In the Supreme Court, sitting as the High Court of Justice

HCJ 5771/12

Before: The Honorable President A. Grunis
The Honorable Deputy President M. Naor
The Honorable Justice (Ret.) E. Arbel
The Honorable Justice E. Rubinstein
The Honorable Justice S. Joubran
The Honorable Justice E. Hayut
The Honorable Justice H. Melcer

The Petitioners:

1. Liat Moshe
2. Dana Glisko

versus

The Respondents:

1. The Board for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756-1996
2. The Ministry of Health
3. Knesset of Israel

Response to Order Nisi

Date of sessions: 8th Tishrei 5773; September 24, 2012
5th Kislev 5773; November 19, 2012
18th Iyar 5773; April 28, 2013
14th Elul 5773; August 20, 2013

Adv. Yehuda Resler; Adv. Amir Rosencrantz
on behalf of the Petitioners

Adv. Nahi Ben Or; Adv. Dana Briskman

on behalf of the First and Second Respondents

Adv. Gur Blai
on behalf of the Third Respondent

Judgment (Reasons)

Justice A. Hayut

The Petitioners are a couple who wish to bring offspring into the world by fertilizing an egg taken from the body of the First Petitioner and implanted in the womb of the Second Petitioner, who will carry the pregnancy and give birth. The Ministry of Health rejected their requests for the necessary authorizations to execute this and therefore filed the petition, which in its amended form challenges different provisions in the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756-1996 (hereinafter: the Surrogacy Law) and the Eggs Donation Law 5770-2010 (Hereinafter: the Eggs Donation Law.)

After two hearings in the petition that were held before a panel of three Justices, an order nisi was issued for the amended petition and it was decided that the hearing for the Respondents' response would be held before an extended panel. The extended panel heard two hearings and after the second hearing, held on August 20, 2013, a decision rejecting the petition was given without reasons. This was done in order to permit the petitioners to plan their steps and to decide whether to accept the partial solution proposed by the Respondents – which I detail below – and because of the concern that the passing of time may adversely impact the chances of success for the medical procedure that could be done under such proposal (among others, due to the age of the First Petitioner, who is about forty one years old.) Therefore, on September 1, 2013 a decision without reasons that rejects the petition by a majority of the panel (President A. Grunis, Deputy President M. Naor, Justice E. Rubinstein and Justice S. Joubran) and against the dissenting position of Justice E. Arbel, Justice H. Melcer and my own was handed down. Below are detailed the reasons at the base of my dissenting opinion, as noted.

The Factual Background

1. The First Petitioner, Liat Moshe (hereinafter: Liat) was born in 1972 and serves as an officer in the IDF at the rank of Lieutenant Colonel. The Second Petitioner, Dana Glisko (hereinafter: Dana) was born in 1983 and the two have been living together as a couple for about ten years. They even signed a "prenuptial agreement" and a "common law marriage agreement" and drafted mutual wills. Since 2007 the two have attempted to bring a child into the world. For this purpose, during the years 2007-2008 Liat underwent artificial

inseminations and hormone treatments, but these have been unsuccessful. Similarly, treatments Liat underwent in 2008-2012 for in vitro fertilization of eggs extracted from her body and then implanted have sadly failed as well. Medical tests on Liat have not diagnosed a cause for the failure of the many fertilization treatments she had underwent, and the reason may be that her uterus may be unable to carry a pregnancy. Such repeated failures have not weakened Liat's spirit and she wishes with all her might to bring a child into the world from her own eggs. As a last resort, the couple has tried to bring a child into the world by extracting an egg from Liat's body, fertilizing it and implanting it in Dana's uterus, so that Dana would carry the pregnancy and give birth. In such a way, the two emphasize, the child would be "genetically and physically connected to them both."

2. Only it quickly became clear to the couple that realizing their wish to bring a child into the world in the described method may implicate them and the treating physician, who would perform the necessary medical procedure, in illegal conduct and a criminal sanction. In February 2012, Liat wrote to the Ministry of Health's Legal Advisor and requested to permit her to donate eggs to her partner, Dana, after their in vitro fertilization. This request relied on earlier decisions by the Ministry of Health that permitted such medical procedure in the past and paved the way, at least in one case, for eggs donations between a female couple. On February 26, 2012 the Ministry of Health's Legal Advisor, Advocate M. Hivner-Harel, that the procedure requested by the couple is contrary to the Eggs Donation Law, which was passed in 2010, because according to this law eggs donation may be approved only for a woman who may not become pregnant with her own eggs due to a medical problem, or who has a different medical problem that justifies using eggs that are not hers in order to have a child (a condition established in section 11 of the Law.) in this case, Dana – who is intended to receive the eggs donation from Liat – does not suffer, as far as we know, from a medical problem and thus their request is denied.

Liat and Dana did not give up and turned to the national supervisor for surrogacy issues in the Ministry of Health and requested to be permitted to undergo a procedure where Dana would serve as surrogate and carry an embryo from Liat's fertilized eggs. This request came after in May 2012 the recommendations of the public committee formed by the Ministry of Health to examine legislative regulation of the issue of fertilization and birth in Israel, headed by Professor Shlomo Mor Yossef (hereinafter: the Mor Yossef Committee) were published. The Mor Yossef Committee report concerns, among others, the issue of surrogacy in Israel. Among the Committee's recommendation was the recommendation to expand the circle of those eligible to undergo a procedure of bringing an offspring into the world via surrogacy that would include also "a single woman who has a medical problem that prevents carrying a pregnancy." This request by Liat was also

denied for the reason that the Surrogacy Law in its current language only permits "intended parents" (defined in section 1 of the law as "a man and a woman who are a couple") to enter an agreement for embryo carrying with a "carrying mother" whose relationship with the child is severed after the birth. The national supervisor for surrogacy added in her response that a team appointed by the Ministry of Health to explore and implement the Mor Yossef Committee recommendations had yet to complete its work and therefore it was impossible at the time to accept Liat's request. In light of this and in light of Liat's age (who at the time had already turned forty years old) – this petition was filed.

The Legal Framework

3. In their amended petition, the couple relies on two alternative legal paths. First, an interpretation of the Surrogacy Law, or judicial intervention in its provisions on a constitutional basis, that would allow the requested procedure through **surrogacy** where by Dana would serve as the "carrying mother" for Liat's fertilized eggs. The second – judicial intervention on a constitutional basis in the Eggs Donation Law and striking down some of its provisions that bar Liat's **eggs donation** to Dana. Before we detail the parties' arguments and the different developments that occurred since the petition was submitted we briefly present the arrangements established in each of the above laws and the obstacles they each present to the couple when they wish to undergo the desired procedure.

4. The Surrogacy Law was passed in 1996 following a report by a public professional committee headed by District Court Judge (Ret.) Shaul Aloni, which in 1994 recommended to permit entering into agreements for carrying embryo in Israel while regulating the issue in primary legislation. In 1995, before the Law was passed, this Court struck down regulations 11 and 13 of the People's Health Regulations (In Vitro Fertilization), 5747-1987 (hereinafter: the Fertilization Regulations,) which prohibited implanting a fertilized egg in a woman who would not be the child's mother as well as prohibited the implantation of an egg taken from a donor unless it was fertilized with the sperm of the woman's husband (see: HCJ 5087/94, *Zebro v. The Minister of Health* (July 17, 1995); for detailed discussion of the background for the Law's legislations, see HCJ 2458/01, *New Family v. The Committee for Approval of Embryo Carrying Agreements, The Ministry of Health*, IsrSC 57(1) 419, 431-35 (2002) (hereinafter: the *New Family* case; see also the *Embryo Carrying* Agreements Bill (Approving Agreements and Status of the Child), 5756-1996, Bills 2456.) as reflected from the explanatory notes of the Bill, the Surrogacy Law was designed to permit agreements for carrying embryo in Israel "under certain conditions and in a supervised manner." According to section 1 of the Surrogacy Law, an agreement for carrying an embryo is made between "intended parents" – who are defined in

section 1 as "a man and a woman who are a couple" – and a "carrying mother" who agrees to become pregnant through the implantation of a fertilized egg in her body and to carry a pregnancy for the intended parents. Under section 2 of the Surrogacy Law, the implantation of a fertilized egg in order to impregnate a carrying mother in order to give the child to the intended parents is contingent upon the existence of several conjunctive conditions, including the drafting of a written agreement between the intended parents and the carrying mother, the approval of the agreement by the approving board mentioned in section 3 of the Law, and meeting several additional threshold conditions such as the lack of familial relationships between one of the intended parents and the carrying mother (see HCJ 625/10, *Jane Doe v. The Board for Approval of Embryo Carrying Agreements under the Agreements Act*, paras. 12-16 (July 26, 2011)). As a rule – except for exceptional cases where the carrying mother wishes to withdraw her embryo carrying agreement and keep the child under the circumstances detailed in section 13 of the Surrogacy Law – the carrying mother gives the child to the intended parents after the birth, and after a parenting order is issued, they are considered the child's parents "for all intents and purposes" (section 12 of the surrogacy Law.)

Section 7 of the Surrogacy Law, titled "Performing an Embryo Carrying Agreement" prohibits performing a surrogacy procedure outside of the path and conditions established by the law, as follows:

"An in vitro fertilization and implantation of a fertilized egg shall not be performed except for at a recognized department and on the basis of an agreement for carrying an embryo , which was approved as detailed."

Section 19(a) of the Surrogacy Law adds a criminal provision whereby anyone implanting a fertilized egg in order to impregnate a carrying mother with the purpose of giving the child not according to the provisions of the law is punishable by one year imprisonment. Therefore the Surrogacy Law creates an arrangement for how agreements for carrying embryo in Israel must be entered into and performed, and under its provisions as detailed above a surrogacy procedure that is inconsistent with its detailed directions cannot be done in Israel (see the *New Family* case, 438-39.)

5. The Eggs Donation Law, which was passed in 2010, about 14 years after the Surrogacy Law was passed, was designed to "regulate the different aspects involved in extracting and donating eggs in Israel, and the use of such eggs" (see the explanatory notes to the Eggs Donation Bill, 5767-2007, Government Bills 289.) Until the law was passed the possibility to donate eggs in Israel was regulated in the Fertilization Regulations. According to those, it was possible to extract eggs only from a woman who was under medical treatment due to infertility problems if the supervising physician determined that

extracting the eggs would advance her treatment. In light of this restriction on the pool of donors, Israel saw a dire shortage of eggs for donation and women who required eggs donation were required to travel to far away countries in order to receive a donation there. The Fertilization Regulations even set various restrictions on the possibility of women to receive eggs donation. For instance, the regulations established that a single woman would not be implanted with a fertilized egg unless the egg is hers and a report from a social worker to support her wishes has been secured. The Eggs Donation Law was meant to expand the circle of donor women to include – alongside the "treated" women (women requiring medical care involved in extracting eggs from their bodies for their own use, and intending the remaining eggs for donation) – also "volunteer donors," who do not undergo fertilization treatments or other treatments involving extracting eggs from their bodies. Additionally, the Law lifted the restriction on receiving eggs donation that the Fertilization Regulations imposed upon single women.

At the background of the law's legislation was a painful incident where a doctor was convicted in disciplinary proceedings for a high dosage of hormones he gave women to whom he provided fertility treatments in order to produce a high number of eggs and intend them for treating other women's infertility. This was done without securing the consent of these women or notifying them (see: the Mor Yossef Committee Report, p. 38; Smadar Kanyun, *Eggs Donation – Social, Ethical and Legal Aspects*, MEDICINE AND LAW 35, 145, 164 (2006); minutes of the 17th Knesset's Labor, Welfare and Health Committee meeting, dated February 18, 2008, p. 2.) One of the purposes the law was designed to achieve, aside from expanding the circle of donor women, was then responding to the concern over the trade in eggs and over the exploitation and disrespect for women's bodies (see minutes of the 17th Knesset's Labor, Welfare and Health Committee meeting, dated March 4, 2008, p. 10-12.) therefore the law established various restrictions as to the maximum number of donations that may be received from the same woman and as to the frequency of extraction of eggs from her body; duties regarding the information that must be given to the donating woman and securing her consent for performing procedures in the eggs extracted from her body; and a prohibition on trade in eggs (see articles A and B of the Eggs Donation Law.) Additionally, section 4 of the Eggs Donation Law establishes the exclusivity of the law's provisions, as such:

> "(a) One shall not perform an eggs extraction from a donor, lab treatment of the eggs, allocation of eggs for implantation or research, or implantation of eggs, but according to this law's provisions.
>
> (b) The provisions of sub-section (a) shall not apply to the extraction of eggs from the body of an intended mother, to

> the lab treatment of eggs extracted as such and to their implantation in the body of a carrying mother for the purposes of performing an agreement for carrying embryo according to the Agreements Law."

Therefore, a procedure of extracting eggs from a donor woman and implanting them in the woman who receive the donation is subject to the provisions of the Eggs Donation Law and performing this inconsistently with these provisions is prohibited unless it is done under an agreement for carrying embryo that was entered into according to the Surrogacy Law.

6. Section 12 of the Eggs Donation Law requires the authorization of a special approving board of six members (hereinafter: the approving board) in order to extract eggs from a "volunteer donor." The approving board is charged with examining the request of a volunteer donor in order to ensure that the intended procedure meets all the conditions detailed in section 12(f) of the Act, and they are:

> "(1) The donor is a resident of Israel who is over the age of 21 but is not yet 35;
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> (2) The donor is not legally incompetent, under guardianship, under arrest or incarcerated;
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> (3) The donor had signed, before the approving board, a form as instructed by the administration, which includes the information form and her consent to extracting the eggs for their implantation;
>
> (4) The approving board is satisfied that the donor's consent is given with a sound mind, out of free will, and not out of family, social, economic or other pressure; and in regard to a donor who intended in advance the eggs extracted from her body to a specific recipient – that her consent was given not for financial reward or any other reward, directly or indirectly, from the recipient or her representative; and it may summon for such purposes the recipient, should the eggs be intended to a particular recipient, or any other person as it sees fit."

In this context the petitioners are seemingly already faced with an obstacle because Liat – the intended donor – was born in 1972 where section 12(f)(1) of the law sets an age limit. However in light of the medical difficulties Liat faced and the many treatments she went through, she may be considered a "treated donor" whose eggs are extracted from her body in the course of medical treatments conducted for her own benefit. Therefore, and under the

provision of section 15 of the Eggs Donation law, she is not required to secure the authorization of the approving board for the extraction of her eggs and is thus not subject to such age restrictions.

7. The main relevant restriction here is the restriction on a receiving woman established in section 11 of the Eggs Donation Law. Under this section, only a woman who suffers from a medical condition that prevents her from being impregnated with the eggs in her body or from a medical condition that justifies using another woman's eggs in order to have a child, may apply to receive an eggs donation. This section stipulates as follows:

> "Once a treating physician discovers that a patient who is a resident of Israel who is over the age of 18 but is not yet 54 years old, is incapable of becoming pregnant with eggs in her body due to a medical condition, or that she has another medical condition that justifies using the eggs of another woman in order to have a child, including by implanting the eggs in a carrying mother under the Agreements Law, the physician shall notify the patient that she may apply for an eggs donation. Such an application shall be submitted with the supervising doctor according to the form instructed by the Administration."

This provision seemingly prevents the petitioning couple to realize their wishes, as it stipulates that in order to receive an eggs donation the receiving woman must present a medical need for the donation, whereas in our case, Dana – the intended **recipient** – does not suffer, as far as we know, from any medical condition that prevents her from becoming pregnant with the eggs in her body or that justifies using another woman's eggs to have a child. Liat – who wishes **to donate** her eggs – is the one who suffers from a medical condition that prevents her from becoming pregnant with the eggs in her body. Section 13 of the law adds the condition that the implantation of the eggs in the receiving woman's body must be approved by the "supervising doctor" as defined in the law. Under this section the supervising doctor must make sure that, among others, the receiving woman indeed does suffer from a medical condition that justifies the implantation of the eggs in her uterus (section 13(e)(2)). Additionally, the doctor must receive confirmation from the database established under the law that the conditions set in section 13(e)(3), which include the condition that the donor is of the same religion as the recipient and is not her family member and that the donor is not married, are met.

8. To this list of restrictions the provision in section 4(a) of the Eggs Donation Law must be added. This provision mandates, as discussed, the exclusivity of this law's provisions whereby any procedure of extracting eggs from a donor,

lab treatment of the eggs, allocating them and implanting them would be performed only under the provisions of the Law. Section 5 of the Eggs Donation Law adds a prohibition of taking out eggs that have been extracted in Israel – whether they are fertilized or not – for their implantation aboard, unless this was approved by a statutory exceptions committee and the intended implantation is in the body of the woman from whom the eggs were extracted. This section prevents the Petitioners to take eggs extracted from Liat's body out of Israel to be implanted in Dana's uterus. Additionally to all this, section 6(b) of the law mandates:

> "An implantation of eggs shall not be performed but in the body of the recipient or the body of a carrying mother who entered into an agreement for carrying an embryo with the recipient according to the Agreements Law."

Similarly to the Surrogacy Law, the legal arrangement established in the Eggs Donation Law, which we detailed above, is also supported by criminal provisions that establish criminal sanctions for an offense under the law's provisions. Thus, for instance, performing an eggs implantation in a woman in violation of section 6(b) of the Act constitutes an offense punishable with six months incarceration or a fine (see section 41(b)(4) of the Eggs Donation Law.)

9. Still, Title C in Chapter C of the Eggs Donation Law authorizes the Minister of Health to convene a committee for exceptional cases, which would comprise of two doctors, a psychologist, a social worker, an attorney, and a clergy person (hereinafter: the exceptions committee.) The committee is charged with examining the approval of a procedure for eggs donation in particular cases which do not meet the conditions established by the Law. However, the authority of the exceptions committee is narrow and limited to permitting procedures in one of the four case as detailed in section 20(a) of the law:

(-) Approving extraction, allocation or implantation of eggs from a **donor who designates, in advance, the eggs** extracted from her body **to a particular recipient**. (section 20(a)(1));

(-) Approving extraction, allocation or implantation of eggs from **a married donor** (section 20(a)(2));

(-) Approving extraction, allocation or implantation of eggs **from a donor who is not a member of the recipient's religion** (section 20(a)(3));

(-) Approving **to take eggs outside of Israel** in order to be implanted in the body of the woman from whom they were extracted (section 20(a)(4)).

The recipient woman or the "supervising physician" (as the latter is defined in the Eggs Donation Law) may approach the exceptions committee, and under section 21(c) of the law the committee may consider the factors detailed in section 22 of the law, which are:

(a) The exceptions committee may approve the extraction, allocation of eggs for implantation or the implantation of eggs, when the recipient intends in advance the eggs extracted from her body to a particular recipient, when it is persuaded that the following has been met, as appropriate under the circumstances:

    1. In terms of a donor who intends in advance the eggs extracted from her body to a particular recipient who is her family member – that there are religious reasons that justify such eggs donation.

    2. In terms of a donor who intends in advance the eggs extracted from her body to a particular recipient who is not her family member – that there are religious or social reasons that justify such eggs donation.

(b) The exceptions committee may approve the extraction, allocation of eggs for implantation or implantation of eggs when the donor is married, when it is satisfied that the following has been met, as appropriate under the circumstances:

    1. In terms of a married donor who intends in advance the eggs extracted from her body to a particular recipient – that there are religious reasons that justify such eggs donation.

    2. In terms of a married donor who does not intend in advance the eggs extracted from her body to a particular recipient – that the eggs extraction is required for their implantation in a particular recipient who, due to a shortage in suitable eggs from donors who are not married, cannot receive an eggs donation but for from a donor who is married.

(c) The Exceptions committee may approve the extraction, allocation of eggs for implantation or extraction of eggs when the recipient is not a member of the donor's religious and when the eggs have not intended in advance by the donor for a particular recipient, when the committee is satisfied that the recipient's religion prohibits her from receiving a donation from a woman who is a member of her religion or due to a shortage of eggs from donors of her religion.

(d) The exceptions committee may approve the taking of eggs extracted in Israel from a patient's body for their implantation out of Israel, when it is

satisfied that the eggs are intended to be implanted in her body and when there is justification for approving the implantation outside of Israel.

The provisions quoted above clearly express that the authority of the exceptions committee is limited to an exhausted list of the four cases detailed. They also clearly reflect that the matter of the Petitioners is not among these cases and thus approaching the exceptions committee would not be to their benefit. Given all this, the Ministry of Health's legal advisor believed that the eggs donation route which they wished to take was not available to the Petitioners, which resulted in her response that:

> "[…] According to the law, an eggs donation may only be approved for a woman who cannot become pregnant by her own eggs or who has another medical condition that justifies using the eggs of another woman in order to have a child.
>
> According to your letter, your partner, Ms. Glisko, has no medical condition that justifies receiving an eggs donation. Therefore, regretfully, your request may not be approved."

Developments Since The Petition Was Filed

10. In the amended petition, submitted on October 3, 2012, the Petitioners requested permission to execute their wishes, whether by striking down different provisions of the Surrogacy Law and the Eggs Donation Law or by interpreting the provisions of these statutes differently than the interpretation of the Ministry of Health. After holding a hearing for the amended petition on November 19, 2012 before a panel of three justices, an order nisi was issued:

> "Based on the petition brought before this Court today, the Court issues an order nisi for the Respondents and instructs them to present themselves and justify:
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> 1. Why the Court should not order that the definition of 'intended parents' as in section 1 of the Embryo Carrying Agreements Law(Approval of the Agreement and the Status of the Child), 5756-1996 (hereinafter: the Law) be struck down for unconstitutionality, and why the Court should not instruct the approving board as established by section 3 of the Law to discuss the Petitioners' request to approve an agreement for carrying embryo on its merits;
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> 2. Why the surrogacy arrangement established by the Law should not be interpreted to include also an arrangement where there is no obligation for disconnecting the 'carrying mother' and the child, and/or that it would be possible to

perform in vitro fertilization and implantation of a fertilized egg outside of an agreement for carrying embryo between 'intended parents' and a 'carrying mother,' as defined in section 1 of the Law;

3. Why the Petitioners should not be permitted to perform a procedure of egg donation such that the First Petitioner would donate an egg to the Second Petitioner in order for it to be implanted in her uterus and fertilized according to the provisions of the Eggs Donation Law, 5770-2010 (hereinafter: the Eggs Donation Law);

4. Why the Court should not order that the exception in section 11 of the Eggs Donation Law, which restrict the possibility of Eggs Donation to cases where the recipient cannot become pregnant with her own eggs due to a medical condition, is struck down for being unconstitutional;

5. Why the language of section 11 of the Eggs Donation Law should not be amended so that the words 'in a carrying mother' be struck out of it."

At the same time, and in an attempt to find a practical resolution for the Petitioners' problem the Attorney General has been requested to notify the Court its position as to the legal procedures under the Eggs Donation Law that may be taken against the Petitioners or any medical professional, were they to perform in Israel any medical procedures in order to execute the medical process they wish to perform. It was also decided that as long as the Attorney General's position is that under the circumstances such legal proceedings should not be initiated, there will be no longer a need for a response on behalf of the Respondents to the order nisi that was issued, and that should there be a need to hold a hearing in the response to the order nisi after the Attorney General's position is received, it would be held before an expanded panel.

11. The Attorney General's notice from December 26, 2012 stated that there is no possibility of declaring in advance that no legal proceedings would be initiated in terms of the described actions, which as to his understanding are not permitted under the Eggs Donation Law or the Surrogacy Law. The Attorney General explained his position as such: "There is an inherent difficulty to notifying in advance, in a notice that constitutes a pre-ruling of sorts that the general prosecution would refrain from enforcing the law on statutorily prohibited acts." Thus the First and Second Respondents (hereinafter, jointly: the State) and the Third Respondents (hereinafter: the Knesset) filed response papers in the Petitions, and on April 28, 2013 a first hearing in the objections to the order nisi was held before an extended panel

of seven Justices. During the hearing, the State's lawyer noted that from the State's perspective there is no restriction on the procedure of extracting Liat's eggs, fertilizing them and freezing them but that until the necessary statutory amendments are passed they cannot be used to be implanted in Dana, as requested in the Petition (see page 6 of the hearing record dated April 28, 2013, l. 24-35.) The State's lawyer also noted that the implementation team appointed by the Ministry of Health to examine the recommendations of the Mor Yossef Committee (hereinafter: the implementation team) is expected to complete its work soon and that after that the Minister of Health would consider the possibility of submitting statutory amendment proposals that may resolve the problem the Petitioners face. At the end of the hearing it was decided that the Respondents would submit update notices and on June 30, 2013 the State updated the Court that the implementation team was expected within several days to submit to the Minister of Health a document summarizing its work and that practical steps, including statutory amendments, were expected – according to the assessment of professional bodies – to be brought for discussion before the Knesset's Labor, Welfare and Health Committee within six months. In an additional notice the State submitted on August 14, 2013 it stated that on July 21, 2013 the Ministry of Health issued a protocol for "taking sperm, eggs or fertilized eggs out from Israel" (hereinafter: the protocol) whose operative meaning, to the extent concerns us, is that the Petitioners would be able, subject to the authorization of the exceptions committee, to follow the route requested – that is to perform the implantation of Liat's fertilized eggs in Dana's womb – but to do so **outside of Israel**. As a result, and in order to flesh out the Petitioners' position regarding the proposal raised, an additional hearing was held before the extended panel on August 20, 2013, but the Petitioners insisted that they wished to be able to perform the entire medical procedure in Israel. The Petitioners noted in this context the financial burden involved in performing the medical procedure out of Israel; the concern that performing the medical procedure out of Israel would reduce its prospects of success; as well as noted the various restrictions related to the fact that Liat is an officer in the IDF.

As all of the attempts to find a practical solution for the problem raised by the petition have failed, we were required to rule on the arguments the parties called upon us to do, and as noted on September 1, 2013 a judgment without reasons which rejects the petition by a majority was handed down.

The Parties' Arguments

12. The Petitioners argue that the arrangements established in the Surrogacy Law and the Eggs Donation Law, which bar them from performing the medical procedure where Liat's fertilized eggs would be implanted in Dana's body are arrangements that violate Liat's right to be a genetic parent and which discriminate against her and Dana compared to other couples. In this context, the Petitioners raise arguments on a constitutional level and on an interpretive level challenging the provisions of the laws mentioned above, and in essence they argue that there is no public interest that must be protected and that justifies barring them from the possibility of conducting the medical procedure which they wish to go through.

To the extent that the petition concerns the Surrogacy Law, the Petitioners argue that the definition of the term "intended parents" in this law as "a man and a woman who are a couple," is discriminatory and unconstitutional because it does not recognize same sex couples or single people as intended parents for purposes of surrogacy in Israel. The Petitioners rely here on a decision from 2002 in the *New Family* case, where it was noted that the definition of "intended parents" in the Surrogacy Law violates the principle of equality because it denies a woman who does not have a male partner the possibility to be an "intended mother." The Petitioners argue that although in the *New Family* case the Court refrained from striking down the arrangements in the Surrogacy Law, but they believe this was only because the Surrogacy Law was a new statute at the time and because the experience necessary for its way of implementation was yet to be amassed. The Petitioners additionally argue that in the years that passed since the Surrogacy Law was enacted there have been developments in the willingness to recognize "nontraditional families" including same sex families raising children. They claim there is no relevant justification for differentiating between such families and heterosexual couples in terms of surrogacy procedures in Israel. The Petitioners add that the holding in *New Family* as to the unjustified discrimination created by the Surrogacy Law, creates an estoppel by record in our matter. In relying on the Mor Yossef Committee report, the Petitioners also argue that this report includes a recommendation to expand the circle of those eligible to conduct surrogacy procedures to include unmarried women or women who cannot carry a pregnancy due to a medical condition, and they argue that Liat falls under this recommendation. The Petitioners further argue that many of the concerns involved in the surrogacy process, including the surrogate's distress after the birth and the concern over her exploitation, do not exist in this case since Dana – who is to serve as surrogate – is the "other half of the family unit into which the child would be brought." The Petitioners add that striking down the definition of "intended parents" in section 1 of the Surrogacy Law would allow applying the law's provisions to them, and this although the connection between surrogate carrying the pregnancy and the child would not be severed after birth. In this context the Petitioners note that the Surrogacy Law does not establish a requirement of disconnection between

the surrogate and the child and that the separation required is from the "intended parents" and the "carrying mother" is a "secondary aspect" which serves a "secondary purpose" that is irrelevant to their extraordinary case.

