12 LEGAL ASPECTS OF REPRODUCTIVE TECHNOLOGY

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Introduction

Is procreation a biological act or an essentially human act? I believe that this is a fundamental question to be addressed when evaluating human reproductive technology. All the more so because assisted reproductive techniques can so easily shift from the therapeutic to the manipulative.

The distinction between therapy and experimentation pure and simple lies at the very core of any analysis of this particular area of study in order to safeguard the integrity of the "person" which is the subject of treatment. I do not only refer here to the patient in the broad sense of the term, but to all parties involved in the reproductive process as well as the human life from inception.

The Need To Legislate

Law is notoriously conservative, yet in this particular area regulation is non-existent save for the mention of DNA testing in paternity litigation - an amendment which was introduced to the Maltese Civil Code in 1993 and left at that. Yet despite the fact that Maltese couples have benefited from new reproductive techniques, the law, unsurprisingly I would say, lives in blissful ignorance, awaiting that first test case which would shake general principles of law at their very foundations!

Comparative Legislation

I propose to approach the subject matter of my talk from a deductive viewpoint - by synthesising the main features of comparative legislation. I believe that this exercise can shed light on the main areas of concern and serve to guide the Maltese

legislator accordingly in formulating a blue print for legislation.

Of the legislation reviewed, I have found the laws of certain Australian States, particularly those of New South Wales, and Victoria and of the United Kingdom, to be particularly comprehensive. I will also refer to legislation in the US State of Louisiana as this State embraces the Napoleonic code as we do and consequently has a legal affinity to our juridical system.

An analysis of these laws immediately indicates the broad spectrum with which countries have chosen to tackle the legal and moral issues attendant on the regulation of reproductive technologies and would , no doubt, obtain a critical response from the Maltese legislator in certain cases.

Primary causes of concern are the issues of consent on the part of the donor, recipient and of the husband, the status of the child born of a reproductive process, and the issue of confidentiality. These constitute main themes in laws and statutes which have sought to provide a framework to regulate the legal relationship between the various parties to an assisted reproductive process.

Definitions

N.S.W.
The relevant legislation in the State of N.S.W. are the ARTIFICIAL CONCEPTION ACT , 1984 and CHILDREN (EQUALITY OF STATUS) AMENDMENT ACT , 1984 No. 6 .
The former deals with artificial insemination which is defined as : *"the artificial insemination of a woman, but does not include, except in section 10, the procedure of implanting in the womb an ovum (whether or not produced by her) fertilised outside her body" (art. 7).*
Artificial insemination and the implantation of a fertilised ovum in the body of a woman are also the areas which are subject to

legislation in other areas of Australia (see for example, the Commonwealth of Australia - Family Law Act 1975),

The Parties

The parties to assisted reproductive techniques are the donor of semen or of the ovum, the woman receiving the semen or implant, the child, and in the case of a married woman - her husband. The medical practitioner is also a party as issues of informed consent, experimentation, and liability are relevant.

Filiation

"Mater semper certa est", but it seems that this is no longer an absolute! Filiation and issues of disavowal of paternity are principal areas of regulation. As I stated in my introduction, Maltese law mentions DNA testing in only one area - that of filiation and even in this case, a Maltese court cannot impose testing on any party to a case in which paternity of a child is in dispute.

A common theme which runs through various laws is that where a married woman has, with the consent of the husband undergone a procedure as a result of which she becomes pregnant, then her husband shall for all purposes , be conclusively presumed to be the father of any child born as a result of the pregnancy (see Australia Capital Territory Artificial Conception Ordinance 1985 s. 5.)
This presumption is absolute.
In N.S.W. the law provides that in respect of the following procedures, namely:

- Artificial insemination of a woman
- Implanting of an ovum produced by a woman and fertilised outside her body
- Semen donated by a person other than her husband
- Semen being a mixture in part produced by her husband and in part by a third party

and where the husband has given his consent, then he shall be presumed for all intents and purposes to have caused the pregnancy and to be the father of the child born as a result of the pregnancy. Furthermore, the legislator does not equivocate on this matter and states categorically that "The presumption of law that arises by virtue of subsection (2) (above) is irrebuttable". (N.S.W.Artificial Conception Act 1984 s.5.)

The same irrebuttable presumptions can be found in other legal systems. In the same manner, a common provision concerns semen used in the procedure which was produced by a man other than the woman's husband. The same absolute presumption has been found to apply provided that the husband would have given his consent to the procedure.*(Art.Concep. Act op.cit).*

The main element for the presumption to apply is the consent of the woman's husband. Once this consent has been given, then for all intents and purposes of law and without any shadow of a doubt, the husband is the father of the child and the donor *shall be conclusively presumed not to be the father.*

It would be wise under the circumstances, therefore, to stipulate that consent must be given in writing.

The determination of paternity and the presumption of status of a child born to a married woman are stipulated in the interests of the child itself. Often, ad hoc amendments have been introduced into Children's Acts and legislation concerning children. The child has a right to certainty of status and society has an interest in regulating the matter in order to avoid doubt and instability.

