HCJ 781-15

Petitioners:

1. **Etai Arad Pinkas**
2. **Yoav Arad Pinkas**
3. **Anon.**
4. **Anon.**
5. **Anon.**
6. **Anon.**
7. **The Association of Israeli Gay Fathers**
8. **Tammuz International Surrogacy Agency Ltd.**

v.

Respondents:

1. **Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) Law, 5756-1996**
2. **The Knesset**

The Supreme Court sitting as High Court of Justice

Before: President M. Naor, Deputy President (emeritus) E. Rubinstein, Deputy President S. Joubran, Justice E. Hayut, Justice H. Melcer.

Petition for an Order Nisi

(Aug. 3, 2017)

Israeli Supreme Court cases cited:

[1] HCJ 8665/14 *Desta v. Knesset*, (Aug. 11, 2015) https://versa.cardozo.yu.edu/opinions/desta-v-knesset

[2] HCJ 2390/96 *Karsik v. State of Israel, Israel Lands Administration*, (Feb. 9, 2009) https://versa.cardozo.yu.edu/opinions/karsik-v-state-israel

[3] CFH 5161/03 *E.S.T. Projects and Human Resources Management Ltd. v. State of Israel* (Sept. 1, 2005).

[4] HCJ 466/07 *Galon v. Attorney General*, (Jan. 11, 2012) https://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary

[5] HCJ 5771/12 *Moshe v. Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) Law, 5756-1996*, (Sept. 18, 2014) https://versa.cardozo.yu.edu/opinions/moshe-v-board-approval-embryo-carrying-agreements-under-embryo-carrying-agreements-law

[6] HCJ 3166/14 *Gutman v. Attorney General*, (March 12, 2015).

[7] HCJ 2311/11 *Sabah v. Knesset*, (Sept. 17, 2014).

[8] HCJ 1213/10 *Nir* v. *Knesset Speaker*, (Feb. 23, 2012).

[9] HCJ 2458/01 *New Family v. Committee for Approval of Embryo Carrying Agreements*, IsrSC 57(1) 419 [2002].

[10] HCJ 6665/12 *E-Cig Ltd. v. Director General of the Ministry of Health*, (Dec. 3, 2014).

[11] LFA 1118/14 *Anon. v. Ministry of Welfare and Social Services*, (April 1, 2015).

[12] HCJ 4406/16 *Association of Banks in Israel v. Knesset*, (Sept. 29, 2016).

[13] HCJ 3734/11 *Davidian v. Knesset* (Aug. 15, 2012).

[14] HCJ 4885/03 *Israel Poultry Farmers Association v. Government*, IsrSC 59(2) 14 [2004] https://versa.cardozo.yu.edu/opinions/israel-poultry-farmers-association-v-government-israel

[15] LCA 3145/99 *Bank Leumi Ltd. v. Hazan*, IsrSC 57(5) 385 [2003].

[16] HCJ 6298/07 *Ressler v. Israel Knesset*, IsrSC 65(3) 1 [2012] https://versa.cardozo.yu.edu/opinions/ressler-v-knesset

[17] HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights v. Minister of Interior*, IsrSC 61(2) 202 [2006] https://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior

[18] HCJFH 10007/09 *Gluten v. National Labor Court*, IsrSC 66(1) 518 [2013].

[19] HCJ 1078/10 *Arad Pinkas v. Committee for Approval of Embryo Carrying Agreements* (June 28, 2010).

[20] HCJ 9134/12 *Gavish v. Knesset*, (April 21, 2016) https://versa.cardozo.yu.edu/opinions/gavish-v-knesset

[21] HCJ 10662/04 *Hassan v. National Insurance Institute*, (Feb. 28, 2012) https://versa.cardozo.yu.edu/opinions/hassan-v-national-insurance-institute

[22] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset*, IsrSC 61(1) 619 [2006].

[23] LFA 7141/15 *A. v. B.*, (Dec. 22, 2016).

[24] CFH 1892/11 *Attorney General v. Anon.*, IsrSC 64(3) 356 [2011].

[25] LFA 5082/05 *Attorney General v. Anon.*, (Oct. 26, 2005).

[26] CA 50/55 *Hershkovitz v. Greenberger*, IsrSC 9 791 [1955]. https://versa.cardozo.yu.edu/opinions/hershkovitz-v-greenberger

[27] HCJ 11437/05 *Kav LaOved v. Ministry of the Interior*, IsrSC 634(3) 122 [2011].

[28] HCJ 2245/06 *Dobrin v. Israel Prisons Service*, (June 13, 2016) https://versa.cardozo.yu.edu/opinions/dobrin-v-israel-prison-service

[29] CFH 2401/95 *Nahmani v. Nahmani*, IsrSC 50(4) 661[1996] https://versa.cardozo.yu.edu/opinions/nahmani-v-nahmani-0

[30] HCJ 4077/12 *A. v. Ministry of Health*, (Feb. 5, 2013) https://versa.cardozo.yu.edu/opinions/doe-v-ministry-health

[31] *A. & B., Prospective Adoptive Parents of a Minor v. Biological Parents*, IsrSC 60(1) 124 [2005].

[32] HCJ 3752/10 *Amnon Rubinstein v. Knesset*, (Sept. 17, 2014).

[33] HCJ 5304/15 *Israel Medical Association v. Knesset*, (Sept. 11, 2016) https://versa.cardozo.yu.edu/opinions/israel-medical-association-v-knesset

[34] HCJ 5239/11 *Avneri v. Knesset*, (April 15, 2015) https://versa.cardozo.yu.edu/opinions/avneri-v-knesset

[35] LAA 4021/09 *Tel Aviv Municipal Tax Administration v. Michel Marsiah Co.*, (Dec. 20, 2010).

[36] LCA 8233/08 *Kovashi v. Adv. Eyal Schwartz*, IsrSC 64(2) 207 [2010].

[37] CA 3213/97 *Nakar v. Local Planning and Development Council Herzliya*, IsrSC 53(4) 625 [1999].

[38] HCJ 6728/06 *"Ometz"— Citizens for Good Governance and Social and Legal Justice v. Prime Minister*, (Nov. 30, 2006).

[39] HCJ 1756/10 *Holon Municipality v. Minister of the Interior*, (Jan. 2, 2013).

[40] CA 2449/08 *Tuashi v. Mercantile Discount Bank Ltd.*, (Nov. 16, 2010).

[41] HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Social Affairs*, (Aug. 11, 1998) https://versa.cardozo.yu.edu/opinions/israel-womens-network-v-minister-labor-social-affairs

[42] HCJ 1030/99 *MK Oron v. Speaker of the Knesset*, IsrSC 56(3) 640 [2002].

[43] CA 4239/15 *Dor Alon Energy Israel 1998 Ltd. v. State of Israel, Tax Authority*, (March 29, 2017).

[44] HCJ 4128/02 *Adam Teva veDin – Israel Union for Environmental Defense v. Prime Minister*, IsrSC 58(3) 503 [2004].

[45] CA 420/83 *Ashur v. Migdal Insurance Co. Ltd.*, IsrSC 44(2) 627 [1990].

[46] HCJ 5087/94 *Zabaro v. Minister of Health*, (July 17, 1995).

[47] CFH 2121/12 *Anon. v. Dayan Urbach*, IsrSC 67(1) 667 [2014] https://versa.cardozo.yu.edu/opinions/anonymous-v-orbach

[48] CA 9183/09 *Football Association Premier League Ltd. v. Anon.*, (May 13, 2012).

[49] HCJ 1892/14 *Association for Civil Rights in Israel v. Minister of Public Security*, (June 13, 2017).

[50] AAA 4105/09 *Haifa Municipality v. Sephardic Jewish Community Association, Haifa*, (Feb. 2. 2012).

[51] HCJ 7245/10 *Adalah – The Legal Center for Arab Minority Rights v. Ministry of Social Affairs*, (June 4, 2013) https://versa.cardozo.yu.edu/opinions/adalah-%E2%80%93-legal-center-arab-minority-rights-israel-v-ministry-social-affairs

[52] HCJ 6698/95 *Ka'adan v. Israel Land Administration*, IsrSC 54(1) 258 [2000] https://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration

[53] HCJ 142/89 *Laor Movement v. Speaker of the Knesset*, IsrSC 44(3) 529 [1990].