As to the Eggs Donation Law, the Petitioners claim that this law was designed to regulate eggs donation while protecting the dignity, rights, and health of the donor woman and the recipient woman and to prevent trade in eggs. The Petitioners emphasize that the eggs donation in their desired route is not expected to infringe upon any public interests or rights that the law was meant to protect. They also emphasize the case law whereby the State must not intervene in intimate events such as the decision whether and how to bring children into the world. The Petitioners add that the medical procedure they wish to undergo is the only one that ensures Liat can realize her right to parenthood in a way that allows for a genetic relationship with the child, and according to them since there is available suitable technology that enables her to realize that right on one hand and on the other there are no weighty considerations that justify it, they should not be barred from the option they wish to pursue. The Petitioners argue that the requirement of section 11 for the recipient woman's "medical need" violates their right to parenthood and is inconsistent with the legal state that existed before the Eggs Donation Law was passed, whereby a female couple was permitted to donate eggs to one another. In this context, the Petitioners rely on Attorney General M. Mazuz's guidelines from 2009 on the issue of eggs donation between a female couple (hereinafter: the Attorney General's guidelines,) where it was noted that the eggs donation between a female couple must not be seen as an act that is violates the public policy and it must be permitted where appropriate. The Petitioners note that had they wished to do the opposite – that is, to extract Dana's eggs, fertilize them and implant them in Liat's uterus – the restriction in section 11 of the Eggs Donation Law would not have been an obstacle because, as noted, Liat suffers from a medical condition that prevents her from becoming pregnant and carrying a pregnancy with her own eggs. Therefore, in their view, their unique situation warrants a remedy that compels the statutory exceptions committee to discuss their request and to approve it. The Petitioners further argue that the Eggs Donation Law must be interpreted in a way that permits them to perform the desired procedure, or alternatively to strike down the exception in section 11 of the Eggs Donation Law. Moreover, the Petitioners maintain that, at the very least, the term "in a carrying mother" which appears in section 11 of the Eggs Donation Law must be deleted from the text, as – under their reading – it limits the implementation of the law's provision in their case because it folds into it the discriminatory definition of "intended parents" from the Surrogacy Law.

13. The State argues, on the other hand, that though the sincerity of the Petitioners' desires to realize their right to parenthood in the particular way they wish to follow, the Petition must be denied for lack of cause to intervene

in the manner in which the relevant statutory provisions have been interpreted, as well as a lack of constitutional cause to strike down any of them. The State emphasized in its arguments that the Petitioners claims were made generally and that they did not point out to the specific constitutional rights that they maintain have been violated by the laws at the center of this Petition. Further, the State argues that the Petitioners have not proven the existence of an infringement at the core of the right to parenthood and have not shown why they should be permitted to exercise this right particularly in the one and only manner they desire and not in any other way.

That State also maintains that the procedure the Petitioners wish to perform attempts to create a new arrangement of what it terms as "genetic biological co-parenting" that does not at all fit the surrogacy institution as regulated in the Surrogacy Law, and thus the provisions of the Surrogacy Law cannot be applied to it. In this context, the State argues that at the foundation of the arrangements established by the Surrogacy Law is the **separation** between "the intended parents" and the "carrying mother" who enter into an agreement to carry embryo, as well as **severing the relationship** between the birthing woman and the child after the birth. However, the State further argues, Dana – who will serve as the carrying mother, according to the Petitioners' request – is one of the intended mothers and there is no anticipated severing of the relationship between her and the child after the birth. The State claims that recognizing a surrogacy route under these circumstances may open the door for recognizing the surrogate as the mother of the child for all intents and purposes, which threatens the system of balances established in the Surrogacy Law and might harm in the future the child's best interest and other interests. The State adds that the basic premise of the Surrogacy Law regarding the separation and severance as mentioned were at the basis of the opinion in *New Family* as well as at the basis of the Mor Yossef Committee's recommendations, and thus the Petitioners cannot rely on these sources for supporting their position. The State maintains that even should the term "intended parents" be struck out of the Surrogacy Law for being unconstitutional, this would not assist the Petitioners, because their matter does not fall under the Surrogacy Law's provisions to begin with. Beyond the necessary scope, the State argues that the proposal to change the term "intended parents" in the Surrogacy Law is now under consideration of the relevant bodies in the executive authority in preparation of bringing it before the Knesset. The State believes that completing the work of the implementation team and the legislature's expected consideration of the amending the Surrogacy Law also support a restrained approach from the Court in terms of intervening in the provisions of the Surrogacy Law at this time.

As for the arguments raised about the constitutionality of the Eggs Donation Law, the State maintains that this is a relatively new statute – enacted in 2010

– and thus the Mor Yossef Commission also refrained from directly considering its provisions. The State adds that there should be no intervention in the limit established in section 11, which conditions egg donation upon the recipient's medical need. This condition, according to the State, is worthy, reasonable and proportional and reflects the view that "an egg is not a 'commodity' – it cannot be traded, and considerations of autonomy and free will, in their ordinary sense, do not apply to it." The State emphasizes that the "medical need" is a relevant characteristic of the Eggs Donation Law which is meant to protect the woman's health, to ensure the child's best interest, and to prevent the possibility that the mechanism of eggs donation would be used, for instance, due to the parents' desire to have a "high-quality" child in the genetic sense. Therefore the State believes that should we hold that the arrangement in section 11 of the Law infringements upon any fundamental right, then this infringement meets the requirements of the Limitations Clause and it should not be struck down. The State further argues that the Petitioners' request to require the exceptions committee to consider their matter is contrary to sections 20-22 of the Eggs Donation Law, which limits the discretion of the exceptions committee to limited cases and this is not one of them. The State also argues that accepting this argument would lead to a significant expansion of the exceptions committee's authorities, against the instructions of the law provisions and against the legislature's purpose that explicitly avoided granting the exceptions committee more extensive authorities, though according to the bill such a proposal was before it. The State further maintains that the Attorney General's guideline from 2009 was issued under different circumstances than those arising in this case, and in any event, with the legislation of the Eggs Donation Law a comprehensive legislative response was provided to the issue of the eggs donation, which should not be strayed from. Furthermore the State argues that striking out the words "in a carrying mother" from section 11 of the Eggs Donation Law would not be of assistance to the petitioners and it may create uncertainty as to the possibility of women who received an eggs donation to implant them in a surrogate. Finally, the State claims that this case raises complex precedential issues in the area of fertilization and birth and as such it is best left to the Legislature, who is charged with developing clear rules according to social standards and broad policy considerations.

14. The Knesset, which was joined to the Petition in its amended version, concentrated its response on the constitutional arguments that the Petitioners raise and joined the State's position in noting that these claims were made by the Petitioners in general and without meaningful substantiation; that the issue of fertilization and birth is a sensitive and complex issue that is best regulated by the Legislature; and that providing a singular solution to the Petitioners' plight may threaten the stability of the comprehensive arrangement established in the relevant laws. Like the State, the Knesset, too, believes that there is no place to consider the arguments by the Petitioners in terms of the

Surrogacy Law because the medical procedure they wish to perform does not fall under surrogacy and thus their arguments in this context – even were they to be accepted – to assist them. Furthermore, the Knesset argues that the Court should not currently intervene in the Surrogacy Law's provisions because recommendations as to their amendments are on the Government's agenda in preparation of bringing them before the Knesset.

In the Knesset's approach, the constitutional protection at the base of the right to parenthood goes to the core of the right – that is the ability to bring children into the world – rather than in realizing the right in a particular way. Therefore, the Knesset argues that a healthy woman like Dana, who is able to realize her parenthood by using her own eggs, cannot be viewed as a holder of a constitutional right to receive an eggs donation in order to be pregnant by another woman's eggs. The Knesset adds that although there is no "moral objection" to the route which the Petitioners wish to follow, the concern about striking down section 11 of the Law stems from the mere risk in the Court's intervention in primary legislation in a way that may harm the system of balances between the branches of government in general and the delicate balances involved in the issue of eggs donation in particular. It was also argued that the restriction in section 11 of the Eggs Donation Law does not violate the right to equality, because it creates a reasonable and logical distinction that achieves the purpose of the law that is providing a solution to the recipient woman's fertilization problems. In any event, the Knesset believes that the purpose of the requirement for medical justification established in section 11 is worthy and consistent with other legislative arrangements in the area of fertilization and birth; that this is a relatively limited restriction that requires that the recipient have some medical condition that warrants the use of another woman's eggs in order to have a child (rather than specifically a medical condition that prevents her from becoming pregnant by her own eggs); and that the restriction goes to the fringes of the right to parent rather than its core. The Knesset argues further that the section that authorizes the exceptions committee to exercise the provisions of the Eggs Donation Law is not a "blanket section" but a limited section that accurately defines the scope of the committee's powers. In this contest the Knesset emphasizes that the Eggs Donation Bill originally included a broader exceptions section which was eliminated. In light of all this, the Knesset believes that the order nisi must be revoked and that the petition must be denied.

Discussion

15. The case before us raises human concerns of the highest order, and it again highlights the existing gap between technological advances and the welcome existing medical abilities in the area of fertilization and birth – which enable couples and single people around the world to realize their hearts' desires and

bring children into the world – and between the slow development of the law which trails behind them attempting to establish proper rules for their regulation (on the law's trailing behind scientific advances and changing social perceptions, see in similar context: HCJ 5785/03, *Gadvan v. The State of Israel, The Ministry of Health*, IsrSC 58(1) 29, 34 (2003); HCJ 4077/12, *Jane Doe v. The Ministry of Health* , para. 2 of Justice E. Rubinstein's judgment and paras. 33-32 of Justice D. Barak-Erez's judgment (February 5, 2013) (hereinafter: the *Jane Doe* case); the *New Family* case, p. 459-60; HCJ 566/11, *Magad v. The Ministry of Interior*, para. 4 of Justice E. Arbel's judgment (January 28, 2014) (hereinafter: the *Magad* case); see also and compare CFH 6407/01, *Zahav Channels and Partners v. Tele Event Ltd.*, IsrSC 58(6) 6, 22-28 (2004); CA 9183/09, *The Football Association Premier League Limited v. John Doe*, para. 6 of Justice N. Hendel's judgment (May 13, 2012); LCA 3810/06, *I. Dory and Chicovski Construction and Investments Ltd. v. Goldstein*, IsrSC 62(3) 175, 196 (2007); Dan Shinman, *A Defense Attorney's View of the Reliance Defense*, THE OR BOOK – A COLLECTION OF ESSAYS IN HONOR OF JUSTICE THEODORE OR 507, 510-12 (Aharon Barak, Ron Sokol and Oded Shaham, Eds., 2013.))

From the outset, I will then say that the complex case before us, underscores the need that modern pieces of legislation that wish to comprehensively regulate such central aspects of people's lives such as the issue of fertilization and birth, and that when they establish a blanket criminal prohibition against conduct that is inconsistent with them, also include a built in mechanism that allows the competent authority designated to do so under the arrangement, to examine and approve on a case by case instances that are exceptional and out of the ordinary. This is because reality often surpasses the imagination and the goal to provide a complete, comprehensive and rigid solution in legislation that inherently cannot fully anticipate all the possible variations in the regulated context, may turn positive and law abiding people into criminals, without this serving any public interest and without it advancing the realization of the purpose that stands at the foundation of the discussed statutory arrangement.

16. Liat's desire to bring a child into the world from her own eggs has not diminished even after the difficult fertilization treatments she had gone through for years. Liat wishes, therefore, to take the last step that may enable her, hopefully, to bring a child who would carry her genetic background into the world. This route is using her eggs through their extraction, fertilization and implantation in Dana's body, her partner for about a decade. This is a process that involves a complex medical procedure, which is mostly to take place in the bodies of the partners who desire it. The Respondents confirmed in their arguments that the procedure they wish to perform does not elicit any "moral objection." Still, it is currently prohibited under both the Surrogacy Law and the Eggs Donation Law that even set a criminal sanction to those

violating such prohibition. In other words, the extraction of Liat's eggs, their fertilization and their implantation in Dana's body is caught in the net of the prohibitions included in the above statutes and may implicate all the people involved (including the attending physician) in criminal offense, only because of the broad and extensive language of these provisions and without an actual violation in the case at hand of any interest which these statutes are designed to protect.

Under these circumstances, it is appropriate to grant the Petitioners any of the remedies they seek?

The Surrogacy Law

17. In their amended petition, the Petitioners wished to find a solution within the institution of surrogacy or alternatively through eggs donation. From the reasons detailed below, I believe that the legal discussion ought to center around the Eggs Donation Law, both because it is clearly the piece of legislation that bars the Petitioners from executing their plan, and because the surrogacy path inherently is unsuitable for their matter.

The obstacle facing the Petitioners in terms of surrogacy is twofold: **first**, the Petitioners (either of them and both of them together) do not meet the definition of "intended parents" as established in the Surrogacy Law and thus are not eligible to take this route in Israel. **Second**, it is seriously doubtful whether under the circumstances surrogacy fits their wishes.

The definition established in section 1 of the Surrogacy Law, whereby "intended parents" are: "A woman and a man who are a couple" raises considerable constitutional difficulties, some of which this Court discussed in *New Family* case (see the position of then Justice M. Cheshin, which was joined by most of the members of the extended panel adjudicating that petition.) The Court noted that this definition unjustifiably discriminated against "single" women compared to a man and a woman who are a couple (there, p. 455-56.) And yet, I see no reason to address in further detail the constitutionality of this definition because it seem that currently real steps are being taken in order to change it, including as a result of the criticism over the Law's provisions expressed in the decision given in the *New Family* case (for a critique of the Court's unwillingness to strike down this definition as early as 2002 in *New Family*, see Dafna Haker, *Beyond 'Old Maid' and 'Sex and the City': Singlehood as an Important Option for Women and Its Treatment in Israeli Law*, IYUNEI MISHPAT 28, 903, 941-43 (2005); see also HCJ 1078/10, *Pinkas v. The Board for Approval of Embryo Carrying Agreements* , (June 28, 2010) where the Petitioners withdrew their petition challenging this definition in light of the convening of the Mor Yosef Committee.) As has already been noted, in May 2012 the recommendations of the Mor Yosef Committee, which

was appointed by the Director General of the Ministry of Health, were published. The recommendations include a concrete proposal to change the definition of the term "intended parents" to also include an unmarried woman who has a medical condition that prevents her from carrying a pregnancy. Additionally, the commission recommended establishing another route for surrogacy in Israel, which would afford access to surrogacy to men without female partners as well. As reflected from the State's arguments, the Mor Yosef Committee's recommendations were passed onto an implementation team established for such purposes in the Ministry of Health, and the fruits of the implementation team's labor were recently submitted to the Minister of Health in order to process them into a bill for amending the legislation that would be brought before the Knesset. It should also be noted that the 18th Knesset is also considering the Agreements for Carrying Embryo Bill (Amendment – Intended Parents), 5772-2012 (P/18/4266), which aims to amend the definition of the term "intended parents" to include also "a woman and a woman or a man and a man" (for additional recent developments on this issue see the Memorandum regarding the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child) (Amendment – Definition of Intended Parents and Executing Agreements out of Israel), 5774-2014, which was approved by the Committee of Ministers for Legislative Matters on March 2, 2014). In light of these developments, it seems that to the extent that the Petitioners are faced with obstacles due to the existing definition of "intended parents" in the Surrogacy Law, the Legislature must be allowed to exhaust the legislative processes and we must refrain at this point from judicial intervention in the Surrogacy Law's provisions (on the self-restraint that binds the Court when asked to intervene in ongoing legislative processes, see and compare: CFH 5161/03, *E.S.T Projects and Human Resources Management Ltd. v. The State of Israel*, IsrSC 60(2) 196, 206 (2005); HCJ 761/86, *Miaari v. The Speaker of the Knesset*, IsrSC 42(4) 868, 873-74 (1989)).

18. However, as noted, even had the Surrogacy Law's definition of "intended parents" been amended – whether by legislation or by judicial intervention – I seriously doubt whether the institution of surrogacy is the appropriate pate to execute and realize the process which the Petitioners seek (see: Ruth Zafran, *There Are Also Two Mothers – The Definition of Motherhood for A Child Born to Same-Sex Female Couples*, DIN U'DVARIM 3 351, 366-67 (2008) (hereinafter: Zafarn)). This is because as opposed to the well-known and acceptable path of surrogacy which the Surrogacy Law also lays out according to which the relationship between the surrogate and the child is severed upon birth, in our matter Dana (the "carrying mother") is expected to continue and raise the child alongside Liat (the "intended mother") as she is, as the Petitioners put it, "the other half of the family unit into which the child would be brought." The State and the Knesset emphasized in their arguments that the issue of **severing** the parenting link between the surrogate (as the "carrying

mother") and the child after birth is a central aspect of the arrangements established by the Surrogacy Law. I accept their approach that without this severance it would be incorrect to see the route the Petitioners wish to take as a surrogacy process. Though the Surrogacy Law regulates the exceptional cases where the court may approve the surrogate's withdrawal from the surrogacy agreement into which she had entered, while establishing her status as mother and guardian over the child (see section 13 of the Law,) but these cases are irrelevant to our matter, which to begin with does not fit any of the characteristics of the institution of surrogacy, in light of the Petitioner's declared intentions to raise the child together in the family unit they started.

As I have found that the surrogacy path is not the right path to examine the Petitioners' claims, this means that should my opinion be heard, the Petition ought to be denied in terms of section 1 and 2 of the issued order nisi.

The Eggs Donation Law

19. The Eggs Donation Law creates different obstacles for the Petitioners. Under section 11 of the Law, a woman who has a medical condition that prevents her from becoming pregnant with the eggs in her body or any other medical condition that justifies using the eggs of another woman in order to have a child is entitled to submit a request to receive an eggs donation. The Eggs Donation Law also stipulates that a child born as a result of an egg donation would be the child of the recipient mother for all intents and purposes, and that the donor woman would have none of the authorities granted parents vis-à-vis their children (section 42 of the Law.) Therefore a woman needing an eggs donation is, as a general rule, a woman who cannot become pregnant by her own eggs because of fertility difficulties or a woman who fears passing on a genetic defect to her children (see Zafran, p. 362.) The woman who donates the eggs does not take, as a general rule, any part of raising the child carried by the recipient woman.

In our case, the Petitioners wish to use a "donation" due to a medical condition that the donating woman (Liat) has, rather than the recipient woman (Dana). This is coupled by the fact that they are a couple who wishes to raise together the child whom they bring into the world together, so that it has genetic ties to one of them and biological ties to the other. As we can see, Dana and Liat do not meet the requirements in the Eggs Donation Law and thus the prohibition in section 4(a) of the Eggs Donation Law, which mandates that "no one shall perform the extraction of eggs from a donor […] or the implantation of eggs, unless according to the provisions of this Law" applies to them, along with the criminal sanction set in section 41 of the Law which can be expected by anyone violating the Law's provisions.

The Background for The Eggs Donation Law's Legislation

20. As noted above, the case before us is not the first case where the Ministry of Health was requested to allow a female couple to bring a child into the world via egg donation from one female partner to the other. Indeed, in July 2006, T.Z. and N.Z., a female couple, approached the legal advisor of the Ministry of Health with a request to approve a medical procedure whereby the eggs of one of them (T.Z.) be extracted, fertilized and implanted in the uterus of the other (N.Z.) who has reproductive difficulties (the facts of the case were detailed in FA (Tel Aviv) 60320/07, *T.Z. v. The Attorney General – State Attorney, District of Tel Aviv* (March 4, 2012) (hereinafter: the *T.Z.* case,) where the court discussed a motion to establish the legal motherhood of the egg donor.) The case took place before the legislation of the Eggs Donation Law, and therefore the relevant legislative framework for examining the request was mainly the Fertilization Regulations and regulation 4 there (in its version then) which prohibited extracting eggs from a woman who is not undergoing medical treatment for fertility difficulties. Despite such prohibition, as described in the decision in *T.Z.*, the couple's request was accepted by attorney Hibner-Harel, as following:

> "We do not see any bar for performing the medical procedure mentioned in your letter. The Regulations require that egg be extracted from a woman who is undergoing medical treatment for infertility, however considering that you and your partner are a family unit – I believe it is sufficient that the fertility treatments are a result of a fertility difficulty of both of you, even if it is not the woman from whom the egg is extracted" (there, paras. 3 and 26.)

Therefore, the Ministry of Health has accepted the request from the female couple to extract eggs from T.Z. even though she did not go through fertility treatments because it considered the couple a family unit and thus was satisfied by the fact that one of them had fertility difficulties. As a result of this position of the Ministry of Health, in that case the necessary medical procedure was performed in September 2006 and in June 2007 the minor D.Z. was born. The case received wide publicity (see Zafran, p. 352) and consequently in July 2008 and April 2009 two additional requests were received by the legal advisor of the Ministry of Health from female couples who wished to be permitted to donate egg to one another. In light of the issue's sensitivity it was decided to bring it to then Attorney General M. Mazuz and in a discussion held in the matter on September 6, 2009 the Attorney General decided that "where a donation between a female couple is concerned […] this must not be seen as an act that violates public policy, and the donation must be permitted" (see document dated November 24, 2009, entitled "Discussion Summary – Eggs Donation between Female Partners," Annexure R/4 of the State's response dated November 12, 2012.) Still, and given that regulation 4 of the Fertilization Regulations establishes an

exclusive procedure for extracting eggs, it was decided that it was impossible to permit extracting egg from a woman who does not meet the requirements of the regulation – that is, that is not under medical treatment for fertility difficulties. The Attorney General added that the current legal situation is unsatisfactory and that there are additional circumstances that would justify eggs donation that are out of the regulation's scope. The Attorney General also noted that the Eggs Donation Bill, which was already being contemplated, must be advanced.

21. Prior to the legislation of the Eggs Donation Law, then, at least one case of an egg donation between women partners was permitted, and this was since the Ministry of Health considering the couple a family unit that merited accepting their request in light of the circumstances of their shared lives. In addition the Attorney General noted that such donation must not be seen as an infringement of the public policy, and called upon the legislature to make an effort to advance the Eggs Donation Bill and through it resolve such cases as well. And indeed, after the Eggs Donation Bill 5767-2007 had passed in the Knesset at first reading, the Knesset's Labor, Welfare and Health Committee took its time between 2008-2010 and poured over different proposed languages for the provisions. The Bill included, among others, different conditions which only when they are met it was possible to receive an eggs donation. They included presenting a "medical need" by the recipient; expanding the circle of donors to include also "volunteer donors" not receiving fertility treatments; and establishing the exceptions committee authorized to approve donations even if certain conditions detailed in the law were not met. On the latter, section 18 of the Bill stipulates:

> "Approval in Exceptional Cases:
>
> 18. When any condition of the conditions for approving the extraction of eggs, approving the allocation of eggs or approving the implantation of eggs under sections 12, 14 or 16, respectively, are not met but the supervising physician believes there are exceptional and unique circumstances that merit the approval even without that particular condition, the physician may approach the exceptions committee with a request to secure such approval."

And section 21 of the Bill, which addresses the exceptions committee's authorities and the scope of its discretion, instructs generally as follows:

> "Approval by the Exceptions Committee
>
> 21. […]

> (e) The exceptions committee may approve the extraction of eggs, allocation of eggs or implantation of eggs, per the request of a supervising physician under section 18, should it believe that under the circumstances there are exceptional and unique reasons to justify doing so."

The explanatory notes to the Bill addressed these sections and noted that they were designed to allow the exceptions committee to consider an eggs donation even with the different conditions detailed in the law are not met "**in cases that justify doing so and that are impossible to anticipate in advance, and without this requiring an amendment to the law**." The Ministry of Health's legal advisor, Adv. M. Hibner-Harel had even explained the need for sections 18 and 21(e) above to the members of the sub-committee that was convened in order to supervise the Bill's advancement, saying that:

> "[…] I would like there to be some section for an exit strategy. There are things in life that I don't anticipate today. I would like to qualify this exit section. I'm not here to climb mountains or to start revolutions, but I need a section because of the problems I see in the course of my position, because of problems that we did not anticipate in the legislation and then I have do diverge from the law and from the courts notes, but we do it because it must be done" (see minutes of meeting Labor, Welfare and Health Sub-Committee for Supervising the Eggs Donation Bill, 5769-2008, dated November 3, 2008, p. 47.)

Some of the members of the sub-committee expressed their concern that these sections would make circumventing the other conditions in the law possible, and after discussing the necessity of the above "basket sections" the mentioned sub-committee members decided to remove them from the Bill noting that "this could be left to the courts." This followed comments by Rabbi Dr. Mordechai Halperin, representative of the Ministry of Health's Bioethics Committee, who told the committee members that:

> "It is better to remove section 18 and leave it to the court […] The court permits things that the law prohibits. Not just the Supreme Court, but also the District Court. There are many examples. When there is a real need it finds the way, even if it is explicitly in violation of the law" (there, p. 50-51.)

And in the exchange between the sub-committee chair, Member of Knesset A. Eldad and Rabbi Halperin, it was also said:

> "Chair Aryeh Eldad: The court cannot act in violation of the law. Maybe we should add here a basket provision that authorizes the court to act as an exception of an exception.
>
> […]
>
> Mordechai Halperin: But this does not to be written. The court does this anyway, regardless of a basket section. So we do not need it." (There, p. 49.)

22. This puzzling and mistaken reasoning is that lead to the removal of the said "basket" sections from the Bill and as a result the Eggs Donation Law, which was passed in 2010, was left without a flexible route to allow considering exceptions from the law's requirements in the unique cases that may not be anticipated in advance, including, for instance, a case such as the one before us where the recipient has no "medical need" for the eggs donation but there are other reasons that justify permitting the donation. The language of the law in the version that passed allows the exceptions committee limited authority that was restricted only to the cases detailed in section 20(a) of the law and only when the conditions detailed in section 22 of the law are met for each of those instances. The Petitioners' case is not among those detailed there and thus they cannot find a solution in turning to the exceptions committee.

Do the law's provisions in their current state violate the constitutional rights of the Petitioners to an extent that merits judicial intervention?

The Eggs Donation Law's Violation of Constitutional Rights

23. Since the legislation of Basic Law: Human Dignity and Liberty in 1992, Israeli law had identified a string of basic rights from the right to dignity, including: the right to equality, to autonomy, to family life, to parenting and to free expression. Do the provisions of the Eggs Donation Law infringe upon the Petitioners' basic right to dignity and its derivative rights? This is the first question that must be examined in order to exercise judicial review over the law's constitutionality. To the extent that we find the answer to be in the affirmative, we must continue and examine whether this infringement meets the requirements of the Limitations Clause of section 8 of Basic Law: Human Dignity and Liberty, and which outlines the scope of protection granted to these basic rights, as relative rights. Finally, to the extent that we may find the infringement by the Eggs Donation Law upon the Petitioners' basic rights to violate the Limitations Clause the consequences of this unconstitutionality must explored, along with ways to cure it (for the three step constitutional analysis and the relativity of constitutional rights, see HCJ 6427/02, *The Movement for Quality Government in Israel v. The Knesset*, IsrSC 61(1) 619, 669-670 (2006); HCJ 7052/03, *Adalla – Legal Center for the Rights of the*

Arab Minority in Israel v. The Minister of Interior, IsrSC 61(2) 202, 281-82 (2006) (hereinafter: the *Adalla* case); HCJ 10662/04, *Hassan v. the National Insurance Institute of Israel*, para. 24 of President D. Beinisch's judgment (February 28, 2012) (hereinafter: the *Hassan* case); HCJ 7146/12, *Adam v. The Knesset*, paras. 68-69 of Justice E. Arbel's judgment (September 16, 2013); Aharon Barak, PROPORTIONALITY IN LAW – THE INFRINGEMENT OF A CONSTITUTIONAL RIGHT AND ITS LIMITS, 51-53, 56-57 (2010) (hereinafter: Barak, PROPORTIONALITY)).

24. The Eggs Donation Law prohibits, as discussed, the Petitioners by criminal sanctions from performing egg extraction from Liat's body and implant that same egg in Dana's uterus after it has been fertilized. Does this amount to a violation of the Petitioners' constitutional rights?

