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Offer, consumption and freedom of information in the context of assisted reproduction in the digital age: problematizing contractual guiding principles

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ABSTRACT

In this paper we focus on the offer of assisted reproduction (AR) services in Brazil, and in this context we focus on important regulatory instruments that guide contractual relationships in the consumption of medical procedures and rights to information, considering their wide popularization through social media. The methodological discussion seeks to collate legal reflections and sociocultural studies of offers of AR, consumption and access to information on AR. Bio-rights, a recent field of knowledge that embraces life and human reproduction, is a rich source for rising debates on AR that allows us to establish essential connections between fields of knowledge that can improve situations of non-access to information. A renewed reading of contractual relations is sought, as well as a critical outlook on the diffusion of AR technical knowledge. For this, we carefully consider the principles of new contractual theory, constitutional parameters, principalism, and basic consumer rights. This is an incipient regulation where contractual relationships touch complex topics that involve procedural success/failure rates, genetic material exchange and confidentiality. The validity of such principles as an aid to legal interpretations of concrete cases must be reconsidered in a situation characterized by legal precarity and reckless dissemination of information.

Oferta, consumo e direito à informação no contexto da Reprodução Medicamente Assistida em tempos de cultura digital: problematizando princípios contratuais norteadores

RESUMO

Neste artigo discutimos a oferta de serviços no contexto da Reprodução Medicamente Assistida (RA) no Brasil à luz de importantes mecanismos de regulação que norteiam as relações contratuais de consumo de procedimentos médicos e o direito à informação tendo em vista a ampla difusão dos mesmos nas

KEYWORDS


Assisted reproduction;
contractual principles;
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PALAVRAS-CHAVE

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redes sociais como ingrediente propulsor de sua popularização. A discussão em termos metodológicos busca cotejar as reflexões jurídicas e os estudos socioculturais sobre a oferta, o consumo e o acesso às informações sobre RA. Nesta direção o Biodireito, uma recente área do saber que envolve a vida e a reprodução humana e, portanto, fecundo para a emergência do debate em torno da RA permitindo estabelecer as conexões necessárias entre estes saberes face o não cumprimento satisfatório do direito à informação. Buscamos uma releitura das relações contratuais e uma abordagem crítica da difusão de informações sobre as técnicas de RA. São considerados de modo articulados princípios da nova teoria contratual, os parâmetros constitucionais, a teoria principialista e os direitos básicos do consumidor. Trata-se de uma regulamentação incipiente onde as relações contratuais exemplificam um tema complexo envolvendo taxas de sucesso/insucesso dos procedimentos, troca de material genético e sigilo. Cabe reconhecer em um cenário de precariedades jurídicas e de disseminações pouco criteriosas de informações a validade de tais princípios como recurso auxiliar na interpretação jurídica em casos concretos.

Oferta, consumo y derecho a la información en el contexto de la Reproducción Médicamente Asistida en tiempos de cultura digital: problematizando principios contractuales que marcan el rumbo.

RESUMEN

En este artículo discutimos la oferta de servicios en el contexto de la Reproducción Médicamente Asistida (RA) en Brasil a la luz de importantes mecanismos de regulación que marcan el rumbo de las relaciones contractuales de consumo de procedimientos médicos y el derecho a la información, teniendo en cuenta su amplia difusión en las redes sociales, como ingrediente propulsor de su popularización. La discusión en términos metodológicos busca cotejar las reflexiones jurídicas y los estudios socioculturales sobre la oferta, el consumo y el acceso a las informaciones sobre RA. En esta dirección se sitúa el bioderecho, un campo reciente del saber que envuelve a la vida y la reproducción humana y, por lo tanto, fecundo para la emergencia del debate en torno de la RA, permitiendo establecer las conexiones necesarias entre estos saberes frente a la falta de cumplimiento satisfactorio del derecho a la información. Buscamos una relectura de las relaciones contractuales y un abordaje crítico de la difusión de informaciones sobre las técnicas de RA. Se consideran de modo articulado los principios de la nueva teoría contractual, los parámetros constitucionales, la teoría principialista y los derechos básicos del consumidor. Se trata de una reglamentación incipiente, donde las relaciones contractuales ejemplifican un tema complejo envolviendo índices de éxito/fracaso de los procedimientos, intercambio de material genético y sigilo. Cabe reconocer, en un escenario de precariedades jurídicas y de diseminaciones poco criteriosas de informaciones, la validez de tales principios como recurso auxiliar en la interpretación jurídica en casos concretos.

1. Introduction

In this paper we wish to problematize the offer and consumption of Assisted Reproduction (AR) considering normative perspectives on access to information rights as elements in the process of disseminating the availability of these techniques. The main idea is to critically compare aspects of the right to information and the consumption of reproductive medical technologies in Brazil, given the large gaps that exist in legal perspectives on AR, which are worsened by the absence of public debates on the topic.