[54] HCJ 2605/05 *Academic Center for Law and Business, Human Rights Division v. Minister of Finance*, IsrSC 63(2) 545 [2009] https://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance

[55] HCJ 566/11 *Mamet Megged v. Minister of the Interior*, (Jan. 28, 2014).

[56] HCJ 4769/95 *Menahem v. Minister of Transport*, IsrSC 57(1) 235 [2002].

[57] HCJ 98/69 *Bergman v. Minister of Finance*, IsrSC 23(1) 693 [1969] https://versa.cardozo.yu.edu/opinions/bergman-v-minister-finance

[58] AAA 343/09 *Jerusalem Open House for Gay Pride v. Jerusalem Municipality*, IsrSC 64(2) 1 [2010] https://versa.cardozo.yu.edu/opinions/jerusalem-open-house-gay-pride-v-jerusalem-municipality

[59] HCJ 2078/96 *Vitz v. Minister of Health*, (Feb. 11, 1997).

[60] LAA 919/15 *A. v. B.*, (July 19, 2017).

[61] LCA 8821/09 *Prozansky v. Layla Tov Production Co. Ltd.*, (Nov. 16, 2011) https://versa.cardozo.yu.edu/opinions/prozansky-v-layla-tov-productions-ltd

[62] FH 25/80 *Katashvili v. State of Israel*, IsrSC 35(2) 457 [1981].

[63] HJC 6665/12 *A. Sig Ltd. v. Director General of the Ministry of Health*, (3.12.2014).

[64] HCJ 8893/16 *Cabel v. Minister of Communication*, (8.1.2017).

[65] HCJ 5436/07 *Movement for Quality Government in Israel v. National Authority for Religious Services*, (May 5, 2010 and Nov. 11, 2010).

[66] HCJ 8300/02 *Nasser v. Government of Israel*, (22.5.2012).

[67] HCJ 625/10 *A. v. Committee for the Approval of Embryo Carrying Agreements*, (26.7.2011).

[68] HCJ 3217/16 *Israel Religious Action Center – The Movement for Progressive Judaism in Israel v. Ministry of Welfare and Social Services*, (Sept. 17, 2017).

[69] CA 488/77 *A. v. Attorney General*, IsrSC 32(3) 421 [1978].

[70] HCJ 3872/93 *Mitral Ltd. v. Prime Minister and Minister of Religion*, IsrSC 47(5) 485 [1993].

PARTIAL JUDGMENT AND DECISION

Deputy President S. Joubran:

1. The petition before us seeks to extend access to the Israeli surrogacy arrangement primarily regulated by the Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) Law, 5756-1996 (hereinafter: Agreements Law), such that it would also apply to same-sex couples and to single individuals, with or without a genetic link to the child.

2. The petition was filed at the beginning of 2015, and two hearings were held before an expanded bench of this Court, and supplemental pleadings were submitted, such that the petition was ripe for decision. However, on July 17, 2017, Respondent 1 submitted a notice providing updated details concerning the Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) (Amendment no. 2) Bill, 5777-2017 (hereinafter: the Bill). This Bill was introduced in the Knesset on July 5, 2017, and passed its first reading on July 17, 2017. In its updating notice, Respondent 1 explained that the Bill deals, *inter alia*, with extending access to Israeli surrogacy agreements, and asked that we rule that, in light of the introduction of the Bill, the petition does not show cause for judicial intervention. In their response of July 21, 2017, the Petitioners contended that the petition should be addressed immediately, in accordance with the current legislative situation, and that in view of the ongoing plight of the Petitioners – some 21 years after enactment of the Law – there is no justification for delaying for an additional, lengthy period for legislative developments. They also emphasize that the Bill relates to the access of genetically-related single women to surrogacy agreements, but does not provide a response for the petitioners in this petition.

3. As will be explained below, in view of the fact that the Bill recently passed its first reading, on the assumption that the legislative process will proceed at a suitable pace, and in light of the judicial restraint required in sensitive matters such as the matter at hand, we are satisfied that the legislature should be granted a certain amount of time in which to complete that legislative process prior to our deciding on the merits of the petition as a whole. However, since the principled arguments of the parties concerning the points of contention

have already been heard, it is already possible, in our opinion, to decide on parts of the petition, and it particular, on the arguments of Petitioners 5-6 (hereinafter: the Petitioners) that it should be permissible to enter into a surrogacy agreement in the absence of any genetic link between the prospective parent or prospective parents and the newborn. In my opinion, even though the Petitioners' argument that the requirement for a genetic link violates the right to parenthood has merit, this violation meets the conditions of the limitations clause in sec. 8 of Basic Law: Human Dignity and Liberty, and as such, the arguments *on this matter* must be dismissed.

My opinion will be presented in two parts: the first part will address the *decision* to postpone deciding on the petition in the matter of extending access to surrogacy to family units that are not presently included; the second part will present a *partial judgment* that dismisses the arguments for striking down the requirement of a genetic link in surrogacy procedures, as will be explained below.

Postponement of the Decision on the Petition

4. As I mentioned above, recently – on July 5, 2017 – a Government bill to amend the Agreements Law was introduced in the Knesset. This proposal passed its first reading in the Knesset plenum on July 17, 2017, and at the time of writing this opinion, it is before the Knesset Labor, Welfare and Health Committee, awaiting preparation for the second and third readings. This proposal – should it be enacted as presently formulated – is expected to bring about a significant change in the current surrogacy arrangements, including allowing, for the first time, single women who have a genetic link to the child to enter into surrogacy agreements. As opposed to this, the formulation of the proposal provides no succor for what is sought by the Petitioners, since it does not extend the Law to same-sex couples and to single men. It should be noted that the said proposal is partially based on the Memorandum for Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) (Amendment – Definition of Prospective Parents and Conditions for Approval of the Agreement) Law, 2777-2016 (hereinafter: Memorandum of the Law), which was published on Oct. 30, 2016, and which similarly proposed expanding the definition of "prospective parents" in sec. 1 of the Agreements Law to include a single woman. Against the background of this development, I believe, as I wrote, that the legislature should be permitted to exhaust the legislative process before this Court decides on the full petition. Below I will briefly discuss my reasons for this.

5. To begin, I will note that for this Court to accord status to a legislative initiative, and in particular, to postpone a hearing in proceedings that are affected by that initiative, is not a common phenomenon (for an in-depth analysis of the issue in modern legal literature, see Bell Yosef, *A Mixed Blessing: The Normative Status of Legislative Initiatives* 40 TEL AVIV L. REV. 253 (2017) (Heb.) (hereinafter: Yosef). For a review of the judgments in which a legislative initiative has affected the course of the hearings in a petition before this Court sitting as the High Court of Justice, see *ibid*., at 262-66). In my view, this is not a bad thing, for it demonstrates a proper, healthy expression of the constitutional dialogue between the branches of government, in which each respects the sphere of activity of the other (see: HCJ 8665/14 *Desta v. Knesset* [1], para. 1, *per* Justice E. Hayut, paras. 1-7 *per* Justice H. Melcer (hereinafter: *Desta*); HCJ 2390/96 *Karsik v. State of Israel, Israel Lands Administration* [2], para. 6; CFH 5161/03 *E.S.T. Projects and Human Resources Management Ltd. v. State of Israel* [3] para. 13; AHARON BARAK, THE JUDGE IN A DEMOCRATIC SOCIETY, 376-89 (2004) (Heb.) (hereinafter: BARAK, JUDGE IN A DEMOCRATIC SOCIETY); DAVID ZECHARIA, THE PURE SOUND OF THE PICCOLO: THE SUPREME COURT, DIALOGUE AND THE FIGHT AGAINST TERRORISM, 241-43 (2012) (Heb.); Yosef, at 292-308; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue between Courts and Legislatures (or perhaps The Charter of Rights isn't such a Bad Thing after all)*, 35 OSGOODE HALL L. J. 75 (1997)). The words of Justice (emer.) E.E. Levy in HCJ 466/07 *Galon v. Attorney General* [4] (hereinafter: *Galon* case) are apt here:

> [The] concept of constitutional dialogue [reflects] an understanding that protection of the values embodied in the constitution is an endeavor that is common to the *three branches of government*. This understanding does not undermine the democratic fundamental principles of the separation of powers and checks and balances; rather, it is concerned with furthering the dialogue between the branches of government and the mutual sensitivity between them … This understanding provides a foundation for the approach whereby it is best that engagement with constitutional questions should be the outcome of an honest, constant and continuous dialogue between the branches. This will likely be beneficial for the conduct of government in general. It

> may well be good for human rights. It is able to dispel antagonism, which is frequently connected to the notion of a right and protection of this right. It has the ability to aid in the development of additional constitutional rights. It allows basic rights to share the spotlight with other values, the promotion of which is important to the public (para. 42 of his opinion).

