The ethics of using artificial means to facilitate or inhibit procreation –
the perspective of the rights of the child

Position Paper by the Office of the Commissioner for Children

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1. Introduction

In its natural form, human procreation involves two sexually developed persons of opposite
sex coming together in a sexual act that can lead to the conception, gestation, eventual
birth and subsequent upbringing of a child. In the natural form of human procreation, all
these stages in the life of the child are carried out by the same two people, namely the
child’s parents.

Artificial procreation, as created by modern medical science, is a much more complex
process wherein every stage is open to myriad possibilities, meaning that the different
stages can be carried out by different people.

The process of conception in artificial procreation does not depend on the sexual act
between two persons but opens up the possibility of producing offspring from the gametes
of two individuals who may not even know one another, thanks to the ability to unite
gametes rather than persons. Hence, a child may be born into a family in which at least one
of the child’s parents is not the child’s biological parent. This is the case even when the
donated gamete would have been the ovum in that the biological parenthood of the child
conceived through such donation would be split between two women, the donor and the
gestating mother.

Since the union of gametes does not take place in a woman’s womb, but in the controlled
environment of a laboratory, it is technically possible to determine how many eggs from the
same woman can be fertilised by the sperm of the same man, and to select which of the
fertilised eggs will proceed to gestation and when this will happen, either through
immediate implantation or through the freezing of the fertilised egg or embryo.

The process of gestation is also variable in that it is possible, through the practice and
technique of surrogacy, for a woman other than the biological mother of an artificially
conceived child to gestate and give birth to the child. This too leads to a situation where a
child may be born into a family in which at least one of the child’s parents is not the child’s
biological parent.

Finally, the birth of a child being gestated is conditional upon whether modern methods of
termination of pregnancy, or abortion are resorted to.
2. Overarching Principles

2.1 The uniqueness of the child

The UN Convention on the Rights of the Child (UN CRC) articulates the subject of its principles in the singular, not in the plural, that is in terms of ‘the child’, not ‘children’. When one reflects on this basic framework of the Convention, one can easily and clearly realise that this is but a consequence of the fact that every child is unique, that is distinct from every other child.

2.2 The best interest of the child

Children have a fundamental right to life and to a good upbringing, amongst a host of other rights. On the other hand, parents bear responsibilities towards children, which responsibilities are but functional towards the realisation of the rights of children.

It is unfortunate that Maltese law establishes the concept of parental authority as opposed to that of parental responsibility, thus implying that parental rights can override the rights of children. Parental rights should be understood as being wholly subservient to the rights and needs of children.

This means that the fundamental premise in any argument in favour or against the use of any artificial technique that can facilitate or inhibit procreation should be the principle of the best interest of the child.

2.3 The inner experience of the child

The principle and method of the best interest of the child may not be able to capture the full scope and depth of the child’s well-being, especially if what is in the best interest of child is determined by somebody other than the child, however knowledgeable about and sensitive to the needs of the child such person may be. Hence, looking at things from the personal perspective of the child is of the essence when dealing with issues that are critical to the well-being of the child.

2.4 Applying the rights of the child

It is unreasonable to talk and reflect on the rights of the child only when a child is born. The unborn child is no less unique than is the born child. The potential for the development into a unique child and individual human being is fully present right from the moment of conception.

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1 These rights are set out in the UN Convention on the Rights of the Child, which Malta ratified in 1990.
2 As per Article 131 of the Civil Code of Malta
3 As per in Article 3 of the UNCRC: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’
It is equally unreasonable to talk and reflect on the rights of the child only when a child is conceived. The whole conceptual apparatus regarding the rights and best interest of the child that is adumbrated above should be employed whenever there is a possibility of a child being conceived. This means that it should not be considered ethical for any technique of medically assisted procreation to be used if the preconditions for the gestation, birth and/or subsequent nurturing of the child resulting from the use of such technique are less than optimal, meaning that the potential child would likely suffer and fail to enjoy its fundamental rights.