This methodological discussion seeks to combine legal reflections and sociocultural studies on the offer and consumption of AR.¹ Bio-rights (Diniz 2014) allow us to establish necessary connections between these two fields, legal and anthropological studies, by giving value to individual autonomy that is constantly limited by the non-compliance of access to information. As analyzed by Campbell (2001), individual consumption, in a general sense, consists of self-oriented and creative projects in which cultural ideas and models are necessarily involved. Both are characteristic of “modern consumers” that are dependent on autonomous hedonism and self-delusion present throughout different dimensions of social life, and are exposed to images of consumption of goods and innovation common to contemporary life. Consumption in the field of AR activates a collective imaginary involving the desire for children that provokes powerful images widely diffused through digital media,² but which rarely include crucial information on related contractual services. The different social, cultural and symbolic nuances that outline the desire for a child must still be considered as needing contextualization and problematization since they are configured by social inequalities.

The diffusion of information through social media illustrates the dominance of biomedical perspectives in framing human assisted reproduction, insofar as medical authorities and specialists are engaged in providing advice to interested populations (Vargas 2010). In her seminal study on Brazil, Citeli (2002) finds that the media can be included in the network of actors that integrate scientific production, as a result of the biological sciences’ efforts in scientific dissemination. An important investment is made into specialist opinions on these matters, providing us with a rich source of illustrations on the offer of AR services, in the light of important principles in new contractual theory, and on applying the social functions of contracts.

From this analytical perspective and based on the available literature, we propose a renewed reading of contractual relations and consider the uncritical dissemination of AR techniques, with a prime example being digital diffusion; said relations do not consider the notion of human personal dignity. Given that these social and contractual relations are unequal and opaque they call for an analysis that takes into account the defense of consumer rights as fundamental rights that are named in the Constitution

¹The paper is based on research data developed and shared by institutional collaborations. The analysis combines a socio-anthropological perspective with critical legal studies in the study of the offer and use of AR in Brazil. The research covers a variety of contexts such as heterosexual and homosexual couples, as well as legal disputes related to the expansion of rights and access to AR with the support of development agencies (CNPq and FAPERJ) in Brazil.

²The use of website data for access to AR techniques deserves particular attention. For anthropologist Hermano Vianna (1995) the World Wide Web, which was originally created within an auto-organizational regime, has destabilized the notion of authorship in cases where the author of websites is unknown. As pointed out by Santos (2007), digital media are characterized by heterogenous settings and therefore express the different “viewpoints” on a topic, which allows the cohabitation of different cultures. It is nevertheless clear that regarding AR there prevails a biomedical perspective that does not take into account the needs and subjectivity of health consumers.

of the Federal Republic of Brazil (Brazil 1988). We carefully consider the principles of new contractual theory, constitutional parameters, principal theory, and basic consumer rights. Such rights are made invisible even though there is ample diffusion of AR techniques in digital media linked to medical clinics and specialists. These communications respond to biomedical criteria that often do not fulfill the informational needs of individuals or couples.

We also point out vague notions and undetermined legal concepts used in such framings that add to the lack of specific Brazilian legislation on the offer of AR services, which in practice is regulated by the Federal Medical Council (Conselho Federal de Medicina-CFM, a regulatory organism of Brazilian medical activity). This is an emergent regulation where contractual relations can exemplify our current discussion using a complex topic involving success/failure rates in the procedures, genetic material exchange and confidentiality. Trade relationships in contemporary societies have changed, marked by increased speed and intensity, under the influence of capitalist markets and an economic order in which the final aim of contracts is no longer stability guaranteed by legal security, but to serve the existential values of contractors – human subjects (Schreiber 2018). Additionally, we must consider that the purpose of contracts in the reproductive field involves sensitive elements. In a situation of legal precarity and uncritical dissemination of information through digital means, one must recognize the validity of such principles.

The Brazilian context has been characterized, since the announcement of the first Brazilian test-tube birth in 1984, by the lack of legislation on the use of AR techniques by individuals and couples. In the absence of legal resources, even without legal powers the CFM remains the primary reference on technical applications, outlining and limiting access to techniques as a matter of public health. This promotes reductionism in light of the ample challenges of contemporary reproductive rights related to individuals' and couples' reproductive decisions. Some of the older issues on regulations pertaining to both individuals and couples, independent of sexual orientation, are (1) the possibility or prohibition of using third-person fertilizing material that is external to the parental project of those using the techniques, (2) the importance of documents (and their legal value) that can attest with certainty and clarity the kind of participation and expression of will related to these processes; as in the case of a partner authorizing the procedure assuming only a socio-affective paternity and, supposing a hypothetical regret, not being able to recognize the child as his, (3) the confidentiality of gamete and embryo identity, and (4) the consequences of postmortem reproduction, among others.