6. In the circumstances of the present petition, since the legislature has expressed its intention to introduce changes into the Agreements Law and to consider the scope of the definition of "prospective parents", a decision concerning the constitutionality of the formulation of the existing Law is liable to constitute undue interference in the sphere of activity reserved for it as the "senior partner" in legislation (BARAK, THE JUDGE IN A DEMOCRACY, 380). The "right of way" that ought to be given to the legislature when we are dealing with a constitutional defect was discussed by my colleague, Justice E. Rubinstein in HCJ 5771/12 *Moshe v. Committee for Approval of Embryo Carrying Agreements* [5] (hereinafter: *Moshe* case), the backdrop to which was an earlier proposal to amend the Agreements Law. He wrote:

> ... the existence of current legislative proceedings to expand the existing circle of eligibility in the Embryo Carrying Law naturally and sensibly calls for judicial restraint by this Court, so that it will not snap at the heels of the legislature .... Of course, if ultimately there is no legislative process, constitutional judicial intervention must not be ruled out .... 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 (para. 46 of his opinion; and see para. 17 of Justice Hayut's opinion).

7. Moreover, in my opinion, making a decision on this petition on the matter of expanding access to surrogacy at this time raises practical difficulties. This is because the normative framework on which this Court will base its decision is liable to change within a short time, which would render our determinations, and any relief that may be given, purely theoretical. Moreover, a decision on the petition after the legislative process has been completed will

ensure that the resources of this Court will be devoted to an issue that has practical application (*cf*: Yosef, 284-86).

8. The Court must certainly exercise caution in postponing its decision on a pending petition due to a legislative initiative. There may be circumstances in which it is inappropriate to adopt such a course, whether because the postponement is liable to severely harm the petitioners or to allow a wrong requiring immediate remedy to persist, or whether because the chances of the legislative initiative maturing into a change in the normative framework are slim. In a certain sense, the major consideration in this matter appears to me to be similar to the criteria for examining a claim of ripeness in constitutional law. As I have pointed out on more than one occasion, a decision on this argument ought to be made by balancing the benefits of addressing the matter confronting this Court in another forum (in our case – the legislature) against the anticipated harm to the petitioners by allowing the existing normative situation to persist (cf. HCJ 3166/14 *Gutman v. Attorney General* [6], para. 5 of my opinion; HCJ 2311/11 *Sabah v. Knesset* [7], para. 7 of my opinion (hereinafter: *Sabah* case); HCJ 1213/10 *Nir* v. *Knesset Speaker* [8], para. 18 of my opinion (hereinafter: *Nir* case)). Therefore, I will now examine the different aspects of the legislative initiative before us, while addressing the primary criteria that have been proposed in the academic literature on this matter (see: Yosef , 301-18) and explaining why, in my view, the benefits outweigh the harm.

9. I will first look at the *legislative process* concerning the matter before us. It is evident that this is not some trifling initiative that has been abandoned over the course of time. The Bill was introduced by the Government, and passed its first reading in the plenum with a majority of 12 to 1, with members of both the coalition and the opposition voting for it, even though the latter expressed reservations about the lack of a response to same-sex couples in the proposal (see: Minutes of Session no. 254 of the 20th Knesset, 205-217 (July 17,.2017)). In the said circumstances, in my view, we should consider the official status of the initiative and the possibility that it will indeed develop into a legislative amendment (*cf*: Yosef, 313-315). Moreover, the Bill has recently moved forward, and currently appears on the legislative agenda, thus increasing the concern about undermining a legislative process in its initial stages (*cf*: Yosef, 309-10).

10. In their response to the updating notice of Respondent 1, the Petitioners note the concurrence between the progress in the legislative process and the course of the hearing on

this petition. Indeed, it is evident that the legislative memorandum was published between the two dates for oral hearings on this petition, and that the Bill was submitted to the Knesset after the conclusion of the hearings and after the parties had submitted all their pleadings, while this Court was deliberating the matter. According to the Petitioners: "It is difficult not to feel some discomfort in view of this conduct." I am myself surprised that it was not possible to advance a legislative process like the one before us over the course of years, particularly in view of the explicit determination of Justice M. Cheshin in 2002 in HCJ 2458/01 *New Family v. Committee for Approval of Embryo Carrying Agreements* [9] (hereinafter: *New Family* case), according to which the distinction made by the Agreements Law between women who are in a relationship and single women is discriminatory (*ibid*., paras. 40-42). However, whatever mistakes were made in the past, my position looking forward is that there is nothing illegitimate in advancing a legislative initiative in response to or in connection with proceedings that are under way in this Court – as long as the motives are relevant and worthy. In this context, Prof. Barak's words are apt:

> In my view, legislation in the course of a pending judicial process does not harm the Court and the mutual respect to which the branches of government are committed. If the legislature concludes that a law is not constitutional, it is not required to wait for the Court to rule on the matter. This is also the case when the legislature concludes that the existing legislation is inappropriate, and should be changed. In such situations, there is no disrespect of the Court when the legislature seeks to have its say first, without waiting for a judicial decision and without harming the party whose matter is before the court. As opposed to this, the judiciary would be severely undermined if the Knesset were to make a decision intended to influence the discretion of the judges in a matter pending before the Court (BARAK, JUDGE IN A DEMOCRATIC SOCIETY, 389; see also: Yosef, at 299).

However, the situation in the present petition is more complex, inasmuch as the legal defect that the legislature is correcting is more limited in scope than Petitioners' objection, and therefore, even if the legislative process is completed, it will not necessarily obviate a decision on the petition. In these circumstances, Prof. Barak's comment at the end of the above passage is doubly relevant, and indeed, one must avoid a scenario of repeated requests

for postponements to allow for completion of the legislation, with the anticipated legislative amendment becoming a means at the service of the Respondent. For this reason, I would propose to my colleagues that we allocate a reasonable period of time after which the State will be required to provide an update concerning the legislative process. Obviously, a rate of progress that does not comport with the importance of the process, taking into account its complexity, will attest to a lesser degree of commitment to its advancement than that attributed to it at this stage, and will also lessen the justification for allowing extra time for its completion, despite the fundamental difficulties raised by this petition (*cf*: HCJ 6665/12 *E-Cig Ltd. v. Director General of the Ministry of Health* [10], para. 27).

11. I will now proceed to examine the *nature of the matter* under discussion, and its ramifications for the appropriate attitude to the legislative initiative and the benefit that may derive from its completion. In particular, I will discuss the substantial complexity on two levels: the professional level and the level of values.

12. *On the professional level*, it is patently clear that the Agreements Law reflects a complex legislative arrangement based on a system of balances and monitoring mechanisms. This system constitutes the product of lengthy, meticulous legislative processes based on the recommendations of the public commission headed by Judge (emer.) Shaul Aloni, which studied the subject of *in vitro* fertilization, including the matter of surrogacy, and published its recommendations in 1994. Some two decades later, another public commission – the Mor Yosef Committee – studied the subject of fertility and reproduction in Israel, including the issue of surrogacy and those who are eligible to avail themselves of it. On the basis of what has been said above, it is evident that the heart of the dispute in the present petition involves questions of expertise – a fact that attests to its considerable complexity from the professional perspective.