The right to autonomy which encompasses one's right over their body is at the "hard core" of the constitutional right to dignity (see CLA 1412/94, *The Hadassah Medical Organization Ein Kerem v. Gilad*, IsrSC 49(2) 516, 525 (1995); CA 2781/93, *Daaka v. "Carmel" Hospital, Haifa*, IsrSC 53(4) 526, 571 (1999) (hereinafter: the *Daaka* case); CA 10064/02, *"Migdal" Insurance Company Ltd. v. Abu Hana*, 60(3) 13, 48 (2005); CA 4576/08, *Ben-Zvi v. Hiss*, para. 25 of Deputy President E. Rivlin's judgment (July 7, 2011); CA 10085/08, *Tnuvah – Co-operational Center v. Estate of Raabi*, para. 33 (December 4, 2011); CA 1303/09, *Kadosh v. Bikur Holim Hospital*, para. 31 (March 5, 2012.)) So, for instance, in *Daaka* it was decided that the basic right to autonomy over one's body means that the patient's informed consent is necessary in order to perform any medical treatment on them, and as Justice T. Or wrote there:

> "This right of a person to determine their life and fate holds within it all the central aspects of their life – where they may live; what may be their occupation; who they may live with; what they may believe. It is central to the existence of each and every individual in society. It expresses the recognition of each and every individual's value as a world unto themselves. It is essential to each individual's self-determination in the sense that the entirety of our choices defines our personality and our life […]
>
> An individual's right to autonomy is not exhausted in this narrow sense, of the possibility to choose. It also includes another aspect – a physical one – of the right to autonomy which goes to one's right to be left alone […] This right means, among others, that every person must be free of intervention in their body without their consent" (there, p. 570-71.)

Justice H. Ben-Ito discussed the autonomy a woman has over her body in terms of intimate decisions involving reproduction and birth, in CA 413/80, *Jane Dow v. John Doe*, IsrSC 35(3) 57, 81 (1981), as follows:

> "Impregnation, pregnancy and birth are intimate events, which are wholly within the private sphere; the State cannot intervene in this area unless there are weighty considerations stemming from the need to protect an individual right or a serious public interest" (and see also CA 1326/09, *Hamer v. Amit*, para. 71 of Deputy President E. Rivlin's judgment (May 28, 2012.)

Regulating the area of eggs donation in legislation that establishes what may or may not be done with a woman's eggs, therefore, on its face infringes a woman's autonomy to determine what may be done with her body. From the donor's perspective, this is an intervention in her ability to realize her wishes to donate an egg to another woman. From the recipient's perspective this is an intervention in her ability to receive in her uterus a fertilized egg and to carry the resulting pregnancy. The law infringes, then, upon the liberty of these two women to choose how they lead their lives free of any external intervention in decisions involving their bodies (see Meir Shamgar, *Issues of fertilization and Birth*, HAPRACLIT 39 21, 27, 31-32 (1989)). However, one's autonomy over their body and the liberty to make decisions involving the body are not absolute rights, and as any other right they must be balanced against conflicting rights or limited in some instances. Therefore, as to the extent that infringing upon the Petitioners' autonomy is concerned, it is necessary to go on and examine whether this infringement meets the requirements of the Limitations Clause.

25. An additional right is infringed under the circumstances and it is also a derivative of the constitutional right to dignity. It is the Petitioners' right to a family life and to designing their family unit as they choose (see CA 5587/93, *Nahmani v. Nahmani*, IsrSC 49(1) 485, 499 (1995); CA 7155/96, *John Doe v. The Attorney General*, IsrSC 51(1) 160, 175 (1997); the *Adalla* case p. 296, 400, 465, 474, 496-97, 523; HCJ 466/07, *MK Zehava Galon – Meretz-Yahad v. The Attorney General*, para. 10 of Justice E. Rubinstein's judgment (January 11, 2012); Yaniv Ron-El, *The Limits of Fertility Freedom from a Liberal Perspective: the Case of Selecting the Child's Sex*, IYUNEI MISHPAT 32 391, 451 (2010) (hereinafter: Ron-El)). Justice A. Procaccia discussed the right to family life in HCJ 7444/03, *Dakka v. The Minister of Interior*, (February 22, 2010) saying:

> "One's right to family is one of the foundations of human existence. Its realization is required for fulfillment and purpose in life. It is a condition to one's self-realization and their ability to tie their life to their partner and to their children in true

> partnership of fate. It reflects the essence of one's being and the realization of their heart's desires. The right to family is located at the top of the list of human rights. Taking away from this right is possible only where it conflicts an opposing value of special force and importance" (there, para. 15.)

The Petitioners wish to have a child together and to expand their family unit. Such a meaningful decision by a couple that goes to having children expresses in full force not only the Petitioners right to autonomy but also their right to family life. In this case the right to family life encompasses an additional important right, which is the right to parenthood (see CA 451/88, *Does v. The State of Israel*, IsrSC 44(1) 330, 337 (1990); CFH 2401/95, *Nahmani v. Nahmani*, IsrSC 50(4) 661, 719 (1996) (hereinafter: the *Nahmani* case); HCJ 2245/06, *Dovrin v. Israel Prison Service*, para. 12 (June 13, 2006); The *Jane Doe* case, paras 26-27 of Justice E. Rubinstein's judgment; The *Magad* case, para. 41 of Deputy President M. Naor's judgment; Pinhas Shifman FAMILY LAW IN ISRAEL vol. 2 139 (1989); Yossi Green IN VITRO FERTILIZATION FROM A CONSENT PERSPECTIVE 66 (1995) (hereinafter: Green.))

There are those who consider the right to parenthood to be the meaning of life, but even if this approach is not universally accepted, it seems the right to parenthood cannot be overstated (see Vardit Rabitzki, *The Right to Parenthood in the Age of Technological Fertilization*, DILEMMAS IN MEDICAL ETHICS 137, 145-147 (Rephael Cohen-Almagor, ed. 2002) (hereinafter: Rabitzki); on the "reproductive freedom" included within the right to parenthood, see Shulamit Almog and Ariel Bendor, *Reproductive Freedom as a Basic Right*, A DIFFERENT KIND OF PREGNANCY 115, 116-17 (Shulamit Almog and Avinoam Ben Zeev, eds. 1996) (hereinafter: Almog and Bendor); the right to parenthood is also mentioned in section 16 of the United Nations' Universal Declaration of Human Rights from 1948 ("Men and women of full age, without any limitations due to race, nationality or religion, have the right to marry and to found a family") as well as in other declarations or treaties, see: Almog and Bendor, p. 117; Rabitzki, p. 137-38; the *Adalla* case p. 470-73.) Indeed, the desire for parenthood follows humans since the dawn of history and scholar P. Shifman notes that while in the past the ability to bring children into the world was in the hands of fate, one of the characteristics of the modern age is that fulfilling such desire is subject to a large extent to one's choice and free will (see P. Shifman, *On the New Family: Notes to Start A Discussion*, IYUNEI MISHPAT 28 643, 661 (2005)).

Professor D. Barak-Erez discussed the statues of the right to parenthood, noting:

> "The right to parenthood is an independent right, rather than a reflection of autonomy of free will. Realizing the option of

> parenthood is not just a possible way of life, but it is also rooted in human existence. Some may find it to be a cure for loneliness; others may use it to cope with awareness of death […] The choice of parenthood is not just a choice about a way of life – it has weight beyond this in human existence. It expresses a fundamental existential need. In addition, the decision to become a parent also solidifies self-realization, particularly in modern society that emphasizes self-realization as a value. However the right to parenthood does not only stem from self-realization. The right to life is an independent fundamental right, rather than merely a derivative of the autonomy of will, and so is the right to parenthood." (Daphne Barak-Erez, *On Symmetry and Neutrality: Following the Nahmani cases*, IYUNEI MISHPAT 20 197, 199-200 (1996)).

In her emotional arguments before us, Liat expressed her desire to be a parent and to have a child who carries her genetic code, as well as the grave pain and frustration she experiences after years of unsuccessful fertilization treatments. All this led Liat to conclude that she will likely be unable to fulfill her wishes unless implanting her fertilized eggs in the uterus of another woman who would carry the pregnancy would become possible. The natural choice for this is of course her partner, Dana, who expressed her wishes to take part in the process as someone interested in expanding their common family unit in this way. In this sense the obstacles mounted by the Eggs Donation Law infringe Liat's right to parenthood, whereas it seems this is a different level of infringement in terms of Dana's right to parenthood.

26. Indeed, the case law and literature discussed the facets of the right to parenthood and have distinguished between the core of the right – such as the "practical ability to bring children into the world" – and facets that are at the periphery of the right – such as "one's ability to choose **how** to exercise their natural right" (see the *Jane Doe* case, paras. 27-32 of Justice E. Rubinstein's judgment and para. 11 of Justice D. Barak-Erez's judgment; see also Ruth Zafran, *The Range of Legitimacy in Choosing the Genetic Characteristics of the Child by the Parents – Choosing the Sex of the Child for Social Reasons as a Case Study*" MISHPAT V'ASAKIM 6 451, 460-61 (2007); Green, p. 68-69; Almog and Bendor, p. 118.) Categorizing each case along this distinction influences the force of the infringed right and the way the right to parenthood must be balanced against other rights and interests that relate to, for instance, the potential child's best interest, the public interest, and the different requirements by the bodies participating in the reproductive process such as sperm donors, egg donors, doctors and treating institutions (see Rabitzki, p. 151-59). In this context, for example, in the *Jane Doe* case it was held that a woman's wishes to bring children into the world who would all have the same

genetic father by once more using the sperm donation of the same donor she used for her first child is not in the core of the right to parenthood and it must be balanced against the refusal of that same anonymous donor for additional uses of his sperm and against his right not to be a parent.

Therefore, the arrangement established in Eggs Donation Law which restricts extraction and implantation of eggs and prohibits through criminal prohibition performing these acts unless they meet the requirements in the law, infringes the Petitioners' constitutional rights to autonomy, family life and parenting. As a result we must continue and examine whether this infringement meets the requirements of the Limitations Clause in section 8 of Basic Law: Human Dignity and Liberty.

The Eggs Donations Law and the Requirements of the Limitations Clause

27. The Limitations Clause in section 8 of Basic Law: Human Dignity and Liberty sets four conjunctive requirements that must be met in order to justify infringing upon a constitutional right that is protected by the Basic Law. The infringement must be done through legislation (or by explicit authorization in legislation); the law must fit the values of the State of Israel; it must be for a worthy purpose ; and the infringement of the right must be to extent not greater than necessary. In our case, there is no dispute that the infringement of the Petitioners' rights is done through legislation – the Eggs Donation Law, and to the extent that this law is concerned the Petitioners have not argued in terms of its fit with the values of the State of Israel. It is possible, then, to focus the discussion in terms of the Limitations Clause on the question of the worthiness of the law's purpose and the proportionality of its arrangements.

Worthy Purpose

28. Section 1 of the law states:

> "The purpose of this law is to regulate eggs donation for the purposes of reproduction and birth, while achieving maximum protection for the dignity, rights and health of the donor woman and the recipient woman, as well as to regulate the use of eggs for research purposes, all while protecting women."

In stating so the law informs that it is designed to regulate the use of technology for extraction and implantation of eggs primarily for the purposes of reproduction, but also for the purposes of research. This purpose is of course worthy and welcome. It advances an important social causes and facilitates the realization of many women's basic, natural and understandable desire for a child while using advance technologies developed in this field and that allow overcoming medical conditions and bringing children into the

world (see minutes from meeting of the 17th Knesset's Labor, Welfare and Health Committee, dated February 18, 2008, p. 5.) Still, it is important to remember that the legislative arrangement regarding eggs donation, like other legislative arrangements (see and compare: the Organ Implantation Law, 5768-2008) trails behind the technological advances that were achieved and have been implemented in medicine for many years before the law was legislated. The need for an arrangement was born, therefore, in order to establish what was and was not to be permitted in this complex and sensitive area in order for it not to remain open for exploitation by different bodies. This explains the emphasis at the end of section 1 that the law was meant to "regulate eggs donation for the purposes of reproduction and birth, **while achieving maximum protection for the dignity, rights and health of the donor woman and the recipient woman** (emphasis added.)"

Examining the purpose of the law must focus then on the rationales behind its various restrictions and prohibitions. The premise that must guide us in this examination is similar in its essence to the premise that then Justice M. Cheshin outlined in the *New Family* case when he discussed the Surrogacy Law:

> "A main aspect of this human need – the need to exist and to survive – in a woman's desire, a desire to the end, for a fruit of her womb, a child that is a flesh of her flesh. Previously, man knew only one way to realize this wish, and this is how the family unit was created. Currently, when technology may assist people where nature fails it, a material rationale is required in order to bar a woman from using this technology" (there, p. 447.)

In other words, the force of the reasons and rationales necessary to limit birth with the assistance of technology must essentially be on par with the force of the reasons and rationales required to limit natural reproduction (see Rabitzki, p. 149-51.)

Reviewing the restrictions and prohibitions established in the Eggs Donation Law indicates that they were meant, generally, to ensure the protection of the health of women involved in the process as well as the health of the child. The law was also intended to prevent trade in eggs and exploitation of women (see, for instance, section 12 and 14 of the Eggs Donation Law which set age limits for a "volunteer donor", restrictions on the number of eggs that may be extracted each time and on the frequency of the extraction process; see also the prohibition on trading and mediations eggs established in section 8 and 9 of the law.) The restriction in section 11 whereby the eligibility for an eggs donation under the law is contingent upon the recipient being "unable due to a medical condition to become pregnant with the eggs in her body, or has

another medical problem justifying using another woman's eggs in order to have a child" was designed to prevent using fertilization and implantation technology for purposes which the legislature considers, and rightly so, as antisocial. This was discussed by scholar Ruth Zafran who noted that the condition in terms of the necessary medical condition of the recipient was meant to prevent using the eggs for eugenics reasons – that is, experimenting with "improving" the genes of the offspring (see Zafran, p. 362.) The resulting conclusion is that the arrangement established by the Legislature in the Eggs Donation Law was for a worthy purpose. Therefore we must further examine whether the means taken by the Legislature to achieve the law's purposes are proportional.

The Proportionality of the Arrangement in the Eggs Donation Law.

29. The proportionality issue may be examined under three sub tests established by the case law. They are: the existence of a rational link between the chosen means and the desired end; a lack of a least restrictive alternative; and proportionality between the benefit achieved by the statute and its different arrangements and the harm caused by its virtue (see, out of many: HCJ 1715/97, *Israel Investment Managers Guild v. The Minister of Finance*, IsrSC 51(4) 367, 385-86 (1997); HCJ 3648/97, *Stamka v. The Minister of Interior*, IsrSC 53(2) 728, 776 (1999) (hereinafter: the *Stamka* case); HCJ 1661/05, *Gaza Beach Regional Council v. Knesset of Israel*, IsrSC 59(2) 481, 549-550 (2005) and the many sources there; HCJ 2442/11, *Stanger v. Speaker of the Knesset*, paras. 41-42 of President A. Grunis' judgment (June 26, 2013); Barak, Proportionality, p. 169-72.)

The rational connection test is designed to detect the existence of the probability that the means chosen by the statutes would indeed lead to achieving the end for which it was enacted. Under this test it is not necessary that the statute ensures fully achieving that end, but it must point to a real link to accomplishing it. In my view, regulating the issue of eggs donation in Israel while imposing different limitations and prohibitions on the possibility to donate and receive eggs, including a criminal prohibition designed to deter and enforce these restrictions, may lead to achieving the purposes of the statute, as we described them above. The fact that as a result of a statute's broad language the possibility of an eggs donation is prohibited even in cases that the law did not attempt to prevent, such as this case, cannot in and of itself sever the rational link between the prohibition and the purpose the law was meant to achieve (Barak, Proportionality, p. 376-78, 411-12.) The matter of the arrangement's proportionality in light of the fact that its restrictions catch in their net cases where there is no concern for harming any of the interests the law wishes to protect, should therefore be explored under the second sub test which poses the question whether there is an alternative means to achieving the law's purpose in a manner that is less restrictive.

30. Indeed, the tight knit net the law casts caught even the Petitioning couple's heart desire, though it is undisputed that it carries no moral flaws and though it is universally clear that it does not harm any other individual or any of the social and public interests which the law wishes to protect. The Respondents raised many good reasons to justify the conditions and restrictions set by the Eggs Donation Law, but they cannot point even to one meaningful reason to justify preventing the Petitioners from going ahead with the extraction, fertilization and implantation procedure they wish to perform, apart from the fact that the law – due to is broad and expansive language – prohibits doing so. It should be emphasized that since we are concerned with the elimination of the Petitioners' basic rights, the prohibition in the law is that which requires justification (see *New Family*, p. 444-45, 448-49) and given the force of the infringed rights and their nature as "negative rights" whose exercise does not impose on the state any duties (see Ravitzki, p. 141; Ron-El, p. 445-448), it seem the strength of the justification for the expansive means chosen, must meet a higher bar.

31. I am afraid that the fact that the Eggs Donation Law (as opposed to its Bill) does not authorize the exceptions committee it forms the general power to examine exceptional and unusual cases leads to the conclusion that the means established by the arrangements included in the law to realize the worthy purposes for which it was enacted, are disproportional and rigid and may cause – as was the case here – arbitrary harm to women whose right to use relevant assisted reproductive technology in order to have a child the law never intended to infringe.

The need to set an exceptions mechanism to allow the examination of particular cases that were impossible to anticipate in advance, particularly where the Legislature established an extensive arrangement that infringes upon basic rights, was discussed by this Court, among others, when analyzing the second sub test of the proportionality requirement in the *Adalla* case (and see also: HCJ 2150/07, *Head of Beit Sirah Village Council v. The Minister of Defense*, para. 5 of Justice E. E. Levi judgment (December 29, 2009); HCJ 10533/04, *Weis v. The Minister of Interior*, para. 43 (June 28, 2011); the *Hassan* case, para. 68 of President D. Beinisch's judgment.) And in the words of President A. Barak:

> "The exceptions mechanism may reduce the law's infringement of rights, without compromising the achievement of the worthy purpose. Therefore, creating such a mechanism is an obvious outcome of the second sub test which addresses identifying a less restrictive alternative. Indeed, just as it is the duty of any administrative authority to exercise judgment on a case by case basis and to recognize the exceptions to the established rules and instructions when circumstances call for

> doing so […] so is it the duty of the Legislature, when setting an arrangement whose outcome is broad infringement of rights, to consider the establishment of an exceptions mechanism that would allow resolution in special cases when the circumstances justify it." (The *Adalla* case, p. 329; see also Barak, Proportionality, p. 407-09.)

Although President A. Barak remained in the minority in *Adalla*, but it seems that on this particular issue, Deputy President (Ret.) M. Cheshin was of the same opinion as Barak (there, p. 455.) Then Justice M. Cheshin's words as to the exceptions mechanism's necessity from a different case are apt here as well:

> "A policy lacking exceptions is like an engine without oil for lubrication. Just as the latter will burn out soon and stop operating, so is the fate of the policy." (The *Stamka* case, p. 794.)

32. The Eggs Donation Law does include a mechanism to examine exceptions, but as was explained in detail above, the authority of this committee is limited and restricted to only four sets of circumstances, as detailed in sections 20 and 22 of the law. In my view this limited and narrow mechanism is insufficient because it does not at all resolve the unjustified infringement on the basic rights of women – such as the Petitioners or others – in those cases where they cannot all be anticipated in advance and do not fall under one of these four sets of circumstances.

To summarize so far – the law in its current version infringes disproportionately upon the rights of the Petitioners and other women whose circumstances are unusual and warrant resolution, and thus because of the limited and unsatisfactory mechanism the law sets to examine and approve exceptional cases. In the absence of a more flexible mechanism to explore exceptional cases that may not be anticipated in advance, the law is flawed for a lack of a proportional means, which is less restrictive on basic rights.

33. In light of this conclusion, there is no longer any need to discuss the third sub test – the narrow proportionality test. In this context I will note, beyond the necessary scope, that expanding the circle of donors, preventing the trade in eggs, and protecting the health of donating and receiving women certainly are important purposes that highly benefit society. Still, the harm incidentally caused to the Petitioners and other women like them whose right to form their family unit and exercise the most meaningful choices in their life are compromised by the law, cannot be justified. This is particularly in the absence of a social or public interest whose protection justifies such infringement, and given the fact that realizing their rights to autonomy, to

family life and to parenthood as they wish to does not infringe in any way upon the rights of any other person. The fact that in this case Liat has no other actual way to have a child to bear her genetic code – other than the method the couple wishes to pursue – only serves to emphasize and exacerbate the unjustified harm to them (compare with the *Jane Doe* case, para. 6 of Justice D. Barak-Erez's judgment.) Indeed the biological genetic link between a parent and child is not the end all be all. Of no less significance (and often of more) "ingredient" to building and shaping the relationship between parents and children is the emotional connection and commitment to the child's well-being and upbringing (see and compare CFH 6211/13, *The Attorney General – The Ministry of Welfare and Social Services v. Jane Doe*, paras. 27-28 of Deputy President M. Naor judgment (December 23, 2013); the *Magad* case, para. 14 of Justice S. Joubran's judgment.) Still, and as already noted, there must be real and meaningful justification to denying a person the possibility to exercise the right to parenthood in a way that includes blood ties between them and the child. In our case it has not been argued, and in any event, it has not been proven that the added value achieved through the blanket prohibition in the Eggs Donation Law is greater than benefit achieved had the law included a mechanism for individual examination of exceptional cases. It cannot be denied – tight prohibitions that have defined in general and all-encompassing provisions present advantages. They facilitate efficiency and efficacy in enforcing the law. However, the main disadvantage of general and extensive language of statutory provisions is the inability to anticipate in advance all those situations that would be caught in the wide and tight net of the prohibition. Therefore, once the legislature chose to cast this tight knit net it must at the same time also establish what Justice M. Cheshin called in *Stamka* "oil for lubrication." In other words, there must be a flexible mechanism that would allow resolution in exceptional cases that justify not applying the prohibition in the law. In this case, and as we are concerned with the Eggs Donations Law, which addresses one of the most sensitive and meaningful issues in human society, the importance of such flexible mechanism that would allow the exceptions committee to perform its function in an appropriate manner cannot be overrated. Sadly, such a mechanism did not find its way into the Eggs Donation Law.

To complete the picture, I will note that in later stages of the adjudication before us, and in an honest effort to find a practical solution, among others, to the Petitioners' problem, the State presented the "Taking of Semen, Eggs or Fertilized Eggs out of Israel" protocol accepted in July 2013. This protocol somewhat opens the door in the strict and extensive prohibition against implanting eggs in violation of the law as established by the Legislature in the Egg Donations Law. Under the protocol it may have been possible, seemingly, to permit the Petitioners to take eggs extracted from Liat's body out from Israel in order for them to be implanted in Dana's uterus abroad. Only this partial solution is not a real response to the constitutional difficulties created

by the law. It does not permit the implantation to be done in Israel. It places a serious financial burden on the petitioners because of the requirement to perform the implantation overseas and all that may be involved in this, and according to the Petitioners, it also reduced the prospects of the procedure's success. Therefore, following this protocol is of some solution to the Petitioners' concrete plight, but it is only a partial fix which forces the Petitioners and others in their situation to leave for overseas in order to find a remedy for their troubles there, without any real justification.

34. Therefore, the legislative arrangement in the Eggs Donations Law includes conditions to perform the extraction and implantation of eggs in Israel and a blanket prohibition against performing these procedures where such conditions are not met. This is without granting the exceptions committee the sufficiently flexible authority to consider individual exceptional cases that justify diverging from the provisions of the law. This arrangement is unconstitutional because it infringes the basic rights of the Petitioners in a way that is consistent with the requirements of the Limitations Clause. The criminal prohibition established in section 41 of the Eggs Donation Law exacerbates the law's violation of these rights because it paints the human desire to have a child in criminal colors, and this without any obvious reason or justification.

In light of all this, we must consider the outcomes of unconstitutionality – that is the question of relief.

The Outcomes of Unconstitutionality

35. Finding that the Eggs Donation Law unconstitutionally violates the Petitioners' basic rights and those of others like them, does not necessarily mean that the law must be struck down. When we come to decide which constitutional relief is appropriate, we must strive as much as possible for a fit between that relief and the harm to be cured. As professor A. Barak wrote in his book about interpretation in the law "the nature of the relief is related to the nature of the harm and the reason it is unconstitutional" (Aharon Barak, INTERPRETATION IN THE LAW, Vol. 3 – Constitutional Interpretation, 732, 767-68 (1994) (hereinafter: Barak, Interpretation in the Law.) Once we have held that arrangements established in the Eggs Donation Law are for a worthy purpose but infringe upon the Petitioners' rights to an extent more than is necessary, we must continue and examine whether there are appropriate means to relieve the infringement or mitigate it without the Court having to strike down the law or any part of it (as to the careful manner in which the Court is required to act before striking down a statute, see HCJ 7111/95, *The Center for Local Government v. The Knesset*, IsrSC 50(3) 485, 496 (1996); HCJ 2605/05, *The Academic Center for Law and Business v. Minister of Finance*, IsrSC 63(2) 545, 592-94 (2009.)) In our case, there is no reason to

strike down the entire Eggs Donation Law, or even to strike down section 4(a) of the law which prohibits performing extraction and implantation of eggs in violation of the law, because such a move would create a significant "statutory void" which would leave the area of eggs donation unregulated and would cause more harm than good. Striking down section 11 of the Eggs Donation Law, all of it or part of it, would also fail to achieve the outcome desired by the Petitioners because that would mean removing an essential and justified requirement, generally, in terms of the necessity of a recipient's woman medical need as a prerequisite for receiving an eggs donation without resolving the problem of many others who face additional rigid restrictions set by the law. Under the circumstances, I believe that the appropriate solution can be found in the mechanism of the exceptions committee. Were my opinion be heard, **we shall read into the Eggs Donation Law** an additional sub section, that would follow section 20(a)(4), whereby the exceptions committee would be authorized to approve an eggs donation "**where it believes that under the circumstances there are special and exceptional circumstances that justify doing so**."

36. This remedy, of "reading into the statute" is well known in the Israeli and foreign case law and literature, and it aims to read into the unconstitutional statutory arrangement provisions that would remove the flaw and alleviate the need for striking down the statute (see Barak, Interpretation in the Law, p. 763.) So, for instance, this remedy is designed to address situations where the statutory provision grants benefits to members of one group, but does not grant that same benefit to members of a different group that is entitled to the same rights. In this situation the blanket striking down of the benefit due to its infringement upon equality would not be the appropriate remedy, because this would undermine the worthy purpose of the statute while harming the members of the group that lawfully enjoy the existing benefit. Therefore courts in the United States and in Canada have developed an appropriate remedy that would expand the scope of the existing arrangement and thus remove the unconstitutional harm it includes, while preserving the statute and protecting the purposes it is meant to achieve (for a comprehensive comparative review see: Barak, Interpretation in the Law, p. 759-65; Imanuel Gross, *Constitutional Remedies*, MISHPAT U'MIMSHAL 4 433, 458-59 (1998) (hereinafter: Gross); Igal Marzel, *Suspending Invalidity Declaration*, MISHPAT U'MIMSHAL 9 39, 62-63 (2005)). In that way, American courts have recognized the possibility of "extension" – the possibility to extend the scope of the statute where appropriate to do so as a constitutional remedy that is preferable to striking down the statute (see *Welsh v. United States*, 398 U.S. 333, 361 (1970), where Justice Harlen, in a dissenting opinion, first proposed the doctrine which became precedent later in *Califano v. Westcott*, 443 U.S. 76, 79 (1979); see also Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979); Evan H. Caminker, *A Norm-Based Remedial Model for Under*

Inclusive Statutes, 95 YALE L. J. 1185 (1986)). The Canadian Supreme Court similarly developed the Reading In doctrine which means reading provisions into the statute that negate its unconstitutionality (see *Schachter v. Canada*, [1992] 2 S.C.R. 679; see also *Vriend v. Alberta* [1998] 1 S.C.R. 493; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers* [2013] S.C.C. 62). The Canadian Court has held, however, that the court would not opt for the remedy of reading into the arrangement while intervening in the statute's framework in every case, and that in order to read in the court must consider, among others, the scope of the necessary extension, whether the extension is simple to execute, the budgetary cost of extension and whether it preserves the basic fabric of the statute (see *Schachter*, p. 19-21.)

