women. The analysis of legislation was combined with data from non-directive interviews to five judges (four men; one woman) working in Family and Juvenile Courts of Law in the country’s northern region. The option for these specific judges rested on the assumption that the contents of their professional activity would place them closer to family issues, in general, and of parenthood, in particular. For this reason, they were expected to have a more intimate knowledge of the country’s current reality and diversity regarding such matters. The interviewees’ recruitment was accomplished through a request letter addressed to the Courts’ presiding-judges. Letters were sent to 10 of the 17 Family and Juvenile Courts; only five of them replied. As such, these five judges represent a small part of the judges working in Family and Juvenile courts. The positive response of these judges to our call may be related to their openness towards the issue under investigation and, thus, to their willingness to express their position through the interview. The interviews focused on the extant MAR law and the possibility of changing it in order to include lesbian couples as potential beneficiaries. The purpose was to obtain the interviewees’ positions regarding this topic. Interview data were subsequently subject to content analysis.

The article sets off the analysis of Portuguese legislation in the context of the European Union (EU) and the ideological framework that supports it. Subsequently, it focuses on the judges’ representations of (lesbian) motherhood. As one shall see, although their representations of motherhood are broad enough to encompass lesbians, this is achieved through a process of normalisation of the lesbian ([12], p. 133) and/or of lesbian motherhood, which may resort to five different arguments: (i) parenthood as a desire inherent to every human being; (ii) motherhood as a defining element of femininity; (iii) motherhood as a project framed by a stable conjugal relationship; (iv) lesbian motherhood as something that can be accomplished through “natural” means; (v) parenthood as a mechanism of social reproduction of the gender regime. Results should be seen with caution since this was an exploratory research. The interpretation of the judges’ discourses offered in this article consists therefore of an analytical exercise which paves the way for more systematic investigations aimed at exploring the tendencies, representations, and analytical dimensions that emerged from this study.

The “normal lesbian” is defined by Seidman ([12], p. 133) as the one whose overall conduct conforms to dominant social norms (e.g., being “feminine”, linking sex to love, being involved in a stable conjugal relationship) being therefore worthy of respect and integration. However, as the author highlighted ([12], p. 140), “normalisation” is potentially ambiguous and unstable because though it can

easily coexist with the heterosexual norm it can also destabilise it. As one shall see, the interviewees believe that lesbians' desire to become mothers is entirely "natural". However, they hold different—sometimes, ambivalent—positions regarding its fulfilment. Though some continue to explicitly or implicitly defend the exclusion of lesbians from MAR, reinforcing the idea that heterosexuality and the conjugal heterosexual family are the only or the most adequate models to parenting, others challenge such vision, defending both the adequacy and legitimacy of other family and sexuality forms.

2. The Portuguese Legal Framework

In Portugal, MAR is regulated under law n.º 32/2006, of July 26, passed after parliamentary debate regarding the uses and applications of medical-technological procedures to procreate [8]. Although medically assisted reproduction had been a reality in Portugal since the mid-1980s, before the promulgation of the law there had been a practice of medical self-regulation parallel to the attempt to approve legislation in this field [13]. Legislative initiatives finally presented to Parliament² shared the fact of resting, in variable degrees, on medical and juridical arguments. These included allusions to infertility as a disease in need of proper treatment, which required duly framing medical practices in this domain. Except for the Communist Party and the Left Block³, whose bills considered single women eligible for reproductive medical treatments, all other Parties clearly aligned with the *doxa* [15]: MAR should only be dispensed in case of heterosexual conjugal infertility. This position was clearer among the Socialist and the Social-Democrat Parties, whose bills rested on an intimate bond between *being a woman*, *being a mother* and *being married* and contrasted with the more subversive views of the Communist Party and the Left Block, who removed marriage from the equation (cf. [16–19]).

Against the backdrop of common European policies, Portugal departs from some EU countries regarding the use and application of MAR technologies [20]. In Germany, Denmark, the Netherlands, Spain, Estonia, Belgium, Bulgaria, Luxembourg, Ireland and the United Kingdom, requirements to access MAR do not include being the member of a couple⁴. This shows a broader notion of parenthood dissociated from marriage and sexual orientation. In Poland, Cyprus, Latvia, Lithuania, Romania, Slovakia and Malta there are no eligibility requirements⁵ (*idem*), which seems to ensure full enjoyment of procreative rights regardless of conjugality and/or heterosexuality. This is not, however, the case in countries such as Austria, the Czech Republic, Finland, France, Greece, Italy, Slovenia or Portugal where heterosexual couples are the only potential beneficiaries of MAR (*idem*).