13. *At the level of values*, the range of medical reproductive techniques gives rise to various social, moral, ethical, religious and legal problems concerning the status of those who contribute gametes to the reproductive process, and of the surrogate mother, as well as broad social implications that may arise from the use of these means (see, in depth: BENZION SCHERESCHEWSKY & MICHAEL CORINALDI, FAMILY LAW, vol. 2, 979-1006 (2016) (Heb.); PINHAS SHIFMAN, FAMILY LAW IN ISRAEL vol. 2, 101-35 (1989) (Heb.); JANET L. DOLGIN & LOIS L. SHEPHERD, BIOETHICS AND THE LAW 94-321 (3rd ed., 2013) (hereinafter: DOLGIN & SHEPHERD). Private surrogacy agreements in themselves are a subject of legal, academic,

social and public discussion revolving around the physical, psychological and familial difficulties of the surrogate mothers (Nuphar Lipkin and Etti Semama, *From Worthy Act to an Off-the-Shelf Product: Creeping Normativization of Surrogacy in Israel*, 15 MISHPAT U-MIMSHAL 435, 480-85 (2013) (Heb.); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1928-32 (1987); Stephen Wilkinson, *The Exploitation Argument against Commercial Surrogacy*, 17 BIOETHICS 169 (2003); June Carbon & Judy Lynee Madeira, *The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction Practices*, 90 WASH. L. REV. ONLINE 1, 13-19 (2015)), and on the compatibility of such agreements with public policy (see and *cf.*: LFA 1118/14 *Anon. v. Ministry of Welfare and Social Services* [11] para. 3 *per* Justice H. Melcer (April 1, 2015) (hereinafter: *Anon.* case); *New Family* case, para. 39 *per* Justice M. Cheshin; Dorit Shapira and Yosef Shapira, *A Decade to the Embryo Carrying (Agreement Authorization & Status of the Newborn Child) Law, 5756-1996: The Reality and the Ideal*, 36 MEDICINE AND LAW 19, 29-32 (2007) (Heb.); Ruth Zafran, *The Family in the Genetic Era – Definition of Parenthood in Circumstances of Artificial Reproduction in a Test Case*, 2 DIN U-DEVARIM 223 (2006) (Heb.); HILA KEREN, CONTRACT LAWS FROM A FEMINIST PERSPECTIVE 273-75 (2004) (Heb.); Report of the Public Professional Committee for the Examination of the Subject of *In Vitro* Fertilization 48-49 (1994) (Heb.) (hereinafter: Aloni Commission); Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J.L. & FEMINISM 211, 222-28, 231-38 (2016); the position of the Supreme Court of the State of Tennessee, United States, which allowed the enforcement of surrogacy agreements subject to various restrictions: *In re Baby*, 447 S.W.3d 807, 827-30, 832-33 (2014); the prohibition on the enforcement of surrogacy agreements except for allowing enforcement of the amount of compensation for the surrogate mother in New South Wales, Australia – Surrogacy Act 2010, §6; and section 541 of the Civil Code that prohibits the enforcement of surrogacy agreements: *Droit de la famille* - 151172, 2015 QCCS 2308 (canlii, 5.20.2015), § 111).

14. As we therefore see, the complexity presented by the Petitioners' requested expansion is not inconsiderable in view of the range of professional and principled considerations it raises. Justice M. Cheshin commented on this in the *New Family* case, stating:

> … surrogacy is a new phenomenon, and the unknown exceeds the known in its ramifications for human life – in terms of health, emotion, society, religion and law. The process of surrogacy involves difficult human issues … with the passage of time and the

> amassing of knowledge and experience, it will be appropriate to revisit the subject (at 457-62).

Indeed, a great deal of time has passed since the advent of Israeli regulation of surrogacy and the judgment in the *New Family* case. Over the years, scientific knowledge on the subject has increased and essential experience has been accumulated by the professional bodies tasked with its realization. While the passage of time has indeed lessened the complexity discussed above, it cannot entirely eliminate it.

15. In my opinion, this complexity reinforces the inappropriateness of deciding this petition at this time (*cf*: Yosef, 318). As we have often noted, developing policy, particularly policy in regard to sensitive issues at the heart of the public agenda and matters of professional expertise, is not the job of this Court, which lacks the resources of professional knowledge available to the legislature. This is evident, for example, in the restrained approach adopted by this Court in regard to legislation concerning socio-economic policy, which similarly involves professional considerations that are beyond the Court's area of expertise (see, e.g.: HCJ 4406/16 *Association of Banks in Israel v. Knesset* [12], para. 39, *per* my colleague President M. Naor (hereinafter: *Association of Banks* case); HCJ 3734/11 *Davidian v. Knesset* [13], para. 39, *per* my colleague President M. Naor (15.8.2012); HCJ 4885/03 *Israel Poultry Farmers Association v. Government* [14], 60; CLA 3145/99 *Bank Leumi Ltd. v. Hazan* [15], 406-09), as well as in the willingness of this Court to defer deciding upon petitions that concern matters of broad public concern, such as the deferment of the military service of full-time yeshiva students (see: HCJ 6298/07 *Ressler v. Israel Knesset* [16], paras. 3-4, *per* President D. Beinisch, and the constitutionality of the Citizenship and Entry into Israel (Temporary Provisions) Law, 5763-2003 (see: HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights v. Minister of Interior* [17], para. 16, *per* President A. Barak (hereinafter: *Adalah* case)).

This does not, of course, detract from the authority of this Court to examine the constitutionality of legislation that is brought before it, and cure possible constitutional defects. This is not one of those cases in which the complexity of the issue justifies our total refusal to address it on the merits (*cf*: HCJFH 10007/09 *Gluten v. National Labor Court* [18], *per* President A. Grunis (hereinafter: *Gluten* case); for a discussion see: Yosef, 286-88). However, due to the separation of powers and the institutional differences that I discussed, I believe that it is better if the legislature first address surrogacy arrangements, and amend the

law in light of its understanding and considerations. This adjournment will also allow the Petitioners, and their representatives in the legislative branch, to participate in the parliamentary and public conversation on amending the law, and try to influence its outcome. Through this process it may be possible to resolve, or at least moderate, the problems in the existing legal situation – which I will address at the end of my opinion – and yield a result in which I believe all the parties can profit. However, if these problems remain and the Petitioners insist on their arguments, we will decide upon the constitutionality of the new arrangement.

16. As opposed to the weighty considerations that I enumerated stands the harm to the Petitioners. It should be stated from the outset that this petition is not a sporadic legal performance. Rather, it lies at the heart of a long, persistent, struggle for equality and for recognition on the part of the LGBT community in a range of areas of life, and in particular in all that concerns the right to become a parent (for a discussion of the various aspects of this issue see, e.g.: Ayelet Blecher-Prigat and Ruth Zafran, *"Children are Joy": Same-Sex Parenthood and Artificial Reproductive Technologies,* LGBTQ RIGHTS IN ISRAEL: GENDER IDENTITY, SEXUAL ORIENTATION AND THE LAW (EINAV MORGENSTERN, YANIV LUSHINSKI & ALON HAREL eds., 2016) 395 (Heb.) (hereinafter: Blecher-Prigat & Zafran); Zvi H. Triger and Mili Mass, *The Child in her Family: A Necessary Turn Towards LGBT Adoption in Israel,* LGBTQ RIGHTS IN ISRAEL: GENDER IDENTITY, SEXUAL ORIENTATION AND THE LAW (EINAV MORGENSTERN, YANIV LUSHINSKI & ALON HAREL eds., 2016) 437 (Heb.) (hereinafter: Triger & Mass)). There is therefore no denying that postponing the decision on the petition is very significant for the Petitioners, as well as for many others of the Israeli public, whether they are members of the community itself or other citizens who identify with their pain. This is due to the strong desire of men and women of the gay community to become parents, and the serious injury to their dignity as a result of the distinction drawn by the Law between them and heterosexual couples – a distinction of dubious relevance, as I will explain below. Moreover, the purpose of the postponement – giving the legislature time to complete the process of amending the Agreements Law – is not accompanied by good news for the Petitioners, for even in its proposed formulation, the Law will not provide relief for the distress of single-sex couples and of single men.

It is not superfluous to say that the disagreement around the accessibility of surrogacy to single-sex couples, as well as for single parents, is not new to us, and over the years it has brought various petitioners – including Petitioners 1-2 in the present case – to come knocking

on the doors of this Court with a request for help. Below I will briefly discuss the main milestones in this chronology in order to illustrate the many years of bitter experience suffered by the Petitioners and the community to which they belong with the subject before us, and the difficulty inherent in sending them away empty-handed – at least in the interim period until the legislative process is completed.

