



Some improvements in the Portuguese medical law

Professor Dr. Guilherme de Oliveira*, University of Coimbra

There have been some improvements in the nascent system of Portuguese medical law during the past few years.

1. On the first of December of 2001 the Convention on Human Rights and Biomedicine and the Additional Protocol on the Prohibition of Cloning Human Beings entered into force in Portugal.

Some of the provisions of the convention didn't bring anything new to Portuguese law as the content of those provisions was the content of some Portuguese rules which were already part of the Portuguese legal system. As a matter of fact, rules about informed consent of both competent and incompetent adults, and of children, could be found in several Portuguese laws, the most interesting being Articles 156 and 157 of the Portuguese Penal Code, which punishes any treatment performed without previous consent of the patient concerned and clarifies what is the content of the so-called "duty of information". The technical interest of these provisions lies in the fact that they are separate from other provisions on medical intervention carried out in disrespect of technical professional standards. The same could be said about rules on respect for private life and control over information which concerns one's private life (Article 10), which has been developed by Portuguese Fundamental law and some other laws many years ago. Rules about protection of persons involved in research (Article 16 and 17) add nothing to Portuguese laws on clinical trials, which have been in force since 1994. Finally, rules about organ transplants match almost perfectly¹ the Portuguese law, which dates back to 1993.

However, some important provisions have become part of the Portuguese internal legal system due to the ratification of the Treaty.

Article 14 on sex-selection is the first rule in Portugal dealing with choosing newborn characteristics, made available by pre-implantation genetic diagnosis. Nevertheless, it is arguable that Portuguese academics, life sciences experts and lay people

* Dr. Guilherme de Oliveira is professor of Civil Law (Family Law) and Medical Law (at the Faculty of Medicine) at the University of Coimbra.

¹ Article 20.2, of the Convention establishes a stronger protection of persons not able to consent to organ removal than Article 8. 3-5 of the Portuguese law. Lacking any reservation made by the Portuguese state according Article 36 of the Convention, this broader protection foreseen by the Convention is now mandatory in Portugal.

should discuss the problem of sex-selection at a much broader level before a rule is laid down, as it is well known that some doubts remain about the restriction made by the Convention.

The most important rule is probably Article 12 on genetic testing. There has been some discussion in Portugal about the use of genetic tests for purposes other than health purposes, namely by employers and insurers. The National Council of Ethics for Life Sciences have recommended the prohibition of genetic testing as a prerequisite of a labour contract, followed by the legal doctrine; lawyers condemned in principle the use of genetic information by insurance companies as well, although some exceptions were admitted whenever exceptionally valuable contracts were concerned. These exceptions for equity sake have not been taken into consideration by the Convention and this is the reason why one may not be entirely satisfied with Article 12. Article 9 on "previously expressed wishes", although not as clear and strict as a rule should be, has the valuable merit of bringing to the attention of Portuguese doctors previously expressed directives on one's life and body, making autonomy more visible and respected, paving the way to a broader use of informed consent doctrine and practice.

Article 18 on embryo research had a considerable impact on public opinion, as it became an issue among life sciences experts and representatives in the Portuguese Parliament. In the first place, Article 18 raised the controversial issue of whether it was legal for biologists or physicians to perform research on embryos in the absence of any law ruling the subject. In the second place, given the circumstance that the answer to the first question has been generally negative, some efforts have been started at an official level in order to produce a law on the subject. Difficulties, however, seem to be of great importance as divergences persist among public opinion divided as to whether to promote scientific research or to pay full respect to the life of the embryo according to the prescriptions of the Catholic Church.

2. Mainstream opinion seems to favour refusal of any kind of research on embryos, as far as we can guess by reading Article 7 of the project of law on Human Assisted Reproduction of the Socialist Party, which is pending in the Portuguese Parliament. This article forbids all kinds of research on viable embryos unless it is to the benefit of the embryo itself. One can guess that the so-called right-wing parties will back this proposal, leaving on the left wing only six or seven percent of all representatives to vote against this proposal. Thus it is quite conceivable that in the near future research on embryos will be deemed illegal by the Portuguese parliament.

Beyond this very important issue there are some other issues, which may divide elected representatives much as it divides public opinion in Portugal as well as in other European countries.