The NSW act goes one step further and provides that the consent of the husband to the fertilisation procedure is presumed and the burden of proving that he did not, in fact, give his consent lies with the husband.(N.S.W. s. 5.(4)

The same considerations apply to the presumption of maternity where an ovum produced by another woman is implanted . In this case the irrebuttable presumption of maternity is in favour of the woman receiving the implant and the donor is presumed in an absolute manner not to be the mother of the child born from the procedure.(see fo ex. Australia Capital Territory – Art.Conc.Act 1985 s.6)

The legislator would have to provide whether the recipient of fertilisation treatment is to be a married woman or otherwise. This requirement is not essential and some states have provided for the presumption of paternity in the case of bona fide domestic couples. A Maltese legislator would in all likelihood opt for the qualification of marriage once reproduction is considered to be an essential human act resulting from a conjugal union.

Penalties For Abuse

The imposition of penalties and sanctions for abuse should be a feature of comprehensive legislation on reproductive technologies. Again, far reaching law makers have proscribed commercial trafficking in semen and ova, advertising and procuring fertilisation treatment for financial gain.

Trading in semen for example is, in NSW subject to a penalty or imprisonment.

Medical Supervision And Informed Consent

The medical practitioner and his team are professionally responsible for the process of fertilisation / implantation. The NSW legislation, for example, provides for pre-procedure assessments which are obligatory on the medical practitioner who will be performing the technique. The law provides that the practitioner shall , before authorising the procedure give due consideration to the following matters :

- Whether the woman or her partner are infertile
- Their children are likely to be infected by a genetic abnormality or disease
- The welfare and interests of the child born of artificial insemination
- The home environment and stability of the household
- Whether or not counselling is desirable
- The physical and mental health, age and emotional reaction of the prospective parent

Contravention of this section (section 7) is tantamount to misconduct in a professional respect (s. 7(2).)

Other provisions concern certification of donors of semen save that of the husbands, and penalties for false or misleading statements by donors.

Elsewhere, in respect of in vitro fertilisation, it is provided that such procedure may not be performed unless not less than 12 months before the carrying out of the procedure, the woman and her husband have undergone examination or treatment by a medical practitioner, *other than the one who will be performing the procedure* as might be reasonably required to establish the woman's fertility by other means.(State of Victoria Act quoted infra s.10).

Control Of Donated Semen

What happens to unused semen? This matter also requires regulation. Respect is given to an agreement between the donor and the person who is to use the semen. The State of Victoria has legislated on the authority to use an embryo in alternative procedures. The Victoria Act quoted infra provides that where the woman cannot receive the implant due to death, illness or injury, then the embryo shall be made available to another woman with the consent of the donor of the gametes from which the embryo

has been derived or, where such persons cannot be found, with the consent of a person so designated by the Minister responsible in an approved hospital (s. 14). In the case of gametes, a withdrawal of consent would oblige the designated person to destroy them forthwith.

Confidentiality

Confidentiality is essential from a number of aspects. The parties would obviously wish to have their identities subject to strict confidentiality and here, one cannot help drawing analogies with adoptive procedures. The NSW Act places the duty of non disclosure at par with the confidentiality owed by a doctor to his patient but admits of exceptions in the case of a court order, or where the person (other than the child) consents thereto, and other limited cases.

On the other hand, the person undergoing the procedure has a right to non-identifying information concerning the donor in the interests of her health and welfare.

Of significance to the issue of administrative practice is the duty to maintain proper records relating to fertilisation procedures. The Victoria Act is quite detailed in this respect and imposes a long list of particulars which are required to be recorded.

Prohibited Procedures

Legislation enacted in the Australian state of Victoria is relevant to the issue of prohibited procedures. I refer here to the *Infertility (Medical Procedures)Act 1984 No. 10163.*

This Act in Part II stipulates the following to be prohibited procedures:

- Cloning
- The fertilisation of the gametes of a man or women by the gametes of an animal

Such procedures are absolutely prohibited. The Act then provides that certain experimental procedures can be authorised by a Standing Review and Advisory Committee .These experimental procedures which can be authorised refer to research on an embryo even if such research would cause damage to the embryo.

Other Issues

Other issues tackled concern the application of the presumption of paternity to bona fide domestic couples provided neither are married and the issue of status to children born of a widow. In the latter case the presumption of paternity would apply if the husband would have given his previous consent to the procedure and his stored semen would be used in the procedure and, further, that the woman does not become a married woman after his death and before the birth of the child.(see e.g. NSW legislation).

The Victoria Act provides clearly that no person can be compelled to undergo fertilisation procedures and the use of the gametes of a person under the age of 18 is prohibited. Interestingly, a the legislator felt the need to specifically prohibit the use of semen for artificial insemination produced by more than one man.