Already in the early years of this century, in the *New Family* case, this Court addressed the distinction drawn by the Law between single women and women in heterosexual relationships. Although the Court recognized the constitutional difficulties this distinction raises, it refrained from intervening in the Law in view of the need to acquire further experience from its implementation. About a decade later, Petitioners 1-2 in the present case petitioned this Court against the decision of Respondent 1 to deny them a surrogacy procedure because they did not, in its view, fall within the definition of "prospective parents" under the Agreements Law. That petition was dismissed with the consent of the parties, in view of the anticipated establishment of the Mor Yosef Committee (see: HCJ 1078/10 *Arad Pinkas v. Committee for Approval of Embryo Carrying Agreements* [19]). The *Moshe* case, heard in this Court several years later, also raised questions involving the limited access to surrogacy, but the Court preferred to refrain from judicial intervention in the provisions of the Agreements Law due to the legislative proceedings that were underway at that time (see: *ibid*., para. 17 *per* Justice E. Hayut). Those proceedings, it is only fair to say, did not result in a legislative act.

17. To summarize: we face a difficult choice, as it is said, "Woe unto me from my Creator [*yotzri*] and woe unto me from my inclination [*yitzri*]" (*Babylonian Talmud, Berakhot* 61a). *On the one hand*, there is considerable value in allowing the legislature time to complete the legislative process that it began, which is now at an advanced stage and enjoys wide support in the Knesset. Allowing this time will allow for public debate of the sensitive issue in an institutional framework appropriate to its complexity, and will express an appropriate democratic constitutional approach in which the branches show a willingness to listen to one another and respect the sphere of authority of the other. *On the other hand*, postponing adjudication of the petition will extend the violation of the Petitioners' rights, the exalted constitutional status of which is not in doubt. This violation has affected them, and the community to which they belong, since the passage of the Agreements Law in 1996, and it constitutes only one of the many aspects in which Israeli law has not yet adapted itself to the reality of pluralistic life today.

18. After having given serious thought to the matter, and not without hesitation, I have concluded that the time is not ripe for deciding on the matter of Petitioners 1-4, in light of the pending legislative proceedings in the Knesset, *inter alia*, on the question of the definition of "prospective parents" in the Agreements Law. I am certain that the legislature will be aware of the serious, on-going harm to the Petitioners, and will act with due dispatch to complete the legislative process. For this reason, I would recommend that *we postpone hearing the petition for a six-month period*, and that we order the Respondents to submit updated notice of the progress of the legislation no later than Feb. 4, 2018.

I will now proceed to the second part of the opinion – an examination of the constitutionality of the requirement of a genetic link in the surrogacy process.

The Requirement for a Genetic Link in the Surrogacy Process

19. Medical procedures aimed at assisting fertilization for the purpose of pregnancy and birth have existed since the end of the eighteenth century, but recourse to these procedures became common only in the middle of the twentieth century, both in the wake of technological developments and in the wake of social changes (see: Ruth Zafran, *Secrets and Lies: The Right of AID Offspring to Seek Out their Biological Fathers* 35 MISHPATIM 519, 527 (5765-2005) (Heb.) (hereinafter: Zafran, *Secrets and Lies*); DOLGIN & SHEPHERD, at 321-28). To simplify the discussion, we can talk about four different links in the reproductive process that can be improved or replaced through medical procedures: the sperm, the egg, the fertilization process, and carrying the pregnancy by the woman (who is called a "surrogate"). Correspondingly, there are different medical procedures that can improve the quality of the sperm of the prospective father or allow for the use of a sperm donation in order to fertilize the egg. There are medical procedures that allow for ova to be extracted from the woman and fertilized outside of her body in order to overcome medical problems in fertilization; there are medical procedures that make it possible to donate a fertilized ovum and implant it in the womb of a woman who has not succeeded in becoming pregnant; and there are medical procedures for implanting a fertilized ovum into the womb of a woman who will serve as a surrogate. In other words, from a medical point of view, there are solutions that provide a response to various challenges in the reproductive process and allow for a child to be brought into the world without a genetic link to the prospective parent (Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002); Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making*

Markets, 30 CARDOZO L. REV. 1885 (2009) (hereinafter: Ben-Asher, *The Curing Law*); on more innovative reproductive possibilities and the possibility of legal adoption, see: Erez Aloni, *Cloning and the LGBTI Family: Cautious Optimism*, 35 N.Y.U REV. L. SOC. CHANGE 1, 14-17, 18-36 (2011); and see *Recommendations of the Public Committee for the Examination of the Legislative Regulation of the Subject of Fertility and Reproduction in Israel* (hereinafter: Mor Yosef Committee). This possibility is not purely theoretical, as transpires from the case of *Anon.* that was heard recently by this Court. That case concerned a transaction entered into by a single woman who obtained an egg donation and a sperm donation, implanted the fertilized egg in a surrogate, and sought to be recognized as the single parent of the child, even though she had no genetic link to the child. The point is – and as decided there – such a request does not comport with the provisions of the Law. Section 2(4) of the Agreements Law conditions entering into a surrogacy agreement on the sperm being that of the prospective father; and secs 6(b), 11 and 13 of the Ova Donation Law, 5770-2010 (hereinafter: Ova Donation Law) allow women to receive egg donations for the purpose of a surrogacy process only in accordance with the provisions of the Agreements Law. For this reason, it was not possible to recognize the process of parenthood initiated by the petitioner in that case as a legal surrogacy procedure. However, whereas the *Anon.* case dealt with the possibility of retroactive recognition of the process described, and in doing so raised constitutional questions, in the present case the Petitioners have grabbed the bull by the horns, and they ask that we look into the very constitutionality of the arrangement. I will discuss this below in the context of the requirement for a genetic link, and in that context only.

The Arguments of the Parties

20. Petitioners 5-6 are single women who seek to realize their right to become parents with the help of the surrogacy process. Due to medical problems, however, not only are they not able to carry an embryo in their wombs, but they also cannot provide their own eggs. Their request, therefore, is to enter into a surrogacy agreement without there being any genetic link between themselves and the child. On Oct. 31, 2013, Petitioner 5 asked the Approvals Committee that had been established pursuant to the Agreements Law to approve her entering into a surrogacy agreement. Her request was dismissed *in limine* on Nov. 24, 2013, since according to the Committee, the Petitioner did not fall within the definition of "prospective parents" as provided in the Law. The Committee was also of the opinion that because one of the requirements of the Law is the existence of a genetic connection between the prospective

parents and the child-to-be, the Law does not allow for use of a sperm donation *as well as* an ovum donation for the purpose of the procedure.

On Oct. 31, 2014, counsel for the Petitioners submitted a letter on their behalf and on behalf of the other petitioners in the petition to the (then) Minister of Health, to the person responsible for the Agreements Law in the Ministry of Health, to the Attorney General, to the Legal Adviser of the Knesset and to the Legal Adviser of the Ministry of Health, in which she requested approval for them to submit their requests to enter into an agreement, and for these requests to be considered on their merits. In her response dated Jan. 4, 2015, the Legal Adviser of the Ministry of Health explained that it was not possible to respond positively to the Petitioners, and that the way to change the situation was by means of a legislative amendment. In view of this, the Petitioners submitted the present petition.

21. The Petitioners contend that denying the possibility of their bringing a child into the world with the assistance of a surrogate constitutes a violation of their right to equality and their right to become parents – a violation that does not meet the criteria of the limitations clause. According to them, in the matter of surrogacy, there is no room to distinguish between a woman who is not capable of carrying a pregnancy to term but who is able to provide her own eggs for the fertilization process, and a woman who cannot carry a pregnancy to term and is medically unable to use her own eggs for the fertilization. Their position is that in both cases, the right to parenthood is violated, and the state must repair this violation without distinction. The Petitioners point out that Israeli law recognizes parenthood in the absence of a genetic connection in several contexts: the Ova Donation Law allows a single woman to receive a donation of an ovum in order to become pregnant (where she is the one who carries the pregnancy); the Agreements Law allows a woman to be recognized as the mother when the child is born through surrogacy and there is a genetic link only to her partner, the prospective father; and the adoption procedures in the Child Adoption Law, 5741-1981, by their nature establish parenthood without a genetic connection. The Petitioners also think that the judgment in the *Anon.* case determined the issue of recognition of private surrogacy that is not in accordance with the Agreements Law, and that it therefore says nothing about the possibility of undergoing a controlled process of surrogacy without a genetic link, and in particular, it does not rule out this possibility.