² Bills presented by the Socialist Party (Bill n.º 151/X), the Left Block (Bill n.º 141/X), the Communist Party (Bill n.º 172/X) and the Social-Democrat Party (Bill n.º 176/X) ([14], p. 9).

³ The Left Block is a coalition of small left-wing parties.

⁴ Considering the 27 member-States of the European Union, there are other prerequisites to MAR besides conjugal status, namely maximum age limit for men and women; the number of cycles accomplished; the number of transferred embryos; and infection by HIV or having a criminal record [20]. Since the current text focuses on lesbian motherhood, conjugal status will be analysed in-depth since it is the criterion that seems to influence more clearly the access of lesbians to MAR, both as single women or as part of a couple. More detailed information on the remaining criteria can be found in the report published in 2010 by the European Society of Human Reproduction and Embryology.

⁵ There are particular cases: e.g., in Sweden, lesbian couples unlike single women are eligible for MAR and in Hungary, single women are eligible as long as they are infertile [20].

In Portugal, legal prerequisites to access reproductive technologies reinforce the binary gender regime, reproducing dominant notions of motherhood/fatherhood and sexuality. MAR is considered a therapeutic service to overcome biological barriers to procreation, namely infertility ([8], p. 35). Reproductive techniques are conceptualized as means to help “Nature”, so they are viewed as a subsidiary form of procreation, *i.e.*, their use is limited to cases of physiological failure that prevent pregnancy [8]. The legal construction of MAR as subsidiary underlies medical discourses advocating that infertility is a (conjugal) disease that needs medical treatment. On the base of this need lies the idea that motherhood is a desire and a goal to every woman, excluding those who do not fit normative patterns of motherhood—placed in a conjugal, heterosexual and stable relationship—and, thus, who cannot be diagnosed as infertile [21]. Considering this, the law forbids medical assistance to procreate both to single women and same-sex couples. In the latter case, particularly, this emerges as a paradox since same-sex marriage and cohabitation⁶ have already been legalised. Current beneficiaries of the services of Reproductive Medicine refer exclusively to heterosexual couples, married or involved in stable cohabitation, with a diagnosis of infertility or of serious and/or genetic, infectious or analogous disease. In this context, one is faced with a juridical definition of those couples considered “suitable” for parenting. “Better”, “more legitimate” couples with full reproductive and parental rights contrast with “inferior”, “less legitimate” couples who are stripped from the latter. The only variable underlying such distinction is the sex difference of the members of the couple⁷.

The main argument supporting the exclusion of lesbian couples from MAR is the latter’s subsidiary character. Medical assisted reproduction is not considered an alternative means to procreate and/or it is not meant to replace “natural”, (hetero) sexual and gendered intercourse. The infertility diagnosis is the element that activates or inhibits medical treatment, depending on the situation: within a conjugal heterosexual relationship it legitimates medical help; within a non-(hetero) normative situation, the argument of infertility loses its authority [22]. In this sense, as Borrillo ([23], p. 367) has argued regarding the French case, “the law, founded on a ‘naturalist’ ideology, is more interested in mimicking biological reproduction than it is in soothing sterility”⁸.

The imposition of sex difference as a prerequisite of MAR rests on a cultural norm that converges with prevailing social values and expectations [8]. On the other hand, MAR technologies also reflect the values of those who create and apply them, legitimated by socially shared meanings regarding reproduction [21]. In the Portuguese case, there is a more or less explicit ideology according to which the “best mothers” and the “best fathers” are those involved in a stable heterosexual arrangement. As a result, though the definition of motherhood has been broadened by the advent of MAR, now including

⁶ The law defines “stable cohabitation” as a cohabitation of at least two years.

⁷ Marital status, age (being at least eighteen years old), and the absence of psychic anomalies are also used to determine the “adequate” beneficiaries of MAR. However, there are other “invisible” conditions to access such medical services. Medical, social, sexual, familiar, and genetic issues are considered in the medical evaluation of potential beneficiaries/donors of gametes [24] and can lead to additional forms of exclusion. Regarding, for example, social class, the high costs of reproductive health services, the fact that most extant reproductive centres are private (17 out of 27), and low state reimbursement all contribute to exclude the less privileged from the medical assistance to procreate.