37. The reading in doctrine has been absorbed into Israeli law. It was first raised in HCJ 721/94, *El Al Israel Airlines v. Danilovitz*, IsrSC 48(5) 749, 767-69 (1994), where the Court noted, though it was unnecessary for purposes of the decision, that this remedy should have been used on the constitutional level because it advances the purpose underlying the statutory arrangement and alleviates the need to strike down the legislation (id., p. 769.) The case in which this Court found it appropriate to apply the doctrine was HCJ 8300/02, *Nasser v. The Government of Israel* (May 22, 2012,) where the Court considered a mechanism of tax benefits established by section 11 (b) of the Income Tax Ordinance [New Version], which detailed a particular list of localities whose residents were entitled to reductions in income tax payments. This list of localities, for the most part, was not defined by any particular criteria and the entitlement for the tax benefit was granted through explicitly noting the names of the localities in the said section. Once it held that the list of localities detailed in section 11(b) of the Ordinance was discriminatory, the Court ordered that the appropriate constitutional remedy would be granting the same benefits to the residents of three Arab and Druze localities that were discriminated against in comparison to the Jewish residents in the nearby localities. The Court then read into the Ordinance the names of the additional localities noting that this move is not inconsistent with the exceptions established in comparative law (see there, paras. 57-59 of President (Ret.) D. Beinisch's judgment; for other cases where the possible use of the Reading In doctrine was discussed, see HCJ 3809/08, *The Association of Civil Rights in Israel v. The Israel Police*, para. 15 of President (Ret.) D. Beinisch's judgment (May 28, 2012); HCJ 3734/11, *Davidian v. The Knesset of Israel*, para. 59 (August 15, 2012.)) In the *New Family* case, too, where the constitutionality of the Surrogacy Law's narrow definition of "intended parents" was discussed, Deputy President S. Levin noted that "the Petitioners [wish] to expand the small opening created by the law in order to resolve the plight of several tens of couples and expand it based on the principle of equality. This technique is permitted through the principles of constitutional interpretation of reading in, but we do not apply it in cases where it deals a complex issue that

its consequences are unclear and where by nature warrant regulation by the Legislature (see *New Family*, p. 468.)

38. In my opinion, the constitutional remedy appropriate in this case is, again, reading a sub-section into section 20(a), as proposed in paragraph 35 above, whereby the exceptions committee would be granted, in addition to the limited powers it currently has, the general and flexible authority to approve an eggs donation where it finds "there are special and exceptional reasons that justify doing so." This remedy leaves the entirety of the arrangements in the law as they are. It preserves the "fabric of the legislation" and does not at all compromise the worthy purposes that the legislature wished to realized through the law. It removes the unconstitutionality of the law's arrangements by allowing, alongside the blanket criminal prohibition in the law, a flexible mechanism that is not bound only to the four case detailed in section 20(a)(1)-(4), and it permits individual examination of cases where the donating or recipient women do not meet (one or more) of the conditions set by the law, but where there may still be special and exceptional reasons that justify approving the donation (for justifying the application of the reading in doctrine, particularly in order to develop exceptions to criminal responsibility, see Gross p. 466-67.) Reading this arrangement into the law does not involve, as I understand, additional budgetary costs, and as discussed, in the proposed version it is intended to cover only unique and exceptional cases that merit it. Nor does the proposed addition pose a significant change to the law's provisions and it is merely a specific extension of the narrow opening left by the legislature when limiting the exceptions committee to the four cases detailed in section 20(a) of the law.

It is important to recall – and I discussed this above in paragraph 21 – that the Bill included an exception clause in the very same language that I propose to read into the law, but it was removed from the final version of the law that was passed after Rabbi Halperin noted to the members of the sub-committee that discussed the Bill, that the section is redundant and that petitioners that do not fall under sections 20(a)(1)-(4) (as marked in the law's final version) that would turn to courts in their distress and present to them special and exceptional circumstances would be granted remedies there. And as Rabbi Halperin said there:

> "It is better to remove section 18 and leave it to the court […] The court permits things that the law prohibits. Not just the Supreme Court, but also the District Court. There are many examples. When there is a real need it finds the way, even if it is explicitly in violation of the law" (Minutes of meeting of the Sub Committee of the Labor, Welfare and Health Committee for Supervising the Eggs Donation Bill 2008, dated November 3, 2008, p. 50-51.)

These things by Rabbi Halperin are unfounded, with all due respect, and they are which ultimately led to removing the general exceptions clause that initially was included in the Bill from the final version that was passed. This caused the final version to be unconstitutional and in order to remedy this flaw I propose reinstating the section that was removed, particularly because it is abundantly clear that removing it was rooted in reasons that are mistaken on their face.

Before concluding, I will note that the State's argument that the Eggs Donation Law is a new statute legislated about three years ago and therefore, similarly to the approach the Court took in *New Family*, intervention in its provisions should be avoided and its application and consequent developments that would follow incrementally should be permitted to take their course, has not escaped me. Indeed in *New Family* the Court believed that though it was found that the Petitioner was unconstitutionally discriminated against there was no place to intervene in the Surrogacy Law because this was "a new and complex issue, and issue with many unknowns that we have yet to experience to the fullest." Instead of intervening in the legislation, the Court therefore opted in that case to call upon the Legislature to contemplate the plight of single women as petitioners and weightily consider applying the law to them. I do not believe that such a move fits the case before us. Since the legislation of the Surrogacy Law about 18 years have passed and still to this day a resolution has yet to be found for petitioners such as the petitioner in *New Family*, though recently and as detailed above, a certain glimmer of hope has been created in this context. Such long wait for action by the legislature requires those whose basic rights have been infringed upon as a result of the current version of the law to hold their breath. Given the nature and substance of these infringed rights, and given the medical procedure required for eggs donations, which must attribute significant – even determinative – weight to the "ticking" of the biological clock, I do not believe that it is proper to adopt here the path walked by this Court in *New Family*.

Conclusion

39. Had my opinion been heard, we would make the order nisi permanent and hold that the Eggs Donation Law disproportionately violates the Petitioners' constitutional rights to autonomy over their bodies, to family life and to parenthood. We would further find that in order to cure this violation we must read into the provisions of the Eggs Donation Law an additional section – section 20(a)(5) – that would authorize the exceptions committee formed under the law to approve the extraction of eggs, their allocation and their implantation in the body of a recipient woman, should the committee be satisfied that **under the circumstances there are special and exceptional reasons that justify doing so**. We would also find that the Petitioners be

permitted to come before the exceptions committee and seek its approval according to such section to perform the extraction of Liat's eggs, their fertilization and implantation in Dana's uterus in order to make it possible for them to bring into their family unit a child that would have a genetic link to Liat and a biological link to Dana, as all of Liat's attempts over the years to become pregnant herself have been unsuccessful. As my opinion remains in the dissent, I see no need to expand about the consequences of section 42(c) of the law for the status of Liat as the child's mother, had the donation been permitted. But it seems that to the extent we are concerned with approval that excepts the procedure from the law not just for Liat's inability to become pregnant herself, but also because of the characteristics of the family unit created by Liat and Dana as a couple, it would have been possible to find a reasonable and proper solution on this issue as well.

Justice

Justice E. Arbel (Ret.)

"And Rachel saw that she did not bear a child with Jacob, and Rachel was envious of her sister and said to Jacob 'Give me sons, or I shall die.'" (Genesis 30, 1.)

1. Our issue in this case concerns the desire for a child, which we hear with an open heart and a forthcoming spirit and try to realize it if only it were possible.

After having read the comprehensive and impressive judgment by my colleague, Justice E. Hayut, I join wholeheartedly with the outcome whereby the Petition must be accepted. However, I intend to propose an additional but different way to reach this outcome, and will detail it below. Since the chain of events and the parties' arguments were presented at length in my colleague's opinion, I can begin at the stage of discussion and decision.

Introduction

2. As my colleague Justice E. Hayut noted, in recent years we witness significant scientific and technological advances in birth and reproductive techniques. These developments open the door to many people, women, couples and families for many additional possibilities to bring children into the world and realize their desires to become parents. All the while our time is also characterized by social developments that create new types of families that were not acceptable in the past. The combination of technological and social advances presents a real challenge for the law, which is constantly required to face unique situations that were not previously known (see HCJ 4077/12, *Jane Doe v. The Ministry of Health*, para. 2 of justice Rubinstein's judgment (February 5, 2013) (hereinafter: the *Sperm Bank case*); CFH 2401/95, *Nahmani v. Nahmani*, IsrSC 50(4) 661, 694 (1996) (hereinafter: the *Nahmani*

case); Pinhas Shiffman, *On the New Family: Introductory Notes*, IYUNEI MISHPAT 28, 643 (2005) (hereinafter: Shiffman)). The Expectation is that the Legislature regulates the use of different reproductive techniques. The main difficulty is caused by the great gap between the time it takes to legislate and legally regulate the use of each reproductive technique and the rate of technological advances (see Ruth Zafran, *There Can Be Two Mothers – The Definition of Motherhood to A Child Born of A Same Sex Couple*, DIN U'DVARIM 3 351, 397 (2008) hereinafter: Zafarn – *There Can Be Two Mothers*.); Ruth Zafran, *The Family in the Genetic Age - the Definition of Parenthood under the Circumstances of Artificial Reproduction as a Case Study*, DIN U'DVARIM 2 223, 230 (2006) (hereinafter: Zafarn – The Family in the Genetic Age.)) This gap leads to situations where the knowledge and technological capabilities to turn people into parents exist, but cannot be permitted to be used without legal and legislative regulation, even when the State has no general objection to realizing parenthood in this way by this couple. This is also our case here. Before us are two women, a couple, where the implantation of one's eggs in the other's uterus may realize their wishes and desires to parenthood. The technological route exists. The State declared it had no general objection to this move, and it should be noted that in the past the State did in fact permit women partners to perform this procedure. Still, the State now argues that there is nothing in the law to regulate the desired procedure, and thus executing the technological possibility cannot be permitted.

3. In my view, this Court has a role in bridging this gap, at least in part. Indeed the Court does not act as a substitute for the Legislature. And obviously the Court must accept and apply the legislative arrangements in place, as long as there is no constitutional reason to intervene in them. However, the Court can assist those who approach it in two ways. One is through the tool of purposive interpretation of legislation. Interpreting an existing legislative arrangement in the field of reproduction and birth must consider the basic human desire of singles and couples to realize their right to parenthood and to have a child. Of course, this purposive interpretation would only be possible when some anchor is found in the language to lay down the foundation for the interpretation and when the considerations and interests existing in the matter justify such interpretation. Another tool at the Court's disposal is finding normative solutions to situations that have yet to be regulated in legislation (see *Nahmani*). Because of the issue's sensitivity and the severe harm to couples and singles who cannot realize their right to parenthood merely due to the Legislature taking its time in forming a legislative arrangement, I believe that the Court must roll up its sleeves and find resolutions for the interim period before the proper arrangements are completed by the Legislature. This in the acceptable manner of developing the law and according to the Foundations of Law 5740-1980 (and see in this regard the different positions by the Justices in *Nahmani*, p. 694, 719, 723, 756.) there is no dispute that at a

later stage the Legislature may form a different legal arrangement than that arrived at by the case law. It is its duty and its authority. And thus summarized Deputy President M. Cheshin:

> "It is true: courts have forever been required to handle gaps formed between yesterday's legislation and jurisprudence and today's life phenomena. The law and legislation are always the law and legislation of yesterday and their progress is slow to advance, it is careful and calculated. Whereas reality, it changes and flows constantly, often at warp speed. So are the reality and the disputes that arise against its backdrop…
>
> Only that for the most part the law is wise to adapt to changing reality, and even as a gap is formed between the language of the law and reality we take the interpretive tools in our hands and use them to catch up and have the law cover the advances of reality…
>
> And indeed, courts have always done so, and do what they can – within the boundaries of language – to cast the written law's net over phenomena coming into the world after the law's enactment, and this even when at the time of legislation the legislature could not have anticipated the existence of such phenomena. The court's first duty is to effect justice between the litigants that come before it, and in performing this duty the court must do whatever possible within the confines of the existing law even if the solution at which it arrives is not the best solution" (CFH 6407/01, *Arutzei Zahav and Co. v. Tele Event Ltd.*, IsrSC 58(6) 6, 23-24 (2004)).

4. Two statutes must be examined in the matter before us: one is the Embryo Carrying Agreements Law (the Approval of the Agreement and the Status of the Child), 5756-1996 (hereinafter: the Surrogacy Law) and the other is the Eggs Donation Law, 5770-2010 (hereinafter: the Eggs Donation Law.) But before I turn to reviewing these statutes, their interpretation and their ramifications for the case at hand, I wish to discuss two important principles that will influence the interpretive process: the right to parenthood and the principle of equality.

The Right to Parenthood

If only I had a son! A little child,
With black curls and smart.
To hold his hand and walk slowly
Along the garden's paths

A little. Child.
…
I will be bitter as our Mother Rachel.
I will pray as Hannah in Shiloh.
I will wait
For him.

5. A woman's (or man's) desire to a child of their own is a common and deep sentiment rooted in human existence and deriving from the desire for self-realization since the dawn of time to this day. It was expressed in the Tanach repeatedly, books and songs were written about it (one of the best known is "Akarah" – "barren" or "infertile", eds. note – by the poet Rachel.) the desire to have and hold a child of one's own body is a fundamental and natural desire that is common to humanity in its entirety. Whatever the explanation for it – biological, psychological or other – most people have a significant, strong and deep wish to become parents. Indeed people go to great lengths and make huge investments – financial, physical and emotional – and are willing to suffer greatly in order to realize their desire for a child even when it is impossible in the natural sense. And in the words of Deputy President M. Cheshin in HCJ 2458/01, *New Family v. the Committee for Approving Agreements for Carrying Embryo, Ministry of Health*, IsrSC 57(1) 419, 445 (2002) (hereinafter: the *New Family* case)):

> "The core of the issue is the heart's desire for a child, that deep, primordial emotional need to parenthood that burns in the woman's soul and does not expire. The core of the issue is the human's survival instinct and need for continuation, if you will. The need and desire to parenthood is inherent to humans."

And Justice Dorner expressed this in *Nahmani* as following, on page 714:

> "In human society, one of the strong expressions for the desire, without whose realization, many cannot see themselves as fully free, is the desire to be a parent. This is not merely a natural, biological need. We are concerned with choices that in human society signify one's individuality and uniqueness. 'Any man who has no children is seen as dead' said Rabbi Yehoshua Ben Levi (Nedarim, 64, 2.) And indeed, for both man and woman, most people see having offspring an existential need that gives meaning to their lives."

(see also Daphne Barak-Erez, *On Symmetry and Neutrality: After The Nahmani Case*, IYUNEI MISHPAT 20 197, 200-01 (1996); Shiffman, p. 664.)

The emotional need to become parents received legal recognition through the right to parenthood. It appears that in the State of Israel there is particular sensitivity to this right, in light of Israeli society's approach to the value of family and the value of having children as central and weighty values (see *New Family*, p. 466.)

6. The right to parenthood, therefore, is generally recognized in Israeli law, both in terms of one's reproductive freedom and in terms of the right to realize the relationship with the child (see Zafran – There Can Be Two Mothers, p. 381-82; the *Sperm Bank case*, para. 26 of Justice Rubinstein's judgment.) "Every person has the right to parenthood and the right to raise and inculcate a child" (HCJ 11437/05, *Kav La'Oved v. Ministry of Interior*, para. 38 of Justice Procaccia's judgment (April 13, 2011.)) Different aspects of the right to parenthood were even enshrined as a constitutional right in Basic Law: Human Dignity and Liberty. Though a comprehensive and exhaustive discussion of the range of the aspects and entire scope of this important and meaningful right has yet to take place, it is in any event clear that the practical possibility to bring children into the world is at the core of the right to parenthood, and thus the State may not infringe on these possibilities without weighty reasons (see 2245/06, *Dovrin v. The Prison Service*, para. 15 of Justice Procaccia's judgment (June 13, 2006) (hereinafter: the *Dovrin* case.)) The Court distinguished between two levels of the right to parenthood, in terms of reproductive and birth freedoms, with the first level being the possibility to exercise one's reproductive abilities and become a parent, whereas the second level goes to the way in which one's natural right to become a parent is realized. This level, it was said there, is in the periphery of the right to parenthood and it protects values such as the right to privacy, the right to autonomy and the like (see the *Sperm Bank case*, para. 29 of Justice Rubinstein's judgment.) Beyond the scope necessary for a decision in our case, I will comment that in my view this case falls under the first level of the right to parenthood rather than the second level, as the State attempts to argue. It is no wonder that for the First Petitioner realizing her right to parenthood is by having a child who carries her genetic code. It seems to me that this desire, which is indeed a natural and understandable human desire, warrants recognition within the core of the right to parenthood, even if today, in the modern age, a genetic relationship is not the end all be all (see the *Sperm Bank* case, paras. 43-45 of Justice Rubinstein's judgment; Zafran – the Family in the Genetic Age, p. 233 onward; Shiffman, p. 668.) therefore the State's proposal to turn the tables – so that the Second Petitioner's eggs be extracted and implanted in the First Petitioner's uterus is not "comparable" in terms of the ranking of rights to the First Petitioner's request to extract eggs from her and implant them in the Second Petitioner's uterus (see *Nahmani*, p. 753, and compare with the *Sperm Bank* case.) and this is true even without considering the probability, which is closer to a near certainty, as to the physical, medical inability of the First Petitioner to carry a pregnancy in her uterus.

7. The right to parenthood was recognized by this Court in the context of using artificial reproductive techniques (see the *Sperm Bank case*, para. 6 of Justice Barak-Erez's judgment and the references there) as well. The current times have opened many avenues for hope to bring a genetic child into the world for those who cannot have children. There are also the possibilities for adopting non biological children. These possibilities repeatedly inspire dilemmas that involve the development of the right to parenthood and exploring its place within the existing legislative framework. Of course, this is not an absolute right. Often times, examining reproductive techniques raises questions of morality and conflict between rights. Thus, for instance, when there is concern for harm to surrogate mothers or women who wish to donate eggs. In these cases, balance is of course required between the different rights and the conflicting interests. In any event, the importance of the right to parenthood and its high status among rights must influence the interpretation of statutes that address the relevant field. It is usually the primary goal of these statutes and thus it must be respected within the purposeful interpretation of the legislation on the matter.

The Principle of Equality

8. Discrimination is the unequal treatment of equals, when there is no relevant difference between them. We cannot ignore the fact that the case before us involves a same sex couple. A reality was created where heterosexual couples are able to use a variety of methods in order to become pregnant and bring a child into the world – from the natural method, through use of eggs donation, surrogacy agreements and the like. On the other hand, same sex couples are limited in the ways they can bring children into the world, both for biological reasons and for legal reasons (see judgment by Justice Joubran in HCJ 566/11, *Mamat-Magad v. The Minister of Interior* (January 28, 2014.)) Indeed there may be cases where it could be argued that there is indeed a relevant difference resulting from the biological difference (such as the need of male couples to use surrogacy arrangements even when neither of them has a medical condition, which can raise the concern of over use of the method of surrogate women, when arguments are made about the harm, medical injuries or exploitation of these women or some of them. see in this regard the recommendations by the public committee for examining the legislative arrangement of fertility and reproduction in Israel, 2012 (the Mor-Yosef Report) p. 57-62; in a different context, see regarding the consideration of the role of existing social attitudes in the best interest of the child: CA 10280/01, *Yarus-Hakak v. The Attorney General*, IsrSC 59(5) 64, 107 (2005) (hereinafter: the *Yarus-Hakak* case)). Still, in many cases it was impossible to point out to such a relevant difference. The social reality is that there are many same sex couples now. Indeed, this is an issue that is not yet a social consensus, but we cannot nevertheless ignore from the reality as it exists both as a matter of fact and a matter of law (see the *New Family* case, p. 450-51;

and see also Zafran – There Can Be Two Mothers, p. 380; HCJ 273/97, *The Association for Protecting Individual Rights v. The Minister of Education, Culture and Sport*, IsrSC 51(5) 822 (1997); Hanan Goldschmit, *The Missed Identification Card of the Israeli Family – The Legal Consequences of Case Law Regarding Adoption by Same Sex Couples*, HAMISHPAT 7, 217, 237 (2012); Shiffman, p. 645.) Many same sex couples raise children, whether through arrangements permitted out of Israel, or through arrangements permitting having children in Israel itself (such as a sperm donation for a female couple.) It should still be emphasized that the Court does not purport here in this context to go into questions about the status of same sex couples and to decide on the value based discussion taking place on the matter (see, the *Yarus-Haka* case, p. 114; HCJ 3045/05, *Ben-Ari v. Director of the Population Administrator*, para. 22 of President Barak's judgment (November 21, 2006) (hereinafter: the *Ben Ari* case.)) Nor do I propose in this opinion to decide on the question of same sex couples' constitutional right to have equal access to artificial reproductive techniques as heterosexual couples (see AAA 343/09, *The Jerusalem Open House for Pride and Tolerance v. The Municipality of Jerusalem*, para. 40 (September 14, 2010) (hereinafter: *The Open House* case.)) Still, to the extent that we are concerned with the interpretation of a legislative arrangement, or the lack of any arrangement at all, we must assume that any legislative arrangement would be interpreted or established to fit the principle of equality and prevent discrimination on the basis of sexual orientation, as long as there is not explicit instruction from the Legislature to the contrary (see also, Ifat Biton, *The Influence of Basic Law: Human Dignity and Liberty on the Status of Same Sex Couples*, KIRYAT HAMISHPAT 2 401 (2002); Michal Tamir (Itzhaki), *The Right to Equality of Homosexuals and Lesbians*, HAPRACLIT 45 94, (2000-2001)).

9. The above approach also fits the existing legislative arrangements that indicated the Legislature's negative view of discrimination on the basis of sexual orientation. Some of these arrangements were added to legislation in recent years and can teach us about the present view of the Legislature in the matter. Thus, for example, it was established that in certain cases one who has committed an offense motivated by animus based on sexual orientation they are punishable at double the penalty set for that same offense (section 144F of the Penal Law 5737-1977.) An employer is prohibited from discriminating between its employees or candidates for employment on the basis of their sexual orientation (section 2(1) of the Equal Opportunities in Employment Law 5748-1988). Similarly it is prohibited to discriminate in public accommodations, supplying products or access to public services because of sexual orientation (section 3(a) of the Prohibition of Discrimination in Products, services and Entrance to Entertainment Establishments and Public Places Law 5761-2000). Caretakers and medical institutions may not discrimination between patients based on their sexual orientation (section 4(a) of the Patient's Rights Law 5756-1996.) It was additionally legislated that

committees for admission to community towns cannot refuse a candidate for reasons of sexual orientation (section 6C of the Cooperative Associations Ordinance.) Those obligated to run tenders are prohibited from discriminating among candidates because of their sexual orientation (section 2(b) of the Tender Obligations Law 5752-1992). And this is only a partial list.

10. Courts, too, throughout all their levels, when coming to interpret legislative arrangements contemplated the principle of equality between heterosexuals and homosexuals, both as single people and as couples. In one case, President Barak reviewed a long list of judgments where it was held that homosexual couples are granted rights under specific statutes and arrangements (see, the *Ben Ari* case, para. 19 of President Barak's judgment, and see also *The Open House* case, para. 54.) It should be noted that in the matter of Ben Ari, the State itself declared that it recognized that the shared life of a homosexual couple constitutes "a social unit with some legal implications." Since that review, this list expanded to include additional judgments walking in the same direction (see, for instance, CA (Nazareth) 3245/03, *A.M. v. The Attorney General in the Custodian General*, (November 11, 2004); AP (Tel Aviv Yaffo) 1255/05, *Garcia v. The Ministry of Interior* (August 17, 2008.) And indeed it was held:

> "The law in Israel regarding the LGBT community and its members reflects the changes that took place over the years in Israeli society. The position of Israeli society is that the law must be indifferent to sexual orientation, just as it must be indifferent to other traits in one's identity or a group – such as age, race, nationality, sex and others. Similarly there is a wide agreement that members of the LGBT community must not be restricted or discriminated against. This position is also expressed both in the case law and in the legislation that prohibits discrimination on the basis of sexual orientation…" (*The Open House* case, para. 54.)

It was even noted that "it seems these are no longer 'islands' of rights, but a comprehensive constitutional concept of a right not to be discriminated against because of sexual orientation." (*The Open House* case, para. 56.)

Without addressing the constitutional issue or establishing a new status, it appears then that legislative arrangements must be interpreted to conform with the principle of equality that requires the equal treatment of same sex couples.

Fertilization Treatments

11. For the purposes of the discussion before us, a woman's fertility difficulties may be schematically divided into two categories: the first is difficulties

related to the woman's eggs that make it impossible to use them for having a child. The second is a medical difficulty to carry a pregnancy. Therefore, there may be four potential situations: a woman with healthy eggs who is able to carry a pregnancy and give birth, a woman with healthy eggs but who is unable to carry a pregnancy; a woman with unhealthy eggs who is able to carry a pregnancy and a woman with unhealthy eggs who is unable to carry a pregnancy. These distinctions will be helpful below as we interpret the legislative arrangements in effect in the field of reproductive techniques.

The Agreements for Carrying Embryo Law

12. As my colleague, Justice E. Hayut, noted, the Surrogacy Law was enacted in Israel in 1996 as a result of the work of a public committee headed by Judge (Ret.) Shaul Aloni that was set up to explore the issue. The law was first to regulate couples' assistance from a surrogate in order to have a child. Under the law, the surrogacy procedure involves the implantation of a fertilized egg in order to impregnate the carrying mother so that she can give the child born as a result to the intended parents (see section 2 of the Surrogacy Law.) The fertilized egg would be, under the Surrogacy Law, an egg that is not from the surrogate. In other words, the egg may be from the intended mother who solicits the surrogacy, or from a donor that is not the intended mother or the carrying mother (see section 2(4) of the Surrogacy Law; section 11 of the Eggs Donation Law.) The sperm fertilizing the egg must be from the intended father (section 2(4) of the Surrogacy Law.) During the surrogacy process the fertilized egg is implanted in the uterus of the surrogate woman who in effect has not genetic relationship to the fertilized egg. After birth, the surrogate is supposed to give the child to the intended parents (see *New Family*, p. 429.) The Surrogacy Law includes many arrangements regarding the procedure, including the conditions for entering into agreements with a surrogate, the conditions for approving an agreement between the intended parents and the surrogate, the status of the child after birth and so on. It should also be noted that the intended parents are defined by the Surrogacy Law as "a man and a woman who are a couple and who enter into an agreement with a carrying mother in order to have a child" (section 1 of the Surrogacy Law.)

It is important to emphasize that the Surrogacy Law does not address the stage of in vitro fertilization, which is regulated by the People's Health Regulations (In Vitro Fertilization) 5747-1987 (hereinafter: the People's Health Regulations.) The law only addresses the stage after fertilized eggs have been created, when the couple seeks the approval of an agreement to implant the eggs with a surrogate (see *New Family*, p. 435.)

13. As the State argues, the Surrogacy Law is irrelevant to the matter before us and does not apply to it. The law clearly distinguishes between the surrogate mother and the intended parents. As mentioned, after the birth no legal link is

meant to exist between the surrogate mother and the child. The physical handing over of the child into the custody of the intended parents must be done as soon as possible after the birth. The welfare administrator is the child's guardian until the intended parents are granted a parenting order. The request of a surrogate mother to renege on the agreement with the intended parents and to keep the child would not, as a general rule, be approved unless by a court and under circumstances that justify it while considering the child's best interest (see chapter C of the Surrogacy Law.) In the case before us, the Petitioners request that the Second Petitioner serve both as a surrogate mother and as an intended mother. This situation is not included in the Surrogacy Law and is beyond its purpose and provisions. The arrangements covered by the Surrogacy Law have nothing to do with the procedure the Petitioners wish to perform. The conclusion is that this law does not apply to the case at hand and does not at all assist in regulating it.

The Eggs Donation Law

14. The second statute related to the issue, which the parties address, is the Eggs Donation Law, enacted in 2010. This law came to resolve the difficulties caused by a shortage of eggs for donation in Israel, a fact that created obstacles to many women requiring fertility treatments where the eggs in their bodies could not be used for these treatments. As emphasized in the explanatory notes to the law, the law's main concern is to regulate the eggs donation in Israel for purposes of having a child, as well as for purposes of research (see the Eggs Donation Bill, 5767- 2007, Bills 292 (hereinafter: the Bill.)) the law concerns two phases in the donation process – the phase of receiving the donation and its designation, and the stage after the birth of the child born as a result of the donation (see the explanatory notes to the Bill, p. 292.) The State argues that the law does not permit the First Petitioner to donate eggs to the Second Petitioner, because under section 11 of the law, the recipient in whose body the egg is implanted must have a medical condition that justifies using the eggs of another woman. The Second Petitioner does not meet this definition because she has not medical condition, as detailed at length in my colleague's judgment. Indeed, these things cannot be disputed. Moreover, I do not believe we must intervene in the medical condition requirement of section 11 of the law. Still, this is not the end of our road, because in my opinion the Eggs Donation Law is not at all relevant to our matter, does not regulate it, and in fact is silent about it without creating a negative arrangement for this case. I shall clarify my position.

