

# The legal investigation of biological paternity in Portugal: Gendered roles and representations<sup>1</sup>

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## Introduction

Almost all European societies support legal efforts to establish parentage when the paternity of children born out of wedlock has not been established. In this context, courts frequently ask for DNA tests as part of public policies to ensure that children are cared for not only financially, but also regarding education, upbringing and psychological development.

Underlying such action, there is a biological conception of paternity that has been discussed against the emergence of new family forms dissociated from the trilogy ‘heterosexual couple-marriage-procreation’. Feminist studies have shown that state institutions, when actively engaging in civil action to identify a child’s father tend to reveal patriarchal gender relations grounded on the evaluation of the mothers’ sexual activity and fidelity and of the fathers’ income and employment status.

This paper explores the ways in which the legal investigation of paternity of children born out of wedlock reveals cultural models that reinforce the naturalisation of gender differences. We contend that:

- by allowing for the “biological true” of paternity, biotechnology has effects on the configuration of parental roles and identities by reproducing gender inequalities, which may question both the rights of children and of biological mothers and fathers.

We intend to show how women and men:

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- evaluate legal interventions in this domain;
- reconfigure their private rights in ways that tend to reproduce and at the same time challenge prevailing patriarchal structures.

### **1. The legal investigation of paternity in Portugal**

In Portugal, a legal investigation of paternity is set off when a child's birth certificate does not show the name of both parents. The investigation is conducted by the Public Office and usually leads to the child's adoption by the biological father. It is usually justified by the child's rights:

- to personal identity via the knowledge of his/ her genetic origin;
- to education, subsistence and the daily care and supervision by two different gender adults;
- to psychological integrity and health, considering the importance of progenitors to a correct medical record based on genetic history.

Within this research project, we interviewed 10 women and 12 men involved in legal investigations of paternity ordered by Portuguese courts. The interview schedule focused on the following dimensions:

- (1) the participants' evaluation of their personal experiences regarding the courts' functioning;
- (2) their perceptions and knowledge regarding the procedures associated to DNA testing, including its results;
- (3) the evolution of their parentage expectations from pregnancy to the moment they are informed about the paternity test's result;
- (4) their perceptions of the underlying social evaluation process and of family support.

This paper focuses exclusively on the first.

Despite some similarities regarding age, conjugal status and schooling, the interviewees' social-demographic profile shows some variations when we compare men and women, namely:

- men hold an employment status more favourable than women;

- more women live with their child(ren) or other family members, whereas most men live with other family members and no children;
- none of the men lived with children without a wife/ partner/ other family member.

## 2. “The father’s name” and “the mother’s life”: Representations and implications of paternity investigation to women and men.

Men’s and women’s representations of the legal investigation process shows that neither the first, nor the latter hold a very clear idea of who is, in fact, responsible for its onset, of its specific procedures or consequences. Women and men think different factors prompt the investigation. Their visions are linked to particular ideas regarding gender relations, which place them on opposite and often conflicting power positions.

Most women believe the investigation is set off because the child’s biological father has refused to name him/her as his own, when in fact it is set off because the father’s name is absent from the child’s birth certificate, curtailing the mother’s, and consequently the child’s rights:

“[the father] didn’t want to give his name and the court asked ‘why did the girl only have the mother’s name and not the father’s’, and I had to say that [the father] wanted to evade giving his name and the court decided to give the name, through DNA.”

(Teresa, 39 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

“Well, I registered the baby without the father. // Since [he] didn’t register it went to court and then we were both contacted and decided to do the paternity test.”

(Catarina, 29 years old, 12<sup>th</sup> year schooling, Single, Laboratory Technician, Positive)

According to the women, the father’s name is utterly important and justifies, on its own, the request for the DNA test, even if this does not necessarily lead to a close relationship between father and child in the future.

Historically, social paternity has produced biological paternity. Technological advance has allowed the determination of the (“true”) biological father, and simultaneously reinforces patriarchal notions of family and gender:

- On one side, underlying the State’s intention we find the ideal of the heterosexual nuclear family and a parallel resistance to fatherless families

(Kelly, 2009), which rest on the belief that success in a child's upbringing can only come from having as reference two different sex parents;

- On the other side, the alleged biological father's paternity refusal rests on a doubt about the mother's sexual conduct and moral character, which sets off an investigation that focuses specifically on these matters (cf. Fonseca, 2009; Machado, 1999, 2008; Turney, 2011).

