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Gendered and social differences on acceding to inheritance: analysing court procedures for the determination of paternity in Portugal (1893-1966)

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Abstract:
This paper explores how the court’s procedures in Portugal (1893-1966) for the determination of paternity of children born outside legal wedlock and whose alleged father doesn’t voluntarily recognize paternity can highlight the social and gendered processes that were vital in the past in accessing resources provided by the family, namely the inheritance supplied by the putative fathers.

It is argued that the judicial practices, in the specific context judicial investigation of paternity, reinforce gender inequalities by reinforcing the normative models of family life and the dominant ideology of women’s and men’s relationships.

This paper speculates on how the legal attempts to establish the paternity of illegitimate children tend to reproduce the prevailing patriarchal structures, but also can contribute in great measure for the individual’s well-being, for the recognition of one’s paternity can permit access to economic, emotional and symbolic resources, otherwise inaccessible.

Introduction
Children born outside institutional marriage without a legal father, along with the uncertainty of biological paternity, have always posed complicated issues for legal systems, especially those that based ownership and inheritance of property on descent through the male line. Historically, paternity investigations have assumed great importance based on the dominant ideological conception of masculine authority as an “economical resource”. Richard Collier puts it in these terms:
“Establishing an authoritative determination of paternity (proving the biological link) has historically posed considerable problems for legal systems. The importance of a man needing to be sure that a particular child is ’his’ has, not surprisingly, been accorded a central place within a legal system in which property rights based ownership and inheritance have traditionally passed through the male line. Within such a system of patrilinear, primogenital ordering, establishing with some degree of certainty a biological connection between a man and a child has assumed great importance.” (Collier 1995, 182).

In ancient societies, as well as in today’s, the knowledge of ascendant’s identity and the expected subsequent access to the intergenerational transference of material, symbolical and emotional resources provided by family can be considered vital elements for the individual’s well-being. However, if nowadays the protection of rights of the children born outside the institutional marriage is consensual, in ancient societies there were several obstacles placed before the acknowledgement of the rights, namely, the access to inheritance, by the so-called “illegitimate children”.

Accepting the currents of thought followed by cultural anthropology for quite a long time, since Lévi-Strauss’s studies of kinship systems (Lévi-Strauss 1969), that the reproduction of human beings is also the reproduction of social relationships (Strathern 1992), this study, being rooted in a tradition of feminist legal studies, explores the social relationships which are reproduced by the courts of law and evoked in the context of paternity investigation - such as representations of paternity, maternity, family and femininity – that highlight the ideologically dominant gender relations, interpreted as means of reinforcing the socially subordinate position of women.
In the words of Gillian Douglas (1991), legal regulation of reproduction mainly reproduces patriarchal structures in society. As she points out, “On a more basic level, while women have almost total power over reproduction, because they bear the child, they have been unable to make use of this power. No man can be certain if a child is his, sort of having genetic testing to find out. But all women, until the past decade, have known that the child they carry is ‘theirs’. Patriarchal structures in society might be said to be based on the desire of men to seek to control this power that women have, to try to ensure that a child belongs to the right man.” (Douglas 1991, xix).

The importance of legal regulation of affiliation relationships seems to be emphasised by the phenomenon of children born outside legal marriage, who don’t have a legal father, articulated together with the uncertainty of biological paternity, often reinforced by assumptions about women’s predilection for deception in reproductive matters (Diduck and Kaganas 1999, 130).

Feminist legal studies have shown that lawsuits that evoke sexuality - such as rape, sexual assault, abortion, assisted reproduction techniques, and the cases of judicial investigation for the determination of paternity, that I now add to this list – stress mechanisms by which the law provides specific meanings to women’s bodies and behaviours (Abbott and Wallace et al. 1991; Bridgeman and Millns, 1995; Gruen and Panichas, 1997; Matoesian, 1992; Pineau, 1997; Smart, 1995), reproducing cultural beliefs about female sexuality and showing how the law has its own very powerful mode of disqualification and subordination of women. This work follows the feminist legal studies agenda in the way Richardson (2005) proposes and illustrates in this
“Instead of creating the identity of the woman-victim, feminism has questioned the meaning of what it is to be a woman. This has allowed feminism to challenge rather than create such a victim identity.” (Richardson 2005, 291).

I will explore how the court’s procedures in Portugal for the determination of paternity of children born outside legal wedlock and whose alleged father doesn’t voluntarily recognize paternity can highlight the social and gendered processes that were vital in the past in accessing material and symbolic resources provided by the family, namely the inheritance provided by the putative fathers.

Which elements could favour, or otherwise be placed against, candidates to inheritance? In what terms was paternity defined and how were the ‘candidates’ to recognition of extra-marital affiliation evaluated? I seek to answer these questions showing that paternity investigations reflect overall cultural stereotypes that penalize the woman who procreates outside legal wedlock and her descendants, who aspire to the material and symbolical resources of the putative father, within a society in which the dominant successional practice is *post-mortem* and the favourites for succession are the firstborn male or female children (Durães, 1988), being an ordinary practice to ignore the illegitimate children in that process.