15. The Eggs Donation Law, as its name indicated, was designed to regulate the **donation** of eggs in Israel for women, who due to a medical condition, need to use another woman's eggs in order to have a child (this alongside the research purposes regulated in the law that are irrelevant to our case.) Should we return to the schematic distinction we articulated above (para. 11) then the

law applies to two categories of women: the one is the woman with unhealthy eggs who can carry a pregnancy and the other is the woman with unhealthy eggs who cannot carry a pregnancy. In the first case, the woman can use the assistance of an egg donation under the Eggs Donation Law, an egg that would then be implanted in her own uterus. In the second case the woman is assisted by both the Eggs Donation Law and the Surrogacy Law, when the egg received from the donor is fertilized and implanted in the uterus of a surrogate mother.

The law, however, according to is purpose and provisions, does not concern the case that do not involve an egg **donation**. The meaning of donation in this context is the giving of an egg to another woman in order for that woman to use the egg, fertilize it and become the mother of the child born out of the fertilized egg. The meaning of donation includes the giving of something to someone, rather to the donor themselves. Therefore, this is different from someone who extracts eggs in order to become herself the mother of the child born out of those fertilized eggs. In such a case it cannot be said that this is a donation, and thus the Eggs Donation Law would not apply to such circumstances. Such, for instance, is a woman who extracts eggs in order to fertilize the eggs, return them into her uterus and become the child's mother. In such a case that is not a donation, because the egg is intended to turn the egg owner into the future child's mother. Indeed, such a case is not covered by the Eggs Donation Law and the People's Health Regulations in terms of in vitro fertilization would instead apply. Similarly, as well, the Eggs Donation Law does not apply to cases of egg extracted from a woman in order to fertilize them and implant them in the uterus of a surrogate (see section 4(b) of the Eggs Donation Law.) This, too, is not a donation, because the owner of the egg intends to be the mother of the child born from the fertilized egg (see the explanatory notes to the Bill, p. 295, which clarify that in this case the extraction of the eggs is not done for the purposes of **donation**.) Similarly, a woman who extracts eggs in order to implant them in her partner's uterus intends to be the mother of the child born of the fertilized egg and to raise that child. Here too it cannot be said that there is a donor and a recipient, and thus the Eggs Donation Law is irrelevant to it. One cannot donate something to himself because then it would not consider a donation. I should not that the use of the term "mother" in this context refers to the social role and the woman's subjective intent rather than to the legal determination regarding who shall be registered and recognized as the child's mother (see on this point Zafran – There Can Be Two Mothers. In any event, I will note that the registration of two women as mothers of a child was made possible through adoption in Israel or abroad: see the *Yarus-Hakak* case as well as HCJ 1779/99, *Jane Doe v. The Minister of Interior*, IsrSC 54(2) 368 (2000); and through a parenting order: FA (Tel Aviv) 60320/07, *T.Z. v. The Attorney General, State Attorney – District of Tel Aviv* (March 4, 2012) (hereinafter: the *T.Z.* case.))

16. The Act's sections must be read and understood in light of the above, and according to this purpose. Indeed, the law wishes to make its provisions exclusive and limit the use of eggs donation to comport with its provisions alone. Section 4 of the Egg Donation Law stipulates as follows:

> "4. Exclusivity of the Law's Provisions:
>
> (a) One shall not perform an eggs extraction from a donor, lab treatment of the eggs, allocation of eggs for implantation or research, or implantation of eggs, but according to this law's provisions.
>
> (b) The provisions of sub-section (a) shall not apply to the extraction of eggs from the body of an intended mother, to the lab treatment of eggs extracted as such and to their implantation in the body of a carrying mother for the purposes of performing an agreement for carrying embryo according to the Agreements Law."

Additionally, section 6(b) of the Eggs Donation Law mandates that:

> "6. Restrictions on the Extraction and Implantation of Eggs
>
> (a) No one shall perform medical treatment on a volunteer donor in order to prepare eggs for extraction to be implanted, unless after securing the approval of the eggs' extraction from the donor's body according to section 12.
>
> (b)An implantation of eggs shall not be performed but in the body of the recipient or the body of a carrying mother who entered into an agreement for carrying embryo with the recipient according to the Agreements Law."

17. These sections must be read, as noted, in light of the purpose of the Eggs Donation Law and in the context of its other sections. They must therefore be understood as excluding the law's provisions to any case in terms of eggs **donation**, that is cases where a woman gives her eggs to another person in order for that person, rather than the donor herself would become the parent of the child born from the donated egg and would be the person raising that child. This interpretation is consistent with the language of the law, its provisions, and its purpose. An alternative interpretation, a more comprehensive one, which requires the application of the law's provision to any extraction and implantation of any egg, would have led to an absurd outcome where in vitro fertilizations would be impossible for women whose eggs are completely healthy, and who wish to extract those eggs and implant them in their uterus in order to become mothers of the child, because then

section 11 of the Eggs Donation Law would not apply to them. Certainly, such interpretation cannot be accepted.

The conclusion that the matter at hand, where the First Petitioner wishes to extract her own healthy eggs, fertilize them, and implant them in her partner's uterus, without requiring a donation but in order for the First Petitioner to raise herself the child that would be born (along with the Second Petitioner, who would give birth to the child) – such a case is not included in the Eggs Donation Law and the law does not create a negative arrangement in its regard.

Interim Conclusion

18. Our conclusion is that a case where a woman wishes to extract eggs in order to fertilize them and implant them in her partner's uterus, with both women serving as mothers to the child (at least "mothers" in the social sense and in terms of their intent to raise the child together), falls neither under the Surrogacy Law nor the Eggs Donation Law. This case is neither regulated by either of these laws nor prohibited by them. But we are still left with the question which statutory arrangement does cover this case? In my view, the answer to this is simple. Since neither of these statutes applies to this case, the arrangement that would apply is the same as that which applied until now, at least according to the position of the State and the Attorney General. This arrangement combines the norms established by the People's Health Regulations, and the authorization created by the absence of any legal regulation in the matter. I shall explain.

The People's Health Regulations

19. The People's Health Regulations of 1987 regulate the conditions for in vitro fertilizations. Section 2 prohibits the extraction of eggs, their fertilization, freezing or implantation unless done in a recognized hospital unit and according to the Regulations' mandates. Section 2A details instructions for eggs extracted and fertilized out of Israel. Sections 3 and 4 stipulate as follows:

> "3. Exclusivity of Purpose of Egg Extraction
>
> The Extraction of eggs will be done only for the purpose of in vitro fertilization and its implantation after fertilization.
>
> 4. Restricting the Extraction of Eggs

> Eggs shall be extracted only from a woman who meets one of the following conditions:
>
> (1) She is undergoing fertility treatments and a supervising physician has determined that the eggs extraction would advance her treatment."

These Regulations have regulated the matter of eggs donations before the Eggs Donation Law was legislated. It should be noted that today eggs donation, as understood according to our interpretation above, cannot be done unless according to these Regulations or the arrangements of the Eggs Donation Law.

20. As for the implantation of a woman's eggs in her partner, the Regulations do not explicitly address this situation, but in my view their arrangements may be applied to it without difficulty, and indeed this was done in the past (see, for example, the *T.Z.* case.) Extracting the egg will be done only from a woman who is undergoing fertility treatments, and only for the purpose of implanting them after their fertilization (section 3 and 4 of the People's Health Regulations.) The egg would be fertilized by the sperm of a donor and implanted in the partner's uterus, in the absence of any prohibition in the Regulations and where the Surrogacy Law does not apply as the birth mother is also one of the intended mothers. And indeed, an instruction by the Attorney General from November 30, 2009 in terms of eggs donations between female partners establishes as follows:

> "Following a discussion recently held by the Attorney General on the issue of eggs donations between female couples, the Attorney General instructed the Ministry of Health that **the donation of an egg extracted from a woman under the In Vitro Fertilization Regulations** (in the course of fertility treatments that she is undergoing) **must not prohibited or restricted**, unless under circumstances where there is concern that doing so would violate the public policy, such as where there is concern that this is done in exploitation or for the purposes of trade eggs.
>
> Accordingly, the Attorney General instructs that as a general rule, the donation of an egg extracted from a woman in a lawful procedure under these Regulations, and that is intended for her female partner, with whom she shares a common household, must not be prohibited or restricted. **Such donation must not be seen as an act that violates the public policies**.

The discussion in the matter was convened following several requests received by the Ministry of Health to approve the donation and implantation of egg donated by a woman to her female partner. At the end of the discussion the Attorney General decided, among others, as following:

- The legal point of departure is that imposing restriction by the State on eggs donations requires an authorization under law. Therefore, since the only restriction in the Regulations on our matter is that the extraction of eggs must be in the course of medical treatment due to the donor's fertility difficulties and only when the extraction is to advance her treatment, then once the eggs have been extracted under these circumstances the Regulations include no lawful anchor for prohibiting their use as a donation to another woman.

- Still, the use of eggs may be prohibited, even when extracted according to the procedure established by the Regulations, where this violates the "public policy," such as when it is done to exploit or for the purposes of trade eggs.

- Where a donation between female partners is concerned, such as the case involving the request to the Ministry of Health, this cannot be viewed as a case that violates public policies, and the donation must be approved.

- The Attorney General emphasized, as was previously made clear in terms of other issues concerning the rights of same sex couples, that this position should not be seen as the creation or recognition of a new family status. Matters of status must be determined and regulated by the Legislature.

..."

And indeed, under this instruction, the implantation of a woman's eggs in her female partner was made possible where the former is undergoing fertility treatments. This instruction by the Attorney General is proper and correct, and in my view, still in effect in light of my conclusion that there is no other legislative arrangement that applies or prohibits the situation before us.

21. It should be noted that in the course of the petitions that have previously submitted the difficulty in establishing meaningful and sensitive regulations in terms of reproductive techniques in regulations rather than in primary legislation were acknowledged. So, for instance, a petition was submitted to challenged regulations 11 and 13 of the People's Health Regulations, which effectively lifted the prohibition against using a surrogate mother in Israel in

order to bring a child into the world, and impose restrictions on the implantation of eggs from a donor. The State agreed to striking down these Regulations. I will further note that voiding the regulations was stayed for a certain period of time that would enable the issue's regulation in primary legislation (see HCJ 5087/94, *Zabro v. The Minister of Health* (July 17, 1995); and HCJ 1237/91, *Nahmani v. The Minister of Health* (unreported,) where the State ultimately permitted the Nahmani couple to perform in vitro fertilization in Israel in order to implant it in the body of a surrogate abroad.) In an additional petition section 8(b) of the People's Health Regulations, which distinguished between the requirements in terms of implanting an egg in a married woman and the requirements in terms of implanting an egg in a single woman, was challenged. With the State's consent, this regulation, too, was struck down and it was held that a single, egalitarian arrangement would apply (see HCJ 998/96, *Yarus-Hakak v. The Director General of the Ministry of Health* (February 11, 1997.)) In the *Sperm Bank* case, the Court's harsh criticism was expressed over the issue of sperm donations and the sperm bank is not regulated in primary legislation (the *Sperm Bank* case, para. 38 of Justice Rubinstein's judgment, para. 33 of Justice Barak-Erez's judgment.)

22. Therefore, the general approach of this Court has been that the use of artificial reproductive techniques must be regulated in primary legislation. Certainly this takes stronger force in terms of issues that have not been regulated at all, in primary or secondary legislation. Still, it seems the Court's general approach has also been to permit the use of artificial reproductive technologies as long as there is no primary legislative arrangement prohibiting so, and where the rights of no third party or other considerable interests are infringed. "Nowadays, when technology may assist people where nature has failed them, a determinative consideration is necessary in order to prevent a woman from using that technology" (*New Family*, p. 447.) And Justice Procaccia emphasized this in terms of a prisoner's right to perform artificial fertilization with his partner:

> "The premise of the petition is that in order for a competent authority to permit a prisoner to perform a procedure of artificial fertilization with his partner, explicit authorization in a statute is required and without it, such permission is outside of the powers granted to it by law. This premise is fundamentally mistaken, and it turns the order of things on their head and undermines foundations of public and constitutional law. Once one has a right, certainly a basic constitutional right, a public authority need not a lawful authorization in order to exercise the right and respect it, the opposite is true. It needs a lawful authorization to limit and violate it, and where the violation limits or prohibits exercising that human right it must pass muster under the tests of the

> Limitation Clause as a condition to its validity and application." (The *Dovrin* case, para. 16 of Justice Procaccia's judgment.)

This position has been applied in the Attorney General's instruction, and thus I, too, support it in terms of the situation before us. Therefore, I shall briefly detail the remaining considerations that support a holding whereby the procedure requested by the Petitioners must be approved in the absence of any lawful arrangement to prohibit it.

23. **First**, the principles I detailed above about the right to parenthood and the principle of equality must be woven into the relevant considerations in the matter. These principles of course support permitting the requested procedure in the absence of instructions from the Legislature to the contrary. **Second**, the arrangement does not raise a concern for infringing the rights of third parties, as it does not involve third parties beyond the couple that is interested in the procedure and participates in it. There is no involvement of a surrogate mother or an egg donor, so there is no concern for their rights or exploitation (see the *New Family* case, p. 453, 464.) Neither does the arrangement raise other typical concerns such as creating an offspring with no genetic link to his parents or caregivers, or the use of medical techniques for the purposes of the child's genetic modification (see Zafran – There Can Be Two Mothers, p. 363.) **Third**, when a couple of women with no fertility difficulties are concerned, they would be able to bring a child into the world with a sperm donation without difficulty, and there is no restriction here. I see no reason why such a couple should be treated differently than an unlucky couple who is unable to bring children into the world in this way (see *New Family*, p. 442.) **Fourth**, the State's position is not founded on principled objection to the procedure requested by the Petitioners, and no claim has been raised regarding a harm to public policy or any other meaningful argument. And indeed, as noted, the Ministry of Health has in the past approved the requested procedure. Additionally, the State emphasizes that the procedure would have been permitted in the converse – that is it would have been possible to permit the Second Petitioner to extract eggs in order to implant it in the uterus of the First Petitioner. There is no logic in approving the procedure in only one direction, when no legal arrangement prohibits the opposite direction. **Finally**, I will note that this is not about bringing a child into a single person's family unit, which undisputedly is a different matter than bringing a child into the family unit of a couple (see *New Family*, p. 453.) And I will note that no research was brought before us to indicate that children benefit from being raised in heterosexual families, and it seems there is research to deny this assumption (see, for example: Zafran – There Can Be Two Mothers, p. 376 and the references there: see also additional research on this issue that substantiate the assumption that there is no correlation between parents' sexual orientation and the children's social and psychological function, and

which refute the findings of research claiming otherwise: Nanette Gartrell and Henny Bos "U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents" Pediatrics 2010, 126:1 28-36; Carlos A. Ball "Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective", 21 Wm. & Mary Bill Rts. J. 691 (2012-2013); Andrew J. Perrin, Philip N. Cohen & Neal Caren "Are children of parents who had same sex relationships disadvantaged? A scientific evaluation of the no-difference Hypothesis", Journal of Gay & Lesbian Mental Health, 17:3 327-336 (2013). See also Justice Procaccia's on the difficulties created by the issue of when the child's best interest consideration may justify preventing the child's birth and when the law may intervene in the matter: "The question when may the child's best interest justify preventing the child's birth is a deep question in the areas of ethics and philosophy. The question of when the law may intervene in this and when a public authority may have the power to intervene in one's right to have a child for reasons of the child's best interest and other reasons is highly difficult and complex. The right to have a child and the right to be born are concepts that are very much within the purview of the extra-legal areas of morality and ethics" (the *Dovrin* case, p. 17 of her judgment.))

Conclusion

24. The picture created by the categorization we mapped out above, then, is as follows: a woman with unhealthy eggs who can carry a pregnancy may be assisted by an eggs donation under the Eggs Donation Law; a woman with unhealthy eggs who cannot carry a pregnancy can be assisted by both an eggs donation under the Eggs Donation Law and by the Surrogacy Law for purposes of implanting the fertilized egg (with the sperm of the intended father) in the uterus of a surrogate mother; a woman with healthy eggs who is able to carry a pregnancy can be assisted by in vitro fertilization when experiencing fertility difficulties under the People's Health Regulations; a woman with healthy eggs who is unable to carry a pregnancy may too perform in vitro fertilization under the People's Health Regulations. The implantation of the eggs in another woman can be done according to the Surrogacy Law(when the other woman is a surrogate) or according to the People's Health Regulations (when the other woman is the partner who is also intended to be the child's parent.)

My conclusion, as that of my colleague's E. Hayut, but by a different rationale and reasons, whereby had my opinion been heard we were to accept the Petition and order the State to permit the First Petitioner to extract eggs, fertilize them, and implant them in the uterus of the Second Petitioner.

Justice (Ret.)

Justice E. Rubinstein:

> "Then [God - eds. note] remembered her way of integrity [Mother Rachel - eds. note],
>
> a fetus was exchanged in [her - eds. note] sister's womb"

(*Even Chug Piyut*, attributed to Rabi Eleazar Ha-Kalir, from Rosh Hashana's first morning prayer's liturgical poems)

Background and Essence

1. The First Petitioner – Liat Moshe (hereinafter: "Liat" or "the First Petitioner") – wishes to bring a genetic child into the world through the Second Petitioner – Dana Glisko (hereinafter: "Dana" or "the Second Petitioner") – her life partner for about a decade now. The difficulty at the basis of this Petition is rooted – it seems – in the difficulties in carrying a pregnancy by the First Petitioner, and the Petition is for eggs from her body be implanted in the uterus of the Second Petitioner so that the child be linked to them both – a genetic link to the First Petitioner, and a physiological link to the Second Petitioner – and thus both of their motherhoods be realized. Once again this Court is called upon to pronounce upon an issue that is not one our fathers and mothers anticipated as there was no real possibility, only few decades ago, that the medical and technological advances would lead to it (HCJ 4077/12, *Jane Doe v. The Ministry of Health*, para. 1 of my judgment (2013) (hereinafter: the *Sperm Bank* case.))

2. On September 1, 2013 we decided (by majority) to reject the Petitioners' request – to implant an egg taken from the First Petitioner's body, fertilized and then implanted in the uterus of the Second Petitioner – and thus in light of the current state of the law. So that the Petitioners know where they stand without delay, the decision was handed down without reasons, by the majority comprised of President A. Grunis, Deputy President M. Naor, Justice S. Joubran and myself, against the dissenting opinions of Justice E. Arbel, Justice E. Hayut and Justice H. Melcer. The facts of the case and the parties' arguments were broadly detailed in the opinion of my colleague Justice Hayut, the core of her position will be presented below, and the same outcome, but by a different reasoning was reached by my colleague Justice Arbel. It so happened that the majority opinion in this judgment was not written in the regular order, but only after the dissenting opinions. With all best intentions to find in favor of the Petitioners, we believe that the significant strides made by the State, including during the deliberation in this case, as detailed by Justice

Hayut is the best possible without legislative amendments; despite the appealing proposals of our colleagues. Therefore we present immediately below the reasons that led us – the majority justices – to reject the petition.

3. The essence of our reasons is that the current state of Israeli law, on the level of existing law, does not permit what the Petitioners request, and this because the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child) 5756-1996 (hereinafter: the Surrogacy Law) does not apply on such circumstances, as will be briefly detailed below, and effectively even our colleagues do not dispute this. The Eggs Donation Law 5770-2010 (hereinafter: the Eggs Donation Law) does not apply either, in our opinion, and we did not see it fit to join the constitutional position of our colleague Justice Hayut, who "reads into" the exceptions committee's powers under the law (article C in chapter C) the authority in this case as well, an authority which the legislature did not grant, and explicitly so, perhaps due to advice from a governmental body which itself is not acceptable to us under the circumstances. This advice, as we will show below, highlights the tension between the words of the Legislature and the powers of the Court. Finally, the People's Health Regulations (In Vitro Fertilization), 5747-1987 (hereinafter: the IVF Regulations,) which our colleague Justice Arbel wishes to use are no longer suitable, in our view, to what is requested, following the legislation of the Eggs Donation Law. There is therefore no lawful way currently to assist the Petitioners beyond what the State was prepared to do after the negotiation and changes in its position.

4. In this context let us recall, as Justice Hayut noted in paragraph 11, during the long hearings in this Petition (four time before an extended panel of this Court) the Ministry of Health issued on July 21, 2013 a protocol regarding "The Taking of Sperm, Eggs or Fertilized Eggs Out of Israel" which permits the Petitioners to perform the requested implantation outside of the country. This protocol allows the taking out of eggs extracted in Israel, among others, "for the purposes of realizing parenting… for the woman from whom the eggs were extracted," with the approval of the exceptions committee. In a notice by the State (dated August 17, 2013) it was also said that the implementation team for the recommendations of the Mor Yossef Committee, which – as noted by Justice Hayut in paragraph 2 – recommended to extend the circle of those eligible to bring children into the world through surrogacy by including "single women who have medical conditions preventing them from creating a pregnancy" prepared a summarizing document in anticipation of legislative amendments.

5. And now for further detail. We will first note that in the medical world the procedure requested by the Petitioners is termed "Partner Assisted Reproduction/ Reciprocal IVF" (hereinafter: Reciprocal IVF.) Reciprocal IVF has become over the years fairly common in fertility clinics around the world

for female same sex couples despite its high cost compared to "regular" IVF. This is because it allows both partners to participate in the process of creating the child, through dividing the "maternal function" between the partner who furnishes the egg (hereinafter: the genetic mother) and the partner who carries the pregnancy (hereinafter: the physiological mother) (see Lilith Ryiah, *The G.I.F.T of Two Biological and Legal Mothers*, 9 AM. U.J. GENDER SOC. POL'Y & L. 207 (2001); Dorothy A. Greenfield and Emre Seli, *Assisted Reproduction in Same Sex Couple*, 289, 291 PRINCIPLES OF OOCYTE AND EMBRYO DONATION (MARK V. SAUER ed., 2013)).

6. In their amended petition, the Petitioners challenge two pieces of legislation that regulate the use of artificial reproductive technologies: the first is the Surrogacy Law, and the second is the Eggs Donation Law, as mentioned. My colleagues, Justices Hayut and Arbel, agree about the inherent misfit between the routes regulated in the Surrogacy Law and the medical procedure requested by the Petitioners. But they believe we should accommodate them through other legal paths, and as to those their opinions differ, as discussed.

7. In a realistic world, there are three potential scenarios where the State may be called upon to approve the medical procedure of reciprocal IVF between women partners: **couple 1** – where both partners have healthy eggs and are able to carry a pregnancy; **couple 2** – where one partner has healthy eggs but is unable to carry a pregnancy; **couple 3** – where one partner has unhealthy eggs but is able to carry a pregnancy. Still, when one partner has unhealthy eggs and is unable to carry a pregnancy there is inherently no realistic possibility to initiate a process of reciprocal IVF. These scenarios before us when we examine the different statutes and the purposes behind them. We now move on to review the paths in which my colleagues walked in searching for a lawful route to realize the Petitioners' wishes to bring into the world a child, who would be genetically linked to Liat, together with her partner – Dana – who is meant to carry the pregnancy with Liat's fertilized eggs (and a sperm donation, of course), as well as to explain why our views differ. We will then address the Petitioners' arguments regarding the unconstitutionality of the Surrogacy Law, while the fundamental position as to its inapplicability is acceptable to us all, both majority and minority justices.

Accepting the Petition through the Eggs Donation Law?

8. Justice Hayut identifies section 11 of the Eggs Donation Law as the primary obstacle to realizing the Petitioners' wishes, in light of the demand that the recipient be a woman who "cannot **due to a medical condition** become pregnant with the eggs in her body, or who has **another medical condition** which justifies using another woman's eggs in order to have a child" (emphasis added – E.R.). Once my colleague reached the conclusion that the Eggs Donation Law infringes the Petitioners' constitutional rights to

autonomy (para. 24), to family life and to parenthood (para. 25), the constitutionality of the infringement was examined. It was said that the arrangement in the Eggs Donation Law was for a worthy purpose, but does not meet the proportionality requirements, because article C of the Eggs Donation Law creates an exception committee under the law, but "without granting the committee a sufficiently flexible authority to consider individual and exceptional cases that warrant diverging from the law's provisions" (para. 34, and see also paras. 30-32.) Justice Hayut therefore suggest constitutional relief of reading into the Eggs Donation Law an additional sub-section – section 20(a)(5) – that would authorize the exceptions committee to approve eggs donation in circumstances where there are "exceptional and special reasons to do so" (para. 35.)

9. Justice Hayut therefore proposes that the Eggs Donation Law would allow the exceptions committee to approve an eggs donation for a recipient who had not pointed to a medical need for donation. Unlike the content of section 11 of the Eggs Donation Law, according to which – in the words of its heading – "a request for donation for the purposes of birth" may be submitted by a woman who is unable due to medical reasons to become pregnant with the eggs in her body and for using another woman's eggs including for surrogacy. As much as we would like to, the history of the exceptions committee makes it difficult to support this position, though I do believe the Legislature would do well to consider authorizing the committee to consider exceptional cases on a broader basis than it has. The current state of the law, until the "amended" legislation is in effect cannot, in our view, encompass more than what the State is willing to agree to, that is, taking the eggs out from the country without penalty as detailed above (para. 4.)

10. Until the Eggs Donation Law was passed in 2010, eggs donation was regulated by the IVF Regulations which permitted eggs donation only from a woman who was "undergoing fertility treatment and where a supervising physician determined that the extraction of eggs advances her treatment" (reg. 4(1)). The restriction in the IVF Regulations on the identity of the donor created a national shortage in the pool of eggs for donation. In 2000, a public professional committee, headed by Rabbi Dr. Mordechai Halperin of the Ministry of Health, was convened in order to study the issue of eggs donation in Israel (hereinafter: the Halperin Committee). The Halperin Committee recommended to make eggs donation possible also from **women who are not undergoing fertility treatments**, and this only for the purposes of fertilization and in return for "comprehensive compensation" (sections 7(a) and 9(b) of the Halperin Committee's recommendations.) It should be noted, that in the Committee's recommendations there was no explicit demand that the recipient would have a medical need for donation. And so, in section 4(2) of the recommendations it was said that the donation recipient would be "a woman past the age of minority and an Israeli citizen whose age at the time of

the eggs' implantation in her body is under 51 years" – this and no more. Still, it is important to note that the recommendations of the Halperin Committee were not presented as is to the Knesset as a bill (see Mordechai Halperin, *Eggs Donation in Israel – Dilemmas and Recommendations*, MEDICINE AND LAW – THE JUBILEE BOOK 165 (2001)).

11. In 2007, the Eggs Donation Bill, 5767-2007 was published in GOVERNMENT BILLS 289, p. 292 (hereinafter: the Bill) and it matured into legislation only in 2010. As was said in the explanatory notes:

> "The proposed statute is intended to regulate the different aspects involved in extraction and donation of eggs in Israel, and the use of these eggs. The essence of the proposed statute is to regulate eggs donation for the purposes of having children, but it also includes provisions that allow, under certain circumstances, use of donated eggs as described, for the purposes of research as well."

As opposed to the Halperin Committee's recommendations, section 11 of the Bill proposed to limit donations to a recipient who points to a medical condition (for a review of the many differences between the Halperin Committee's recommendations and the Eggs Donation Bill, 5767-2007, see Smadar Noy, Daniel Mishori and Yali Hashesh, *Gold Eggs Laying Geese – The Eggs Donation Bill 5767*, REFU'A U'MISHPAT 36, 161, 175-79 (2007)). The explanatory notes for section 11 clarify that the requesting woman may also point to the existence of "**other** justifying reasons" (there, p. 297, emphasis added – E.R.). Additionally, in section 21(e) of the Bill it was proposed to grant the exceptions committee the following powers:

> "To approve the extraction of eggs, the allocation of eggs or the implantation of eggs, according to the request of a supervising physician as defined in section 18, should the committee be satisfied that under the circumstances there are exceptional and special reasons to do so."

The explanatory notes clarified that the unique reasons are those "**which cannot be anticipated in advance, and this without requiring an amendment to the statute**" (there, p. 304, emphasis added – E.R.) The catch all section that aimed to authorize the exceptions committee to consider "exceptional and special reasons" was deliberately removed by the sub-committee of the Labor, Welfare and Health Committee that discussed the statue. This removal was criticized in my colleague Justice Hayut's opinion (paras. 21-22, 38.) A question remains, on the "legislative intent" level, whether even had the catch all section been enacted into the Eggs Donation Law, was there place under the circumstances before us for the exceptions

committee to have approved egg donation where the recipient does not demonstrate any medical need, because we are concerned with a case where it is seemingly clear that the law did not have in mind in its origin. We shall review the legislative history in order to uncover this.