One of these issues is about *post mortem* insemination. The main concern was, of course, the prospect of the future child being raised without a father and this concern

led to a broad refusal of that kind of insemination for many years — as far as one can read in the domestic literature. Nevertheless, the astonishing growth in the divorce rate and the consequent increase of monoparental families lessened the concern and some signs of acceptance have been shown. In fact, a text approved by the Parliament in 1999 admitted post mortem insemination provided the consent of the deceased husband had been given; but this decree of the Parliament has not been ratified by the President of the Republic. The new revised proposal now pending in the Parliament keeps this rule and beyond this it favours the implantation in uterus of an embryo created before the man's death, in accordance with a parental project clearly settled before between man and wife (Article 18). The project, however, doesn't allow single women in general to be inseminated.

Another issue taken into consideration by the pending project of law in the Portuguese parliament is *the access to the identity of sperm donors*. The discussion in Portugal, scarce as it may be, goes along with discussions all over the world on this topic. Those whose intention is to favour the emotional stability of the family against what they call a menace of aggression coming from inconvenient knowledge of the identity of donors back the anonymity of donors; those whose intention is to favour the right to know one's own origins back the right to know the identity of donors. It seemed that twenty years ago in Portugal, as in all Southern European countries, anonymity of donors was the majority opinion; but in recent years one may see some changes. In fact, the recent proposal of law referred to above permits the children conceived by means of the sperm of a donor to access the identity of the man when he or she has reached the age of majority (Article 12). This change is understandable as one can notice it in other countries given the overall trend towards individualism, transparency, truth and growing interest in genetics; but it is not at all favoured by doctors performing insemination with donated sperm who feel worried that lack of anonymity, on the one hand, makes donors less prone to cooperate and, on the other hand, makes families feel uncomfortable at the prospect of undesired future encounters.

Beyond these questions the most problematic issue in the context of a foreseeable comprehensive regulation of Medical Assisted Reproduction in the near future in Portugal is the difficult issue of *surplus embryos* arising from infertility treatment. There is widespread current of public opinion which grants embryos strong legal protection and tries to make all possible efforts to avoid production of surplus embryos. This intention led in 1999 to a proposal not to fertilise more than five eggs in each cycle in order to make it technically possible to use all resulting embryos, and this rule has been approved by parliament. But this decree has been strongly opposed by most of the doctors performing infertility treatment, arguing that such a low number of eggs would decrease the success rate of their practice to an unfair level, which would finally harm the women concerned. They wrote to the President of the Republic, who has not ratified the Parliament's decree. According to the message sent by the President of the Republic to the Parliament, it is likely that this particular issue has been a crucial factor in the rejection of the Decree.

The issue of surplus embryos will be present in discussions about other matters such as the use of *Pre-implantation Genetic Diagnosis* in the context of the process of so-called *designer babies*, which leads to the production of embryos with no immediate use; and, of course, in the context of embryonic stem cell research. Some projects of law observable in our country deal with Pre-implantation Genetic Diagnosis sometimes in an unclear way. However, it seems clear that the use of those techniques to produce an embryo with particular genetic characteristics which are suitable to allow future treatment to the benefit of a young brother suffering from a particular disease, as in the most known cases like Nash and Hashmi cases, is likely to be prohibited. This ban, however, would probably generate some opposition from health units which would be able to perform that kind of intervention and by the lay public suffering from some health condition that could be alleviated by the use of these techniques.

The use of surplus embryos for the purpose of *stem cell research* is quite a sensitive issue in Portugal. The implicit destruction of embryos leads many people to oppose it and it is foreseeable that the Portuguese Parliament will deal with this issue in the very near future due to the European context and discussions taking place about resources and funding by the European Commission. The Portuguese government has proposed that the European Commission immediately allow funding for research on stem cells lines produced two years ago, following the regime adopted by the U.S.A. but this proposal has been rejected. Meanwhile, a *white paper* on embryo research has been published by Professor Daniel Serrão (the president of the committee dealing with Embryo Protection in the framework of an Additional Protocol to the Oviedo Convention); and a small left-wing party—Bloco de Esquerda—have just introduced a project of law favouring the research on stem cells taken from surplus embryos after informed consent of the couples, strict selection of health institutions and advice from a specific body of experts.