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1 The European concern with the defence of the rights of children born outside legal wedlock is quite evident in the guidelines proposed by the European Convention of October, 15th 1975, entitled *European Convention on the Legal Status of Children Born out of Wedlock*, which stipulated the need for the European Council member states to adopt common legal arrangements in this matter. In addition, we stress the importance assumed in the Universal Declaration of Human Rights, which reinforced the need to establish the principle of the children’s legal parity. In the United States, the debate on discrimination and the use of concepts as “bastards” or “illegitimate” to name the individuals born outside legal wedlock, became particularly fierce in the beginning of the sixties, reaching its zenith with the coming into force of the legislation contained in the 1973’s *Uniform Parentage Act*, which established the legal equality of the individuals independently of the civil context of their birth and gave the courts the possibility to investigate paternity within a civil court (Douthwaite, 1979)
Based on micro-analysis methods, this study fell upon the content analysis of the sentencing of thirteen hundred and twenty-seven legal cases of paternity investigation that took place between 1893 and 2000 in a court located in the Northern Portugal. In addition, jurisprudence on the matter that was published during the considered period was also analysed and interviews to judges and Prosecutor Counsels were conducted, on a national level, along the years of 2001 and 2002.

This article’s scope is focused on the period between 1893 and 1966, trying to understand to what extent the courts acted as a mediator instance between individuals born outside legal wedlock who intended to have access to the inheritance of the putative father and the legitimate heirs. During the period under analysis, the paternity investigation was started by voluntary initiative of the individuals (or their legal representatives) who wanted to have recognised in court their father’s identity. Only through the legal changes of the 1966’s Civil Code, paternity investigations became mandatory in Portugal under certain circumstances and being no longer faced as a strategy to access inheritance by individuals born outside institutional marriage.

On the studied court, a reduced number of paternity investigation cases are found between 1893 and 1966: only seventy cases against twelve hundred and fifty seven on the period between 1967 and 2000. This is partly due to a strangling imposed by the legal restrictions on the admissibility of paternity investigations which were made to protect the peace of the “legitimate” families’ home (Pinto, 1995), setting strong objections on the admissibility to file this kind of lawsuit as long as the putative father
was still alive, specially if he was married, stressing the legal imposition of official secrecy on the affiliation of “adulterine” children, which was enforced until 1966\(^2\)

Until the publication of the first Portuguese Civil Code – in 1867 – the children born of unmarried parents that weren’t affiliated could freely investigate their paternity. Once the denominated *Seabra Code* came into force, it was established that paternity investigations could only take place by exception, under three very strict circumstances:

“1 – having a written statement from the father declaring his paternity; 2 – being the son in possession of status, that is, reputed as such by the putative father and the community; 3 – in the case of violent ravishment or abduction.” (Art. 130.º Civil Code 1867: 25). These conditions of juridical admissibility of paternity investigations were common to those established by the denominated *Napoleonic Code*, promulgated in France in 1804, whose fundamental legal principles were adopted by several countries such as Spain, Belgium, Luxemburg and Italy.

1. **Legal framework of paternity investigations**

It has not always been usual to establish the link between a child and its parents when the child is born to an unmarried woman. Ancient societies commonly denied family ties between such a child and her father and, therefore, access to familial transfer of

\(^{2}\) Since the Family Law changes introduced in Portugal in 1966, the legal system permits the “unofficial inquiry of paternity” which occurs in a court of law and investigates the paternity of any minor under two years old, whose birth record does not show the identity of the father. By imposition of the Portuguese law, the clerk at the Registry Office is bound to forward to the proper court a copy of any birth certificate that only indicates the mother’s identity, with exception of the cases in which the clerk can verify that the registered minor was born of an incestuous relationship. The Portuguese law also includes maternity judicial investigation for the following cases: when there is an omission in the birth certificate concerning maternity in result of not being declared; if the registered person was already adopted by the mother’s sibling or someone else related to her in direct line; or if the registered person is already adopted by someone other than the mother’s husband, having been born or conceived, nonetheless, during the marriage. (Pinto 1995, 69). Notice, though, that maternity judicial investigation lawsuits are very rare.
material and symbolic resources. In ancient Roman law a child born outside of marriage was a *filius nullius*, i.e., it had no family ties with any of its parents (not even with its mother). It had not been self-evident that such a child should be entitled to financial support from its father or that it should have the right to inherit from him (and his relatives).

In fact, until the 70s of the XXth century, affiliation laws in most western European countries protected the ‘legitimate family’ and there were very limited conditions for admissibility of a paternity investigation and it was almost impossible to have paternity recognized in the case of a married man. In fact, law almost appeared to have been designed to give the putative father a ‘sporting chance to get away with it’ (Barton and Douglas, 1995, 200).

The Portuguese Civil Code of 1867 reflected much of the first French Civil Code (1804) impositions regarding Family Law and therefore imposed several restrictions on the investigation of paternity in order to protect the legitimate family. On the contrary, in ancient Nordic Law, however, the link between a child born to an unmarried woman and its father was acknowledged and it seems to be characteristic of Nordic countries that the task of establishing paternity of non-marital children (in Sweden since the late 1910s) has been considered society’s responsibility. The legal situation in the Nordic countries is not, however, in all respects identical as, for example, on the question of how a refusal on the part of the mother to co-operate in the identification of the father is regarded (Eekelaar and Sarcevic, 1993).

Despite some differences in family law systems, to what affiliation laws are concerned, most Western European legal systems are historically interconnected and have some
common legal dispositions, like the application of the Roman Law’s rule of the presumption of paternity – *Pater est, quem nuptiae demonstrat* - which ties men legally to any children born to their wives (Assier-Andrieu and Commaille, 1995; Council of Europe, 1999; Diduck and Kaganas, 1999; Eekelaar and Sarcevic, 1993; European Commission, 1997; Forder, 1993). Even if there isn’t a biological tie between the child and the mother’s husband, the law considers that the husband is the legal father and in most countries people have to engage themselves in a particular civil proceeding in order to remove that presumption of paternity. As such, institutional marriage remains a privileged place as the preferred way of attributing paternity (Sheldon 2005, 541) and of transferring economic, emotional and symbolic resources. But the problem of paternity and access to resources like inheritance and property remains on what concerns children born outside legal marriage.