⁸ Notwithstanding, medical power to decide who “suitable” fathers and mothers are extends beyond scientific or juridical justifications since they can refuse access to MAR based exclusively on ethical reasons: current legislation ensures this through a clause of “consciousness objection”.

the possibility of conceiving a child in the absence of sexual intercourse, it was simultaneously narrowed down.

The recent discussion, between November 2011 and January 2012, of four bills aimed at changing the MAR law represented an attempt to overcome certain ideas of the parental project as part of motherhood ([14], p. 3). The bills of the Socialist and Social-Democrat Parties wanted to change the prohibition to access surrogate motherhood in some exceptional, disease-related situations, e.g., in the absence of the uterus. The bills put forward by five Socialist MPs and by the Left Block, apart from legalising surrogate motherhood in particular clinical situations, also introduced changes in the configuration of MAR techniques so that these could be considered complementary procreation methods also accessible to lesbian couples and single women (*idem*). These two bills also suggested the elimination of heterosexual marriage or stable cohabitation and of the infertility diagnosis as requirements to access MAR. Both were rejected in parliament on January 20, 2012.

Usually, the Portuguese legislator asks the contribution of “experts” to support parliamentary debates and resolutions. In this particular case, the set of experts included the Superior Council of Magistrates, the Public Ministry Superior Council, the National Council for Medically Assisted Procreation (NCMAP), the Order of Barristers and the National Council of Ethics for the Sciences of Life (NCESL).

The first two organisations kept their appreciations within a strictly juridical field, highlighting the eminently political and non-judicial character of the bills [25], as well as the legislative incoherency that would result from the approval of same-sex couples’ access to MAR when they are still legally banned from joint adoption; they also stressed that such changes would necessarily lead to additional amendments in the concepts of motherhood and fatherhood that can be found in other laws [26]. Curiously, the Order of Barristers ([27], p. 8) did not refrain itself from situating its official position in a clearly ideological domain by defending the treatment of conjugal infertility or other serious diseases affecting heterosexual couples as the fundament of MAR and comparing its use in other situations to a procedure that “injures human dignity and comes down to an additional step towards [Aldous Huxley’s] *Brave New World*”.

Not referring—as one might expect—to juridical matters, the Order clearly aligned its official position with the one of the NCMAP, who is formally in charge of any pronouncements on ethical, social and legal queries regarding the applications of reproductive technologies. The NCMAP underpinned the declaration it had already released in 2010 when same-sex marriage was legalised concerning the effects of the new law on MAR: such medical techniques are subsidiary, not alternative, means to procreate and they must be dispensed exclusively to heterosexual couples with a diagnosis of infertility or genetic or infectious disease requiring medical treatment [28].

However, as has been said, the problems that support access to MAR—be it infertility or a serious disease—are always and first of all problems affecting the individual, not the couple ([23], p. 366), a fact that both the law and this kind of statements simply discard. It is, thus, a type of argumentation that does little more than reinforcing and contributing to the imposition of heterosexuality and the legitimization of a particular family model [23,30].

Only the NCESL ([29], p. 12) defended that “excluding access to MAR techniques to people who are not heterosexually married [...], and especially the prohibition and penalisation of such access to

people who want to do it at their own expenses is such a serious limitation of people's autonomy that it can only be exempted from ethical reproach should it rest on an equally solemn justification".

The contrasting position of the NCESL, resting on the defence of a right to procreation, may be at least partly due to its composition: whereas the NCMAP was overwhelmingly composed by medical doctors, the latter were in clear minority in the NCESL, which also included biologists, philosophers and psychologists, among other professionals⁹. In addition, whereas less than a quarter of the NCMAP members were women, these represented a third of the NCESL. As Silva and Machado [30] highlighted, the Portuguese law that regulates MAR was conceived mainly based on the contributions and intervention of men linked to the medical and juridical fields and as such it reflects an ideological mould resting on the defence of the heterosexual, patriarchal and biogenetic family. The NCESL's more diverse composition may have supported less strictly "naturalistic", "biological" and "masculine" visions of human reproduction, reflected in the afore mentioned pronouncement.

Anyway, law n.º 32/2006 of July 26 is still valid, which means that lesbians who wish to become medically assisted mothers will have to do so unlawfully. So, even if the law can be seen as having contributed to a certain "deregulation" of the gender regime by weakening the direct and causal association between sexuality and reproduction, it keeps on concurring to the reinforcement of normative femininity—intimately linked to stable conjugality, motherhood and heterosexuality—and the heterosexual nuclear family.