3. *HIV and AIDS* continues to be a major public health problem in Portugal, due to various reasons that have nothing to do with medical law. However, it seems to me worthwhile to draw attention to a public discussion which has taken place in the media on one particular question: is the doctor of an infected person allowed or obliged to inform the patient's partner about his or her health condition, despite the opposition of the concerned patient? Or is this communication a clear breach of medical secrecy? Doctors and professional bodies are obviously very prone towards complying with medical secrecy and they are right to say that any breach of medical confidentiality, however reasonable it may be, has tremendous consequences in terms of trust within the doctor-patient relationship. Lay people, however, feel that communication to the partner, even if it is against the will of the infected person, is worthwhile as it may avoid great harm or even save the life of the patient's partner. According to legal doctrine and criminal code, the doctor breaches medical secrecy whenever he or she discloses information about the infected patient; nevertheless, there will be no pu-

nishment because disclosure has been grounded in the need to avoid harm, which may outweigh the benefit of medical confidentiality itself. One must add that in ordinary cases the physician may disclose information; in cases which are somehow different, whenever the doctor is the assistant doctor of the infected patient and of his or her partner as well, it seems that the doctor has the duty to disclose information, otherwise he or she is not fulfilling medical standards of care. However, it seems that official bodies of physicians continue to proclaim that medical secrecy is mandatory without exception.

4. Another main issue is *tuberculosis* as a public health problem. Some patients refuse or interrupt treatment; thus, tuberculosis turns out to be resistant to drugs and highly contagious. Mandatory internment of these patients seems to be the only way to deal with this issue.

An old law of 1949 determined that the General Health Authority was allowed to determine compulsory internment of the patient suffering from tuberculosis.

However, courts have been rejecting mandatory internment, as it appears to be against the constitutionally protected right to freedom, as there is not an exception clearly foreseeable in the text of the Constitution itself; and a public administrative authority would not be allowed to take the decision, only a court would be allowed to do so in any case. However, a recent sentence of the Court of Appeal in Oporto in February 2002 decided on the compulsory internment of a citizen carrier of tuberculosis since the patient, by refusing to follow the treatment, was creating a *concrete danger* of contagion of *third persons*, his *relatives* and *co-habitants* and was a *danger to public health* as well. The court has argued that the Constitution of the Republic permits mandatory internment as a security measure not only because the individual has been committing a crime (which seems to be a clearly admitted exception to the right to freedom) but also if he or she is creating a particular danger of causing great harm to third persons. This solution seems to be in accordance with Article 5.1, e), ECHR, as well as with Article 26. 1 of the Oviedo Convention which allows restriction to the informed consent principle, whenever a restriction is "necessary in a democratic society for the protection of public health or for the protection of the rights and freedoms of others". However, Law 2.036 is unconstitutional with regard to the process of internment.

This solution is not well accepted by everybody. Some Portuguese lawyers argue that the exception admitted by the text of the Constitution, which allows mandatory confinement to be stipulated, deals only with "security measures" in a criminal environment, not in a public health context. Thus, the sentence of Oporto's Court of Appeal is under scrutiny by the Constitutional Court at this moment.

5. On the 5th of June 2002, the Socialist Party presented in Parliament a Project of Law (draft-law 49/IX) that criminalizes *the trafficking of organs and tissues*, as well as the advertising or recruitment of donors. The draft-law provides a broad definition of "trafficking of organs": anyone who, with intention of commercialisation, uses or collects organs or tissues of human origin shall be punished with 2 to 10 years in prison; and if this is done without the consent of the donor, there is an aggravation of the penalty by 1/3. The project also creates a crime of advertising or recruitment of donors: advertising the trading of human organs or recruitment of donors, in order to commercialise organs or tissues, shall be punished with up to 2 years in prison.

Trafficking of organs, however, is certainly not a problem in Portugal. Transplants are very strictly organised in a benevolent way and the whole activity is being performed according to the law of 1993 and to medical ethics, and under the surveillance of private and public authorities, in a smooth and successful framework.

6. On the 22nd of August of this year, Parliament dealt with an important issue that has been forgotten up to now: the regulation of non-academic medicine. Popular healers are spread throughout the country, performing cures and benefiting from a general complacency amongst both the rural population and authorities. In the last few years, however, one such healer caused great harm to many people, some of whom have died; this particular case may have brought this activity to the attention of government. The most important rules of the law are those that determine that the penal code applies to non-conventional medicine, particularly the criminal rule that imposes informed consent before interventions and the article that imposes accordance with standards of practice.

7. Finally, the implementation of the Directive 2001/20/CE on *Clinical Trials* is currently being drafted. Of course, most of the issues raised by this activity were already dealt with in accordance with the law on clinical trials of 1994.