One should be careful not to reify the child who may be conceived, and, on this basis, to compare such child to a born or unborn child who may be up for fostering or adoption. The former child will not suffer from not being conceived, simply because the child has no life, whilst a living child who may be up for fostering or adoption would possibly suffer less from being fostered or adopted under suboptimal conditions than from not being fostered or adopted at all. Hence, in all cases of a child who may be conceived, the preconditions for the child’s life course after conception must be no less than optimal.

3. The ethics of using artificial means to facilitate or inhibit procreation – the perspective of the rights of the child

3.1 Donation of Gametes

The process of conception of a child, whether it occurs through natural or artificial means, cannot be thought of simply as a trigger in a chain of events that culminates in the child’s coming into the world. This is because the elements involved in the process of conception, namely the genetic information carried inside the gametes, become an integral and permanent part of the makeup and identity of the child who is conceived. This means that the role of a person involved in the conception of a child cannot be merely biological and thus limited to the stages of conception, gestation and possibly birth, but should be social too, hence extended to the postnatal nurtural phase of the child’s life. This is clearly reflected in Article 18 of the UNCRC, which says that “both parents have common responsibilities for the upbringing and development of the child.”

Where the donation of gametes is anonymous, the child who is conceived and born from such donation is also denied the right to his or her personal identity, specifically the “right to know....his or her parents”, as according to Article 7 of the UNCRC. If the concept of personal identity of a child is extended to encompass other children who may be born from the same gametes as the child, then it is so much harder for the child to gain knowledge and possibly acquaintanceship of all the members of his or her biological family.

3.2 Implantation and Freezing of Embryos

Article 2 of the UNCRC says that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of
any kind...”. The possibility afforded by artificial procreation to select which of the fertilised eggs are to immediately proceed to gestation through immediate implantation in the mother’s womb and which embryos should be frozen in view of future implantations is fertile ground for the discrimination which the Convention so clearly prohibits in the aforementioned article.

This is the case because the process of embryo freezing or vitrification carries a real risk, however low it may be, of spontaneous death of frozen embryos. Hence, in selecting which embryos should be immediately implanted in the mother’s womb and which embryos should be frozen, one is granting the right to life to one embryo to a higher degree of certainty than to another embryo. This tends to make it more likely that the embryos that are selected for immediate implantation will be those that are preferred over other embryos on the basis of some favoured characteristic of a genetic kind.

Frozen embryos face another risk than the risk of dying before they get a chance of being implanted, namely a potential risk of neither their biological parents nor any prospective adoptive or foster parents wanting to take custody of them, thus denying them both the right to life and to a harmonious upbringing and development. Such a stalemate in the life of the frozen embryo may result from the biological parents refusing to free the embryo for adoption even when they do not intend to proceed with the embryo’s gestation. Also, since the embryos that are selected for freezing tend to be the least healthy of all the embryos produced through a treatment cycle, the chances of such embryos being adopted are slimmer.

In view of the risks carried by embryo freezing, it is important to pre-empt the need to freeze embryos by ensuring that the number of eggs that are fertilized is not in excess of the number of embryos that a woman can sustain in her womb without an increased risk of multiple pregnancies, that are dangerous to both the unborn children and the mother.

While the idea of freezing embryos may be a chilling one to entertain, one cannot completely rule out this medical technique since it may be necessary to resort to in an emergency when the woman is unable, on medical grounds, to undergo implantation of embryos immediately after fertilisation.

3.3 Surrogacy

The possibility of a woman other than the biological mother of the conceived child to gestate and give birth to the child raises the same concerns as those that are explained in 3.1 in relation to the right of the child to know and be cared for by his or her biological parents.

However, surrogacy raises other concerns as well. These relate to the ability of the surrogate mother to provide what the child needs for its optimal development at the highly
critical prenatal and postnatal phases of the child’s life. The way one gauges this ability depends on how the child in these very early stages of its life is viewed.