3. Judges and Lesbian Motherhood

The interviews to judges working in Family and Juvenile Courts of Law show that, generically, their representations of motherhood are broad enough to include lesbian motherhood. Although some interviewees clearly reproduce the normative model consecrated in law, most of them admit or even defend that lesbian motherhood should be accomplished through MAR. In any case, however, this is achieved through a process of normalisation of the lesbian [12] and/or of lesbian relationships that presents variations and supports different positions on the part of the judges.

Parenthood is primarily seen as the satisfaction of a desire inherent to the human being, resting on the assumption that all individuals feel an "inner urge" to become parents and that the latter must not be cut short [31]. Parenthood is, thus, perceived by the interviewees as a biogenetic impulse that surpasses individual will, as the following quotes exemplify:

"[...] the desire to have children is a natural thing for almost everybody; so, people who don't experience such desire are rare. [...] It's natural for everybody to want children. [...] It's something that's also the expansion of genes. [...] There's a trend to the immortality of genes" (Judge 1, male).

"I think it's natural for the human being to think about procreation. Also, because it's the only way of continuation of the species. And even anthropologically the continuation of the species is a concern for every

⁹ Specifically, by the time these statements were released the NCMAP had 9 members as follows: 5 members named by Parliament (1 judge; 5 medical doctors) and 4 permanent members named by the Government (1 physicist; 3 medical doctors). The NCELS had 19 members as follows: 6 members named by Parliament (4 medical doctors; 1 biochemist; 1 philosopher); 5 members named by the Ministers Council (2 medical doctors; 1 psychologist; 1 biologist; 1 judge); 8 members named by other entities (1 bio-ethicist; 2 medical doctors; 1 biologist; 1 lawyer; 1 nurse; 1 philosopher).

species, and nature itself always finds ways – sometimes most interesting and most biased—of preservation of the species” (Judge 2, female).

Since reproduction is seen as a kind of biological imposition, the interviewees acknowledge that the desire to become a father/mother can also be found among lesbians and gays since they are like any other women and men, even though, according to one judge, they may “not want” to fulfil it in a “natural” way:

“Because, in the end, lesbians and gays, that is, male homosexuals, want to have children, too; they simply don’t want to reach that goal the way nature developed for that purpose, which is heterosexual intercourse” (Judge 1, male).

However, despite seeing parenthood as intrinsic to all humans—therefore, to men and women—it continues to be linked mainly to women. In other words, motherhood and femininity are interwoven. In some cases, women are therefore seen as “naturally” designed for the maternal role. Such argument tends to converge with an essentialist perspective of motherhood based on the assumption that all women are genetically equipped to become mothers and their personal fulfilment can only be achieved by obeying such “biological destiny” [32]. Curiously, among those who defend this kind of reasoning there is the only female judge, whereas some male judges prefer to underscore the learned character of motherhood:

“I think [...] it’s natural for women to think about motherhood even as a matter of self-fulfilment and completion, in short, [of] being complete as human beings” (Judge 2, female).

“Women have been [...], in a way, prepared by educators [to become mothers] and all that, and men—either heterosexuals, or homosexuals—haven’t” (Judge 1, male).

Either inborn, or learned, motherhood is considered part of the female *habitus*—a disposition that is expected to be activated namely in the contexts where procreation concurs to the social reproduction of the dominant family model [15]. As such, some judges emphasise that although both same-sex marriage and cohabitation have been legalised in Portugal, lesbians in both situations continue to be denied access to MAR. Since they are in a situation similar to other (heterosexual) couples (conjugal, stable and nuclear family), this argument is used to stress their position in favour of additional amendments to the law. In their views,

“I think there’s no reason whatsoever to prevent two women who are married to one another from having a child, from becoming pregnant (Judge 3, male).

“Because the marriage contract itself was changed by law 9/2010¹⁰ and, therefore, the sex of the consorts is no longer relevant” (Judge 4, male).