Problematizing wider issues that involve specific circumstances is done throughout legal scholarship but goes beyond the scope of the present work. Here our interest is only in problematizing regulatory aspects of how AR techniques are offered, consumed and the dissemination of information on Brazilian AR under the aforementioned conceptual framework and the massive popularization of AR techniques in Brazil. Presently, specific legal principles rather than legal norms appear of greater importance, insofar as the latter barely define actions demanded by the State under specific hypotheses. The former, in contrast, present themselves as actual directives that condition interpretative actions of phenomena and legal reality, in addition to their function of providing unity and harmony to the legal system (their structuring function). We furthermore identify an incipient regulatory framework involving the complexity of success/failure rates of procedures, exchange of genetic material and confidentiality that considers the 1988

Brazilian Constitution (Brazil 1988; Brazil 2002), but that is not actioned in practice. The traditional principles of contractual relations information have been undergoing revisions, giving superior value to fair and honest behavior as well as the duty to inform, which have come to rule business relations. Article 6 of the Consumer Defense Code catalogues, by way of examples, consumers' basic rights that will orient and instrumentalize consumer relationships. For this analysis we highlight two specific sections of this article, section I which states "the protection of life, health and safety against the risks provoked by practices in the supply of goods and services considered dangerous or hazardous"; and section III which states that "information that is adequate and clear about the different products and services, with the correct specification of the quantity, characteristics, composition, quality and price, as well as the risks they present."³ The Consumer Code (Brazil 1990) is a legal micro-system edited for the sake of consumers (the weaker part in consumer relations) which aims to reach equality between them and service providers or product suppliers, seeking fairer solutions to cases requiring adjustments or revisions.

Principal theory, which had already evidenced the theoretical and methodological hegemony in bioethics, is present in discussions on ethical and moral problems in health-related fields: beneficence, non-maleficence, autonomy and justice. These state, *grosso modo*, the medical commitment to the realization of patients' good in clinical and research settings, the respect of individual autonomy (informed consent), and resource assignment in health services (Corrêa and Loyola 2015, 55). Regarding new contractual theory, the concept of objective goodwill (Garcia 2009, 15) states that "the set of ethical behavior standards, which are objectively assessable, must be followed by parties entering into contract at all stages of the existence of contractual relations, from their creation and up to the extinction of contracts."

We start from the premise that these principles comprise only vaguely determined notions and indeterminate legal concepts, being therefore auxiliary resources in the legal interpretation of cases in different settings of social reality, including their applicability to AR. They nevertheless are constituted as auxiliaries for judges in the interpretation of legal mechanisms demanded by specific cases under trial. The need for promoting advances in the regulation of practices involving biotechnological innovation can therefore be considered. New developments involving life and human reproduction are necessary given the insufficiency of past legislation.

The paper is structured into two parts according to our premises. In the first part we present the characteristics of how AR techniques are offered, their consumption and the access to information on the topic, in order to contextualize the characteristics of AR technology used by individual and couple consumers. In the second part we contextualize the guiding principles of Brazilian contractual relationships and their connections to AR in health contexts.

2. Offer, the consumption of AR techniques and access to information

A first reflection on AR regards the fact that individuals and couples that now demand the use of AR techniques are implicated, in a defined way, in their consumption. The characteristics of contemporary consumers in related studies (Duarte 2010), particularly in

³http://www.planalto.gov.br/ccivil_03/leis/L8078.htm. Accessed March 30, 2019.

regards to the description of individuals in their relationships to goods and merchandises currently available, have been prone to criticism if we consider different models of public policy analysis (Souza 2006). The criticism is centered on how consuming subjects have been analyzed independently from the discourses that constitute them, particularly as autonomous individuals abstracted from social relations. In the critical perspective, individuals can choose, in a free and autonomous form, from a wide spectrum of possible social goods and resources available. However, regarding medical services on reproduction, attention must be paid to issues involving contracts, as in the case of surrogate wombs. If we look at the rules implicit in the relations between markets and goods that define couples as active consumers, then it is possible to see that conditions for choice involving couples' wishes, analyzed by Strathern (1991), insert them into an "initiative culture".⁴

While we do not deny that actual AR technology consumers have revealed new possibilities for reproductive options, contrary to the protective norms set out by contractual theory and especially those referring to rights to information, individuals and couples may not necessarily have sufficient clarity about risks to individual health, the effects on the body or even consequences for children born through AR. Taking into account AR technology consumers (Strathern 1991; Strathern 1992), the matter at hand involves not only biological procreation in itself, but a significant grouping of human relationships that includes our own representations of ways to act in society. This places us in front of complex questions demanding answers, through public policies, in Brazil. A considerable growth in the demand for AR in health services, including public ones, has been observed. This growth has been possible through the use of irrefutable arguments of universal access to health and the right of having children; above all, the socially constructed value of desiring children that underlies them (Ramírez-Gálvez 2011). Although being in fact available through public service, AR is principally available through the private sector.