2. **From the “seduced” woman to “social” paternity**

The theme of the “virgin”, “innocent” and “seduced” woman has occupied a great deal of jurisprudence and legal doctrine published in Portuguese juridical magazines, at least since the end of the sixties of the XIXth century until the mid- seventies of the XXth century. This does not mean that this imagery of femininity disappeared in later periods. On the contrary, it’s still quite present in today’s legislation (Beleza 1993).

Closely associated to the “respectable maddona’s” (Jackson et al 1996) imagery, several mechanisms of inference related to the feminine morality emerge, that is, the woman’s moral conduct is disclosed and evaluated according to judgement patterns of their sexual behaviour, leading jurists of that time to act on a binary vision which opposed
“honest” to “dishonest” women. Thus, the “honest” women were “abducted” or “seduced”. The “others” – the women of “bad sexual and moral manners” – harassed men.

In the 1867’s Civil Code, the illegitimate paternity investigation lawsuit was forbidden, with the exception of the following cases: having a written statement from the father in which paternity was declared; being the son in “possession of status”; and having occurred “violent ravishment or abduction, that coincided with the time of birth” (Pinto 1995, 138). The following example, taken from a sentence pronounced in 1935 in Vale Court, concerning an illegitimate paternity investigation lawsuit filed by an alleged son born in 1888, reveals a reasoning which is precisely based upon the existence of “possession of status” (public recognition of the alleged paternity) and in the occurrence of “abduction”, an event that presumes the use of violence, if not physical, then at least symbolical, emphasizing in a particularly ostentatious fashion the patriarchal conception of gender relations:

“In the year of 1887, after a short time of courtship, the late Visconde de Viamonte da Silveira, abducted the Petitioner’s mother and took her to Quinta do Louro, his father’s property, and there he took her virginity and began having sexual intercourse from which the P. was born. Shortly after, he brought her to this city and rented and furnished a house for her on Rua de D. João I, in this city, where she gave birth. The birth of the P. coincided with the time of the abduction. Sexual intercourse of the late Visconde de Viamonte da Silveira with the P.’s mother continued after his birth until the above-named got married. When the P.’s mother became aware of the planned marriage, she sought to oppose it and, given her underage status, she took the necessary steps to file a lawsuit against the late Visconde de Viamonte da Silveira.
Then, a relative of the late Visconde de Viamonte da Silveira, knowing of the fact, served as a mediator between him and the P.’s mother, in order to give up on the criminal lawsuit, the Visconde de Viamonte da Silveira gave her a small dowry. Since he began having sexual intercourse with the P.’s mother, the Visconde de Viamonte da Silveira always took care and provided for her, paying the rent of the house he rented for her, providing for the childbirth expenses and all that she needed for her son. And even the Visconde de Viamonte da Silveira’s own father, the P.’s grandfather, had delivered to the P.’s mother’s house chickens, grain and wine, even after the marriage of that son of his. After the P.’s birth, the Visconde de Viamonte da Silveira, before and after the marriage, whilst his son was a child, he would carry him on his lap, kiss him and gave him his hand for him to kiss, calling him son. After the P. grew up and reached school age, he gave him an allowance for school and dressing expenses. And when he was a grown boy he would many times give him money and always throughout his life he helped him. He employed him in the Castanheiro factory. Once the P. fulfilled his military duties he managed to find him a position in the public security police force. Whenever the P. met any trouble before the Public Office, or any other issue, immediately the deceased would spontaneously provide him with his services. Every dress- suit that the Visconde de Viamonte no longer wore, he would give to the P., and even after his departure, and by his recommendation, the first R. delivered a suit to the P. (...). When the Visconde de Viamonte da Silveira was breathing his last, the family sent for the P., and the first died in the P.’s arms, which later helped in dressing the deceased. (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1932-1933)
With the Civil Code’s reform performed in 1910, the Portuguese judicial system began to accept yet another situation in which an illegitimate paternity investigation lawsuit could be brought into action – in the cases of “seduction performed with abuse of authority or trust, or by promise of marriage” (Pinto 1995, 138). This change in legislation caused the concept of “seduction” to be one of the most used terms in the judicial discourses about feminine sexual behaviour, substituting, by recurring use in the judge’s discourses, the former arguments frequently used in the Illegitimate Paternity Investigation Lawsuits, which invoked the “abducted woman’s” imagery as the last resort for the man who wanted to fulfil the desire to “deflower” a maiden.