12. The minutes of the meetings of the sub-committee of the Labor, Welfare and Health Committee reveal that the Ministry of Health's legal advisor, Adv. M. Hibner Harel, wished to create through the catch all section "an exit strategy, there are things in life I do not anticipate today" (sub-committee meeting, dated November 3, 2008.) Things to this effect were quoted by Justice Hayut in paragraph 21. And indeed justice Hayut believes that the catch all section should have covered "cases such as the one before us where the recipient has no medical need for an eggs donation but there are other reasons the justify permitting the donation" (para. 22.) However, were we to take a closer look at the sub committee's discussions from November 3, 2008 we find – it seems – that the catch all section, before it was removed, was not designed to resolve such cases. During the discussion Rabbi Dr. Halperin expressed his concern that "the catch all section makes everything else redundant. It compromises anonymity, infringes the woman's rights, infringes the man's rights. It is a section that violates all the rights." Adv. M. Hivner Harel clarified that "this section was actually born out of the shortage in eggs donation for research… this section was written for catastrophes. It **was not born as a catch all section for cases that are not catastrophes**" (there, p. 46, emphasis added – E.R.) Is the scenario of partners wishing to perform a procedure of reciprocal in vitro fertilization one that is a "catastrophe"? I doubt it. Let us recall that the medical procedure – reciprocal IVF – as requested by the Petitioners was anticipated and familiar to professional bodies, including in FA (Tel Aviv Dis.) 60320/07, *T.Z. v. The Attorney General, State Attorney – District of Tel Aviv* (2012) (hereinafter: the *T.Z.* case.) This was a case where in 2006 a lesbian couple secured the approval of the Ministry of Health's legal advisor herself to perform the procedure of reciprocal IVF. I will later discuss the distinctions between that case and ours. It is therefore doubtful whether, it was actually proposed to legislate the catch all section in order to provide a solution for the procedure the petitioners request to perform.

13. The foreseeability of the procedure requested by the Petitioners is seemingly also inferred from the sub-committee's discussions in regards to the drafting of section 22(a)(2) which addresses the designation of a donation from particular donor to a particular recipient for "religious or social" reasons:

> "Chair Aryeh Eldad:
>
> If there is **an opening for lesbians**, there is also an opening for the best friend. It is unclear what it is, but there is opening for the exceptions committee to discuss and say she can't. **This is**

> **a good opening**." (Minutes of sub-committee of the Labor, Welfare and Health Committee for Reviewing the Eggs Donation Bill, 5769-2008 (November 3, 2008.)) (emphases added – E.R.)

It seems that in the committee there was the opinion that saw section 22(a)(2) of the Eggs Donation Law the door to the exceptions committee for permitting lesbian couples non anonymous donations of eggs from one partner to the other who needs the donation for "a medical need" (couple number 3 in the scenarios presented in paragraph 7 above.)

14. My colleague Justice Hayut quoted extensively (para. 21) things from the discussion of the sub-committee, though at the end of the day it was decided not to include a catch all section, as a result of Rabbi Dr. Halperin noting during the discussion that "It is better to remove section 18 (approval in special cases – E.R.) and leave it to the court […] The court permits things that the law prohibits. Not just the Supreme Court, but also the District Court. There are many examples. When there is a real need it finds the way, even if it is in violation of the explicit law." And in response to the comment by the Chair, Professor Eldad, that "the court cannot operate in violation of the law, maybe we can add here a catch all section that authorizes the court as an exception to the exception," Rabbi Dr. Halperin replied "but this does not need to be written. The court does that anyway even without catch all sections. So we do not need this."

My colleague criticizes these things as "puzzling and mistaken reasoning." I regret that Dr. Halperin, who is a rabbi, a gynecologist and a legal expert, and an author of many works in medicine, and in particularly in the field of fertility "a symptomatic dysfunction" – that is, the conventional wisdom common in different circles as if the Court does as it wills. No matter what the law is, the Court walks its own path. The law is not a "pick your own adventure" even, and perhaps first and foremost, to the Court. The Court's role is to interpret, and often the law is subject to different interpretations between which the Court must decide (on the issue of interpretation see – for instance – the series of books by Professor Aharon Barak on INTERPRETATION IN THE LAW, which reviews all aspects of the issue.) Moreover, when the legislature "burdens" the court with interpretive duties in matters that are subject to great moral and public debated, such as the phrase "the values of the State of Israel as a Jewish and democratic state" in section 1A of Basic Law: Human Dignity and Liberty and section 2 of Basic Law: Freedom of Occupation. However, where the Legislature's position is clear, even under the legislative purpose as it the statute was enacted (as opposed to questions of interpretation where a statute is open to interpretation) – the Court must exercise great caution and it is not free to decide as it wishes, even when a worthy cause is at stake – and there the Court must wait for the Legislature.

15. Indeed, even were the proposed catch all section in the Eggs Donation bill enacted into the Eggs Donation Law, and in my view it should have been, the question remains – and I shall leave it for determination in future cases – whether it would have been appropriate to permit the Petitioners' request, and this in light of the primacy given by the Eggs Donation Law to physiological parenthood over genetic parenthood. In Israeli legislation there are several statutes that address parenthood (for the different models, see Yechezkel Margalit, *On the Determination of Legal Parenthood by Consent as a Response to the Challenges of Determining Parenthood in Modern Times*, DIN U'DVARIM 6, 533 (2012) (hereinafter: Margalit); Mordechai Halperin, *"A Woman Conceived Seed and Gave Birth" Biological Parenting and Genetic Parenting*, WEEKLY PARASHA – LEGAL REVIEWS OF TORAH PORTIONS, VAYIKRA 110 (A. HaCohen and M. Vigoda, eds. 2012.)) Section 3(a) of the Woman's Equal Opportunity Law, 5711-1951 and section 14 of the Legal Competence and Guardianship Law, 5722-1962 reflect approach that bemoan the genetic element, an approach absent from the Adoption Law 5741-1981 and the Eggs Donation Law and even under some views in the Surrogacy Law, where the genetic element is somewhat marginalized and allows the establishment of parenthood not on the basis of clear genetic foundations (see Hagai Kalai, *Suspected Parents: Legal Supervision and Control over Non Heteronormative Parents Following HCJ 566/11 Mamat-Magad v. The Minister of Interior*, LAW IN THE NET – HUMAN RIGHTS – DECISION COMMENTARY UPDATES 28, 5, 9-13 (2014) (hereinafter: Kalai.)) I will admit that in my eyes genetic parenthood **within surrogacy** is primary and therefore also the theoretical and moral approval of surrogacy. It should be noted that rulers of Jewish law are split on the question of which woman is considered the mother in the case of surrogacy, and see paragraph 36 below. In any event, in order to fit our case under the confines of such a "catch all section" it would have been necessary to create a model of "inherent constructed co-parenthood" and this remains in question.

16. What is the model of parenthood reflected in the Eggs Donation Law? Section 42 of the law stipulates that the child born of an egg donation **shall be the child of the recipient** and this without any need for issuing a parenthood order. In other words, through the Eggs Donation Law, despite the genetic link between the egg donor and the child, the physiological contribution of the recipient in creating the child is privileged. The Egg Donations Law, as we detail further in the context of the Surrogacy Law, aimed to "delink" the egg donor from the child and the recipient (see in this context of disconnecting the legal link in section 42(c) of the Eggs Donation Law, which mandates the severance of legal rights and obligations between the donor and the child; see also the references in the Eggs Donation Law in defining an "intended mother" and a "carrying mother" in the definitions section to the Surrogacy Law which at its basis is the view of "delinking" the "intended parents" from

the "carrying mother" and in effect from the child and the "carrying mother.") Only the issue of delinking is similar in both statutes.

17. The purpose of the Eggs Donation Law is expressed in section 1 of the law which stipulates that the law is essentially intended to regulate eggs donation for the purposes of birth **for women who cannot realize their parenthood** without an eggs donation, and this "while maximum preservation of their dignity, and protection of the rights and the health of the donor and the recipient." This is also reflected in the legislative history: "realizing parenthood is a paramount value in the State of Israel… We must understand that when the State of Israel approved this Bill it was concerned with the realization of parenthood by **women who would be unable to do so without an eggs donation**" (Adv. M. Hibner Harel, minutes of discussions in the sub-committee, dated February 18, 2008, emphasis added – E.R.) The goal of realizing parenthood by the recipient, despite the absence or deficiency in genetic material, is also inferred from the medical route to receiving an eggs donation: "Women who suffer ovarian dysfunction, a lack of ovaries, or reduced ovarian reserves; women who repeatedly produce eggs and/or embryos of compromised quality; women who have failed, after repeated attempts, to become pregnant through IVF treatments; carriers of a severe genetic defect; women over the age of 45" (Orly Loten, *Eggs Donation for Fertilization and Research*, THE KNESSET – CENTER OF RESEARCH AND INFORMATION (November 13, 2007)).

18. The fundamental approach of limiting the donation to a recipient with a medical need has, therefore, medical justifications, such as avoiding medical treatment that is unnecessary (Michal Agmon Gonen and Keren Dabach Deutsch, *The Physician's Right To Refuse Providing Fertility Treatments*, REFU'A U'MISHPAT 33, 13 (2005)), as well as social justifications such as preventing the use of donations for purposes of genetic engineering (Ruth Zafran, *There Can Be Two Mothers – The Definition of Motherhood to a Child Born to a Female Same Sex Couple*, DIN U'DVARIM 3 351, 362 (2008) (hereinafter: Zafran.)) Creating a **distinction** between recipients who require the donation due to a medical need and recipients who seek the donation without demonstrating a medical need is at its core consistent with the legislative purpose, which is protecting the health of the donor and the recipient involved in eggs donation for the purposes of having a child. We therefore find that the approval granted by the exceptions committee to a donation by the First Petitioner to the Second Petitions would doubtfully, on its face, fit into the harmony within the entire provisions of the law in light of the primacy it affords physiological parenthood in cases where the woman is unable to realize her genetic motherhood. Realizing the desire of a woman, such as in the case before us, to bring into the world a child with genetic code that is similar to hers on its face diverges from the rationale motivating the Eggs Donation Law which was designed to assist women with medical

conditions involving their eggs to realize their right to parenthood. Had the law intended for it to be possible to give an eggs donation to a healthy woman due to the medical need of the donor as well, presumably this would have been said explicitly (LCA 5638/95, *Migdal Insurance Company Ltd. v. Shamur*, IsrSC 49(4) 865, 871 (1996); CA 4100/97, *Ridner v. Vizaltier*, IsrSC 52(4) 580, 594 (1998); AAA 1721/10, *Ganei Tikva Local Council v. Kopelvitch*, para. 12 (2011)).

19. At the basis of the law, therefore, is the giving of an egg donation to a woman who has a medical need for the donation. This realizes the law's primary objective – to assist women with defects in their eggs to realize their right to parenthood. The distinction the law created between women who have a medical need and women who do not, seemingly does not discriminate against the Second Petitioner, in light of the existing relevant difference (HCJ 4124/00, *Yekutieli v. The Minister for Religious Affairs*, para. 35 of President Beinisch's judgment (2010)). Thus, as opposed to my colleague Justice Hayut, I do not believe we are concerned with the constitutional level of examining the Eggs Donation Law, as this law to begin with did not come to cast its net over our case.

20. The opinion of my colleague Justice Hayut emphasized the matter of *T.Z.*, a case from 2006 where the Ministry of Health permitted, before the legislation of the Eggs Donation Law, to women partners to donate eggs to one another. The *T.Z.* case was brought as evidence that the Ministry of Health "see the female couple a family unit that justifies granting their request while considering the circumstances of their shared lives" (Hayut, para. 21.) However, I am afraid that this case does not constitute evidence. Examining the facts of that case reveals that the receiving partner had a clear medical need for a donation from her partner, unlike the circumstances of the Second Petitioner. In other words, had the Eggs Donation Law already been on the books 2006 when the partners in *T.Z.* sought approval for an eggs donation, they would have been granted such approval according to the law, as the recipient meets the restriction legislated into section 11 of the law due to her medical need. And the other partner would have been permitted to donate, as the Eggs Donation Law removed the requirement for the donor to be in the midst of reproductive treatments. This route was proposed to the Petitioners during the hearing held on November 19, 2012 – it was suggested that Dana would donate to Liat, who has a proved medical need, a non-anonymous donation, as was also done in *T.Z.*, but this proposal was rejected by the Petitioners.

21. When reciprocal IVF between women partners was approved in the past, before the Eggs Donation Law was legislated, it was done according to medical policy that was later **supported** through primary legislation. My colleague Justice Hayut described (para. 20) the Attorney General's

Guidelines from November 24, 2009 (following a discussion dated September 6, 2009) and thus the reason that the approval of the Attorney General was necessary in *T.Z.* was that the donor in that case was not at the time undergoing fertility treatments, and this limitation was lifted by the Eggs Donation Law, and indeed was not an obstacle for the Petitioners in our case either.

In the absence of the recipient's "medical need," even had the Attorney General's Guidelines from 2009 applied, the Petitioners could not have relied upon it. The novelty in the Attorney General's Guidelines was lifting the restriction imposed by the IVF Regulations on the identity of the donor, while the hindrance faced by the Petitioners here stems from the requirement that the donor would have a medical need for a donation, a restriction that, as noted, is inferred from the legislative history, the legislative purpose and the primacy the Eggs Donation Law affords physiological parenthood.

22. Were we to return to the scenarios we presented at the outset of the judgment, the Eggs Donation Law in its present version resolves only the problems of couple number 3, who seeks a procedure of eggs donation from a partner with healthy eggs who wishes to make a non-anonymous donation to her partner who has unhealthy eggs and would carry the pregnancy. By adding the catch all section, my colleague Justice Hayut seeks to additionally allow couple number 2 – where one of the partners has healthy eggs but is unable to carry the pregnancy – to come under the provisions of the law, in order to realize Liat's wishes to be a genetic parent through her partner. It should be noted, that even had the catch all section been included in the Eggs Donation Law, as my colleague suggests, this would not resolve the problems of couple number 1 – two partners who have no proven medical condition – but still wish to pursue the process of reciprocal IVF in order to create a common genetic physiological child.

23. It is quite possible that there is a social need, in light of the rapid developments in the area of relationships as experienced in our world, for eliminating the requirement for the recipient's medical need as established in section 11 and this in light of the desire to expand the circle of those eligible for an eggs donation – for example, in the Petitioners' case or the case of single men or a male homosexual couples who need the donation as a result of an inherent biological deficit (Haim Avraham, *On Parenthood, Surrogacy and the State between Them*, forthcoming in LAWS 8 (2015) (hereinafter: Avraham)), or to resolve the issue of bastards (Yossi Green, *Is There Resolution for the Problem of Bastards through Medical Technologies in the Field of Reproduction?*, MOZNEI MISHPAT 7, 411 (2010)). This expansion lays first and foremost in the hands of the Legislature, who is charged with weighting the balances. In any event, and certainly in light of the legislative history on one hand and the partial solution proposed by the State on the other

hand, it seems there is no place to authorize the exceptions committee to create medical public policy out of thin air through a catch all section and while eliminating the requirement for medical need in specific cases – this without any guidelines in the form of legislative instructions, which are possible through a not too great legislative effort.

Approving the Request through The People's Health Regulations (In Vitro Fertilization), 5747-1987?

24. My colleague Justice Arbel, believes too that the Petitioners cannot prevail through the Eggs Donation Law, because "one cannot donate something to themselves, because that cannot be considered a donation" (para. 15,) and found that there is no justification to intervene in the requirement for a medical need under section 11 of the Eggs Donation Law (para. 14.) Also she suggested in her opinion an alternative path to the one proposed by Justice Hayut to accomplish a procedure of reciprocal IVF as requested by the Petitioners, through the IVF Regulations (paras. 17-18.) According to Justice Arbel, it is possible to apply the People's Health Regulations to the situation requested by the Petitioners without difficulty, as it has already been done in the *T.Z.* case.

25. However, as we have already shown above (para. 20,) the circumstances of *T.Z.* are greatly different from the circumstances of the Petition before us. It is true that the Attorney General's Guidelines from November 30, 2009 addresses a donation between women partners, saying that "this should not be seen as an act that violates the public policy." However, in all the cases detailed as the foundation for this premise, which were presented at the discussion held on November 24, 2009, the recipient partner demonstrated a medical need for the donation from her partner. Meaning, we are concerned with cases that are clearly covered by the current legal arrangement established by the Eggs Donation Law, which is not seemingly the case in the case here.

26. Moreover, the language of regulation 4 of the IVF Regulations can be viewed as evidence for the indispensability of the requirement for a medical need:

> "Extraction of an egg shall be done only from a woman who has met one of these conditions: (1) she is undergoing fertility treatments and a supervising physician has determined that extracting the eggs **would advance her treatment**; (2) she is not undergoing fertility treatments, but is interested in preserving fertility, due to her age…" (Emphasis added – E.R.)

And indeed – the definitions section of the Regulations distinguishes between a procedure of "taking an egg" which involves extracting eggs from a woman

and implanting them in **her** body and a process of "egg donation" which involves taking an egg from a woman and implanting it in the body of **another** woman. Regulation 3 stipulates that taking eggs will be done only "for the purpose of in vitro fertilization and implantation after its fertilization." We learn that the taking process, which involves the IVF process of one woman only, cannot be applied to the process of reciprocal IVF as requested by the Petitioners. Indeed "in the past the Ministry of Health approved the requested process" (para. 23), as my colleague Justice Arbel noted, but I fear that now, after the Eggs Donation Law was legislated, we are living in a different legal reality, and it seems the permission granted by the Ministry of Health became obsolete once the Eggs Donation Law was passed, as it regulated what was previously allowed through the Ministry's approval – a process of non-anonymous donation of an egg from a woman not undergoing fertility treatments to a woman requiring the donation for medical reasons. The Attorney General's Guidelines from 2009 implicitly exists through the Eggs Donation Law, and thus it is difficult to use the Regulations to approve a procedure where an egg is taken from the First Petitioner's body to be implanted in the Second Petitioner's uterus. I fear such a procedure has no source in the IVF Regulations. In light of the above regarding the *T.Z.* case, it is also impossible to say that the law aggravated the circumstances of women like the Petitioners, and of course the Legislature holds the key to any amendments.

Interim Conclusion – Perhaps I Will Build a Family Trough Her (Genesis 16:2)?

27. As mentioned, my colleagues Justices Hayut and Arbel propose to pave a lawful way for the medical procedure requested by the Petitioners be it through the Eggs Donation Law or through the IVF Regulations, respectively. They both rejected applying the Surrogacy Law on the circumstances at hand, due to the absence of the severance element between the carrying mother and the child. Only their proposals create, in effect, a "D tour" of sorts for the Surrogacy Law, only for the sake of offering a solution for this case, and in my view the current state of the law does not support this. It is a good question whether a broad interpretation is appropriate before the Legislature has had its say.

28. I will add several comments: the surrogacy and eggs donation procedures are in effect two aspects of the same medical procedure. In both processes – aside from surrogacy cases where the intended mother requires both the services of a uterus and an eggs donation – the function of motherhood is divided between two different women: the genetic function and the physiological function. In both processes there is Woman A who provides an egg to Woman B in whose body the fertilized egg is implanted. The difference between the procedures stems only from the **agreement** between the parties that

determines who will be the parent of the child born as a result of the medical procedure:

> "When egg is retrieved from one woman, fertilized, and then implanted in a second woman, the first woman could be functioning either as an egg donor – with no intention of rearing the child – or, alternatively, as the intended rearing mother. Moreover, the second woman (i.e., the woman who carries the fertilized egg to term) might be functioning as a 'surrogate' or, alternatively, as the intended rearing mother. In both situations, *the cast of characters is identical*. What differentiates the two circumstances is not the functions performed by parties, but rather the intentions of the parties upon entering into the arrangement. These intentions define the roles of the parties and should determine legal maternal status" (Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 277 (1995). (Emphases added – E.R.)

And further:

> "An egg donor recipient woman and a gestational surrogate differ only in maternal intent, usually also reflected by legal contract. This 'only,' however, yields a cosmos of different contested meanings of motherhood." (DION FARQUHR, THE OTHER MACHINE: DISCOURSE AND REPRODUCTIVE TECHNOLOGIES 151 (1996) (Emphasis added – E.R.)

The Agreement between the parties depends on the medical need of the woman who initiates the procedure. When a woman requires an egg donation, the requested process is termed "egg donation" and when she requires assistance in carrying a pregnancy the requested process is termed "surrogacy" – whereas the medical procedure itself essentially remains the same, identical.

29. Evidence for this can be found in sections 4(b) and 6(b) of the Eggs Donation Law:

> "4(b) The instruction of section 4(a) would not apply to an eggs extraction from the body of an intended mother, to the lab treatment of eggs extracted as such and to their implantation in the body of a carrying mother **for the purposes of executing an agreement for carrying embryo** , under the Agreements Law.
>
> …

> 6(b) There shall be no implantation of eggs but for implantation in the body of a recipient or of a carrying mother who entered into an agreement with a recipient for carrying embryo under the Agreements Law." (Emphasis added – E.R.)

The identical medical procedure – extracting eggs from Woman A and implanting them in Woman B – is regulated by two **different** statutes. The root of the differences between the legislative arrangements is in the social agreement between the parties to the procedure and the State. Implanting a fertilized egg in the body of an intended mother according to the Surrogacy Law, is not considered a donation. Section 4(b) and 6(b) of the Eggs Donation Law clarify that there is a social choice in terms of categorizing the same procedure differently according to the medical need motivating the parties. I am afraid, that introducing a catch all section into the Eggs Donation Law, which would allow Woman A to donate an egg to a woman who has no medical need means the ***de facto*** **creation of a surrogacy route under the Eggs Donation Law**. This would require thought and examining legislative harmony. Extracting eggs from Woman A, fertilizing it and implanting it in the uterus of Woman B who herself has no medical need for a donation appears to put us close to a quasi-surrogacy procedure. Even in a surrogacy procedure, the carrying mother has not medical need for an egg donation and the fertilized egg is implanted in her body **despite** the lack of a medical need, this only if the link is severed after birth. See section 1 of this Law (the definition of "carrying mother") as well as section 2 which addresses "implantation of fertilized eggs for the purposes of impregnating a carrying mother in order to **give away** the born child to the intended parents" (emphasis added – E.R.). The obstacle barring the Petitioners from coming under the confines of the Eggs Donation Law – the medical need – does not exist when we are concerned with a surrogacy procedure, thought, it is contingent upon severance, which in this case is the opposite from what the Petitioners seek.

30. The proposal to make use of the IVF Regulations, too, sounds like a "circumventing" of the Surrogacy Law because, indeed as long as the egg extraction is done for the purposes of fertilization in the body of the woman from whom the egg had been extracted, the legal arrangement which applies is the Regulations. However, once the egg is implanted in another woman's body, the two relevant statutes are the Surrogacy Law and the Eggs Donation Law, and the determination as to the applying statute is examined in light of the **intent** of the party who requested the procedure in order to realize their parenthood. In our case, the First Petitioner seeks to create a child who will carry her genetic code, through the implantation of a fertilized egg from her body in the uterus of the Second Petitioner who has no medical need for the procedure. This all means that the using of the Eggs Donation Law and the IVF Regulations in order to enable a procedure where an egg is implanted in

the Second Petitioner without a proven medical need, is therefore kind of circumvention of the Surrogacy Law and its provisions – an arrangement that allows, in effect, surrogacy where there is already a preexisting relationship between the intended mother and the recipient mother which is the foundation of the surrogacy, and this without applying the Surrogacy Law and the checks and balances included in its provisions, and in violation of the law's approach in its current version.

Approving the Request through the Surrogacy Law?

31. To complete the picture, I shall address the Petitioners' argument as to applying the Surrogacy Law which was at the foundation of their Petition from its outset. The State maintains that there are two main barriers in the Petitioners' way when wishing to rely on the provisions of the Surrogacy Law. **The first**, that they are not included in the circle of eligible women; **and second**, the absence of severing the link between the carrying mother and the child after the birth, in light of their declared intent to raise the child together. To the State, the procedure desired by the Petitioners inherently does not fall under the Surrogacy Law, and exceeds its purpose and its provisions because it "creates genetic, biological co-parenting." This position was general acceptable to the Justices in the extended panel – who saw the Surrogacy Law as an arrangement of severance after birth – and was at the foundation of the decision dated September 24, 2012 to have the Petitioners amend their Petition so that it would address also the Eggs Donation Law.

32. And yet I shall explore the question whether surrogacy **in and of itself** requires severance between the carrying mother and the child. During the hearing on April 28, 2013 Justice Arbel wondered about this, and I myself raised the question (see the records.) My concern was on the values level, first and foremost. According to the State, the severance between the carrying mother and the "intended parents" is an overarching principle of the institution of surrogacy, whereas recognizing the carrying mother as a legal mother has far reaching consequences, that is, recognizing a surrogate as the child's mother for all intents and purposes, and doing so against the narrow and balanced arrangement established by section 13 of the Surrogacy Law which allows the carrying mother to renege on the agreement – including severance – in extreme circumstances alone.

And indeed it is seemingly possible to find in the various provisions of the Surrogacy Law evidence for the State's position. We mentioned section 1 which defines an agreement for carrying embryo as an "agreement between intended parents and a carrying mother whereby the carrying mother agrees to become pregnant via implantation of a fertilized egg and to carry the pregnancy **for the intended parents**" (emphasis added – E.R.). We also pointed to section 2. Moreover, section 19 of the law stipulates that entering

into an agreement to carry an embryo not according to the path laid out in the law is a criminal offense, punishable by incarceration. The law clearly designs the route to be followed by parties entering into an agreement of contractual, commercial surrogacy which involves compensation for the carrying mother ("Commercial Surrogacy") and does not involve regulation as altruistic surrogacy.

33. From the explanatory notes of the Surrogacy Law we learn that the law aims to permit surrogacy agreements "under certain conditions and in a supervised manner" (see the Embryo Carrying Agreements Bill (Approval of the Agreement and the Status of the Child), 5756- 1995 (BILLS 5756 n. 2456, p. 259, December 6, 1995.) The existing limitations in the law are inherent to the design of the surrogacy mechanism in light of the concerns for the exploitation of the surrogate mother. The Surrogacy Law was proposed following a report by a committee headed by Justice (Ret.) Shaul Aloni, and I will concede that reading the law on its face – including reading the explanatory notes to the Bill – resound of surrogacy based on severance. The explanatory notes (there) speak of advance technologies that allow "bringing children into the world… with the assistance of a woman (carrying mother) willing to become pregnant and to carry a pregnancy in her uterus for a couple, with the genetic code of the couple or at least one of them (intending parents) **and to give away the child to them upon birth**" (emphasis added – E.R.). I will not, however, discussing – beyond the necessary scope, it seems, of the case at hand – a situation where surrogacy does not in itself require complete severance between the carrying mother and the child.

Surrogacy seeks, at its core, to use the ability of a particular woman to carry a pregnancy and this in order to assist another (HCJ 625/10, *Jane Doe v. The Committee for Approving Agreements for Carrying Embryo under the Agreements Law*, para. 12 of Deputy President Rivlin's judgment (2011)). Assistance in carrying a pregnancy in itself does not necessarily mean there must be severance, and this may depend on the circumstances, but it does require legislation, and I must say this – with emphasis – at this stage already. It should be noted that in certain countries which opted to permit surrogacy (Britain, Australia and Finland) an altruistic model was selected, rather than contractual, commercial (which our Law is modeled after, as inferred also by its title – the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756-1996.) The altruistic model, as opposed to the contractual, commercial model, is built on a foundation of a preexisting relationship between the surrogate and the intended parents (Nufar Lipkin and Eti Smama, *From Vision to Shelf Product: The Crawling Normativation of Surrogacy in Israel*, MISHPAT U'MIMSHAL 15, 435, 449-453 (2013) (hereinafter: Lipkin and Smama)).

34. The normative advantage of the altruistic model is that it allows overcoming the concern as to the exploitation inherent to the paid surrogacy model, a model that the approach at its foundation is that the surrogate mother is but a service provided, while ignoring the uniqueness of the procedure and the costs it involves (Id., p. 489-490.) The existing relationship between the surrogate mother and the intended parents, on the basis of which the agreement is made, may negate and at least decrease the concern for the surrogate's exploitation. The Israeli Surrogacy Law, which addresses – as noted – commercial surrogacy, was designed with particular emphasis on the interests of the intended parents, who are usually interested in receiving the child without committing to an ongoing relationship with the surrogate. However, this is not necessarily the only way it was possible to shape the relationship created in the framework of the agreement between the intended parents and the carrying mother.