The subjective dimension of individuals and couples gets lost in the realization of their parental projects because of massive advances in biomedicine. A notable example is the lack of transparency on the best treatment available in regard to success rates⁵; a situation that has been widely remarked, yet still endures. In the field of health, an intensification of Internet access has been observed related to the availability of information on health and sickness, as a complementary resource of information received during medical appointments, anti-depressant consumption, clinical psychology, and medical clinical case discussions (Lefèvre, Lefèvre, and Madeira 2007; Chaves 2007; Leitão and Nicolani-da-Costa 2005; Abensur et al. 2007). Australian medics Hangwi Tang and Ng (2006) offer the concept "Googling for diagnosis" in their research on the use of the Internet as support to reach a diagnosis. These types of results initially worried the medical community, they considered the possibility that the Internet could constitute a source of auto-medication for laypeople. Nevertheless, closer scrutiny revealed that patients' search for data

⁴For Strathern, culture consists in the way in which analogies are established between the things that make up certain thoughts. An 'initiative culture' regarding the consumption of reproductive technologies has as conceptual matrix, the idea that offspring should exist by choice.

⁵According to Cavalieri Filho (2011, 151) "In transparency in consumer relations clear, correct and precise information matters regarding the product or service to be supplied, and the contract to be signed – rights, obligations and restrictions." A direct consequence of this principle is the duty of service providers to inform, and the rights of consumers to information.

on illnesses actually pointed to a transformation of in-clinic practices, mainly of power relationships between medics and patients. Ramírez-Gálvez (2003) pointed out, in his study of the divulgation of AR in the printed press and electronic media, how the new field in Brazil was characterized by the diffusion and institutionalization of new behavioral models. The topic of AR technologies, according to researchers in the field, was forged in the last decades through television through reporting and interviews, including the TV soap operas produced from 1990 to 2000 (Ramírez-Gálvez 2003; Luna 2002).

The figure of a specialist in assisted reproduction has been central in the popularization discourse on infertility, and contributes to problems on how women and men's desire for children become associated to the development of AR technologies advertised from a very positive vantage angle. A decade ago there was excitement over the news, accessed through the then novel "World Wide Web," that during the elections for a São Paulo city prefecture one of the candidates revindicated access to reproductive technologies in his campaign. This meant that the clinical services of Dr. Roger Abdelmassih would become available through the public health network. Abdelmassih was a pioneer in infertility treatments in Brazil, with his clinic being the first to use in vitro fertilization in the 70s and responsible for almost a third of births using AR. With over three-thousand births during a decade of activity, Dr. Abdelmassih became an international reference point in AR, also because of his treatment of celebrity patients. The doctor and his clinic were frequently mentioned online by those craving effective quality treatments. In the media, the discourse on the expansion of resources was not restricted to its costs, as the doctor became focused on a different patient profile that included women who had undergone tubal ligation, men who had undergone a vasectomy, same-sex couples, and single women.

Another angle promoted during these times were the falling costs of AR procedures, including the opening of financial credits related to treatment. Such initiatives did not always find adequate regulation at the normative level and were only starting to deal with the complexities of the subject. In November 2016, during the Congress of the American Society for Reproductive Medicine, experts highlighted advances in techniques and how the greater specialization of doctors in this area could justify the increase in success rates. Bradley Van Voohis, president of the American Society for Assisted Reproduction Technology, spoke of an 80% chance of success for the IVF procedure. However, doctor Marcio Coslovsky, from Primordia Medicina Reprodutiva in Rio de Janeiro, suggested to exercise caution in the communication of such high numbers. According to him, the "good clinics" in Brazil worked only with a 40–45% success rate, the very best ones reaching 51%. He also proclaimed that "the most modern technologies should not be used on all couples for reasons related to cost and access to treatment, but should be aimed at those who have significant problems with becoming pregnant."⁶ However, it is worth remembering that family planning is no longer limited to contraception, as it is up to individuals or couples to decide in privacy whether or not to have children and the timing to achieve this, which implies a role for the State in their assistance. Brazilian Law 9.263 (Brazil 1996), which regulates the right to family planning, also recognizes the use of

⁶Portal Saúde. Accessed March 20, 2019. <https://saude.abril.com.br/familia/fertilizacao-in-vitro-as-taxas-de-sucesso-subiram-muito/>

fertilization and conception techniques in human reproduction.⁷ Such rights are effectively enshrined, guaranteed and protected, given that they are located within the field of public freedoms, which are based on the obligation of the State to deliver.