The following extract, taken from a decision by the Portuguese Supreme Court of Justice on May 26th, 1948, regarding a “crime of ravishment by seduction” is particularly illustrative of the concept of “seduction” that we repeatedly find in the illegitimate paternity investigation lawsuits records and, as such, profoundly revealing of the dominant patterns of social relations between men and women at that time:

“During courtship and by means of seduction with promises of marriage [the defendant] managed to engage in coitus with Armanda, who was a virgin and was 17 years and 5 months of age. It was also found proven that the offended lived with two, older, ill mannered, sisters to whose house often went, during night-time, boys from Macedo de Cavaleiros and other proveniences, staying there until early morning hours, dancing and such amusements (...) having the defendant seduced her, with courtship and promises of marriage, into having carnal union for the first time, thus managing to deflower her (...) the marriage promises, which the defendant denied, cannot be doubted in the current state of the proceedings. And that these promises and courtship can be successfully used in these cases, in order to dominate and destroy the woman’s
moral resistance, to entrust herself into a man’s hands, is common knowledge, as is current jurisprudence (...). It stands from the instance’s judgment that the minor did not behave like a corrupted or dissolute woman and that the defendant treated her as an honest girl; there was courtship and promises of marriage so that she would give in to his lustful desires. The licentious life led by her sisters (...) did not inhibited him to publicly promenade his sweetheart. Both were unmarried, without much difference in age and, as it would seem accordingly to their respective economic conditions, their social statuses were not very differentiated. The circumstances gave the marriage promises a ring of truth and seriousness, although, deep inside, they were complete bollocks.” (Portuguese Supreme Court of Justice 1948b, 133-135).

The concept of seduction associated to the illegitimate paternity investigation lawsuit assumes two distinct meanings: the seduction “with promises of marriage” and “seduction with abuse of authority”. The distinction made between concepts reveals the cultural conceptions of that time regarding the manner in which men and women should relate to each other, being that the seduction “with promise of marriage” could only be proven in court if the petitioner of the lawsuit could convince the judge that, at the time of conception of the alleged son or daughter, there was no impediment to marriage between the mother and the putative father.

If nowadays the impediments regarding marriage possess a strictly legal character (for at least one of the individuals is already married or because they relate to each other in the first degree) in earlier times those objections to marriage could have an exclusively “social” expression – for example, if both individuals in question were to belong to different social classes. The extract mentioned above also illustrates in what way “social
equality” between lovers was considered by the judges to be a “safe” indication of the seriousness of the promises of marriage.

The following examples, taken from the records from an _Illegitimate Paternity Investigation Lawsuit_ that took place in Vale Court in 1930 and from a sentence pronounced by the Portuguese Supreme Court of Justice in 1949, respectively, were selected in order to illustrate the dominant conception that the “seriousness” of the marriage promises could only be judicially proven in cases that romantic engagement occurred between individuals who possessed similar social statuses:

“Olivia was a well-mannered, honest and virginal girl, living at the time, as she does nowadays, in her parent’s house, aiding her mother with the house shores and also working as a seamstress, when R. began courting her. Their social status was, and still is, equal, for which the defendant’s wedding promises were trustworthy, also given that the assiduity and continuity of a five year uninterrupted courtship constituted further elements that took the inquirer’s mother to believe in the sincerity of the ongoing wedding promises that were even confirmed in letters. And, in spite of being obstinately besieged by R., Olivia managed to defend her virginity until R., by means of disloyal and treacherous promises of wedding which he swore to be firm, sincere and worthy, even speaking to his father, the A. about the wedding, and even proposing to her, managed to seduce her and deflower her.” (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1930-1930).

Even still, twenty years later, we find the following sentence pronounced by the Portuguese Supreme Court of Justice, which shows the same principle of “social parity” as grounds for the juridical construction of the marriage promise’s credibility:
“The petitioner’s mother only gave consent to the afore-mentioned gentleman to deflower her after a long period of courtship, with public displays of affection and tenderness and promises of marriage. These promises should appear sincere and acceptable to the courted girl, for it couldn’t be proved that she was of other social condition than Joaquim Eduardo’s and both had reached by then the age in which matrimony is legally possible.” (Portuguese Supreme Court of Justice 1949, 242).

Besides seduction “with promises of marriage”, there is another concept, the “seduction with abuse of authority” which is particularly illustrative of the patriarchal nature of gender relations. The content analysis directed to the Illegitimate Paternity Investigation Lawsuit’s records that took place in Vale Court (1893 – 1966) shows that this is the most invoked mode of “seduction”, which is consistent with the clear social inequality found between the “mothers” and the “alleged fathers”, as described in the fourth chapter of this thesis.

In the cases where a position of social inequality between man and woman is found, the possibilities of “seduction with promises of marriage” fade away, and all is left is the alternative of “seduction by abuse of authority”, being that the notion of “male authority” may assume different expressions, sustained by the invocation of male superiority in terms of social standing, hierarchical relations or age. There are several examples found, but the phraseology that states such facts are almost identical, formulated in statements like the following, drawn from a judicial sentence pronounced in 1946: “The mother of the petitioner was virgin and honest and reputed as such by everyone. In the beginnings of 1923, the investigated, abusing of his quality as master and his acquired confidence, he managed to convince the petitioner’s mother to have
sexual intercourse with him. And thus, on that February, he deflowered her, continuing after that to engage in sexual intercourse with her.” (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1946-1946)

Yet still, in another Illegitimate Paternity Investigation Lawsuit taken place in Vale Court in 1939, but in which the grounds for the motion for action date back to events that took place in the late XIXth century, mentioning the social differences between the “seducer” an the “seduced”: “Aware of her pregnancy, Maria Adelaide’s parents, by virtue of Dr. António José da Silva Basto Júnior’s social superiority and the deflowered girl father’s social humility, shamefully kept their silence, despite felling quite crossed that the same Dr. Basto had abused of his superiority to deflower their daughter, all the more since he posed himself, and indeed was, one of Maria Adelaide’s father closest friends.” (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1939-1939).

The “seduced” woman is, in this way, the opposite of the “seductive”, “provocative” and “easy” woman. The following statement, extracted from a judicial sentence pronounced by the Portuguese Supreme Court of Justice in 1948, synthesizes that cultural presumption: “It is of common knowledge that courtship with promises of marriage is successfully used to dishonour inexperienced girls and that such resort is not employed when they are the temptresses” (Portuguese Supreme Court of Justice 1948a, 128).

