**Portuguese contribution for the Questionnaire on Safeguards for the protection of the rights of children born from surrogacy arrangements of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material**

**Identity, origins and parentage**

1. **Describe safeguards protecting identity rights (CRC art. 7 and 8) that are currently being implemented in your State. Safeguards include laws, judicial and administrative procedures, enforcement actions, and other practices intended to prevent or remedy violations of human rights norms. Note whether and how such general safeguards protecting identity rights apply in the context of surrogacy arrangements.**

Under the Portuguese constitutional law, everyone has the right to personal identity and the law guarantees the personal dignity and genetic identity of the human person, particularly in the creation, development and use of technologies and in scientific experimentation [Articles 26 (1) (3)]. Additionally, our Constitution determines that children born outside wedlock may not be the subject to any discrimination on that ground and neither the law nor official departments or services may use discriminatory terms in relation to filiation [Articles 36 (4)]. Portuguese legal scholars consider that the right to personal identity encompasses the right to know its genetic ancestry. Indeed, although this right it is not expressly enshrined, due to the «open clause» of Article 16 that establishes that fundamental rights enshrined in the Constitution shall not exclude any others set out in applicable international laws and legal rules, it can be inferred from other constitutional provisions.

Article 26 (1) also covers the rights to development of personality, to civil capacity, to citizenship, to a good name and reputation, to personal portrayal, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination. The right to a name and the right to acquire a nationality are included in this provision, which are regulated by law.

Article 1 of Civil Registry Code establishes the facts subject to mandatory registration in the civil registry, *inter alia*, birth and parentage. Birth certificates contain the following elements: first and last name(s); sex; date of birth, including the exact time of birth; parish and municipality where the baby was born; complete name, age, civil status, place of birth and habitual residence of the parents; complete name of the grandparents. Everyone has the right to request the issuance of a certificate regarding the facts registered in the Civil Registry database and limitations to this right concern, for instance, adoption and change of sex.

Regarding citizenship, it should be stressed that according to Article 4 of the Portuguese Constitution: “All persons whom the law or an international convention considers to be Portuguese citizens are such citizens”. In addition to Article 26 (1) already mentioned, it should be underlined that deprivation of citizenship and restrictions on civil capacity may only occur in the cases and under the terms that are provided for by law, and may not be based on political motives [Article 26 (4)].

With a view to protect the family, the Constitution determines that is for the State to regulate assisted reproduction technologies in such a way as to safeguard the dignity of the human person [Article 67 (2) (e)]. Law No. 32/2006, of 26 of July, on its latest version, governs the use of assisted reproduction technologies.

Article 15 (1) (4) of Law No. 32/2006 provides for the anonymity of all third-party donors of genetic material intended to make a woman’s fertilisation possible. The rule is thus that the donor’s identity should not be disclosed to the person who is born via a heterologous assisted reproduction technique, except when there are pressing reasons recognised by a court’s decision.

However, following the 2018 ruling of the Constitutional Court, these provisions were held as unconstitutional since they violated the personal identity and the development of personality of persons born from a surrogacy arrangement.

1. **Describe safeguards protecting the access to origins (CRC art. 7 and 8) that are currently being implemented in your State. Note whether and how such general safeguards protecting the access to origins apply in the context of surrogacy arrangements.**

*Please referrer to the answer provided in Question 1.*

1. **Describe how the right to access origins is balanced with the right to privacy of parents and gamete donors. Indicate specifically how the best interests of the child are factored in.**

*Please referrer to the answer provided in Question 1.*

1. **Describe safeguards protecting the family environment (CRC art. 7, 8, 9, 10, 20) that are currently being implemented in your State. Note whether and how such general safeguards protecting the family environment apply in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.**

The Portuguese Constitution contains important provisions with regard to the protection of family and children. Thus, Article 36 sets out, *inter alia*, the right to found a family, to marry, non-discrimination of children born of wedlock, adoption and conditions in which children may be separated from their parents (where these do not abide by their duties towards children and always by judicial decision). Under constitutional law, family is considered a fundamental element in society and enjoys the right to protection by society and the State (Article 67). Under this provision, the State must, among other tasks, to promote social and economic independence of households, to promote the creation and guarantee access to a nursery national network and other social facilities designed to support the family, to regulate assisted procreation in such a way as to safeguard the dignity of the human person and to promote the work-life balance.

Articles 68 and 69 encompass rights related to parenthood and childhood, respectively. According to this last provision, children enjoy the protection of the State, especially from all forms of abandonment, discrimination and oppression and from the improper exercise of authority in the family or any other institution. Children who are orphaned, abandoned or deprived of a normal family environment in any way must benefit from special protection of the State.

These provisions must guide the entire legal framework pertaining to family matters, including surrogacy.