As opposed to this, the Respondents insist that a parental connection in the absence of a genetic link is a complex matter that should addressed by legislation. According to them, this

is all the more so in regard to surrogacy, which makes it possible to create a child with no physiological link to the prospective parents. As a natural outcome, they argue, doing away with the requirement for a genetic link between the prospective parents and the child will turn the surrogacy process into a process resembling adoption. Here, the respondents refer to the position of the Mor Yosef Committee, which stressed the importance of the genetic link in fertilization procedures.

Deliberation and Decision

22. As we know, the constitutional examination comprises three main stages: examination of the existence of a violation of a constitutional right, examination of the constitutionality of the violation in light of the limitations clause, and examination of the appropriate constitutional remedy. If there is no violation, or if the violation is constitutional, there is no need to move to the next stage of the examination (see: HCJ 9134/12 *Gavish v. Knesset* [20], para. 25 *per* President M. Naor; HCJ 10662/04 *Hassan v. National Insurance Institute* [21], para. 24, *per* President D. Beinisch, and the opinion of Justice U. Vogelman; HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [22], paras. 20-21, *per* President A. Barak (hereinafter: *Movement for Quality Government* case). I shall discuss these stages in the above order.

23. First, does the existing surrogacy arrangement violate the constitutional rights of Petitioners 5-6? As I shall immediately explain, in my view there is no violation of their right to equality. In my opinion, for the purpose of the process of surrogacy, there is a relevant distinction between prospective parents who are capable of having a genetic link to the child, and prospective parents who are unable to do so. As opposed to this, I am of the opinion that there is indeed a violation of the right of the Petitioners to parenthood.

The Alleged Violation of the Right to Equality

24. The starting point is that there is a difference between people who are able to donate gametes (sperm or ovum) for the sake of creating an embryo, and those who are not able to donate gametes for the purpose of creating an embryo. This difference is a medical-biological difference that stems from the bodily capabilities of each person (on the developments in genetic research and their possible effect on the issue, see: Jennifer S. Hendricks. *Genetic Essentialism in Family Law*, 26 HEALTH MATRIX: THE JOURNAL OF LAW-MEDICINE, 109, 122 (2016); Jennifer S. Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CAS. W. RES. L.

REV. 399 (2011); Rajesh C. Rao, *Alternatives to Embryonic Stem Cells and Cloning: A Brief Scientific Overview*, 9 YALE J. HEALTH POL'Y L. & ETHICS 603 (2009); DOLGIN & SHEPHERD, 370-75). In the present matter, the question arises whether in the framework of the regulation of surrogacy agreements, there is a relevant distinction between a person who is able to provide gametes that will be used for the purpose of giving birth and will ensure that the child bears her genes, and another person who is unable to do so. The Petitioners argue that the condition whereby the prospective parent must supply his/her own genetic material in order for a surrogacy agreement to be approved, (i.e., a requirement for a genetic link) constitutes unlawful discrimination. I am of a different opinion. In my view, this is a distinction that is relevant and not discriminatory. The main reasons for this position are the recognition of the importance of the genetic link between parents and children in general, and the importance of this link in surrogacy in particular, as I will explain below.

25. The genetic link between parents and their children is of considerable importance, and it has deep historical roots in most known human cultures. The words of Dr. Yehezkel Margalit on this link are apt here:

> There is no material doubt that this is the most ancient model, which in almost every culture acquired historical and mythological exclusivity in determining legal parenthood – both fatherhood and motherhood. It should be stressed that even the critics of this model do not deny the very deep importance and significance of the genetic element (Yehezkel Margalit, *Determining Legal Parenthood by Agreement as a Possible Solution to the Challenges of the New Era*, 6 DIN U-DEVARIM 553, 566-67 (2012) (Heb.).

The importance of the genetic link to the relationship between parents and children is a common thread in Israeli law. The legislature has referred to this link in several legislative acts: (see: secs. 3(a) and 9 of the Children's Foster Care Law, 5776-2016; secs. 3(c) and 10(2) of the Succession Law, 5725-1965; sec. 6 of the Population Registry Law, 5725-1965; sec. 14 of the Legal Capacity and Guardianship Law, 5722-1962; secs. 1(a) and 3(a) of the Family Law Amendment (Maintenance) Law, 5719-1959; sec. 3(a) of the Women's Equal Rights Law, 5711-1951; and arts. 5 and 9 of the Convention on the Rights of the Child, (concluded on Nov. 20, 1989, ratified on Aug. 4, 1991)); and this Court has mentioned several times the importance of the "voice of the blood" that symbolizes the genetic link

between the child and parent (see, e.g.,: LFA 7141/15 *A. v. B.* [23], paras. 5-6 *per* Justice H. Melcer, and the references there (hereinafter: *A. v. B.* case); CFH 1892/11 *Attorney General v. Anon.* [24], *per* Justice E. Arbel (hereinafter: CFH 1892/11); LFA 5082/05 *Attorney General v. Anon.* [25], para. 5, *per* Justice A. Procaccia (hereinafter: LFA 5082/05); *New Family* case, para. 31, *per* Justice M. Cheshin; CA 50/55 *Hershkovitz v. Greenberger* [26], paras. 14-16, *per* Deputy President S.Z. Cheshin). I had the opportunity of relating to the matter in one of the cases, saying:

> We must not forget the nature of the connection between a parent and his child. The connection of blood. The connection of life. The connection of nature … When we sever it, whether absolutely or relatively, we must act with great caution, taking into account the constitutional right of the parent, but on the other hand the constitutional rights of the child, the public interest, and sometimes the interest and even the right of the adoptive family, as may be appropriate (CFH 1892/11, para. 6 of my opinion).

26. The elevated status of the genetic link has consequences for surrogacy, as emerged in the *A. v. B.* case. There, Justice Hendel noted three relevant links regarding surrogacy: the *genetic link*, which is the connection between the prospective parent who contributed his or her genetic reproductive material and the child; the *physiological link*, which is the connection between the pregnant mother and the child; and the *link to the link*, which is the connection that a particular person has to the person with the genetic link to the child. It was explained there that the genetic link constitutes the basis for conferring the status of parenthood in the framework of the surrogacy process, and that it is a *sine qua non* for recognition of the link to the link. Justice Hendel explained that there is, indeed, also a physiological link – but its status in surrogacy is marginal, since this process, by its nature, separates the physiological mother (the surrogate) from the child (see, e.g., secs. 12-13 of the Agreements Law). Hence, in all that concerns the definition of parenthood in surrogacy, the genetic link is of great importance in the present legal situation.

The importance of the genetic link in surrogacy finds expression in several additional sources: the report of the Mor Yosef Committee, which found that surrogacy (as well as egg donation under the Ova Donation Law) is to be approved only on condition that one of the prospective parents has a genetic link to the child (see the Report, at 39-40, 62, 64); and see

the Aloni Commission Report, 22-23, 48); in the language of sec. 2(4) of the Agreements Law; in the legislative history of the Agreements Law (see the minutes of session no. 430 of the 13th Knesset, *per* the chairman of the Labor and Welfare Committee, Yossi Katz, and the Minister of Health Dr. Efraim Sneh (March 7, 1996) (hereinafter: minutes of session 430)); in the position of the State as presented to this Court (see secs. 47-49 of the Response of Respondent 1 to the amended petition); and in the bills to amend the Agreements Law that have been introduced in the Knesset in recent years (see: sec. 2(4) of the Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) (Amendment) **(**Amendment of the Definition of Prospective Parents and Conditions for Approval of Agreement) Bill**,** 5777-2017; sec. 3(2) of the Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) (Amendment – Extension of Eligibility for Surrogacy Processes and Extension of Protection of the Surrogate Mother) Bill, 5776-2016; Explanatory Notes to the Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) (Amendment no. 2) Bill, 5774-2014, and sec. 6(6) of this Bill; Explanatory Notes to the Bill, 1152, and sec. 2 of that Bill).