The woman’s reputation within her own community is also an element to be considered by the judge upon the moment of making his decision, especially when it comes to the
classification of the performed actions (the woman’s “consent” in “submitting” to sexual intercourse) as a result, or not, of “seduction”. The importance assumed by the classifications of the woman’s behaviour that emerge from the social background is rather explicit in the following excerpt from a Vale Court sentence:

“Reputation is a psychological or conscientious element that also pertains to law, and treatment is a matter of fact, combining a whole, for that is the way the agent’s state of mind is brought to surface (...) The public will also only deem the individual as the child of the investigated when his actions and the mother’s convince them that she is his daughter. That was what happened in the present case. And so, it was proven that Rosa, the petitioner’s mother, was a virgin when she engaged in sexual intercourse with the above-named Fernando for the first time, as she was also considered by the public.” (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1946-1946).

And the judge proceeds in defining the concept of “seduction”, distinguishing the one which occurrence will carry penal consequences (in case the “offended woman” is a “minor” and a “virgin”), possibly being classified as crime of rape, of another type of seduction that may function, namely, as a pretext of admissibility for a Illegimate Paternity Investigation Lawsuit in the case of absence of the elements of underage and virginity:

“There is only one kind of seduction, although it may have different consequences, depending on the seduced being under or over 18 years of age and on being, or not, a virgin. The petitioner, being under 18 years of age and a virgin, falls under the jurisdiction of the Art. 392.º of the Penal Code, sanction avoided by the
seducer if she is over 18”. (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1946-1946).

Public displays of courtship constitute another valued element by the Portuguese judges regarding Illegitimate Paternity Investigation Lawsuits. The recognition of the romantic affair by the community is fundamental, not only for the matter of judicial admissibility of the lawsuit, but also in an eventual judicial sentence favourable to the petitioner of the lawsuit in question. However, the fact which is most relevant in the argumentation presented by the judges in the considered period of time (1893-1966), at the moment of pronouncing a sentence, is the denominated “possession of status” or “social paternity”, that is, the proof in court that the “public” considered the petitioner of the Illegitimate Paternity Investigation Lawsuit to be the son/daughter of the designated father. The elements that were used to sustain the argument of “public visibility” and “social paternity” were various, but generally pointed towards the “economic” function (of material support) which, socially, would be expected from a father.

The inquiries formulated by the judges – which illustrate the magisterial selection of the facts considered “relevant” to stand as evidence in court – of judicial sentences taken from the collection of files of Illegitimate Paternity Investigation Lawsuits found in Vale Court point, invariably, towards facts predominantly classifiable within the “economic sphere”. Let us consider the following example:

“When Eulália found herself pregnant, the investigated ordered part of the layette for the petitioner, which he later paid for? And the rest of the layette he bought in Porto was also paid for by the investigated? From Vizela, did Eulália go to Póvoa de Varzim with the investigated, always at his expenses? (...) When the petitioner was born, the
investigated offered her all the affection, watching over so that she had no want or need? (...) Being one’s daughter, he wanted her to be well dressed? And he always gave her money, clothes and other objects? And paid for her education in elementary school? And then he sent her to this city in order to graduate from the industrial school, paying for the expenses of such studies? And during the time of those studies the petitioner took lodging in D. Maria de Belém’s house (...) at the expenses of the investigated that, as he paid for those expenses, always presented himself as the petitioner’s father? The petitioner went on vacation to Póvoa de Varzim and the expenses were paid by the investigated? And for the purpose mentioned in the question above, the investigated provided clothes for the petitioner? For many years, the petitioner always spent her Sundays at the investigated’s home, by his request, and there she had meals? (...) He gave her presents, among them, a pair of gold earrings?” (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1951-1951).

The manifestation of “abuse of authority” of a man over a woman appears incarnate under the form of an exercise of power which is grounded on elements of hierarchical or economic nature, or in a conjunction of both. The typical example of such a form of exercise of power is the relationship established between the “master” and the “maid”, which is a means of justifying the woman’s “persuasion” to give up her “most precious gift”, her “moral arms” – embodied in her “virginity” – and to “surrender” to the seducer. Let us examine the following Illegitimate Paternity Investigation Lawsuit that took place in Vale Court between 1964 and 1965, considered “admissible” by the judge and whose petitioner was an university student who alleged to be the illegitimate daughter of an already deceased professor that in 1943 had hired her mother as a “handmaid”, with him being 43 years of age and her mother 16. The judge pronounced
The sentence that: “The investigated, by his social position and difference in age, furthermore, by the fact that he was the master, enjoyed a great deal of influence over the petitioner’s mother, a humble country servant.” (Records of Illegitimate Paternity Investigation Lawsuits, Vale Court, 1964-1965).

The judge’s mindsets, reflected upon the jurisprudence produced until mid-sixties of the XXth century, analyzed here, show in clear fashion, the social processes of configuration of the relations between men and women. Classificatory processes of feminine behaviour are undertaken, placing on opposite sides the “well behaved” women (virginal and resistant in face of men’s advances, until they finally give in, vanquished by the exercise of the manly power of seduction) and the “misbehaved” (the frivolous and the seducers, who deviate from the dominant norms of feminine behaviour).

The evaluation of a woman’s sexual and moral behaviour that procreates outside wedlock has important impact in the production of sentences of paternity investigation lawsuits, which will be reflected on the possibilities to inherit from the putative fathers by children born of extra-conjugal relationships.