The issue is also related to the theme of medicalization of life in the field of bioethics, given that the way these medical services are offered involves the preservation of life. In this context, there is a need for greater patient knowledge on rights, health conditions and treatment perspectives, resulting in a subordination of medical activity to free and sufficiently informed consent. Likewise, it has implications for personality rights intrinsic to human beings, as they concern the person's own way of being. There are countless ways that could be enumerated in which related violations of physical or psychic rights lead to intolerable situations: integrity, degradation to the body or parts of it, body image, expression, nourishment, privacy/ intimacy, freedom, secrecy and confidentiality, and social coexistence.

In the recent past, the basis of a relationship of trust involving individuals who signed a contract was different, as there was more confidence in those carrying out the act. They did so if and when they wanted (opportunity analysis), about what they wanted (evaluation of the object or content of the contract), and also with whom they wanted (subjective appreciation), since the contract as the main source of obligations was the best representation of the importance given to private autonomy. It should be added that this notion (private autonomy) was linked to the idea of free will centered on the individual. As a result, the contract had the force of law between parties who were normally on equal footing. Currently, in the face of increasingly standardized contracts (adhesion contracts) in which there is a legal entity on the one hand and the consumer on the other, it is even possible for external intervention to curb unfair practices or clauses, in order to bring back balance to this relationship.

3. Contextualizing the assumptions guiding contractual relations in Brazil and their connections to AR

With the replacement of the individualist contract model there is a limitation to contractual freedom and a greater concern for the content of the contract and the clauses that bind the parties. It should be remarked that this is not a question of restricting individual freedom. Freedom to contract is universally enjoyed and acted upon. It is an indeclinable right, insofar as the contract remains the main form in which private interests are self-regulated. However, there are limitations in public order rules that affect the content of contracts.⁸ This is undoubtedly the greatest gain from the application of the social function of the contract in general pacts, but this does not necessarily occur in the field of AR consumption.⁹

The free and informed consent form (ICF) is presented as a kind of contract in which the patient accepts the financial charges and which indicates the stages of treatment, with an

⁷Law 9.263 (Brazil 1996) Article 9 states that "to exercise the right to family planning, all methods and techniques of conception and contraception that are scientifically accepted and that do not endanger people's lives and health, are guaranteed by freedom of choice." Accessed 30 March 2019. http://www.planalto.gov.br/ccivil_03/leis/L9263.htm

⁸Public order standards are those that protect social interests. In the context of consumer relations, they are the rules that protect consumers, being the means through which society is safeguarded. Therefore, it is not only the parties, suppliers and service providers that are of interest, with these rules sometimes prevailing over the will of actors. There is an established consensus that society's interests overrule when they conflict with individuals' interests.

⁹As for the notion of social end, the legal doctrine on its meaning is unanimous: social ends or social functions signify collective purposes.

observation on the success rates according to age. Regarding in vitro fertilization, it informs on cryopreservation, the eventual disposal and donation of embryos, but ethical issues present in the CFM Resolution such as the patient's beliefs or health risks are not brought up (Brazil 2017; Brazil 2013; Bazzaco et al. 2014).

The social effectiveness of the contract, in the sense that it must be interpreted according to the values present in the social environment in which it was signed so as to prevent unjust social clauses and to regulate an excessive burden on the most vulnerable party, started to represent the touchstone for the analysis and interpretation of contracts today. This last point is an especially sensitive issue regarding access to in vitro fertilization, as it is not always possible to accurately demarcate the financial resources needed for the entire treatment, as well as the number of attempts. Multi-twin births also impact household budgets when not considering this situation with due care. In this sense, it is important to examine the wording of statement no. 23 CJF / STJ, approved on the first Civil Law Day session:

The social function of the contract, provided for in art. 421¹⁰ of the new Civil Code (Brazil 2002), does not eliminate the principle of contractual autonomy, but attenuates or reduces the scope of this principle, when meta-individual interests or individual interest related to the dignity of the human person are present.¹¹

There was awareness of the consequences of guideline non-observance in business relations: there has since been a strong increase in requests for reparations (indemnity) based on moral damage involving fundamental values protected by the Constitution of the Federative Republic of Brazil (Brazil 1988; Brazil 2002). It should also be noted that since the beginning of its effectiveness, the principles have played a fundamental role in all private relations, in particular, the principles of social solidarity, *lato sensu* equality (isonomy) and the dignity of the human person, the latter being a true general protection clause. As a result of the primacy conferred to the person, as it permeates all fields of Civil Law, the strong guarantee previously conferred to credit and property protection relationships was displaced by giving way to existential issues.