The importance of the genetic link in surrogacy has also been recognized in comparative law (see, in general: Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1066, 1082-93 and the references there; this is the position in South Africa (see: sec. 294 of the Children's Act 38 of 2005; *AB and Another v. Minister of Social Development* [2016] ZACC 43, §§ 276-278 (hereinafter: *AB* case); in the UK – Human Fertilisation and Embryology Act 2008, art. 54(1)(b); in the Province of Alberta, Canada (see: Family Law Act, Statutes of Alberta, 2003 Chapter F-4.5, § 5.1(d) (2016); in the State of South Australia (see: Family Relationship Acts 1975 – Sect 10HA § 2a(h)(2)); in the States of Virginia, Nevada and Maine in the United States (see: Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S – A National Conversation Informed by Global Lawmaking*, COLUMBIA LAW SCHOOL SEXUALITY & GENDER LAW CLINIC 10, 55, 81-82 (2016); Nev. Rev. Stat. § 126.670, and in the European Court of Human Rights (see: *Mennesson v. France* (app. no. 65192/11, ECHR 2014); *Paradiso & Campenelli v. Italy* (app. No. 25358/12), §§ 195, 211). At the same time, it must be noted that some legal systems comprise arrangements that recognize surrogacy even without a genetic link. This is the case in the Canadian Province of British Columbia and in the Northwest Territories (see: Family Law Act [SBC 2011], C 25, §§ 20, 29; Children's Law Act, S.N.W.T. 1997 §8.1(3)), in the State of California in the United States (see, e.g., Cal. Fam. Code §7960; and in further detail in the updating notice of

the Petitioners), and in the States of Tasmania and Victoria in Australia (see: Assisted Reproductive Treatment Act 2008 No. 76 of 2008, §§ 3, 39-45 (Victoria); Surrogacy Act 2012 (No. 34 of 2012), §3 (Tasmania)).

27. The consistent requirement of Israeli law and of most Western states for the existence of a genetic link between the prospective parents and the child in the surrogacy process has its logic. It is true that there are other significant connections between parents and children – emotional and psychological connections that build up over time. However, I believe that for the purpose of approving the surrogacy process, there is a relevant difference between the existence of those connections alone, which are present in every connection between parents and children, and the existence of a genetic link *in addition* to those connections. This is due, *inter alia*, to the special nature and the complexity of surrogacy for all those involved in it, and to the potential it harbors for causing harm unless it is properly regulated (see and *cf*: para. 42 below; *AB* case, paras. 177-85, 283-87, 293-94; on concern for "commercialization" of the production of children as a result of under-regulation of the surrogacy process, see: Elizabeth S. Anderson, *Is Women's Labor a Commodity?* 19 PHIL. & PUB. AFF. 71, 75-80 (1990); Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132, 150-51 (1992)). Now, the absence of a genetic link does not, *per se*, prevent recourse to assisted medical reproductive techniques that are not surrogacy. Even in the absence of such a link, a particular woman may seek the assistance of some reproductive technique, as long as she is able to have another, additional link to the child – for example, a physiological link (being pregnant with the child) or a link to a link (when there is a genetic link to the spouse who is the prospective parent). However, as I shall explain below, in the absence of the possibility of an additional link to the child in the surrogacy process, the importance of the genetic link rises to the point of exclusivity.

28. Moreover, surrogacy is a sensitive process that brings together new medical techniques and the ancient societal need for survival – whose importance cannot be exaggerated – by the birth of children. This meeting requires extreme caution. Although surrogacy is becoming ever more common with the passage of time, it still raises various moral, ethical, religious and legal difficulties. However, these difficulties are somewhat tempered by the combination of this new reproductive technique with the recognized, central element of reproduction, i.e., the genetic link. What are the implications of this? Given the importance of reproduction for the existence and continuation of society, given the novel nature of the process of surrogacy and its possible effects on traditional reproduction, and given that the element of the genetic

link is an established social element at the very heart of society, I believe that a distinction on the basis of a genetic link is relevant in the regulation of an assisted reproductive technique such as surrogacy. I would emphasize that this is not an expression of a position on the relationship between reproductive techniques and social conceptions in general – especially in regard to harm to groups that have been viewed as "suspect" – which requires a more careful study. What I have said is confined to the question of the relevance, solely in the context of surrogacy, of the distinction between prospective parents who have a genetic link to the child and prospective parents who are not able to establish such a link. Israeli law does not view those who are unable to establish a genetic link to the child on the basis of producing gametes as a "suspect group", and without laying down hard and fast rules, I am also not convinced that this is a case of "disability" as reflected in the anti-discrimination laws (see, and *cf*: *AB* case, paras. 298-302; Ben-Asher, *The Curing Law* 1912-1916; Seema Mohapatra, *Assisted Reproduction Inequality and Marriage Equality*, 92 CHI.-KENT. L. REV. 87, 91-93, 100-02 (2017)). It is therefore evident that when we are dealing with assisted medical reproductive techniques like surrogacy, a distinction on the basis of the existence of a genetic link constitutes, as stated, a relevant distinction.

29. It emerges from the above that both Israeli law and most Western states that permit surrogacy regard the genetic link between prospective parents and the child as an essential condition for this process – despite the harm it entails to those people whose personal circumstances prevent them from providing the reproductive material that will allow for a genetic link. It seems to me that on the basis of this common conception and the values underlying it, the requirement of Israeli law for a genetic link in the surrogacy process is not discriminatory, but rather it is based on material, relevant reasons. Therefore, I find that it does not violate the constitutional right of the Petitioners to equality, and I will proceed to examine the alleged violation of the other right – the right to become a parent.

The Alleged Violation of the Right to Become a Parent

30. The right to parenthood has been recognized in Israel as a constitutional right that derives from human dignity (see, e.g.: HCJ 11437/05 *Kav LaOved v. Ministry of the Interior* [27], paras. 29-32 and 38-40 *per* Justice A. Procaccia, para. 4 of my opinion, and para. 6 *per* Justice E. Rubinstein; HCJ 2245/06 *Dobrin v. Israel Prisons Service* [28], para. 12 *per* Justice A. Procaccia (hereinafter: *Dobrin* case); CFH 2401/95 *Nahmani v. Nahmani* [29], 675-78, 719, 785 (hereinafter: *Nahmani* case)). There are two separate aspects to the right to

parenthood: one is the right to realize parenthood, on which I have elaborated on other occasions and which does not lie at the heart of this petition (see: *Adalah* case, paras. 1-14 of my opinion); the other is the right to become a parent (see: *Anon. v. Anon.* case, paras. 5-8 *per* Justice H. Melcer and the references there, paras. 11-13 *per* Justice I. Amit; HCJ 4077/12 *A. v. Ministry of Health* [30] para. 29 *per* Justice E. Rubinstein (hereinafter: *A. v. Ministry of Health*); *Moshe* case, paras. 6-7 *per* Justice (emer.) E. Arbel; CFH 1892/11, paras. 4 and 6 of my opinion; LFA 377/05 *A. & B. v. Biological Parents* [31], paras. 7-9 *per* Justice A. Procaccia (hereinafter: *Biological Parents* case)). The right to become a parent realizes the right to family life, the right of autonomy of the individual, and the right to privacy (see: *Moshe* case, para. 26 *per* Justice E. Hayut; *Biological Parents* case, para. 7 *per* Justice A. Procaccia; *A. v. Ministry of Health* case, para. 32 *per* Justice E. Rubinstein, and para. 6 *per* Justice D. Barak-Erez; *Nahmani* case, para. 7 *per* Justice D. Dorner, para. 2 *per* President A. Barak; and see also: Aloni Commission, at 10-11; Daphne Barak-Erez, *Symmetry and Neutrality: Reflections on the Nahmani Case*, 20 TEL AVIV U. L. REV. 197, 199-200 (1996) (Heb.)). Recently, a position has been expressed whereby the right to become a parent also stems from the right to liberty, as stated in sec. 5 of Basic Law: Human Dignity and Liberty (*A.. v. B.*. case, paras. 5-8 *per* Justice H. Melcer and the references there, paras. 11-13 *per* Justice I. Amit).