3. The obstacles in accessing inheritance by children born outside legal marriage

Up until legislative alterations created by the 1966’s Civil Code, which came to impose mandatory paternity investigation whenever a child is registered without the father’s identification, it was the citizen, of full age, that would appeal to the court, trying to have his father’s identity acknowledged. In the case of the under aged, the lawsuit was
brought into action by the legal representative of the individual whose father’s identity was unknown.

In the whole of the paternity investigation lawsuits that took place between 1893 and 1966 in the Vale Court, most petitioners are the children themselves (54.3%) or their respective mothers (37.1%), in case they are still under aged, making up for almost the entirety of the petitioners under consideration (91.4%).

The importance assumed by the mothers, on one hand, and within the ensemble of the children, the number of female individuals registered as petitioners of *paternity investigation lawsuits* – twenty two daughters against sixteen sons – on the other, comes to show some indications about feminine involvement in this kind of lawsuits. In fact, according to research studies made in other countries, men generally appear in court more frequently than women, whether they appear as petitioners or defendants (Santos *et al* 1996). This fact comes to show that, namely, social inequality in access to justice is also laden with gender inequalities. Nevertheless, apparently, gender differentiation in access to justice seems to be strongly affected by the type of lawsuit in question, being the case that women constitute the majority of petitioners in lawsuits related to family problems (nowadays, we must stand out the importance of divorce suits) (Delgado 1996).

From the twenty women that in the studied cases filed *illegitimate paternity investigation lawsuits*, fourteen of them were married, which may indicate that the
women’s access to court has been quite dependant on the male protection provided by the respective husbands. Furthermore, in all illegitimate paternity investigation lawsuits, which involved married women who wished to have their father’s identity acknowledged in court, the petitioner side also included their respective husbands.

The decision to file an illegitimate paternity investigation lawsuit seems to be profoundly conditioned, not only by the possession of economic, cultural and social capital, suitable for an effective interaction with the judicial system, but also on a very hard reality – the obituary situation of the alleged father. The weight of the legal framing which is reflected in a clear conditioning of the necessary requirements in order to file illegitimate paternity investigations suits, is quite visible, insofar as in many of the analyzed lawsuits, the alleged fathers were already deceased at the time the illegitimate paternity investigations lawsuit was filed (74,3%). In other words, a possible legal acknowledgement of paternity could no longer pose a “threat” to the family constituted through institutional wedlock.

The obituary status of the putative father assumes great importance, by the fact that is perceivable that the ultimate goal of this kind of lawsuit is to attain legal acknowledgement of paternity in order to access an inheritance. Thus, we find that the protection of family peace is a value of major importance for the judicial system because of the legal impediments that prevent public awareness of a possible voluntary

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4 Up until the profound reforms introduced in the Civil Code in 1977, the Portuguese law adopted the general principle inherited from roman law, that the woman’s situation within the family was under the rule of the pater familias who, not only had absolute authority over his descendants, but also over his wife. In this regard, when the woman married, she would stay under the strict dependence of the husband; while the unmarried, divorced and widowed women enjoyed a civil quality similar to men’s (Sá, 1996)
affiliation of an “adulterine” son. Notice that, in the single recorded case involving a living alleged father, the lawsuit ended up being considered “inadmissible”.

There are, however, other factors that explain the seldom cases in which children born outside legal wedlock, chose the judicial path in order to become candidates to inheritance. In this type of lawsuits, the petitioner is the citizen him/herself who deliberately chooses to file a lawsuit in order to have legal acknowledgement of the father’s identity, which implies a series of resources – economical, social and cultural – which are necessary for an effective access to justice. Well, one presumes that in ancient societies births of children outside legal wedlock concerned mostly the women of unprivileged social strata – and, consequently, deprived of the economical, social and cultural resources necessary to bring before a court their intention of legal acknowledgement of their biological father’s identity.

Besides, many individuals would drop an illegitimate paternity investigation lawsuit in exchange for certain parallel compensations, namely, material compensations by the defendants of the illegitimate paternity investigation lawsuit in question – heirs of the alleged father. As Carlos Silva (1998) states, the promulgation of the 1867’s Civil Code, by instituting successional rights for “illegitimate” children, ended up in the creation of “schemes” used by the paternal progenitor in order to “undo” heirs, namely, by assuming themselves as the illegitimate children’s “godfather” or by donating estates or money in order to keep inheritance claims away.

5 The first Portuguese Civil Code (1867) under the influence of the Napoleonic Code, and similarly to affiliation laws common in European countries, prohibited the affiliation of adulterine children. With the “children’s protection law” coming into force in Portugal in December 25th, 1910, affiliation became allowed, but would become subject of official secrecy. The latter imposition came to an end, in our country, with the coming into force of the 1966’s Civil Code.
Several studies have stressed that the lower the citizen’s social stratus is the lesser is the probability that he resorts to a court of law (Caplowitz 1963; Santos et al 1996). If obstacles of economic nature in access to courts may appear to be of objective nature, the social and cultural obstacles seem to be more difficult to understand, concerning, namely, the citizen’s capacity to be aware of their rights and perceive their problems as issues susceptible of being solved within judicial instances. (Santos et al 1996, 485-488).

The working hypothesis I maintain in this work, that the judicial-institutional mechanisms aimed at the phenomenon of out of legal wedlock births reflect gendered social relations, from which emerge processes of social subordination of women, is reinforced by the analysis of the mother’s and alleged father’s age group, found within illegitimate paternity investigation lawsuits, at the time of birth of the children: in fact, the mother’s group as a whole is younger than that of the putative fathers.