Not all legislators have provided such comprehensive treatment. In the Canadian Province of Quebec, for example, the Civil Code provides the relevant article which concerns the status of the child and in consonance with other laws, provides that the husband cannot contest paternity if he has given consent to artificial insemination.(Civil Code art. 586). The same treatment is given in the Louisiana Civil Code (art 188).

Surrogate Motherhood

The SURROGACY ARRANGEMENTS ACT 1985 of the United Kingdom defines a surrogate mother as *a woman who carries a child in pursuance of an arrangement (a) made before she began to carry the child and (b) made with a view that the child is to be handed over to, and parental rights being exercised by, another person . (Art.1)*

The Law is made applicable to all such arrangements, lawful or otherwise . The principal purpose of the Act is to prohibit and sanction surrogacy arrangements on a commercial basis.

The Human Embryo

A Louisiana Act (ACT No 964) provides a definition of the human embryo for the purposes of the law as an "in vitro fertilised human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organised that it will develop in utero into an unborn child" (Chap 3 s .121). This law prohibits research on human embryos as well as the sale of a human ovum, a fertilised human ovum, and a human embryo.

Article 123 provides that:
"An in virto fertilised human ovum exists as a juridical person until such time as the in vitro fertilised ovum is implanted in the womb, or at any other time when rights attach to an unborn child according to law."

This implies that the fertilised ovum is to be identified specifically and is not to be deemed in any manner to be the property of the physician or medical facility in which it is stored. The physician is at law the *guardian* of the ovum unless the identity of the fertilisation patients is expressed. In the latter case they acquired the rights of parents. If such parents renounce, then the ovum will be available for adoptive implantation.

Art 129 further provides that *a viable in vitro fertilised human ovum is a juridical person which shall not be intentionally destroyed...* but further clarifies that an in vitro human ovum which fails to develop further over a 36 hour period except if in a state of cryopreservation, is considered non-viable.

Regarding inheritance rights, the solution adopted by the Louisiana legislator is that such rights will only flow once the ovum develops into an unborn child that it born in a live birth (art 133).

The status of the unborn child raises ethical considerations. As we have seen, the unborn child can be the subject of rights . However, international human rights documents have been notably reluctant to recognise the unborn child as a subject entitled to the guaranteed protection against violation of fundamental human rights. *A contrario senso*, no international legal norm actually states that the right to life only attaches to persons already born. Such norms are couched in terms which refer to the "individual" or to "the integrity of the human person" (see for example, *The Universal Declaration of Fundamental Human Rights at art. 3, and the European Convention on Human Rights and Fundamental Freedoms at art. 2).*

The European Commission has, however, affirmed that the European Convention in article 2 does recognise the right to life of the foetus but a subject to certain implicit limitations, primarily the right to life and the protection of the health of the mother during the initial phase of pregnancy. (see *X vs United Kingdom* Dec. 13.5.1980 and *Bruggemen and Schuten vs The Federal republic of Germany* Dec. 12.7.1977). The Commission based its reasoning on the consideration that the life of the foetus was inextricably linked to that of the mother .

The European Court of Justice of the European Union has stopped short of recognising a the right to abort on the part of the mother as a fundamental human right whilst sanctioning State interference

which prevented the dissemination of information on the availability of abortion procedures in other member states of the EU.

On the issue of consent, the European Commission on Human Rights in a decision given in 1979 considered the complaint that the state legislation denied the father of a foetus the right to be consulted about a proposed abortion by his wife, which, it was argued, constituted a denial of his right to respect for private and family life. The Commission recognised the right of the pregnant mother as the person primarily concerned with the pregnancy , its continuation and termination and refereed to the decision above mentioned. The Commission stated that *having regard to the right of the pregnant woman, it could not find that the husband's and potential father's right to respect for his private and family life could be so widely interpreted as to embrace such procedural rights as claimed by applicant, i.e. the right to be consulted ro the right to make applications, about an abortion that his wife intended to have performed on her.*

The Moment of Conception

The Parliamentary Assembly of the Council of Europe has, in various Recommendations, called for Respect for the embryo and foetus which are to be treated with the respect owed to human dignity *(Recc Nos. 934 (1982);1046 (1986) and 1100 (1989).*

However, the applicability of the right to privacy in international Human Rights documents is more in keeping with the judgment in *Roe vs Wade* (410 US 113 (1973) than with the contention that the foetus has a right to life.

This landmark judgement of the US Supreme Court was reformulated more recently . In *Roe*, it was held that a State could not proscribe abortions in the first trimester of pregnancy. In Planned Parenthood of South-eastern Pennsylvania vs Casey this trimester was rejected and it was held that the test throughout

pregnancy was to be the same, namely, that the State could not impose an *undue burden which should have the purpose and effect of placing a substantial obstacle in the path of a woman's choice.* (505 US 112 S.Court. 2791 (1992).

Our legislator would argue with this judgment. Life begins from the moment of conception, although again, experts are not even in agreement on the definition of this term. Certainly, the moral issues are fundamental and on this matter, the law must protect life itself.