1. **Provide information on existing laws, regulations or practices for the establishment, recognition and contestation of legal parentage. Indicate specifically how the best interests of the child are factored in.**

Under Portuguese law, even if no biological tie between the child and the mother’s husband exists, the law considers that the husband is the legal father and it is necessary to bring civil proceedings in order to rebut that presumption of paternity [Article 1796 (2), 1826 (1) and 1869 of the Civil Code, hereinafter the CC]. With regard to children born outside legal marriage, a formal and free will declaration to that effect must be made by the father himself or by a third person with a special mandate [Article 1796 (2) and Article 1849 of the CC]. Concerning maternity, parentage stems from the birth and is established by declaration [Article 1796 (1) and 1803 of the CC].

The son/daughter has *locus standi* to challenge paternity by taking legal action against the alleged father and proceedings must be initiated while he/she is a minor or within the 10 years following its legal age [Articles 1869, 1873, 1817 (1) and 1819 of the CC].

Maternity can be challenged by the son/daughter against the alleged mother or, if she has deceased, against its husband and also, successively, against descendants, ascendants and brothers/sisters; the time limit to bring proceedings is the same as the already mentioned [Articles 1817 (1) and 1819 of the CC].

Best interest’s child principle is pervasive trough the Portuguese CC, including parentage, as well as all legislation dealing with family matters.

1. **Specify how the establishment of parentage occurs in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.**

*Please refer to the answer provided to Question 1. (DATA)*

**Sale of children**

1. **Provide information on the laws prohibiting the sale and trafficking of children as well as corresponding implementation measures. Note whether and how such general safeguards against the sale and trafficking of children apply in the context of surrogacy arrangements.**

Sale and trafficking of children are subject to the general rules established on Article 160 of the Criminal Code. To put it briefly, the definition of trafficking in human beings considers:

* Offer, deliver, recruitment, entices, accepts, harbors or receipt of persons for the purpose of exploitation. Exploitation includes sexual exploitation, labour exploitation, forced begging, slavery, removal of organs or the exploitation of criminal activities;
* By means of:
	1. By violence, abduction or serious threat;
	2. By fraudulent ruse or manipulation;
	3. With abuse of authority resulting from a relationship of hierarchical, economic, work or family dependence;
	4. By taking advantage of the psychic incapacity or situation of special vulnerability of the victim; or
	5. Through obtaining consent from the person who has control over the victim;

will be punished with a prison term of from three to ten years. This sanction is also applied in case of a minor and if it is used any of the means referred above or the perpetrator acts professionally or with the intention of monetary gain, it will be punished with a prison term of three to twelve years. That provision also establishes that whoever, through payment or other reward, offers, delivers, solicits or accepts a minor, or obtains or gives consent for his/her adoption, will be punished with a prison term of one to five years.

*Please refer also to the answer provided to Question 2.*

1. **Describe any safeguards against the sale of children and child trafficking specifically created for surrogacy arrangements.**

There are no safeguards against the sale of children and child trafficking specifically created for surrogacy arrangements.

1. **Comment on the adequacy of current safeguards against the sale of children and child trafficking in the context of surrogacy arrangements.**

As previously stated, currently there are no safeguards. However, at this stage it is difficult to evaluate if this circumstance is cause for concern having in mind that Law No. 32/2006, and surrogacy provisions in particularly, was amended in 2016 and was only regulated in 2017. Additionally, in April 2018 the Constitutional Court held as unconstitutional, with generally binding force, a set of norms of Article 8 of Law No. 32/2006. Therefore, not only the regime on surrogacy is recent, but also it has been subject to a harsh constitutional scrutiny (though not related with the matters addressed in the question). Surrogacy raises complex issues and the instability of its legal regime (due to the facts mentioned) may hinder our knowledge and reflexion about all the aspects and concerns that we should have in mind.

1. **Note situations and provide data, if any, where a lack of safeguards have allowed or unduly risked violations of these norms in the context of surrogacy arrangements.**

For the reasons stated above (please referrer to the answers provided in Questions 2. e 3.), it is not possible to note situations or provide data.

All the same, it should be stressed that the amendments introduced in 2016 on Law No. 32/2006 reinforced and clarified criminal sanctions with regard surrogacy. Thus, Article 39 punishes not only anyone who, in their role as intending parents or surrogate mother, enters into surrogacy contracts that entail any form of profit, but also anyone who, in their role as intending parents or surrogate mother, enters into surrogacy altruistic contracts, but fall outside the cases provided for in Article 8(2) to (6).

1. **Note the number and types of cases where safeguards against the sale of children have been used in criminal cases in the context of surrogacy arrangements.**

*Please referrer to the answer provided in Question 4. regarding the recent changes introduced in the criminal legal framework*.