Such doubt is associated by the men to their involvement in emotional relationships that they classify as unstable and troubled, in extra-marital affairs or in fleeting encounters with the women, i.e., relationships that prevent them from somehow watching over the women's sexual lives, as supposedly happens when one is married:

"[...] it wasn't a relationship I had with that person – let's call it, I don't know, a one-day stand or an acquaintance, that's all. The matter is that she claimed she was pregnant, that the child was mine and I answered simply 'Ok, if he is, then, I'm here to assume my mistakes, to assume whatever I've done. But you'll have to prove me if, in fact, I'm the father or not, because it's not me who's going to ask for the paternity test...'// And, well, she moved to court."

(Tiago, 22 years old, 9<sup>th</sup> year schooling, Single, Hotel Employee, Positive)

"Yes, some doubts because that pregnancy appeared when we had already broke up. It was a bit odd, caught by surprise, and, well, if we have the chance, let's do it [the test]..."

(David, 26 years old, 12<sup>th</sup> year schooling, Single, Warehouse Employee, Positive)

This type of doubt is part of the ideological bedrock that sustains the legal investigation of paternity since during the latter the woman's sexual conduct – including the one that precedes *and* the one that follows pregnancy – is particularly important and determines its continuation and its results (Costa, 2009; Machado, 1999; 2008). In the absence of marriage or stable cohabitation, the procedure aims at excluding the possibility of the child belonging to another man.

However, the women believe their relationships with the men were stable enough to ensure that they were being honest regarding the child's paternity:

"It wasn't the court, it was the girl's father who wanted because we dated for five years, and during the last year we had some problems... [...] And, there, when he knew I was pregnant, he simply said the daughter wasn't his."

(Rosalina, 18 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

So, the paternity refusal ends up leading to DNA testing as a way to determine the woman's "good" or "bad" conduct. This is why some women consider that the investigation process is particularly painful to women, a "punishment" on the part of the men they are the victims of:

"[I feel] A little bit hurt because people doubt us, right?... As women, right?... I think I'm talking about women, in general... Doubting that, I think... But then they [men] are entitled to it, right?... // It's a bit difficult, it's a bit difficult for us, women, I believe it's a bit difficult."

(Fátima, 32 years old, 9<sup>th</sup> year schooling, Divorced, Unemployed, Positive)

"Children that come to the world aren't guilty of their parents' faults; they're entitled to know who their real father is. Though I think no court has the right to invade a woman's privacy that way."

(Rosalina, 18 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

In fact, "through judicial paternity hearings, the sexual and reproductive activity of the mother is no longer seen as an intimate and private experience, but becomes a matter of interest to the state, in the name of the child's interests" (Machado, 2008: 225) even when it conflicts with the mother's right to privacy (Wallbank, 2004).

Both the men's refusal to voluntarily acknowledging paternity and the process women are subsequently subject to is seen by the latter as particularly shameful or embarrassing (Costa, 2009; Fonseca, 2009; Turney, 2004, 2011). Women are somehow suspect of a "paternity fraud" in order to obtain advantages for themselves, namely financial ones (Turney, 2011).

On the other hand, belief in a "paternity fraud" may also be assumed by other relations (parents, friends, acquaintances), reinforcing the women's dishonourable status. So, the genetic determination of paternity can also be seen, as noted by Turney (2011: 1119), as "a way of making a public statement of exoneration about the biological paternity of their child", clearing the women from suspicions:

"I, thank God, know who the father is... He's the one who's going to be harmed."

(Sameiro, 27 years old, 6<sup>th</sup> year schooling, Single, Unemployed, Positive)

... and as a way of "forcing" men to take some responsibility – namely, material – regarding the child:

“I felt so relieved!... I was so choked, so to say, with my problems, of not being able to solve them alone!... It was a relief asking for help and that help came from the court. For me, it worked out fine. Say, he was trying to run away but he couldn’t. And he almost did, right?...”

(Sónia, 21 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

“Someone who says he wants to leave, he could leave in terms of psychological support, but not in terms of naming the daughter and paying her support, that he couldn’t.”

(Teresa, 39 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

One of the purposes of the investigation is to ensure the mother has the necessary economic support to raise the child, but as Kelly (2009: 329-330) states, this is also a form of privatizing the economic responsibility for the child, relieving the State from such financial burden. Situating the child within a ‘traditional’ family, it reduces the chances of the State being called to provide for her/his subsistence (idem).

Most women we interviewed were unemployed, which made them particularly vulnerable and somehow forced them to undergo a paternity investigation in order to ensure the child’s rights. Additionally, they had to deal with prevailing notions of motherhood as a “natural” given for women. “Failing” to provide such care entails a diminished status as woman and mother (Faria, 2011), which explains the anguish we find in the interviews, the fear of not being able to deal with the difficulties of being single mothers, of failing or losing their children:

“When she’s ill – ‘cause I have no other support –, well, I try to control myself but I feel miserable at the same time, because it’s just me for everything... // First, it’s my first child, and the last, may God [keep her] for many years... being mother and father to your first child, my mind just doesn’t stop. Worried. // Such concern...”