The conceptual association between marriage and parenthood reflects the importance of marriage as a source of filiation in juridical systems derived from Roman Law, like the Portuguese, moulding all legislation in this domain [23,33]. In the context of stable conjuality, arguments contrary to homo-parenthood, in general, and lesbian motherhood, in particular, lose, according to these interviewees, at least part of their relevance. It is an argument that, on its own, does not thwart the

¹⁰ The law that legalised same-sex marriage.

reproduction of two fundamental features of dominant femininity: conjugality and motherhood. Notwithstanding, it contains a potentially disrupting element: the absence of a father. However, this is not a unanimous position. Once again, the female judge clearly states her approval of current legislation—and its restrictive definition of infertility—by arguing that lesbian motherhood can be achieved through other means. According to her,

“[...] I think [...] it’s easier for women to have children than it is to men, since women can always, let’s say, even within the gay community, find ways to procreate, so they don’t need to resort to other means—adoption, or the like—as men do, right?” (Judge 2, female).

There is another interviewee whose favourable position regarding current legislation is more ambivalent. Resorting to an identical reasoning, and despite acknowledging that parenthood is a right, the “problem” seems to lie on whom supports the costs of medical assistance to procreate:

“Also because those people can easily, against all odds, become pregnant, can’t they? In the ladies’ case. It’s easy! Isn’t it? Why do they want to spend State money if they can easily get pregnant? [...] I think the State has no business supporting financial or medical assistance whatsoever to the ladies. I think it shouldn’t, let’s say, forbid it; but I don’t think the State has to pay for those techniques in such situations. // There’s no money for these things. I think that if couples can and will have those children at their own expenses, then, o.k., it’s a right” (Judge 5, male).

The reduction of the National Health Service’s costs was, in fact, one of the reasons invoked by the socialist MP Maria de Belém Roseira to justify the exclusion of non-heterosexual couples and singles from MAR during the parliamentary debates that led to the approval of law n.º 32/2006 of July 26 (cf. [30], p. 85). It is a kind of argument integral to the State’s neo-liberal project of privatisation mentioned by Kelly ([34], p. 329), which has also supported processes of paternity assignment to children born from single mothers with similar purposes and consequences: to decrease the State’s financial effort and reinforce the heterosexual nuclear family. As such, it seems that regarding the “same” right there are, nevertheless, two different types of citizens: those “worthy” of public support (heterosexuals who are married); and those who are not (all those who do not fit the dominant family model).

The idea according to which man and woman are “naturally” complementary especially as exemplified in sexual intercourse with reproductive purposes, even when the latter is merely instrumental, seems to frame judge 5’s conception of lesbian motherhood. A fundamental paradox then emerges: the representation of motherhood as an institute every woman may be involved in regardless of her family model, which must be reached with the active participation of a man, even if the latter is to be subsequently “removed” from the equation. This resembles what Standing (cit. in [35]) called “private patriarchy” since the ideal context for motherhood mentioned by judges 2 and 5 always requires the (sexually) determinant presence of a man. These are, in fact, the same interviewees who argue that a child’s “healthy” development requires the presence of both father and mother, based on the arguable idea according to which “the mere fact of being a heterosexual is equivalent to otherness and the acknowledgement of sex [gender] difference” ([36], p. 232). In this context, lesbian motherhood is the subject of ambivalence:

“[...] man and woman sometimes have characteristics that can be different [...] truth is there are complementary characteristics [...] and growing up with those complementary characteristics can be somehow more useful to a child, to a healthy development” (Judge 2, female).

“I think the role of the father and the role of the mother [...] are always important for the child to have a masculine reference, a feminine reference, and for those roles to be, so to speak, assigned to one and the other regarding the way that child is brought up. [...] Now, I don't know [...] whether in a lesbian or homosexual family one of them may assume a more feminine and the other a more masculine function so that such roles may somehow be assumed by both in order to compensate that... [...] Without losing masculinity and femininity, that's obvious” (Judge 5, male).

However, as Borrillo ([23], p. 368) stated, this reasoning questions the very foundation of filiation consecrated in Civil Law, which highlights its social rather than biological character [37,38]. In short, in both cases, the fundamental problem underlying these interviewees' discourses is that of preserving heteronormative gender and family. This is especially obvious in the discourse of the judge 5, for whom the mimicking of the heterosexual family by lesbian couples is the most acceptable alternative to the absence of a father. Against this backdrop, lesbian motherhood always emerges as a surrogate defined by its distance and shortfall vis-à-vis the legitimate model.