It is in this context that the notion of good faith has also changed. Initially linked to the good intention of the contractor, it was present mainly in the analysis of possessory issues and in the defects of consent that affected the free expression of will, such as error¹²: it concerned the person who ignored an addiction related to another person or to a good. This was subjective good faith, very present in the Civil Code of 1916. In current Civil Law (Brazil 2002), which is more concerned with ethical behavior, good faith is related to the conduct of the negotiating parties, since then called objective good faith. According to Judith Martins Costa (2000, 157) the principle of objective good faith:

... is the requirement of fair conduct among contractors, related to the attached duties that are inherent to any contract, there being no need to expressly provide for them. They consist

¹⁰2002 Civil Code Article 421. Accessed 15 April 2002: "The freedom to contract will be exercised due to and within the limits of the social function of the contract." http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm

¹¹Civil Law Day sessions I, II, III, IV and V. Approved statements. Accessed April 15, 2020. <http://www.cjf.jus.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-juditarios-1/publicacoes-1/jornadas-cej/EnunciadosAprovados-Jornadas-1345.pdf>

¹²"Error is the false perception of the facts that leads the person to perform conduct that one would not do, if they knew the truth." As a result of the erroneous manifestation of will the contract is voidable, and may cease to have valid effects (Lisboa 2009, 234).

of indications, acts of protection, such as the duty to ward off damage, acts of surveillance, cooperation and assistance.

In business relations, the entry into force of the Consumer Protection Code in 1990¹³ inaugurated a new stage marked by the concern with the implementation of “citizen spirit,” recognizing through law rights previously ignored. This new mentality led to a restructuring of the business market, with consumer rights even occupying a prominent place in companies’ management strategies (Maia 2001). Almost 30 years later, the changes are significant: in general, today the consumer is a more conscientious subject, aware of their rights and, emancipated, is able to scrutinize their violation. On the other hand, the State (public power) also needed to adapt itself to make the effectiveness of this new order possible and did so through greater inspection and intervention in these relationships, previously relegated only to the actions of interested parties.

Only in this way can balance and harmony in consumer relations be guaranteed and, in theory, the condition of vulnerability inherent to the consumer is reduced based on different criteria. Constitutional values, notably sociality and material balance, add up to the success in much desired contractual justice. However, despite the favorable results of the application of constitutional principles in consumer relations associated to the creation of a new contractual theory, the standardization of contracting practices, with the consumer being practically obligated to accept clauses and conditions unilaterally imposed under penalty of not hiring, makes the notion of vulnerability remain in need of revision, especially when involving health issues. The literature includes references to problems involving adhesion contracts: those not resulting from free debate between the parties, but from the tacit acceptance of previously established terms and conditions (Pereira 2016). As highlighted above, the ICF used in AR that aims to guarantee autonomy regarding the choice of procedure needs to be rewritten in order to facilitate understanding, as it is a contract structured unilaterally by clinics (or doctors) with clauses accepted by patients in mass. It evidences an unequal relationship, being considered as adherence. This modality corresponds to one approved by the supplier of products or services without the active participation of the consumer, who is prevented from substantially modifying its content.¹⁴ Contracts entered into in a negotiated manner, with a wide debate and discussion on their clauses between the parties involved, are minimal in commercial practices.

This entire discussion, which involves patterns and singularities in contracting activities, gains different forms in the context of health when we discuss the relationship between consumption and acquisition of goods in medical services. The notion of vulnerability in this context, which is no longer restricted to socioeconomic aspects, saw its field of application expanded and complexed, especially when involving access to public health policies and the consequent medicalization of society. Public health policies, which also need to contemplate the provision of assisted reproduction, cannot disregard

¹³Since then “the contract is an emerging and central private law institution, due to the change in its structure and function.” It plays a particularly important role to the circulation of wealth, providing security to legal relations. Under the perspective of the constitutionalization of Civil Law, it serves not only the interests of markets but those of the people who contract, in order to minimally achieve individual dignity (Tartuce 2017).

¹⁴Article 54 of the Consumer Protection Code states that “an adhesion contract is one whose clauses have been approved by the competent authority or established unilaterally by the supplier of products or services, without the consumer being able to discuss or substantially modify its content” (Brazil 1990). Accessed March 30, 2019: http://www.planalto.gov.br/ccivil_03/leis/L8078.htm.

contemporary debates around reproductive rights and family planning. Furthermore, recent approaches have reinforced the valorization of bodily autonomy in understanding self-determination in health care, including reproductive autonomy. In this sense, in the presence of mental health, a person must self-determine the design of their own health care, which throws into the spotlight the old paternalistic view that characterized doctor-patient relationships, in which the first decides “what is best for the patient.”