Furthermore, in the beginning of this year, the adaption of the court management software in order to collect the data related to crimes cases in the context of surrogacy arrangements was concluded. Hence, no data is yet available.

**Data**

1. **Indicate if surrogacy arrangements are legal in your State and if so how many occur every year.**

Surrogacy arrangements are admissible under the conditions set forth in Article 8 of Law No. 32/2006. Surrogacy is considered as an exceptional situation and only admitted in cases in which there is no uterus, or that organ has a lesion or suffers from an illness in such a way as to absolutely and definitively preclude the woman’s pregnancy, or in clinical situations that justify it [Article 8 (2)].

Surrogacy takes place in the context of assisted reproductive technologies with recourse to the gametes of at least one of the intending parents and the surrogate mother may not in any event be the donor of any oocyte used in the procedure [Article 8 (3)].

Surrogacy contracts are subject to a prior authorisation from the National Council for the Assisted Reproductive Technologies, which supervises the whole process, and after hearing the Portuguese Medical Association [Article 8 (4)].

Commercial surrogacy is proscribed and costs derived from the healthcare provided, including transport costs, can be reimbursed [Article 8 (5)]. Furthermore, surrogacy is not permitted where there is an economically subordinate relationship, namely of employment or service-provider nature, between the parties involved [Article 8 (6)].

According to Article 8 (1) and (7), the surrogate mother hands over the child after the birth, renouncing the powers and duties pertaining to maternity, and the child is be deemed to be the son or daughter of the intending parents.

Under Article 8 (8) and Article 14 (1) (2) (4) (6), on the terms of the validity and efficacy of the parties’ consent, the parties must be:

* Give free and informed consent, expressly and in writing, in the presence of the doctor in charge;
* Informed, in advance and in writing, of all the known benefits and risks that result from the use of assisted reproductive techniques, as well as of all their ethical, social and legal implications;
* Can only freely revoke their consent until the beginning of the therapeutic assisted reproductive technologies process;
* Informed, in advance and in writing, of the significance of the surrogate mother’s influence on embryonic and foetal development.

Surrogacy arrangements are subject to a written contract between the parties, to be supervised by the National Council for the Assisted Reproductive Technologies, which may not impose behavioural restrictions on the surrogate mother, nor any terms that infringe on her rights, freedom and dignity [Article 8 (10) (11)].

Whether they are for profit or gratuitous, gestational surrogacy transactions that do not respect the provisions mentioned are null and void [Article 8 (12)].

An important caveat must be added. On the 24th of April 2018, the Constitutional Court held as unconstitutional, with generally binding force, a set of norms of Article 8 of Law No. 32/2006. In its ruling, the Constitutional Court considered, *inter alia* and briefly, unconstitutional Article 8 (4) (10) (11), and consequently, Article 8 (2) (3), in the part that they permit entry into surrogacy contracts on an exceptional basis and subject to prior authorisation, since they breach the principle that laws must be determinable and precise, which is a corollary of the principle of a democratic state based on the rule of law. The Constitutional Court also held unconstitutional Article 8 (8), in conjunction with Article 14 (5), in the part that it does not allow to the surrogate mother to revoke her consent until the transfer of the child to the intending parents, as it violates the right to the development of her personality, interpreted in accordance with the principle of the dignity of the human person, and the right to found a family.

A legal text is being finalised by the Parliament to address the questions raised by this ruling.

*The Ministry of Justice is not responsible for collecting this data.*

1. **For countries where surrogacy is permitted, please indicate the number of cases, if any, of contract breaches or of refusal to transfer the child.**

*The Ministry of Justice is not responsible for collecting this data.*

1. **Indicate if intermediaries facilitating surrogacy arrangements must be registered and, if so, how many are registered in your State.**

Under Law No. 32/2006, altruistic surrogacy is the only form of surrogacy admitted [Article 8 (2)]. All the actors that can participate in the surrogacy process, such as clinics, clinic personnel, the National Council for the Assisted Reproductive Technologies, lawyers, are not “intermediaries” in the sense that they bring together intending parents and surrogate mothers and/or mediate the ongoing surrogacy arrangements and accordingly receive compensation due to a contractual relationship. Hence, there is no register for “intermediaries”.

1. **For countries where surrogacy is prohibited, please indicate the number of cases, on an annual basis, where nationals have made a surrogacy arrangement abroad and have returned to their country of origin with the surrogate-born child.**

*Not applicable*

1. **Following on the previous question, please indicate under which circumstances authorities have allowed their nationals to bring the child born from a surrogacy arrangement back into their country of origin and if so please indicate which ones (e.g. domestic parenting orders, judgements, best interests of the child determinations, etc.), and how often they have been used.**

*Not applicable*

1. **Lastly, in the same context, please indicate how many cases have led to the non-recognition of parentage orders established in the State where the surrogacy arrangement occurred.**

*Not applicable*