For the other judges, however, this matter not only is not essential, but also reveals a certain distance of the legislator regarding the more plural and multi-layered reality. As such, they acknowledge and accept other parenthood models where the caretakers' genders are irrelevant, as the following quotes show:

“[...] I find no obstacle whatsoever to one-parent families for a simple reason: some people are part of one-parent families; only formally are they part of two-parent families. They are part of a one-parent family, really: they live with the mother, or the father, or even a grandmother or grandfather, or an uncle or aunt. [...] On the whole, I think the arguments or theories that defend two-parent families are decrepit, or on the verge of becoming decrepit [...] in face of social transformations and the complexity of current life. So, I think, actually, [...] that it's better to have a good parent than two bad ones, isn't it? I mean, be it a father or a mother” (Judge 4, male).

“[...] I know a lot of widowed parents who were able to raise sons and daughters. [...] a [male] friend of mine [...] raised his daughters and he raised them well. So, men are not incapable to take on parental responsibilities” (Judge 1, male).

These two judges both mentioned their personal and close contact with cases that escape normative models, which may help explain their positions: one recalled having gay colleagues in school; the other one, apart from being acquainted with a male one-parent family also highlighted the need to avoid homophobic prejudice. In addition, they were both open-minded regarding matters such as women's rights (particularly, the ones affecting their own bodies) and matters such as the legalisation of prostitution and abortion. One of them had been a pro-choice activist in Portugal. So, despite one can argue, as Bourdieu [15] did, that the rules that structure the juridical field tend to produce a certain homology in the judges' dispositions and representations, they do not determine completely. Individuals are “plural actors”; they incorporate diversified “patrimonies of dispositions” acquired in different contexts [39]. The fact that most judges were in favour of lesbians' and/or single women's

access to MAR shows that we may be facing a multi-determined process determined by the characteristics of the juridical subfield they belong to as much as by their own personal experiences of other non-strictly professional fields.

4. Conclusions

Throughout this text, one has argued that the extant MAR law in Portugal reinforces and legitimates the gender regime, resting on a representation of femininity closely linked to motherhood, stable conjugality and heterosexuality. Sex difference, stable conjugality and the infertility diagnosis required to access MAR ensure that all those who do not fit that model—among which, lesbians—are prevented from enjoying the same rights. As a result, all other forms of family and sexuality are defined by their “distance” or “inadequacy” regarding the nuclear heterosexual family consecrated by law. Nevertheless, the existence of a law does not mean it is consensual, not even among those responsible for its enforcement. For this reason, one tried to know the positions of judges regarding the possibility to change the law in order to include lesbian couples as potential beneficiaries of MAR, especially considering that same-sex marriage and cohabitation are already legally sanctioned in Portugal. The option for judges working in Family and Juvenile Courts of Law rested on the assumption that their direct contact with current family and parenthood matters would render their representations more complex and multi-layered than the ones present in the law.

In fact, the interviews show divergences regarding current legislation, namely regarding lesbians’ access to medical-technological reproductive treatments. The judges’ positions, however, are based, to different degrees, on a process of normalisation of the lesbian and/or of lesbian motherhood that rests on one or more of the following assumptions: (i) parenthood is a desire inherent to human beings, therefore it is also present among non-heterosexuals; (ii) motherhood is a defining element of femininity and lesbians are women; (iii) motherhood is a project to be framed by a stable conjugal relationship, and same-sex marriage and cohabitation are legal; (iv) lesbian motherhood can be achieved through “natural” means, so lesbians do not necessarily need to have access to MAR; (v) parenthood is a mechanism of reproduction of the gender regime, so sex-difference should be present in the couple. These assumptions are combined in different ways and support different positions on the part of the judges: although some were in favour of current legislation, most of them thought it should be changed. Whereas the first underscored sex-difference as essential to a child’s healthy development, thus explicitly or implicitly defending the heterosexual nuclear family and current restrictions under the MAR law, the others admitted the legitimacy of alternative family models, namely same-sex and one-parent families, which would render both single women and lesbians eligible for MAR. These judges reported their close personal knowledge and contact with non-normative forms of sexuality and family, which may have contributed to their open-mindedness regarding such matters.

Such results point to on-going changes towards the acceptance of procreation outside heterosexual relationships, namely—though not exclusively—through medical assistance. As such, these judges’ critical positions regarding the extant legal framework may eventually signal an overall trend towards its revision. However, considering the exploratory nature of this research, these results should be seen as clues for future research.

Conflicts of Interest

The authors declare no conflict of interest.

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