(Teresa, 39 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positivo)

“I only have one reason to be afraid. It’s... losing my daughter. It’s the only reason. For being a single mother, yes. // I don’t know... I already lost one, so...”

(Carla, 22 years old, 6<sup>th</sup> year schooling, Married, Unemployed, Negative)

The interviews show, in short, that “being a father” continues to be a matter of choice to men (Turney, 2011: 1112) and that “being a mother” – especially, a “good mother” – is felt as an obligation by women.

Whatever the actual effects of the paternity investigation are on the future relationship between the child and his/ her progenitors, the State’s demand of the father’s name in the birth certificate shows an intention to create a “complete”, though not united family around the child, reinforcing the ideal of the heterosexual

nuclear family (Kelly, 2009: 330). For this reason, the true (and most relevant) impact of DNA test may reside in the reconfiguration of the relationship network and identity of the parts (Strathern, 1995).

However, not all interviewees believe these matters are being adequately dealt with by the State. There are resistances and examinations that highlight a quest for a certain autonomy towards male domination and State regulation.

### **3. The underlying struggle between autonomy and domination**

Women and men simultaneously challenge social and legal determinations regarding DNA tests and their implications, and accept without questioning their different “fates”.

Among some men, we find a discourse about pregnancy as a feminine expedient to “grab the man” or to “profit” financially from the child’s right to financial support. They feel as victims, betrayed or “used” by the women who got pregnant:

“Well, me, I immediately felt she was grabbing me and that she wanted something more than just giving me a child... I work on transportations, up and down, I have many miles and, I don’t know... There, I earn enough for myself, but if she wants to lay back, that’s not the way to do it. That’s it, for me...”

(Tomás, 25 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

“And I think people have to stop with such manipulations, those games of ‘you’re the father’, without being so, to take hold of that person, to do that stuff, I do find it [the DNA test] really important, indeed.”

(Hugo, 30 years old, 4<sup>th</sup> year schooling, Divorced, Chauffeur, Negative)

Few men assume some responsibility for the child’s conception and none claims to have been proactive in terms of contraception. They assume that taking contraceptive measures is the woman’s “natural” obligation and women tend to reproduce the same idea by conveying some “guilt” for “letting” the pregnancy happen:

“I got pregnant ‘cause I was having thyroid problems. So, I was a bit out of control, I never thought I could get pregnant, also ‘cause I was taking the pill... But since this was a bit out of control, there...”

(Catarina, 29 years old, 12<sup>th</sup> year schooling, Single, Laboratory Technician, positive)

“He came here back then... We spent one night together and that’s why I got pregnant.”

(Carla, 22 years old, 6<sup>th</sup> year schooling, Married, Unemployed, Negative)

It is in the light of such presumptions that the pregnancy is seen by men as premeditated. Faced with an unwanted pregnancy, some men admit to have proposed and some women admit to have received suggestions to terminate pregnancy. Despite their partners’ pressure, however, the women decided to have the child. Even if the latter was not wanted by the men, there was some expectancy that the child’s rights would be granted and that he/she could have a future relationship with the father. The DNA test nurtures such expectations, simultaneously reproducing and naturalizing different parental roles for men and women: usually, women are granted parental guard and all corresponding responsibilities whereas men are expected to provide for the child’s financial support and to visit him/ her sporadically.

Meanwhile, some women’s refusal to allow the biological father to see the child emerge as a retaliation to their initial refusal of paternity in the absence of a DNA test, which forced the women to face the investigation process. Such refusal is, in fact, fostered by legal determinations that grant women increased rights over the child, situating the man as an accessory element of the parental relation:

“[The court] Did the stuff it usually does, she would stay with the mother, I had the right to a certain time for visiting, I had to pay x, y, all that stuff... It was decided... The girl stayed with the mother, [I] would send the money regularly – Which the court imposed on me – and as for the visits... The mother said ‘I already know he’s not going to want to take the baby home’ and whatever and it’s not exactly so, let’s go easy on it, because... Well, every moment of our life is a mystery.”

(Paulo, 42 years old, 9<sup>th</sup> year schooling, Married, Estofador, Positive)

“Besides doing what she did, she refuses my visits or if I want to know or see him... I’ve never seen him, I only saw him once, when I went to the DNA testing.”