Because of absence of a law on AR,¹⁵ medical parameters, even when they do not meet the expectations of couples and individuals who resort to technologies, continue to present themselves as indisputable truths. In spite of increased access to AR, for couples or homo-affective individuals, CFM’s ethical standards are still restrictive in relation to, for example, age. Added to this reality are the negative moral injunctions still present in choosing a parental project that relies on the use of technology.¹⁶

Various issues in this debate cannot be ignored: the naturalization of the reproductive body, especially women’s; the privacy and intimacy of individuals and couples who consume any assisted reproduction technique; autonomy, in the sense of freedom of choice with regard to the exercise of sexuality and reproduction; the right to reproductive and family planning; and public health policies. In addition, the fragility of medical and health records resulting from the lack of regulation on AR in Brazil contributes to the lack of adequate information on the effectiveness of the procedures used, despite the statistical data indicating a dizzying increase in success rates.¹⁷ There are many other aspects, including those involving the public sector. An example is Ordinance No. 1,397¹⁸ published by the Ministry of Health in 2013, expanding the number of services that offer AR procedures within the scope of SUS. However, the document has gaps in the criteria used to choose establishments, the objectives for using resources, and the conditions for carrying out monitoring and accountability (Vargas, da Silveira Rossi, and da Costa Moás 2015).

Assisted reproduction techniques, despite not being a novelty in the medical field or in the wider social environment, imply risks of different orders especially for women. In several stages of the procedure vulnerability may worsen, requiring what the legal literature constructs as “duty of care” that is related to concerns with the protection of individuals, their autonomy and integrity.¹⁹ Generally speaking, the environment in which AR is developed is not a protective one. Both couple and individuals are subject of large amounts of stress and anxiety surrounding expectations of treatment success (Tamanini 2003; Vargas, Russo, and Heilborn 2010). Looking at this dimension of risk and

¹⁵Despite numerous bills submitted to the National Congress, to this date Brazil only has successive ethical norms (resolutions) issued by the Federal Council of Medicine to regulate this matter. The most recent is number 2,168/2017, accessed March 30, 2019: http://www.portalmédico.org.br/resolucoes/cfm/2017/2168_2017.pdf

¹⁶There is a new culture on adoption that focuses on the idea of giving one or more children a family. There is an active participation of support groups for adoption, which encourage and sensitize families that are capable of adopting, to adopt siblings, “older” children (late adoption), and children with syndromes or special needs. There is thus an appeal to ameliorate the situation of underprivileged children, a sad reality in Brazil. As a consequence, the couple or the individual who opts for pregnancy on a biological basis, using AR techniques, often suffers accusations of selfishness (Rinaldi 2010).

¹⁷As highlighted in the opening sections there is no widely consensual statistical data, and furthermore, confidence is doubtful where data exists.

¹⁸Ordinance No. 1,397, July 3, 2013. Accessed May 15, 2019: http://bvsm.sau.de.gov.br/bvs/sau.delegis/gm/2014/prt1397_03_07_2014.html

¹⁹In general, the environment under which AR occurs is not welcoming. The couple or individuals are subjected to severe stress and anxiety arising from the expectation of success.

vulnerability, individuals and couples who travel abroad in search of a type of AR treatment which is not offered or prohibited by their home country should be considered. This globally differentiated service offering was enthusiastically disseminated in Brazilian media in recent times.²⁰ The Medicina S/ website quoted data from the Latin American Assisted Reproduction Network (REDLARA) which places Brazil as the leading country in terms of the number of births achieved with assisted reproduction.²¹ According to this database, Brazil reported 83 thousand lived births followed by Argentina with 39,366 births and Mexico with 31,903 births. This offer of services and other factors linked to regulatory processes determine the itinerary of couples seeking treatments in terms of the practice called “reproductive tourism” which we will not detail here. However, the data from procedures performed in the countries that lead the ranking gives us a general idea of the demand, with “reproductive tourism” and “transnational pregnancy” being interpreted in various ways. According to Machin (2016), reproductive tourism (or fertility travel) is an inappropriate term, since it relates an uncomfortable and stressful practice with leisure and relaxation time, as it would be preferable for couples to stay in their countries of origin if the circumstances were favorable. An additional reason is the negative connotation that is given to the term, by implying an idea of evading the law or the patient’s search for strange or illegal treatment abroad. The specific terminology used to describe the phenomenon therefore needs to be carefully chosen to avoid misinterpretation.

The term “cross-border reproductive care” (CBRC) is considered to describe the phenomenon in an objective and sufficiently broad way that precludes judgment on the reasons underlying “patient mobility,” which can involve an effective movement of professionals and people in search of methods that help reproduction. The term is the standard definition proposed by the European Society for Human Reproduction and Embryology (ESHRE). A problem still presents itself from a lack of specific legal parameters that regulate this free trade and the free circulation of genetic material, opening the possibility for the distortion of assisted reproduction procedures, say, with the risk of eugenics in assisted fertilization laboratory practices. This brings up the question of the extent to which only national regulations of this practice can cover a new market in reproductive medicine, or whether a form of control based on international agreements to define universal standards would be the most appropriate option.