35. It is not unnecessary to note that scholars of Jewish law have theorized that the child in the surrogacy procedure has two mothers and this because of the concern for prohibited relations (see Z. Lev, *Test Tube Baby – the Status of the Surrogate Mother*, EMEK HAHALAKHA B 163, 169 (1989); David J. Bleich, CONTEMPORARY HALAKHIC PROBLEMS 107-108 (1977)). This, as we will see, is the strict position of Rabbi S.Z. Auerbach. This all means that determining whether we are concerned with severance or with a relationship is an epistemological choice resulting from public policy and is not imminent to the medical procedure itself. There are in fact those who would say that surrogacy has environmental consequences that implicate the child. Still, the Surrogacy Law in its current version, which wishes to severe the relationship between the carrying mother and the child and intended parents, leaves a period of "twilight" – between the child's birth and the grant of the parenting order (sections 10-11 of the Surrogacy Law) – where legal status has yet to be given to the intended parents but the child has already been moved into their custody. In this short period of time, the generic link to the intended parents does not ensure them any legal status, but does ensure them custody, and only the parenting order afterwards is which creates the final severance. It seems that the law as it is, creates a period of time where both women (the carrying and the intended) are tied to the child, at the same time. However, clearly this was not the intention of the law, which was designed to regulate surrogacy on a contractual, commercial basis which is followed by **severance**. Still, I have decided to examine, in light of the Petitioners' arguments, the constitutionality of the Surrogacy Law in this regard.

Surrogacy – the Jewish Law

36. To the credit of Jewish law I will note that current rulers of Jewish law contemplate and deliberate the question of surrogacy, just as they do many questions of Jewish law that come out of the technological and medical

advances prevalent in our times, as well as the new family configurations, whether they are single parents or couples (see Rabbi Z.N. Goldberg, *Attributing Motherhood When Implanting An Embryo in the Uterus of Another*, TEHUMIN 5 248 (1984); Rabbi M. Herschler, *Halachic Problems of a Test Tube Baby*, HALACHA AND MEDICINE 1, 307 (1980); Rabbi A Klab, *Who is the Child's Mother – The Parent or the Woman who Gave Birth?*, THUMIN 5, 260 (1984); Rabbi Y.B. Meir, *In Vitro Fertilization – Attributing a Fetus Born to the Surrogate Mother and the Biological Mother*, ASYA 11, 25 (1986); Rabbi E. Bik, *Attributing Motherhood in Embryo Implantation*, THUMIN 7, 266 (1987); Professor Michael Korinaldi, *The Legal Status of a Child Born from Artificial Fertilization with a Sperm or an Egg Donor*, JEWISH LAW YEARLY 18-19, 295 (1992-1994); Professor Daniel Sinclair, *Artificial Insemination and In Vitro Fertilization in Jewish Law: Comparative, Halachic-Methodological and Moral Perspectives*, HAMISHPAT 9 291 (2004); Rachel Chishlvitz, *Surrogacy Coupled with Eggs Donation: Legal and Halachic Perspectives*, REFUAH U'MISHPAT 39, 82, 85 (2008)). Some of the rulers did not consider surrogacy in a positive light as they saw it as confusing and mixing. However, it seems it should be considered, though it is not at the hard of the issue, similarly to artificial insemination that was permitted where there was great need for it (for reservations about surrogacy see KOVETZ YESHURUN, 21 535, 537 on behalf of Rabbi Y.S. Elyashiv and Rabbi S.Z. Auerbach; on permitting artificial insemination see Rabbi M. Feinstein following the M.H.R.S.M, Q.A. IGROT MOSHE EVEN HA'EZER 1, 10.) What is this great need? Family continuation is seen as the woman's (for instance, the woman who requests artificial insemination) request for assistance at her old age ("A stick in hand and a shovel for burial"), BAVLI KETUBBOT 64, 71) and see the *Sperm Bank* case, in paragraph 27 of my opinion. Is it possible to see the realization of the right to parenthood a great need? This may be an extension of the need "at old age" to a life that is meaningful and satisfactory.

Another question that is somewhat highlighted by our issue, is who is considered the mother of the child – the donor of the egg or the surrogate? Rabbi Yosef Shalom Elyashiv (NISHMAT AVRAHAM 4, EVEN HA'EZER 2, 2) believed that the genetic mother – the egg donor – is the mother (KOVETZ YESHURUN, p. 535-40) though perhaps later he came to doubt this (YESHURUN 21 (2009)) and see the references in Rabbi Dr. M. Halperin's book MEDICINE, REALITY, HALACHA AND THE WORD OF THE MEDICALLY WISE (2012) 22-23, 294-95. So believed, too, Rabbi I.M. Soloveitchik, *The Law of a Test Tube Baby*, OR HAMIZRACH 100, 122-128 (1981); see also Rabbi S. Goren, *Implanting Embryo According to Halacha*, HATZOFE 17 (1984); Rabbi Dr. E. Warhaftig, *Annexure to the Discussion regarding Test Tube Babies*, THUMIN 5 268-269 (1984)), but for another opinion, Rabbi E.I. Waldenberg (*Tzitz Eliezer*, part 19, 40; 20, 49) who thought that the eggs do not belong to the body of the surrogate and she therefore would be considered the mother; and see also Rabbi Zalman Nehemia Goldberg, TEHUMIN 5 270. In his book,

Rabbi Halperin presents the contrary position of Rabbi Ovadiah Yosef, Rabbi M. Brandsdorfer and Rabbi S.M. Amar who believe that the genetic mother is the mother (see the sources there, pages 294-295; and there are also opinions that have changed.) For a collection of opinions that essentially tip in favor of the surrogate's motherhood, see also OLAMOT (lesson 33, 2009); but see Rabbi Aviad Bartov, *Permitted through his Mother – and a Surrogate Mother*, SHIURIM B'MASECHET BEITZA, Har-Etzion Yeshiva, which summarizes (and see the references there) as follows: "Today it seems that the common Halachic practice is to say that the status of the fetus born of this arrangement (in vitro fertilization of the surrogate mother – E.R.) must be determined by the status of the mother who is the source of the test tube, rather than the surrogate mother." The opinion of Rabbi S.Z. Auerbach, as I have heard it from Rabbi Professor Abraham Steinberg, was that there is no clear solution in either direction because there is not satisfactory evidence for full determination and thus both women must be seen "mother in strictness" (which would require, for instance, the conversion of one of them should she not be Jewish.) See also Rabbi Itzhak Shilat MEDICINE, HALACHA AND THE TORA'S INTENTIONS (2014) 222, 231, who brings from NISHMAT AVRAHAM (2 Ed.) EVEN HA'EZER 35. Ultimately in this case there is no need to determine who the mother is, as the goal is complete partnership between the two specific women, though this may come up in matters of singleness or of separation (see *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Ct. App. 2004); Sanja Zgonjanin, *What Does It Take To Be A (Lesbian) Parent? On Intent and Genetics* 16 HASTINGS WOMEN'S L. J. 251 (2004-2005)).

Does the Surrogacy Law Infringe upon the Constitutional Right?

37. The Surrogacy Law reflects the social agreement reached whereby "commercial surrogacy" was established for a narrow circle of intended parents who are a heterosexual couple (HCJ 2458/01, *New Family v. The Committee for Approving Agreements for Carrying Embryo*, IsrSC 57(1) 419, 437-38 (2002) (hereinafter: the *New Family* case.)) Does the existing arrangement in the Surrogacy Law infringe upon the Petitioners' right to parenthood? Further, does creating a genetic, biological child within a lesbian relationship was not in the Legislature's mind when passing the Surrogacy Law, but since the First Petitioner wishes to realize her right to genetic parenthood by using her partner's uterus, can her request rely on the Surrogacy Law?

The First Step – Is There an Infringement upon the Right to Parenthood?

38. The right to family life is a sub right that derives from the constitutional right to human dignity (HCJ 7052/03, *Adalla Center for Arab Minority Rights in Israel v. The Minister of Interior*, IsrSC 61(2) 2002 (2006)). The right to parenthood is a granddaughter right to the right to family life and it

encompasses various methods for fertility, reproduction and birth (Aharon Barak, *The Constitution of the Family: Constitutional Aspects of Family Law*, MISHPAT V'ASAKIM 15, 13, 42 (2014) (hereinafter: Constitution of the Family); Aharon Barak HUMAN DIGNITY – THE CONSTITUTIONAL RIGHT AND ITS DAUGHTERS Vol. 2, 662-670 (2014)). There is no dispute that the right to parenthood was recognized repeatedly in the jurisprudence of this Court as a basic constitutional right (CA 5527/93, *Nahmani v. Nahmani*, IsrSC 49(1) 485, 499 (1995); CFH 7015/94, *The Attorney General v. Jane Doe*, IsrSC 50(1) 48, 102 (1995); CFH 2401/95, *Nahmani v. Nahmani*, IsrSC 50(4) 661, 775 (1996); the *New Family* case, p. 445; HCJ 2245/06, *Dovrin v. The Prison Service*, para. 12 of Justice Procaccia's judgment (2006); HCJ 4293/01, *New Family v. The Minister of Labor and Welfare*, paras. 17-21 of Justice Procaccia's judgment (2009) (hereinafter: *HCJ New Family*); HCJ 11437/05, *Kav L'Oved v. The Minister of Interior*, para. 38 of Justice Procaccia's judgment (2011) (hereinafter: the *Kav L'Oved* case); the *Sperm Bank* case, para. 27 of my judgment and para. 8 of Justice Barak-Erez's judgment (2013)).

39. The right to parenthood was recognized as a right with "negative" and "positive" aspects (*HCJ New Family*, para. 3 of President Beinisch's judgment and para. 5 of Deputy President Rivlin's judgment.) The negative aspect concerns protecting the individual from external intervention in the right and its exercise. The positive aspect goes to the state's duty to assist the individual in exercising the right (see Aharon Barak, INTERPRETATION IN LAW 3, 312 (1994); Aharon Barak, PROPORTIONALITY IN LAW: INFRINGEMENT ON CONSTITUTIONAL RIGHTS AND ITS LIMITATIONS 44 (2010) (hereinafter: Barak, Proportionality)). The right to parenthood was repeatedly considered against technological developments in the area of reproduction. Surrogacy has been recognized as part of the right to parenthood, but was categorized as a process that belongs on the positive level of the right to parenthood (*HCJ New Family*, para. 23 of Justice Procaccia's judgment.) For critiques on this categorization, see Kalai, p. 19-20. In any event, by both aspects, the right to parenthood is not absolute (Barak, Proportionality, p. 56-57.)

40. The Petition at hand raises, among others, the question of whether the right to parenthood includes the right to **genetic** parenthood specifically. This question was not explicitly contemplated in the case law, but the **"voice of blood"** – the genetic element – has been heard (CFH 7015/94, *The Attorney General v. Jane Doe*, IsrSC 56(1) 48, 102 (1995); the *New Family* case, p. 461; Pinhas Shiffman FAMILY LAW IN ISRAEL 132-133 (1989); the *Kav L'Oved* case, paras. 38-39 of Justice Procaccia's judgment; CFH 1892/11, *The Attorney General v. Jane Doe*, para. 6 of Justice Joubran's judgment (2011)). In the *Sperm Bank* case (paras. 43-45) I discussed the weakening of the genetic element, and that genetic parenthood cannot be considered to be the end all be all. This has support in Jewish law, too – "Happy is who does charity, one

who raises orphan boys and girls in one's home and brings them to be married" (Bavli, KETUBBOT 50, 71); "Anyone teaching Torah to another's son as if the child is his" (Bavli, MEGILA 13, 71); "I know no other father but you, as that who raises one is called father, rather than the only leading to birth" (SHEMOT RABBA, 46, 5, "and now, God, you are our father"); "Rabbi Hanina says 'and her neighbors gave him a name that meant he was a child born to Naomi (RUTH 4, 17), as because Naomi gave birth and Ruth gave birth, but Ruth gave birth and Naomi raised he was therefore called for her" (Bavli, SANHEDRIN 19, 72); on the model preferring the "social/ functional/ psychological parenthood" see Margalit, p. 576-582.)) Recently this Court considered the general and supplemental issue of a request to establish parenthood based only on a contractual foundation without any genetic element in AA 1118/14, *Jane Doe v. The Ministry of Welfare and Social Services* (the Petition was denied on July 13, 2014, in a decision that has yet to include reasons.)

41. In the *Sperm Bank* case, I addressed the two levels of the right to parenthood (para. 29):

> "From all of this another distinction is revealed, which goes to the two levels of this right. **The first level**, which is **in itself valuable**, is the ability to realize reproduction ability and become a biological mother or father. **The second level**, which is that at the basis of the **right not to be a parent**, is one's ability to choose **how** to realize their natural right that is the first level. The second level is in the periphery of the right to parenthood, it is not designed to protect the value itself of having children, but other values **such as the right to privacy, autonomy and free will with whom, how and when** if at all, to bring children into the world (including the ability to **plan a family**)" (emphases added – E.R.)

The distinction between the two aspects of the right is relevant here. The wise would easily see that on the legal level it is possible to distinguish between the infringement upon the First Petitioner's right to parenthood and the infringement upon that right of the Second Petitioner's. While the infringement upon the Second Petitioner is focused essentially on the second level of the right, because she is prevented from **realizing the right in a manner she had requested** , the infringement upon the First Petitioner is located in the first level of the right to parenthood, because she is barred from the very access for a surrogacy procedure and therefore, realizing her right to genetic parenthood. This categorization of the Second Petitioner's issue does not negate the actual infringement because "as long as the margins are part of the right, the marginal character of the right's infringement is relevant only to the stage of constitutional review of the infringement, rather than the matter of

whether there is in fact an infringement upon the right to human dignity" (The Constitution of the Family, p. 30; Barak, Proportionality, p. 44.)

42. For purposes of this discussion, I shall assume that the arrangement set in the Surrogacy Law which permits agreements between a man and woman and a surrogate and which requires severance of the relationship between the surrogate, the child and the intended parents upon birth, infringes the Petitioners' right to parenthood. I will thus examine the constitutionality of this infringement.

The Second Step – Is the Infringement of the Constitutional Right Lawful (Limitations Clause)?

43. The Limitations Clause includes four conditions, as articulated by the language of section 8 of Basic Law: Human Dignity and Liberty – the infringement must be done in a law or by law under in its explicit authorization; it must be fitting of the values of the State of Israel; it must be for a worthy purpose; and to an extent no greater than necessary. Two main obstacles stand in the Petitioners' way to be included by the arrangements of the Surrogacy Law. **One**, the statute's definition of the term "intended parents," which is (section 1) "a man and a woman who are a couple, who enter into an agreement with a carrying mother in order to have a child." **Two**, the absence of severance between the carrying mother and the intended parents after the birth of the child. We shall address both these pivotal obstacles.

The Constitutionality of the Definition of the Term "Intended Parents"

44. The narrow circle of eligibility resulting from the definition of "intended parents" in the Surrogacy Law was considered in the *New Family* case within the issue of the eligibility of a single woman to realize her right to parenthood through a surrogacy procedure. It was held that "the law did not intend to fix the problems of a women without children who has no male partner, it did not even aim at solving the problems of a man without a female partner or any other couple" (Id. p. 439, by Deputy President Cheshin.) In the *New Family* case, the narrow circle of eligibility was considered constitutional primarily because the law's novelty at the time. Deputy President Cheshin insisted that in the future, the issue will warrant revisiting, once relevant information was accumulated as to the execution of the surrogacy procedure as well as to its consequences (Id., p. 447-48, 456.) See also Yelena Chechko, *On Ripeness and Constitutionality: Following HCJ 3429/11*, Alumni of The Orthodox Arab High School v. The Minister of Finance *and HCJ 3803/11*, Board of Trusties of Israeli Stock Market v. The State of Israel, MISHPATIM 43, 419 (2013)).

45. The Professor Shlomo Mor Yossef Committee – the Public Committee of Examining Legislative Regulation of Reproduction and Birth in Israel (2012) – did indeed recommend to expand the circle of eligibility for surrogacy, so that single women, too, would be able to access the process of commercial surrogacy. The Committee further recommended establishing altruistic surrogacy for single men (for critiques regarding the Committee's recommendations, see Avraham, chapter 3d.)

Following the publication of the Committee's recommendations, in June 2012 a team was put together to examine methods of implementing the recommendations, as we have noted above. This year the Memorandum for the Agreements for Carrying Embryo Law (Approval of an Agreement and the Status of the Child) (Amendment – Definition of Intended Parents and Executing an Agreement outside of Israel), 5774-2014 was presented and received the approval of the Ministers Committee for Legislative Matters on March 2, 2014. The memorandum proposes to change the definition of "intended parents" to include in the circle of eligibility single women and single men. That is, it was proposed to expand the circle of eligibility for commercial surrogacy, according to the spirit of the decision in the *New Family* case. The memorandum does not directly resolve the issue of the Petitioners here under the model they request – only making it possible for the First Petitioner to contract a strange woman as a surrogate, which of course is not the Petitioners' intention.

46. In any event, the existence of current legislative proceedings to expand the existing circle of eligibility in the Surrogacy Law naturally and sensibly calls for judicial restraint by this Court, so it won't trail behind the Legislature (para. 17 of Justice Hayut's judgment; HCJ 9682/10, *Milu'off Agricultural Cooperative Association Ltd. v. The Minister of Agriculture – Ministry of Agriculture and Rural Development* (2011)). Of course, were there ultimately not to be legislative processes constitutional judicial intervention must not be ruled out of the realm of possibility. I do agree with my colleague Justice Arbel's words in her judgment that "legislative arrangements must be interpreted to fit with the principle of equality which demands the equal treatment of same sex couples" (para. 10.) However, the appropriate port of call for such changes is first and foremost the Legislature, and the existence of advanced legislative processes warrants such judicial restraint.

47. To conclude so far, the definition of the term "intended parents" in the Surrogacy Law prevents the First Petitioner's access to surrogacy. The State claims (para. 51) that this issue is merely theoretical in her regard in light of her desire to have the assistance of her partner in order to realize the surrogacy procedure. However, there should be a distinction between barring access to a procedure, on the first level of the First Petitioner's right to parenthood, and the matter of how the surrogacy procedure will be executed on the second

level of the right. We now move to the second bar, which is concerned with **how** the right to parenthood is exercised.

The Requirement for the Severance of the Relationship between the Carrying Mother and the Intended Parents – Constitutional?

48. The First Petitioner's desire to execute the surrogacy procedure through her partner, appears to be, as mentioned above, concerned with the second level of the right to parenthood: the way in which the right it exercised. The First Petitioner wishes to exercise her right to genetic parenthood in a **particular** way, that is possible on its face in the medical sense – subject to the reservations of the First Petitioner's treating physician that "there is no conclusive evidence as to whether the problem is the eggs or the pregnancy taking root (uterus-based)" (exhibit P/2 of the Amended Petition dated April 14, 2013), but it is still uncharted land in the legal sense.

49. Altruistic surrogacy, and at least surrogacy based on a relationship, is not recognized in the current legislative arrangement. Still, in the mentioned law's memorandum it is possible to find slight hinting at establishing such surrogacy. Thus, it was suggested to change the definition of "relative" in section 1(3) of the Surrogacy Law so that cousins would not be considered relatives and could serve as carrying mothers. In section 2(3)(b) of the Surrogacy Law it was proposed to add an exception to the basic prohibition on the intended parents and the carrying mother being relatives as following: "despite the above, a sister cold use as a carrying mother as long as the sperm fertilizing the eggs implanted in her body is not of her brother." The desire to increase the pool of candidates for carrying mothers brought the drafters of the memorandum to consider relatives of the intended parents under the assumption that **the existence of a relationship** would serve as a catalyst for entering into the surrogacy procedure.

In order to examine the proportionality of the demand to severe the relationship between the surrogate and the intended parents we shall consider the three accepted sub tests: first, the fit test – which requires a connection between the worthy purpose and the means selected to accomplishing it. Second, the least restrictive means test – which requires that the means chosen infringes on one's right as little as possible. The third test concerns the existence of a proper connection between the means and the purpose, and weighs the benefits resulting from the infringing statute against the extent of harm done to the right (HCJ 4769/95, *Menachem v. Minister of Transport*, IsrSC 57(1) 235, 279-86 (2002); Aharon Barak, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION, 545-47 (1994); Barak, Proportionality, p. 373-454.)

50. Because there is on its fact a rational link between the surrogacy model built around the severance and the achievement of the purpose of the Surrogacy Law, as it currently is, we will move on to the second sub test for proportionality and ask whether there is an alternative which infringes on the right to parenthood less but may still achieve the law's purpose. The Petitioners justifiably point to a variety of problems and criticisms raised in regard to commercial surrogacy – the exploitation of the surrogate's financial circumstances, the hardship of severing the relationship with the child, regret for entering into the procedure, and the involvement of a third party in reproductive procedures (Lipkin and Smama, p. 480-85.) They argue that these are negated by an altruistic procedure which they seek. However, the altruistic model is not free of flaws, either. The main concern arising in an altruistic model is the social and familial pressure on the woman, which may lead her to enter into an intrusive and difficult procedure that does not reflect her true wishes (Rakhi Ruparelia, *Giving Away the Gift of Life: Surrogacy and the Canadian Assisted Human Reproduction Act* 23 CAN. J. FAM. L 11, 14; 29; 35-36 (2007); Janice J. Raymond, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM, 53-54 (1993)). In the United States, for example, there is a tendency to restrain altruistic agreements between relatives because of the concern for difficulties of disconnection from the child (Lipkin and Smama, p. 450.) An additional problem is the lack of sufficient psychological and scientific knowledge about the altruistic process and its consequences (Id., p. 490.)

51. Moreover, altruistic surrogacy may also raise, to greater force, the question of the surrogate's legal status vis-à-vis the child. Ordinarily, in a procedure of surrogacy, once a parenting order is granted the carrying mother loses any legal status toward the child. In the procedure requested by the Petitioners, it is likely that the Second Petitioner who would have carried the child would seek legal recognition as the child's mother (see also HCJ 566/11, *Doron Mamat-Magad v. The Ministry of Interior* (January 28, 2014) (hereinafter: the *Mamat-Magad* case.) Such a request poses significant difficulty to the institution of surrogacy in its current formulation which only recognizes the intended mother as the legal mother (Zafran, p. 388-395.) Legal recognition within the Surrogacy Law of the carrying mother may potentially cause harm to the group of "intended parents" who currently utilize the Surrogacy Law.

52. In light of all the above, permitting a model of "relationship" within the existing statutory arrangement cannot create an alternative that less infringes upon the constitutional right, which can still accomplish the purposes of the law. Though the establishment of altruistic surrogacy has great potential, the task of setting it up is clearly within the purview of the Legislature in light of the difficulties it presents in the absence of proper and balanced regulation. Establishing a model of altruistic surrogacy requires to create legislative

mechanisms that would ensure the free will of the surrogate as well as methods for detection and follow up. Here is a challenge for the Legislature.

53. The Surrogacy Law therefore restricts the First Petitioner's right to altruistic surrogacy, as this model has yet to be enacted in a statute. However, the infringement is limited to achieving the purpose of surrogacy through the altruistic model **in Israel**. The State did not block the First Petitioner's way from executing the surrogacy procedure **along the route she desires** abroad. We refereed to the Ministry of Health's protocol from July 21, 2013 titled "Taking Semen, Eggs or Fertilized Eggs out from Israel," which enables the First Petitioner to take fertilized eggs extracted from her body out of Israel, in order for them to be "implanted in the body of the woman from whom the eggs were extracted or in the body of a surrogate woman for the purposes of carrying a pregnancy for the woman from whom the eggs were extracted, or **for the purposes of realizing parenthood in alternative means for the women from whom the eggs were extracted**." (Emphasis added – E.R.)

Through the protocol the State avoids defining the requested procedure as a surrogacy procedure, in light of the law's absence of recognition of the altruistic model, but at the same time removes the obstacle standing in the Petitioners' way to execute the procedure in other countries in the manner they wish to execute it. In my view, the option given to the First Petitioner to take her genetic material out of Israel meets the requirement of the third sub test (narrow proportionality) which concerns the relation between the infringement upon the constitutional right and the benefit achieved. Since altruistic surrogacy does not exist in Israel, it seems we have a proportional solution that balances the petitioners' desire to execute the procedure in a specific manner they request and the need to refrain establishing judicial arrangements as a "patch work." In contrast, allowing the Petitioners to realize their wishes in the specific manner they seek – that is, through altruistic surrogacy **in Israel** – would result in parts of the Surrogacy law becoming incoherent with each other (for the problems of "patch work" legislation, see HCJ 7691/95, *Sagi v. The Government of Israel*, IsrSC 52(5) 577, 587-88 (1998); LCA 418/03, *Ossem Food Industries Ltd. v. Smaja*, IsrSC 59(3) 541, 552-54 (2004); CrimA 4783/09, *Shulstein v. The Antitrust Authority*, para. 1 (2010)).

Finally, referring the First Petitioner under today's state of the law to exercise her right out of Israel, with all the inconvenience involved, does not automatically cause unconstitutional infringement upon her right (HCJ 466/07, *Galon v. The Attorney General*, para. 8 of (then) Justice Naor's judgment (2012) (hereinafter: the *Galon* case.) Executing the procedure, in the specific manner requested, out of Israel constitutes a proportionate solution for the First Petitioner, as long as there is no existing legislative regulation of altruistic surrogacy. Executing the procedure allows the State to assist the

Petitioners without causing disharmony to the existing statute. Indeed, there is discomfort with the State referring its citizens to realize their dreams and rights in other countries (the *Mamat Magad* case, paras. 5-10 of Justice Joubran's judgment,) yet in the absence of a legislative arrangement that allows surrogacy along the route the Petitioners request, the solution suggested by the State through the protocol is proportionate, because "at times even the exercise of a constitutional right yields to the public interest" (see *Galon*, para. 11 of (then) Justice Naor's judgment) and in our case – to harmony in the system of parenthood arrangements and the balances between them. Interpretation such as the Petitioners requested stands, as my colleague Justice Hayut noted as well (para. 18), in contrast to the core of the existing arrangement, which focuses on severance between the surrogate and the intended parents.

54. Under the circumstances – as we have not accepted the Petition – it is unnecessary to delve into the issue of the legal recognition of the carrying mother (the Second Petitioner.) However, to the extent that the Petitioners chose or will choose to execute the procedure abroad, it seems the solution proposed by the District Court in *T.Z.* (paras. 31 and 34) – issuing a judicial parenting order (after conducting a review to support the petition for a parenting order) – and which comes out also of the *Mamat Magad* case (para. 43 of Deputy President Naor's judgment, para. 11 of my judgment) could seemingly work in favor of the Petitioners here, because the State expressed no general objection to a family unit of "co mothers" which the Petitioners wish to contract, but only to the legal route in which they seek to construct it (on the legal recognition of two mothers in the United States, see Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J.C.R. & C.L 201 (2009)).

55. As to the future regulation of altruistic surrogacy within the general Surrogacy Law which currently only regulates commercial surrogacy, the Legislature must explore the possibility of establishing a route for altruistic surrogacy, which would operate in parallel to the commercial route where the law's different parts would not conflict with one another, but complement each other. See – and this is only brought as an example – the proposal by the "Woman to Woman" Center in regard to introducing elements of a "relationship" into contractual commercial surrogacy as well, and this based on psychological research demonstrating that the **human relationships** formed are the primary benefit that the surrogate enjoys in the process (Nufar Lipkin and Eti Smama, SURROGACY IN ISRAEL – 2010 SNAPSHOT AND PROPOSAL FOR LEGISLATIVE AMENDMENTS – REPORT BY 'WOMAN TO WOMAN-FEMINIST CENTER, HAIFA' 65, 80-82 (2010), Elly Teman, BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF (2010)).

Conclusion and Final Words

56. At the end of the day, we did not see it fit to intervene in the State's latest proposal, which meets the Petitioners significantly closer, though not exactly at their desired point. In our view, under the current state of the law it is impossible to fully assist the Petitioners, and doing so is up to the Legislature. As we have demonstrated, the dissenting opinion's suggestions – as appealing as they may be – are not acceptable to us on the legal level. Hence our position not to accept the petition. There is no order as to costs.

Justice

President A. Grunis:

I agree with the judgment of my colleague, Justice E. Rubinstein.