The “young” woman’s image, “innocent victim of the male’s sexual advances”, that has been recurrent in Portuguese law and jurisprudence (Beleza 1991) is found perfectly rendered in illegitimate paternity investigation lawsuits: mothers under the age of 24 lead with 70,3% (33,3% under 20 years and 37,0% from 20 to 24 years), bearing no reference to women over 35. The alleged father’s age structure reveals, on the contrary, a more aged group, with dominance by individuals over 39 years old (34,2%). Nevertheless, we must point out a convergence of these individuals in the 20 to 29 years class (21,1% from 20 to 24 years and 26,3% from 25 to 29 years), in spite of the absence of individuals under the age of twenty.
The importance of the “legitimate” family’s judicial protection – instituted by wedlock – enforced by the tight impositions concerning the possibilities to file an illegitimate paternity investigation lawsuit that were enforced until the “1977’s Reform”, is clearly visible if we look into the illegitimate paternity investigation lawsuit’s mother and alleged father’s marital status at the time of the child’s birth and at the time of the motion for lawsuit, respectively. Almost all mothers involved in these lawsuits were unmarried at the time of the child’s birth (95,7%) and 92,8% were also at the time of the filing for lawsuit. In effect, mothers remain in the same marital status in both occasions, existing only two cases of unmarried mothers that were married at the time of the filing of the lawsuit; and only one case of a “married” mother at the time the minor was born and that, by the time the lawsuit was filed, was already deceased.

The majority of the putative fathers are unmarried at the time of the minor’s birth (67,1%) but, at the time of the motion for lawsuit, the situation changes a little – the 41,4% unmarried are opposed by 37,1% married men – which may indicate, on one hand, an easier access to the matrimonial market by men. On the other hand, this fact arouses the suspicion of the considerable impact that the “single mother” stigma had during the time considered, for which women in those circumstances saw their chances of access to institutional marriage considerably diminished.

There is a consensus among most of the authors who studied the social phenomenon of the single mother in Portugal that maternity outside wedlock rarely leads to an “absolute” social stigmatization, coming to find an important percentage of women that actually got married (Cabral 1989; Sá 1996; Scott 1999). However, what appears to be most pertinent is the profound social differentiation which affects the possibilities of
access to marriage by single mothers, bearing strong indications that, on one hand, maternity outside legal wedlock is found more often in unprivileged social groups rather than in the higher social classes; and on the other hand, if access to the matrimonial market is more difficult for women deprived of economic resources than for those who are more favoured, that condition is considerably aggravated in the case of the poorer single mothers.

The higher social classes seem to have codes of sexual conduct that are more strict and controlling of feminine behaviour and, perhaps, have at their disposal more “repairing” mechanisms of transgressive behaviours that would lead, eventually, wealthy single mothers to get married more easily than the others (Silva 1998). Furthermore, the phenomenon of births outside legal wedlock, in communities of a not so distant past, would many times render: “social relations of dominance by men who belong to wealthier social groups over (almost) deprived women, especially servants and journeywomen” (Silva 1998, 234).

In regard to the analyzed illegitimate paternity investigation lawsuits, a contrast is verified between the social standing of the putative father and the standing occupied by the woman who gave birth outside of legal wedlock. On the woman’s side concentration at the base of the social hierarchy is found: we have predominance of seamstresses (14%), housewives (22%) labourers (22%), and servants (25%). On the alleged fathers’ side, there is a dominance by proprietors with 42%. This gender bias in terms of social standing is articulated along with other modes of social subordination of the mother of the child born outside legal wedlock regarding the alleged father, being common to have
a relationship of economic domination over the mother, through the offering of gifts and money, eventually associated to an emotional and symbolical dependence.

Before the promulgation of the first Portuguese Civil Code, the biological father imposed fewer objections to the assumption of his part, although in a disguised manner, by taking on the illegitimate child in his house as his servant (Silva 1998, 262). But, from the moment when the Civil Code was promulgated, giving the latter successional rights, although restricted, the biological father tends to conceal himself under the figure of a godfather or by arranging one for his illegitimate child (Silva *ibidem*), which allowed the bastards access to a minimal spiritual and material legacy, at the same time it ensured almost integral transfer of the properties in favour of the legitimate descendants.

**Conclusion:**

Nowadays, if the unmarried father voluntarily registers the child’s birth along with the mother he will automatically be recognised as being the legal father but when that doesn’t happen and the birth certificate doesn’t indicate the identity of the father of the child, courts proceedings may undertake efforts to establish fatherhood. In the past, the cultural and legal settings were quite different and several obstacles were posed to the legal recognition of paternity from the part of unmarried parents. This was justified on the traditional ground underlying to the *Pater est* rule itself, i.e., the consolidation of the family founded on marriage. Thus, the rule was seen as the necessary expression of the legal duty of fidelity (of the wife) which continued undiminished in all these situations (Senaeve 1993).
Although family law and civil proceedings concerning investigation of paternity of children born outside marriage may vary in the diverse national legal systems\(^6\), almost all societies now support efforts to establish parentage in these cases. The degree of support varies from country to country. However, in the last four decades, family law of most European countries has suffered a drift towards the end of the disparity between children born in and out of wedlock and the privileging of assuring the children’s right to have a mother and a father. The reasons for this general consensus are connected with the notion that the acknowledgment of paternity is vital to the well-being of individuals, on several dimensions: the personal, psychological, social, economic, moral and medical\(^7\); factors that interrelate in complex ways and some of them have raised some controversies, especially issues related to the invocation of the need to establish paternity of children without a legal father or who have a legal father who isn’t the

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\(^6\) Several European countries, such as Scandinavian countries, Germany and Portugal have at the present day compulsory inquiries of paternity when the birth certificate of a child under two years old does not show the identity of the father. Other countries just give the court the power to investigate paternity in the course of existing civil proceedings regarding the child. That is the case in UK, where Family Law allows the Secretary of State, the alleged father or the person with custody to apply for a declaration of parentage of the child. (Cretney, 2003).