The approach to this question is multidisciplinary, but jurists in particular have long held debates on relevant vulnerability issues, based on the consensus view that special protection is necessary for people affected in their dignity due to adverse psychophysical, social and economic conditions (Barboza 2009). Special laws now protect children and adolescents, the elderly, tenants and consumers, among others. For certain social categories or minorities, vulnerability is assumed because of their very condition. According to Schramm (2008), a vulnerable person is a potential victim, as they are exposed to risk stemming from their condition or weakness. The vulnerability of couples in the context of AR has many similar facets, resulting in mistrust regarding the procedures. To cite an example, we illustrate the experience of a couple based on data from our research

²⁰Sol, praia e fertilização: Espanha vira Meca do turismo reprodutivo. Accessed June 2020. <http://g1.globo.com/ciencia-e-saude/noticia/2012/09/sol-praia-e-fertilizacao-espanha-vira-meca-do-turismo-reprodutivo.html>

²¹Brasil lidera ranking em reprodução assistida. Accessed May 2020. <https://medicinas.com.br/ranking-reproducao-assistida/>.

(Vargas 2006). The couple described their disappointment with a clinic in Rio de Janeiro due to the large financial investment, “a real fortune”, and their insecurity and distrust regarding the conditions for preservation and disposal of frozen eggs due to a lack of information. “No one said anything. So it was their word against ours.” When asked if they had a contract, they replied, “There is a contract, but that thing, it’s like a risk contract,” demonstrating the legal vulnerability to which they were subjected. We do not have updated information on this issue, but similar lacunae continue to be observed.

Care as a legal value gained prominence in the scope of institutional interpretations related to Family Law (Dias 2013), in view of a growing recognition of affection and parental responsibilities, e.g. the recognition of multi-parenting, equality between biological and socio-affective paternities, and affective abandonment as a civil liability. The obligation to indemnify the non-observance of a legal duty to care, inherent to family power, was summarized by Supreme Court Minister Nancy Andrighi: “to love is a faculty, to care is a duty! [...] Care as an objective legal value is incorporated into the Brazilian legal system, not through that expression, but with phrases and terms that manifest its different ends, as observed in article 227 of the CRFB/88.”²² This undoubtedly expresses a responsible way of relating that includes being present, worrying, considering, valuing the other, listening, protecting, and understanding (Meirelles 2009).

4. Closing remarks

Our aim has been to present some reflections on the offer of AR, having as background important principles of the new Brazilian contractual theory. We considered the impact of the protective rules of the Consumer Protection Code (Brazil 1990) that should be used to aid consumers (individuals or couples) of reproductive technology, who generally are in a vulnerable state. We have not aimed to exhaustively analyze a theme that is still under construction, but to point out problematic issues that are sometimes distant from specific cases subject to evaluation.

The relationship between the State and reproductive medicine has historically determined the specific enactment of public health AR policies in Brazil. As a sensitive issue for society as a whole, it should be included, at least theoretically, in the list of concerns that the State manages, intervenes and regulates, when considering legal frameworks such as the 1988 Constitution; and yet, this remains to be observed in practice. Within current public health policy there is no public debate on the consumption of reproductive technologies, which is reflected in the incipient way of addressing this issue by governmental and non-governmental bodies. In private networks, the lack of public debates receives scarce interest. At stake is not an issue of whether men and women have the right to have children or not, but of asking about how to determine imperatives that apply to its realization – whatever their conditions may be – and that govern conduct, behavior, practices and emotions. Discussions on the topic display gaps on the use of medical technologies that are reproductive, as well as of normative aspects involved in contracts involving reproductive decisions. Considering the large investments in research

²²The final decision is available online. Accessed May 5 2019. https://ww2.stj.jus.br/revistaeletronica/ita.asp?registro=200901937019&dt_publicacao=10/05/2012

in the biomedical area, it seems relevant to know and better reflect on the guiding principles of legal decisions.

It is worth considering that the desire to have children and to start a family are shaped by culture, and they are not universally or uniquely determined by the economic resources involved. Having children in contemporary societies has become an issue that requires reflection and decision-making, that directly involves contractual procedures taking into account the expansion of the supply of reproductive technological resources and the freedom of choice for families. But, we can ask ourselves, can this freedom be fully achieved through certain types of contracts? How can we guarantee protection in vulnerable contexts such as when facing health matters? Procreation can now be thought of as personal preference, but it does not necessarily correspond to acceptable or “good” choices in the sense of social consensus for the individuals involved. The AR offer currently created is based on the construction of refined images of techniques that only provide human beings with benefits.

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