President

Deputy President M. Naor:

1. I am among the majority Justices who have found the Petition must be denied.

2. The right to parenthood received recognition as a fundamental right, which expresses the natural desires of women and men for continuance in future generations (HCJ 566/11, *Mamat-Magad v. The Ministry of Interior*, para. 41 of my judgment (January 28, 2014); HCJ 4077/12, *Jane Doe v. The Ministry of Health*, paras. 25-29 of my colleague Justice E. Rubinstein's judgment (February 5, 2013) (hereinafter: the *Jane Doe* case)); dismissing a motion for further hearing – HCJFH 1403/13, *Jane Doe v. The Ministry of Health* (June 6, 2013.)) The right to parenthood, as other rights in our law, has different aspects. At the core of the right to parenthood is the right of each man or woman to bring children into the world through natural reproduction, free of state intervention. It is also accepted that at the heart of the right is "the practical ability to enter the 'group of parents' and bring a child into the world (Id., para. 33). Another question, a more complex one, is what is the level of protection that must be given to one's demand that the State assist him in creating genetic, physiological or legal parenthood. This, in light of the medical, technological advances that make creating parenthood by artificial means possible. These things found expression in the jurisprudence of this Court. See, for example: HCJ 4293/01, *New Family v. The Minister of Labor and Welfare* (March, 24, 2009), which addressed, among others, the question whether there is a constitutional right to adopt. Justice A. Procaccia discussed

there the complexity inherent in the question whether one has a right to require the State to assist in the process of creating parenthood:

> "The question from a different angle is whether the constitutional right to family life and parenthood, which is granted to any person, gives rise also to the right to require the state to take action in order to make it possible where one is not able, or does not wish, to exercise it naturally – for instance through adoption, through surrogacy or through in vitro fertilization. Does the state's failure to act amount to an 'infringement' whose constitutionality is examined according to the Limitations Clause? Such questions are complex and multi-faceted. They go to the link between the constitutional right and the means one has to exercise that right. They raise issues with broad normative, moral, social and other ramifications. The approaches to resolving them are subject to the influences of time, place and circumstances…
>
> … The question to what extent the state must assist the individual and grant the means necessary to assist reproductive processes through artificial reproductive techniques is difficult and complex. The greater the need for intervention of external factors in the reproduction processes, the farther we travel from the hard core of the right to parenthood as based on the individual's autonomy and his independent right to make decisions that determine his fate without external intervention. The scope of the duty of the state to assist the individual through active steps to realize his natural parenthood through artificial means is difficult and has many aspects." (Paras. 22-23.)

In that same matter, President D. Beinisch commented that the right to parenthood should not be interpreted as merely a negative right, but added that were there a constitutional right to parenthood through adoption, it would have been necessary to distinguish between the scope and the force of the constitutional protection given to the relevant right in different contexts (para. 3; see also the position of Deputy President E. Rivlin there, who believed that there is a liberty to adopt, and that restricting this liberty must be done in consideration of competing interests. See also, Aharon Barak, HUMAN DIGNITY: THE CONSTITUTIONAL RIGHT AND ITS DAUGHTERS, vol. 2, 667 (2014)). As my colleagues pointed out, alongside the right to parenthood, the best interest of third parties who are at times involved in the process of artificial reproduction as well as medical, social, and other ethical considerations must all come into account. These considerations may lead to the limitation of the means to realize the right to parenthood, as well as

declining to recognize certain types of parenthood (see and compare: our decision without reasons in LFA 1118/14, *Jane Doe v. The Ministry of Welfare and Social Services* (July 13, 2014.)) The mere fact that there are various ways to become a parent does not mean that the State must allow their execution in any way that science and technology allow. A similar approach was expressed in the matter of *Jane Doe*, where Justice D. Barak-Erez discussed the fact that the protection of the right to parenthood must be distinguished from the protection for the goal to exercise the right to parenthood "in a particular way" (para. 11), and that "these situations continue to raise the question whether when a certain course of action is available, as a scientific and technological matter, would this mean that there is also a right to make use of it, and that the way the right is exercises cannot be restricted." (Para. 32.)

3. In the case before us, the Petitioners wish to bring a common child into the world, in a manner where the child will be born of the Second Petitioner's uterus and will carry the genetic code of the First Petitioner. According to the Petitioners, the Respondents have not indicated there was a moral flaw, or any other consideration that justifies preventing them from exercising their right to parenthood in this way. Although their plight is touching, my opinion was that the Petition must be dismissed.

4. My colleagues have demonstrated at length, and I shall not repeat, that under the system of statutes existing currently, what the Petitioners wish to do is impermissible and may even lead to a criminal sanction, including for the treating physician.

5. My colleague Justice Hayut in her humane and sensitive judgment wishes to find remedy for the Petitioners and their desires through the doctrine of "reading in." In her view, this way allows authorizing the exceptions committee already exists under the Eggs Donation Law, 5770-2010 (hereinafter: the Eggs Donation Law) to approve eggs donation when the committee is satisfied that under the circumstances there are exceptional and special reasons that justify doing so. This language appeared in the Bill, but was removed as a result of Rabbi Halperin's suggestion to leave this to the court because "the court permits things that the law prohibits." My colleague points out that these things by Rabbi Halperin have no foundation. Indeed, as opposed to Rabbi Halperin's suggestion, the courts do not do as they see fit with statutes and law, and they do not permit what the statute has prohibited. The way of courts is the way of interpretation, and when necessary – and when the court sees it to be justified – it takes the exceptional step of judicial intervention. Still, in my opinion, even were we to expand the powers of the exceptions committee, as my colleague suggests, there was no case before us that was necessarily suitable to apply the exception to the principles established in the Eggs Donation Law. On this point, I join the words of my

colleague Justice Rubinstein in paras. 16-23 of his judgment. The arrangements in terms of eggs donation, which were described in detail, emphasize the **physiological** connection between the mother and the fetus. In this way, section 42(a) of the Eggs Donation Law, mandates that a child born of an egg donation would be the child of the **recipient** for all intents and purposes. Without devaluing the importance of the genetic connection, I believe this is an infringement upon a **particular** way to realize the right to parenthood, and thus its force is diminished in my eyes. Accepting the Petition may shift the weight to the genetic relationship between the child and the **recipient**, and thus impact the definitions of parenthood resulting from an eggs donation, as well. There is no moral flaw to the Petitioners request, but accepting it may implicate other issues and destabilize the balances established in the legislation of reproduction and birth. It should also be noted that the restrictions set in the Eggs Donation Law are not concerned with the sexual preference of the recipient or the donor but with resolving the recipient woman's reproductive difficulties. As a result there is no prohibition against the Second Petitioner donating eggs to the First Petitioner. Additionally, that the legislation regulating egg donation is actually recent and that during the hearing before the extended panel held on April 28, 2013 the Respondents expressed their willingness to examine the need to amend it must also be factored in.

5. The circumstances described above, along with the possibility open to the Petitioners to realize their wished outside of Israel leads to a conclusion that there is no justification, at this time, to intervene in primary legislation. In this case, taking the extraordinary step of reading into the law amounts, almost, to instructing the exceptions committee to stray from the law in the Petitioners' case, under circumstances that have no justification for doing so. Another difficulty in taking this step is that expanding the powers of the exceptions committee, as proposed by me colleague, may have wide consequences outside of the individual case of the Petitioners and couples like them. This is, in my view, a substantive and significant change to the law, and I doubt whether it is proper to make in the way of "reading in."

6. Moreover, even were to intervene in the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756- 1996 (hereinafter: the Surrogacy Law,) and find that the term "intended parents" in this law includes not only couples who are a man and a woman but also a woman and a woman (and I am inclined to find as such; see also Memorandum regarding the Agreements to Carry Embryo Law (Approval of an Agreement and the Status of the Child) (Amendment – definition of Intended Parents and Executing an Agreement out of Israel), 5774-2014), this would not benefit the Petitioners. The Surrogacy Law reflects a model where the relationship between the surrogate and the child is severed upon birth, whereas the Petitioners wish to realize a **different** type of parenthood, where

the woman carrying the pregnancy, along with the genetic mother, will together serve as mothers to the child. The Surrogacy Law is not the appropriate avenue for the Petitioners' matter.

7. My colleague, Justice Arbel emphasized in her sensitive opinion the First Petitioner's desire for a child of her own. As to the legal route taken by Justice Arbel, I join the words of Justice Rubinstein in paragraphs 24-26 of his opinion.

8. In conclusion: with all the empathy to the Petitioners' desire to bring a child into the world in the particular way they suggest, including performing the entire procedure in Israel, I find it impossible to accept their petition. They are able, however, to take the route to which the Ministry of Health was willing to agree.

Deputy President

Justice S. Joubran:

1. The issue before us is not easy to decide. On one hand it touches the heart of human existence – the desire to be a parent; on the other hand it touches the heart of society's existence – regulating its conduct through the law. The Amended Petition aims to challenge different provisions in two statutes, which according to the Petitioners, limit their ability to realize their will to be genetic and biological co parents by using artificial reproductive technologies. The first statute is the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756-1996 (hereinafter: the Surrogacy Law). The other statute is the Eggs Donation Law, 5770-2010 (hereinafter: the Eggs Donation Law). The dispute is, in short, whether it is possible under the circumstances of the case to allow the Petitioners to have their wish and this despite the limitations of the law.

2. I join the judgment of my colleague Justice Rubinstein, according to which we cannot permit the Petitioners' request. Like my colleague, I too believe that there is currently no lawful avenue to fulfill their hearts' desires, and I shall add but several short comments.

3. First as to the Surrogacy Law. I accept the position that the case before us does not fall under this law. The Second Petitioner – the "surrogate" mother – wishes to carry the embryo in her uterus and give birth to it and is intended additionally to be the co parent of the child. In order for the law to apply to the Petitioner, a central element of the Surrogacy Law must exist. This is the element of **post birth severance**. The current outline of the Surrogacy Law requires as a general rule, aside from exceptional cases that are detailed in

section 13 of the law, severance between the carrying mother and the child and the intended parents after birth. It seems that the existing Surrogacy Law does not regulate situations where the mother who carries a fetus in her uterus and gives birth to it would also be the child's mother, and thus the law does not exist in the case before us. This is true at least under the Israeli Surrogacy Law. It appears there are possible other outlines for surrogacy different than that in the law in its current version. The definition of surrogacy depends on the law and may take many different forms (see primarily paras. 32-33 of my colleague Justice Rubinstein's judgment.) So, for example, there is altruistic surrogacy and there is contractual commercial surrogacy. However, as said, the **current** state of the law in our country indeed does not permit under any interpretive reading what the Petitioners ask.

4. Now for the Eggs Donation Law. In the case before us, the recipient who receives the eggs is, as far as we know, a **healthy** woman. The difficulty in applying the law to her is that the Eggs Donation Law requires that the recipient **have a medical condition** that requires an eggs donation from another woman (section 11 of the Eggs Donation Law,) and thus this basic condition is not met in the case at hand.

5. Although section 18 of the Eggs Donation Law authorizes an exceptions committee to approve an eggs donation procedure in certain exceptional case, but these are detailed in an **exhaustive** list in section 20(a) of the law and the case before us does not fall within the list. My colleague Justice Hayut proposed to use the reading in doctrine in order to read into the Eggs Donation Law a general catch all section, in addition to the list of exceptional cases detailed in the law, which authorizes the exceptions committee to approve an eggs donation "if it is satisfied that under the circumstances there are special and exceptional reasons which justify doing so" and thus permit what is requested by the Petitioners (paras. 35-38 of her judgment.) My position is identical to that of my colleague Justice Rubinstein, that this reading is impossible. The language of the Eggs Donation Bill did include such a catch all section that granted the exceptions committee the power to authorize an eggs donation "if [the committee] was satisfied that under the circumstances there are exceptional and special reasons which justify doing so" (section 21(e) of the Eggs Donation Bill, 5767-2007 GOVERNMENT BILLS 289, 292,) and the explanatory notes clarify that the exceptional reasons are those which "were impossible to have anticipated, and this without requiring an amendment to the law" (para. 11 of my colleague Justice Rubinstein's judgment.) However, the Petitioners' request was **anticipated and known** to the professional bodies as well as the sub- committee of the Committee for Labor, Welfare and Health. This particularly in light of FA (Dist. Tel Aviv) 60320/07 *T.Z. v. The Attorney General, State Attorney – District of Tel Aviv* (March 4, 2012) (hereinafter: the *T.Z.* case) where a similar matter of a female couple interested in biological genetic co-parenting, but where the recipient

woman had a medical need for the eggs donation, was decided. And yet, at the end of the day the Legislature decided not to include in the Eggs Donation Law a general catch all section or a specific exception that permitted a case such as the one before us. Under these circumstances, I doubt whether it is possible for us to read a reading that is inconsistent with the legislative intent. Therefore, it seems this law, too, does not apply to the circumstances of the case before us.

6. Beyond the necessary scope, the question whether the Eggs Donation Law is at all relevant to the case before us is raised. Indeed, the Eggs Donation Law was designed to assist women who are unable to realize their parenthood in means other than an eggs donation, but in my view – and in this regard my opinion converges with the opinion of my collogue Justice Arbel – this law is not relevant to our matter, both in light of its said purpose and the clarity of its sections which explicitly exclude cases where the woman is able to realize her parenthood even without the eggs donation, and in light of the fact that in effect this is not a "donation" in our case, as my colleague Justice Arbel analyzed in a deep and persuasive manner. I accept the conclusion that the meaning of "donation" is giving to another without receiving any compensation and in our case the "donor" receives the right to be a co mother to the child. In my opinion, this is the reasonable interpretation of this term. Therefore, and in light of my colleague Justice Arbel's additional reasons, I believe that the Eggs Donation Law is irrelevant to our matter.

7. My colleague Justice Arbel thus turned to the People's Health Regulations (In Vitro Fertilization), 5747-1987 (hereinafter: The IVF Regulations) in order to locate a solution to the problem and her position is that these Regulations are relevant to the case at hand, as they were in the case of *T.Z.*. However, my position is as the position of my colleague Justice Rubinstein. These two cases are distinguishable in the fundamental element of **the egg recipient's medical need**. In the case before us there is no such need because the woman seeking to receive the eggs is a healthy woman and thus the *T.Z.* case, which considered a recipient with a medical need, cannot be analogized. It seems that the guidelines by the Attorney General from November 30, 2009 regarding eggs donation between female partners are irrelevant as well because these guidelines also relied on a case where the receiving partner demonstrated a medical need for a donation from her partner. And in any event, the Eggs Donation Law was enacted after this and regulated the issue in primary legislation.

8. As to the application of the IVF Regulations to the case at hand, I believe that the procedure requested by the Petitioners lacks any anchor in these Regulations. The IVF Regulations establish, among others, the exclusivity of the purposes for egg extraction as in vitro fertilization of the egg and its consequent implantation (regulation 3,) but they do not address a procedure

such as the one sought in this Petition in any way. The reasonable interpretation of these Regulations leads to the conclusion that there were designed to regulate in vitro fertilization of a woman's egg in order to implant it in her own body rather than the body of another, whether the latter woman is her partner or a stranger. And in any event, as my colleague Justice Arbel emphasizes in section 19 of her opinion, the procedure of eggs donation can currently be done **only according to the arrangements of the Eggs Donation Law**. Section 4 of the Eggs Donation Law explicitly limits the activity of eggs extraction and implantation to follow only the provisions of this law, unless in cases of surrogacy.

9. We learn that the procedure where a woman wishes to give her egg to her (healthy) partner in order for it to be implanted in the partner who would give birth to a mutual genetic, biological child is not regulated in Israeli legislation. But had the Eggs Donation Law not include a provision mandates the treatment of eggs to conform solely to this law (section 4 of the Eggs Donation Law,) it seems the Petitioners' request would have been permissible. However, the explicit prohibition to follow a different path than that set out in the Eggs Donation Law limits the steps of the Petitioners and does not afford them what they request (see and compare HCJ 2458/01, *New Family v. The Committee for Approving Agreements for Carrying Embryo*, IsrSC 57(1) 419, 445 (2002), in a parallel context of exclusivity of arrangements in the Surrogacy Law.) Therefore, in the case before us I believe that despite our willingness to do so, we cannot assist the Petitioners.

10. In this context, a central matter that came up in my colleagues positions was the legislative intent while enacting the Eggs Donation Law, 5770-2010 (hereinafter: the Eggs Donation Law) and the assumption about courts' intervention in legislation (see the discussion in this regard in my colleague Justice Hayut's judgment in paras. 21-22, 38 and in my colleague Justice Rubinstein's judgment in paras. 11-14.) So, for instance, Rabbi Dr. Halperin said that "the court permits things that are prohibited… when there is a real need it finds the way to do so even in violation of express statute" and later "this does not need to be written. The court does this anyway even without a catch all section." I have but to join the words of my colleagues Justice Hayut and Justice Rubinstein on this issue. The assumption that the court would intervene in legislation even if it were against the law is fundamentally mistaken and undermines the public's trust in the court system. As emphasized by my colleague Justice Rubinstein, the court sees it fit to intervene in legislation only in extreme cases and it does so with great care. These things are of even more force where the Legislature clarified his position and where the question of the statute's interpretation does not come up, as in the case before us.

11. Similarly to the position of my colleague Justice Rubinstein, I, too, believe that the removal of the requirement for the recipient's medical need as set in section 11 of the Eggs Donation Law must be considered in order to extend the circle of men and women eligible for an eggs donation. Similarly certain aspects or the Surrogacy Law should also be revisited and current gaps in the statutory regime – such as the existence of a procedure of partner assisted reproduction, or reciprocal IVF, which permits eggs donation for healthy women as well, of course with inherent and imminent mechanisms of control and supervision – should be regulated in legislation.

12. The right to parenthood – as discussed at length in paragraphs 2-3 of my colleague Deputy President M. Naor's judgment – is an important and fundamental right in our country, a basic constitutional right that stands to each man and woman by virtue of their humanity. However, I agree with the position that the right to parenthood is not the right to parenthood **exercised in a particular way** (see HCJ 4077/12, *Jane Doe v. The Ministry of Health*, para. 11 of Justice Barak-Erez's judgment (February 5, 2013.)) In the case before us, the Petitioners have several options to become parents, even if not all of them make the requested genetic biological co-parenting model possible. Specifically, they have the option, to which the State agreed, to perform the requested procedure abroad and receive recognition of the genetic biological co-parenting in Israel. We must hope that this option will be only temporary for such cases until the Legislature permits performing the procedure in our own country.

Justice

Justice H. Melcer:

1. At the time it was decided – by a majority of four Justices against three – to deny this petition. I was among the minority. The decision was made public with no reasoning so that the Petitioners may calculate their steps according to the outcome and explore whether they are willing to accept the partial solution proposed to them by the Respondents. We took this route in light of the constraints of "the biological clock" which weighed heavy on the Petitioner, and thus we allowed the Petitioners to make an informed decision in their matter as early as possible.

It is time now for giving reasons, and these took shape so that first the opinions of my colleagues in the minority, Justice E. Hayut and Justice (Ret.) E. Arbel were written and the opinions of the majority Justices, headed by the opinion of my colleague Justice E. Rubinstein, then followed. As a result before me is all the comprehensive and studious material and I have but to

clarify why I was of the view that the Petition must not be rejected and how it should be upheld. I shall turn to this immediately, but I will open by briefly reviewing the Petition and focusing on the issues in agreement and those in dispute.

2. The Petitioners are partners. They wish to bring a child into the world in the following way: an egg taken from the body of the First Petitioner would be fertilized and then implanted in the body of the Second Petitioner. Seemingly, under the **statutory** situation in our country, the said method is not permitted to be executed in Israel, in light of the different provisions in the Agreements for Carrying Embryo Law (Approval of an Agreement and the Status of the Child), 5756-1996 (hereinafter: the Surrogacy Law) and in the Eggs Donation Law,5770-2010 (hereinafter: The Eggs Law.) In order for this to be permitted, the Petitioners have therefore raised different arguments on the interpretive and constitutional levels to challenge the restricting provisions. An order nisi was granted in the Petition and it was considered by an extended panel.

3. My colleague, Justice E. Hayut, described well (and thus I will not repeat): The various legal obstacles in the statutory network that the Petitioners face in realizing their desire to parenthood and the constitutional rights on which they rely in their arguments. Finally, my colleague analyzed the current restrictions in the mentioned statutes against the "Limitations Clause". In a sharp and concise opinion she reached the conclusion that the arrangement set in the Eggs Donation Law, which restricts extraction, fertilization and implantation of the fertilized eggs and prohibits, under criminal prohibition, the performance of these procedures in the circumstances where the Petitioners find themselves, violates the Petitioners' constitutional rights to autonomy, to family life and to parenthood. Therefore she found that the limitations in the Eggs Law in this sense do not pass the requirements of the Limitations Clause in section 8 of Basic Law: Human Dignity and Liberty.

   I join all these finding, as it was not said that there is an **interpretive avenue** that would grant the Petitioners' wishes without judicial intervention in existing legislation (and I believe that there is such a path.) I additionally share my colleague's conclusion and the views of the remaining members of the panel that judicial intervention in the Surrogacy Law is not the proper path to examine the arguments of the Petitioners and to find remedy to their plight.

4. Therefore it appears that the split in opinions between the majority and the minority is on the question whether the restrictions in the Eggs Law which bar the Petitioners from realizing their desires meet the requirements of the Limitations Clause. Together with this difference in opinions, within the minority justices, there is an agreement regarding the outcome (that the Petition should have been accepted), but we do not agree on the method of resolution and as to the legal basis for it.

It is fitting here to note further that even the Respondents, who were also aware of the Petitioners' distress, proposed during the hearings in the Petition a certain **partial** solution for the Petitioners – an arrangement that the majority saw fit to accept as satisfactory under the circumstances, and not go beyond.

In the following paragraphs I will attempt to concisely demonstrate why the majority's position is unsatisfactory, and why the minority position, with its differing aspects, is preferable to me.

5. In analyzing the legal problem brought to us two insights should, at least, guide us, in my view:

a. Technology generally precedes the law. In these cases where the Legislature and the courts are called upon to pour the essence of existing, good, and established fundamental **principles** into new legal vessels (as if were they wine which gets better with age, which only needs a more modern container. Compare: Stephen Breyer, ACTIVE LIBERTY 64 (2009)). And see my opinion in CA 9183/09, *The Football Association Premier League Limited v. John Doe*, (May 13, 2012.)

b. Interpretation is the preferable method to resolve issues which overlap with constitutional questions and this before we reach the last resort of striking down legislation. See: judgments by President A. Barak and then Justices M. Cheshin and D. Beinisch in HCJ 9098/01, *Genis v. The Ministry of Construction and Housing*, IsrSC 59(4), 241 (2004); HCJ 3809/08, *The Association of Civil Rights in Israel v. The Israel Police* (May 28, 2012); my judgment in LCA 7204/06, *Israela Erlich v. Yehoshua Bertel* at para. 40 (August 22, 2012.) Review also comparative law – the judgment of the United States Supreme Court, by Justice Roberts (in majority) in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2593-94 (2012)).

Considering these insights and the distress of the Petitioners' and others like them, the Respondents notified us in an updated notice that on July 21, 2013 the Ministry of Health published a protocol for the "taking Sperm, Eggs or Fertilized Eggs out of Israel." Following the protocol a decision was also made by the exceptions committee, which operates under the Eggs Law. The committee approved the taking of eggs out of Israel in order for them to be implanted abroad under certain circumstances. Such approval is permissible under section 22(d) of the Eggs Law. The protocol and the decision by the exceptions committee both mean that it is now permitted to perform the procedure of extracting eggs from the First Petitioner in Israel and later their fertilization, with their implantation in the Second Petitioners' bodies to be done out of Israel.

The majority Justices are willing to consider this, under the circumstances, a satisfactory solution to this problem. I, with all due respect, think differently for two reasons:

(a) Section 22(d) of the Eggs Law stipulates as follows:

> "The exceptions committee may approve the taking out of eggs extracted in Israel from a patient's body for the purposes of their implantation out of Israel, **if it satisfied that the eggs were intended to be implanted in her body**, and that there is justification to approve the eggs' implantation out of Israel." (My emphasis – H.M.)
>
> Therefore, it seems, the requirement that the exceptions committee be satisfied that the eggs be intended to be implanted in the patient's body, in its plain language, is not met here, and thus referring the matter abroad works primarily to "distance and marginalize". What is more – moving the solution abroad is more burdensome.

(b) Constitutionally, it is neither appropriate nor proportionate to send an Israeli citizen abroad to exercise her constitutional rights. In this context, the Petitioner's cry (who is also an officer in the IDF) that called upon us from the bottom of her heart not to accept the partial solution proposed to the Petitioners by the Respondents, still rings in my ears, particularly because in my view she is not only correct on an emotional level, but also on a legal level.

What is, then, the right solution? I shall elaborate on this directly below.

6. It appears to me that granting the Petitioners' wishes could have come to its resolution within the authority of the exceptions committee under section 22(a)(2) of the Eggs Law, which reads as follows:

> "The Exceptions Committee may approve the extraction of eggs for implantation, or implantation of eggs when the donor designates in advance the eggs extracted from her body to a particular recipient, when it is satisfied that the following conditions are met, as appropriate to each case:
>
> …(2) In the case of the donor who designates in advance the eggs extracted from her body to a particular recipient who is not her family member – there are religious or social reasons which justify such an egg donation."

This sub section has none of the limitations of the type included is section 22(d) of the above Eggs Law. Moreover, the interpretation taken by the majority is much less sound. Furthermore, as demonstrated by my colleague

Justice E. Rubinstein in paragraph 12 of his opinion – during the discussions of the Knesset's sub-committee of Labor, Welfare and Health, which considered the Eggs law's bill before it was prepared for its second and third reading the sub committee's chair, MK Professor Ariyeh Eldad commented that this section was a good opening for same sex female couples.

In this way it would have been possible therefore to grant the requested by the Petitioners and accept, in this sense, their petition (there still would have been the issue of the Child's status under section 42 of the Eggs Law, however this issue could be resolved by finding statutory solutions (see and compare with the situation in Britain – section 42-46 of the Human Fertilization and Embryology Act 2008,) or judicial ones (see the majority opinion in HCJ 566/11, *Doron Mamat-Magad v. The Ministry of Interior* (January 28, 2014.) Additionally, this issue was not included by the Petitioners in their Petition.)

However, since my colleagues do not accept, to my regret, for some reasons that were not expressed, the interpretive approach based on section 22(a)(2) of the Eggs Law in order to resolve the issue – I am also willing to walk down one of the paths proposed by my colleagues to the minority and in this sense will limit myself only to several short comments.

7. As to the proposal raised by my colleague Justice E. Hayut (as to the addition of a catch all section for an exception to the Eggs Law) – this solution, in principle, is acceptable to me as I support the approach that legislation should include authorities that enable solutions in "a special particular case," or to instruct doing so by way of judicial interpretation. See HCJ 2390/10, *Ala Halihal v. The Minister of Interior* (May 23, 2010) para. 10 of my judgment; APA 9890/09, *Nava v. The Ministry of Interior* (July 11, 2013), para. 16(d) of my judgment; LAA 7272/10, *Jane Doe v. John Doe* (January 7, 2014), section 6 of my judgment.)

Furthermore – differently. The read in remedy also seems fitting to me under the circumstances (compare to my opinion in APA 343/09, *Jerusalem Open House for Pride and Tolerance v. The Jerusalem Municipality*, September 14, 2010, there in para. 5.)

On the apparent difficulty that views the "catch all exception" section to have been initially proposed in the Knesset, but then rejected – indeed this is possible to overcome in light of the **mistaken reasoning** which led (as my colleagues' opinions clarify) to the removal of that section from the agenda.

8. As for the alternative option, suggested by my colleague Justice (Ret.) E. Arbel, insofar that it is original and creative, which indeed it is – it is also acceptable to me. The reasons for this is that the People's Health Regulations (In Vitro Fertilization), 5747-1987 were left standing despite the Eggs Law,

and thus it is possible that they indeed are supposed to regulate different cases than those covered by the Eggs Law. This solution is not free of flaws either (see regulation 8(b)(1) of these Regulations) however its advantage lies in the possibility that it provides the tools to overcome the provision of section 42 of the Eggs Law.

9. In conclusion – though the path to resolution which we – my colleagues and I – support is different in its reasoning, we all believe that **the Petitioners' Petition must be accepted**. This also validates my general approach that when the consideration of basic legal issues – from different perspectives of the relevant statutes – **leads, in every path, to a similar conclusion** – this is a sign and indication that from **a general legal philosophy** the outcome is **correct** (see my opinion in CA 4244/12, *Haaretz Newspaper Publication Ltd. v. Major General Efrayim Bracha* (February 19, 2014), there in para. 35.)

10. As a result, were the minority opinions heard – the Petitioners would not have to travel beyond the sea to realize their desires.

Justice

For all these reasons it was decided on September 1, 2013 to reject the Petition by a majority of opinions by President A. Grunis, Deputy President M. Naor, Justice E. Rubinstein, and Justice S. Joubran, against the dissenting opinions by Justices E. Arbel, E. Hayut and H. Melcer.

There is no order as to costs.

Reasons given today, September 18, 2014.

President | Deputy President | Justice (Ret.)

Justice | Justice | Justice