If the child is seen simply as a cluster of needs, then one can conclude that, in principle, a surrogate mother can manage her pregnancy and newborn with the same level of care and attention to the baby’s well-being as can a non-surrogate mother. However, more questions arise if the child in its infancy and pre-infancy is thought of more widely as a social being whose attachment to the mother stems not simply from the satisfaction of the child’s physical needs by the mother but also from meaningful and loving social contact and interaction between mother and child. The key question is whether severing the bond between mother and child so early in the child’s life as a result of the custodial passage of the child from its surrogate mother to its legal mother is harmful to the child.

This and other questions and doubts cannot completely be put to rest by arguing that this passage should be effected as soon as possible after the birth of the child in order to prevent the formation of a strong bond between the child and the surrogate mother. The sensitivity of the unborn child to stimuli in the world outside the mother’s womb, including to its mother’s voice, is well documented. Hence, one cannot rule out that a child who, a short while after being born, passes from the custody of its biological mother to that of its legal parent/s will be harmed in the process, especially if one considers the extreme psychological fragility of a newborn.

In practice, there are myriad risks associated with the practice of surrogacy. One such risk is that of surrogate mothers making some sort of claim, not necessarily legal, on the child after the custodial passage, thus giving rise to uncomfortable and stressful situations for the child. Another risk arises from the would-be parent/s of a surrogate child reneging on their commitment to take legal custody of the surrogate child, possibly on grounds, for example, of a disability suffered by the born child. In the case of surrogacy where the surrogate mother would have donated her gametes for fertilisation, one must take into account the right of a child born through surrogacy to know his or her biological mother. Also, could the fact that a surrogate mother will not herself reap the fruits of her care of the child in the form of an optimally healthy and happy child act as a demotivating factor in her commitment towards the child? Many of these risks are aggravated if surrogacy is carried out on a commercial rather than a purely humanitarian basis.

While a solid legal framework that would regulate surrogacy of the humanitarian kind can go some way towards addressing these risks, the thorny legal and practical issues that are associated with even the best regulatory frameworks in the fields of child adoption and fostering make it ill-advised to venture into a practice like surrogacy that probably carries more insidious risks.

### 3.4 Abortion

The uniqueness of the unborn child has already been premised above. This uniqueness means that the unborn child is irreplaceable and that right to life and to optimal conditions
of development that is universally accorded to the born child\textsuperscript{4} should be extended in equal measure to the unborn child. This is in line with the call made in the preamble of the UN CRC for “appropriate legal protection, \textit{before} as well as \textit{after} birth”.

Hence, abortion cannot be seen as the wilful termination of a pregnancy but as the unjust denial of the fundamental right to life to a unique albeit unborn child.

4. Legislative Proposals and Conclusions

In view of the considerations articulated in 3, the Office states its position that:

4.1 Donation of Gametes

The donation of gametes should not be allowed.

4.2 Egg Fertilisation, Selection of Embryos for Implantation, Embryo Freezing

The current injunctions against eugenic selection or discarding of embryos and against embryo freezing, as articulated in Articles 6(e) and 7 respectively of the Embryo Protection Act, should be retained.

The current injunction against the fertilisation of more than two eggs within the same treatment cycle, as articulated in Article 6(b) of the Embryo Protection Act, should remain.

4.3 Surrogacy

The current injunction against surrogacy as articulated in Article 6(f) of the Embryo Protection Act should remain.

4.4 Abortion

Human abortion should remain illegal in Malta and its prohibition should be articulated in terms not of the procurement of miscarriage\textsuperscript{5} but of the right to life of the unborn child.

Likewise the whole legal apparatus that is in place in respect of artificial procreation should be articulated in terms of the rights of the unborn child or the child to be conceived. This should be reflected also, as is currently the case, in the very name of the law, namely the Embryo Protection Act.

\textsuperscript{4} As per Article 6 of the UNCRC: ‘States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child.’

\textsuperscript{5} As per Article 241 of the Criminal Code of Malta