\(^7\) The reasons to establish parentage and the definition of legal rules to establish parentage are not uncontentious and self evident. Most European societies support efforts to establish parenthood in order to promote the creation of families and ensure that children are cared not only financially but also with regard to education, upbringing and day-to-day care. There are also medical reasons to establish parentage, the main one being to enable the child to know his personal medical history and the importance of parents in the psychological development of infants must not be underestimated. However, it does not follow that establishing parentage is necessarily important. It may not matter to the child if the male and the female adults of its family are its legal parents or not. It may be argued that the important thing is that there is someone who acts as a father and a mother towards the child (Eriksson and Saldeen, 1993). At the other end of the spectrum, however, there is the possibility that the parent with care (generally the mother) doesn’t want the recognition or the determination of paternity because the child was born as a result of transient or coercive relationships. The underlying aim of the present UK Family Law on parental responsibility has been to protect women who are ‘victims’ of such circumstances by allowing the mother, in effect, to veto parental responsibility for an unmarried father unless he can persuade the court to override her objections. However, recent changes to the UK law by way of 'The Child Support Act (Pensions and Social Security) Act 2000 permits courts to authorize blood testing of a child when the parent with care refuses consent but the court considers it to be in the child best interests (Wallbank 2004).
biological father regarding children born by artificial procreation using donor sperm (Gilbar 2005). Some authors point out that the recent trends of affiliation laws in Europe have three common elements: equalisation, liberalisation and modernisation (Senaeve 1993). Regarding ‘equalisation’, the primary object and result of the reforms has been the elimination of discrimination between various categories of children (legitimate and illegitimate) on the grounds of birth. The liberalisation of affiliation laws has been in the sense of suppressing numerous restrictions on the establishment and on the contestation of affiliation. Finally, one of the most perceptible objectives of all these reforms has been to modernise affiliation laws by adapting it to new medico-genetic techniques, which permit a child to be conceived without sexual intercourse. Furthermore, attention has been given to the application of scientific proof of parentage with a view to the establishment and the contestation of maternity and paternity. Today, DNA profiling is indeed becoming increasingly important as part of the court’s procedures to investigate paternity of children born outside legal marriage and when there isn’t a voluntary recognition of paternity.

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8 In the last years there has been an intense public debate concerning the child’s right to know her genetic origins. In the context of donor anonymity the debate relates to the balance between the child’s right to know (the ethics of ‘rights’, according to which priority is given to the right over the good) and the possible integrity of the family (the ethics of ‘utility’ by which the concern would be to balance the interests of all the parties with the view to the consequences for individuals and for the family as a unit) (Wallbank 2004, 247).

9 In the past four decades all west European countries have carried out more or less substantial reforms of their affiliation laws regarding the equality in all fields between children born within and outside of wedlock, with the elimination of the traditional institution of legitimacy and its accompanying terminology. Some outstanding examples of reforms of affiliation laws were in Netherlands (1969), France (1972), Switzerland (1976), Portugal (1977), Luxembourg (1979), Belgium (1987) (for further details on reforms on affiliation laws in Europe, consult Senaeve, 1993; Assier-Andrieu & Commaille, 1995; Spaas & Selous 1998).
These profound modifications on Family Law are reflex to a set of conditions that rebounded all over Europe and the United States of America, namely the considerable advances seen during the 70s in the field of genetics and particularly in the realm of the investigation of biological paternity. At par with these scientific advances there were certain ideological changes, translated in a greater concern with the defence of the rights of the children born outside institutional marriage and a growing intervention of the State in areas such as protection of the minor and control of parental authority (Meulders in Eekelaar and Sarcevic 1993). 10

Still, little is known about the social and economic impacts of the legal establishment of paternity, although there are some studies carried out at the United States (Pirog-Good and Good, D., 1995) and in some European countries (European Commission, 1997) that show that very few of these legal fathers live with their children or make any contact with them, at the same time that very few contribute to the children’s financial support. Some authors also claim that the impact on paternity establishment outcomes, namely, on what concerns child support payments, may be improved if there is a public policy to establish a routine of monitoring the biological father’s obligations concerning child support (Garfinkel and Klawitter 1990).

The changes in legislation concerning paternity, supported by science’s progresses in identifying the biological father, may constitute one of the means to safeguard the children’s rights and, in some cases, the women’s, as long as privacy rights are protected. This way, legal systems may contribute in great measure for the individual’s

10 The European concern over the rights of the children born outside the marriage is self-evident in the orientation professed by the EC of October 15th, 1975, European Convention on the Judicial Statute of Children born Outside of Wedlock, that specified the need for the member states of the European Council to adopt common judicial dispositions over this matter.
well-being, for the recognition of one’s paternity can permit access to economic,
emotional and symbolic resources, otherwise inaccessible. This involves a
multidimensional concept of well-being that enables individuals, men and women, to
live a ‘good’ life and to compose their effective functioning, in the sense opened by
authors like Amartya Sen (1985).

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