(Tiago, 22 years old, 9<sup>th</sup> year schooling, Single, Hotel Employee, Positive)

In some cases, there is an open challenge towards decisions that are forced against the parts’ will and their evaluation of the situation:

“The test wasn’t even necessary. It wasn’t... // He’s going to do nothing, he’s got nothing to give, nothing to do... He wasn’t going to put me and the baby well in life, he wasn’t. I didn’t need his name. I didn’t.”

(Maria, 44 years old, 4<sup>th</sup> year schooling, Divorced, Cook, Positive)



“By the time my daughter was born, I only registered her with my name [...] although my current partner wanted to register her with his name, but legally that’s not possible. // My partner, when he took over my daughter, the case was filed. But since some cases were being investigated by the Public Office, the judge opened my daughter’s process and noticed some stuff weren’t right... So, they couldn’t be ignored.”

(Carla, 22 years old, 6<sup>th</sup> year schooling, Married, Unemployed, Negative)

These two cases raise questions about whether State action in the name of its citizens can, on one side, surpass the latter’s personal will and freedom and, on the other, force a solution that they feel is an additional problem. In the first case, Maria tried to escape a violent man that she thought could bring no good to her or her child; in the second case, there is an obvious interference of the State in the determination of the paternity of a child who already had a “father”, though not a biological one. At least in these two cases, in the eyes of the Portuguese State, the biological father seems to be more important than the “affective” father.

In the interviewees’ questionings we find glimpses of an autonomy that is not complete, or full, but rather suffocated by the legal visions of what it means to “be a mother” or a “father”. In fact, paternity based on a DNA test can be contested on a number of factors, namely on the absence of affective bonds, even when the test result is positive:

“As I’m saying, if everything had been right from the start, had she said ‘Look, I’m pregnant’, then I would be following the pregnancy and all that, and then I’d see. I didn’t follow it at all, she’s not mine! // I haven’t loved the girl, the baby, because... I’m sorry, she’s not, she’s not mine.”

(Tomás, 25 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

Tomás’ discourse shows that paternity is a social phenomenon undergoing changes brought along by genetic testing. Tomás truly believes that there is something wrong with the test. But although he is the only interviewee who openly contests the test’s result, other interviewees hold similar suspicions regarding the judicial procedures and possible frauds in benefit of one of the parts:

“I wasn’t afraid it’d be negative because he wasn’t the father. I was afraid it’d be negative because of his acquaintances. Because he always gets what he wants... and I never do. // But if it was negative, be sure I’d call the police on the spot. I would... I would because I know what I did.”

(Rosalina, 18 years old, 9<sup>th</sup> year schooling, Single, Unemployed, Positive)

“Because I’ve heard it can be tampered with, the test. I’ve heard, but I really don’t think Fátima, or her boyfriend at the time, having enough influence to interfere in the

test. But I think an analytic report of the test should be provided so that I could confer with a doctor...”

(João, 56 years old, 9<sup>th</sup> year schooling, Married, Public Officer, Positive)

## Conclusions

The way the paternity investigation process is carried out reinforces regulatory intents that are different according to gender, which are present in the interviewees' discourses and interfere in its outcomes. Even if the process results from a legal imposition, it conveys “a gendered conflict over paternity establishment” (Turney, 2004: 3), with different and uneven consequences for men and women.

Whereas men point out as an immediate consequence of their involvement in the process the loss of an emotional relationship (a marriage, e.g.), women complain about the invasion of their privacy, of negative social judgements and of the men's lack of interest in sharing the child's life and education. In a sense, the mother's life is implicated before, during and after the conclusion of the investigation since she is – and will be – usually the child's sole provider, whereas the father is simply compelled to sign the birth certificate and, at best, to pay for child support. The interviewees' discourses reaffirm gender inequalities resting on the naturalization of the women's main responsibility for their children and on the men's *relative* lack of responsibility in this domain.

However, neither men, nor women accept the State's intromission in their “private” lives peacefully. Their critical position is especially visible regarding the imposition of a biological paternity that not only does not imply the adoption of a genuine parental role, as it can also force a relationship that is considered negative both by and to the biological mothers/ fathers, and to the child.

In short, legal investigations of paternity provide important elements for the analysis of the processes and effects of male domination. However, it also shows the individuals' attempts to reconfigure their private rights, which simultaneously seem to defy the dominant patriarchal structures.

We propose the concept of “vulnerable autonomy” (Faria, 2011) to emphasize the idea that, when faced with the need to deal with the legal obligation of socially situating the child, several interviewees question certain aspects of the judicial process that they find restrictive of their autonomous action. Even if such questioning does not actually bring down the patriarchal structures that support the legal process itself, it shows that individuals do not necessarily fully comply to them.

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