31. The Petitioners' argue that the requirement for a genetic link as provided in the Agreements Law affects their possibility of bringing a child into the world with the help of medical reproductive techniques, and particularly, the technique of surrogacy. I believe that this argument is correct. In my view, the scope of the right to become a parent extends to all the various medical techniques that assist reproduction. As such, this right also includes the possibility of becoming a parent by means of surrogacy. This position emerges both from the rulings of this Court (see: *New Family* case, paras. 31-32 *per* Justice M. Cheshin; *A. v. Ministry of Health* case, para. 27 *per* Justice E. Rubinstein, para. 6 *per* Justice D. Barak-Erez; *Moshe* case, para. 28 *per* Justice E. Hayut, paras. 6-7 *per* Justice (emer.) E. Arbel; *Dobrin* case, para. 15 *per* Justice A. Procaccia; and see reservations as to this decision in the *Anon.* case, para. 23 *per* Justice N. Hendel, and the references there); as well as from comparative law (see: European Court of Human Rights: *S.H. v. Austria*, App. No. 57813/00, §§ 81-82, ECHR 2011(hereinafter: *S.H.* case); *Dickson v. United Kingdom*, App. No. 44362/04 §§ 65-66, ECHR 2007; in the Constitutional Court of South Africa: *AB* case, paras 94, 110, 118, 121; in the Greek Constitution: EUROPEAN PARLIAMENT – DIRECTORATE GENERAL FOR

INTERNAL POLICIES, A COMPARATIVE STUDY ON THE REGIME OF SURROGACY IN EU MEMBER STATES, 277-78 (2013), and esp. note 513; and a combination of arts. 12(1) and 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights (signed Dec. 16, 1966, ratified Oct. 3, 1991), and on this matter see *S.H.* case, para. 9 of the minority opinion); also from academic research on the subject (see: AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL RIGHT AND ITS DAUGHTER RIGHTS, vol. 2, 675-76 (2014) (Heb.); Aharon Barak, *The Light at the End of the Tunnel and the LGBT Community in Israel*, Vol. III, SELECTED ESSAYS: CONSTITUTIONAL INQUIRIES 399, 402 (2017) (Heb.); Meir Shamgar, *Issues on the Subject of Reproduction and Birth*, 39 HAPRAKLIT 21, 28 (1996) (Heb.); and from the approach of the public committees that examined matters of medical reproductive techniques (see: Aloni Committee, 13; Mor Yosef Committee, 25).

32. From all of the above it emerges that the Petitioners have a constitutional right to become parents with the assistance of medical reproductive techniques. This right is a relative one: it is limited by sub-constitutional arrangements, and particularly by the Agreements Law and the Ova Donation Law (see: *Moshe* case, para. 2 *per* President M. Naor, para. 12 of my opinion, and paras. 25-26 *per* Justice E. Hayut; and see: *Anon.* case, para. 3 *per* President M, Naor; and see other limitations on aspects of the right to become a parent: *A. v. Ministry of Health* case, para. 51 *per* Justice E. Rubinstein, para. 11 *per* Justice D. Barak-Erez; and see *AB* case, paras. 237, 314-15). Below I will discuss whether this violation complies with the criteria of the limitations clause.

Limitations Clause

33. As we know, the limitations clause in sec. 8 of Basic Law: Human Dignity and Liberty comprises four conditions: the violation must be by law or by express authorization in a law; the law must befit the values of the State of Israel as a Jewish and democratic state; the law must be for a proper purpose; and finally, the violation of the right must be proportionate (see: *Desta* case, para. 24 *per* President M. Naor; *Sabah* case, paras. 66-70 of my opinion; HCJ 3752/10 *Rubinstein v. Knesset* [32] paras. 66-67 *per* Justice (emer.) E. Arbel). I will now address the violations of the constitutional right of the Petitioners to become parents in light of these criteria.

34. In the present matter, it is indisputable that the first condition is fulfilled, inasmuch as the violation of the protected right was effected by virtue of the Agreements Law. In my view, the Law complies with the second condition. The Agreements Law regulates and realizes

both the right to become a parent with the assistance of medical reproductive techniques and protection of women who are pregnant in the framework of surrogacy (see, e.g., secs. 4(a)(2), 4(a)(3), (4(a)(4) of the Agreements Law) – and thus the Law promotes human rights. In these circumstances, and in view of the fact that this condition has not yet been sufficiently developed in the case law, it seems to me that the Agreements Law befits the values of the State of Israel as a Jewish and democratic state (see: HCJ 5304/15 *Israel Medical Association v. Knesset* [33], paras. 103-106 *per* Deputy President E. Rubinstein (hereinafter: *Israel Medical Association* case); HCJ 5239/11 *Avneri v. Knesset* [34], paras. 28-30 *per* Justice H. Melcer; *Galon* case, paras. 13-18, 27-31 *per* Justice (emer.) E.E. Levy, paras. 2, 8 of my opinion).

35. The third condition examines whether the offending Law serves a proper purpose. I will first consider the purpose of the Agreements Law itself. Justice M. Cheshin discussed the purpose of this Law in the *New Family* case, and ruled that its purpose was "to establish a comprehensive arrangement on the subject of surrogacy, and that there will be no surrogacy other than by virtue thereof […] to solve the problems of spouses, men and women, who are childless, and these problems alone (paras. 15, 18 of his opinion; and see the *Moshe* case, para. 44 *per* Justice E. Rubinstein). In my view, the purpose of the Agreements Law is broader than that determined by the late Deputy President M. Cheshin. My position is based on the subjective purpose of the Law, but mainly on its objective purpose. I shall explain.

36. The subjective purpose of the Agreements Law may be inferred from two main sources. *The first source* is the language of the Law. Both the name of the Agreements Law and the broad areas regulated by the language of the Law – including approval of a surrogacy agreement (Chapter 2 of the Law), regulation of the status of the newborn, the surrogate mother and the prospective parents upon the birth of the child, which includes the link of the child to the prospective parents and severance of the link to the surrogate mother (secs. 4(a)(2), 4(a)(3), 4(a)(4) of the Law, and the criminal prohibition against surrogacy contrary to the provisions of the Law (sec. 19 of the Law) – attest to the legislative intention to permit surrogacy agreements, to regulate their conditions, to regulate the status of the child and its link to the prospective parents, and to assure the well-being of the surrogate mother. *The second source* is the legislative history. The explanatory notes to the Agreements Law reveal that "the proposed Law is intended to permit surrogacy agreements with certain limitations and in a controlled manner" (Explanatory Notes to the Agreements Bill, *H.H.* 259, 259) (hereinafter: Explanatory Notes to the Agreements Bill). Similarly, the Knesset members who

voted on the Law in the second and third readings noted the regulatory purpose of the Law and its aspiration to realize constitutional rights. Thus, the Minister of Health, MK Dr. Ephraim Sneh, noted: "I, as initiator of this Law, insisted first of all that there be legislation, since there were those who wanted to allow some sort of free market in the State". Thus, MK Yael Dayan, a member of the Labor and Welfare Committee of the Knesset, who worked on the Law, noted: "What is determinant with respect […] is the existence of a fundamental right, the right to be a parent […] in every case in which the right to motherhood is denied due to a physical handicap, due to the inability to become pregnant. This is a moral issue – a basic right of the first order" (minutes of meeting 430). What we see from the above is that the subjective purpose of the Law is to regulate surrogacy agreements in Israel, including the status of the prospective parents and their link to the newborn, and to realize the right to become a parent while preserving the dignity and the health of the surrogate. In addition, Justice M. Cheshin found that the intention of the legislature was also to restrict access to surrogacy so that only heterosexual couples would be eligible to avail themselves of this technique (see: *New Family* case, paras. 17-18 of his opinion).

37. In order to determine the objective purpose of the Agreements Law, we will look at the interpretive presumptions. In the present matter, two of these presumptions are particularly relevant: the presumption that the law aspires to protect and realize human rights, and the presumption concerning legislative harmony. Regarding the first, the Agreements Law permits and regulates the realization of the right to become a parent with the assistance of medical reproductive techniques, and in particular, the technique of surrogacy. Similarly, the Agreements Law includes protection of the dignity and well-being of the surrogate mother – and in this way it realizes her constitutional rights in the framework of this process.

The second presumption concerning legislative harmony says that a piece of legislation should be interpreted in accordance with the legislative tapestry into which it is woven (LAA 4021/09 *Tel Aviv Municipal Tax Administration v. Michel Marsiah Co.* [35], para. 32 *per* Justice E. Rubinstein; LCA 8233/08 *Kovashi v. Adv. Eyal Schwartz* [36], para. 37 *per* Justice E. Arbel ; CA 3213/97 *Nakar v. Local Planning and Development Council Herzliya* [37], 633-34. In this context I noted in one of the cases:

> It is a well-known principle of our legal system that when the Court seeks to interpret any statute, it must examine legal arrangements that are materially related to the subject under

> discussion (*in pari materia*). Giving the identical interpretation to subjects in related areas realizes the principle of normative harmony (HCJ 6728/06 *"Ometz"— Citizens for Good Governance and Social and Legal Justice v. Prime Minister* [38], para. 6 of my opinion).

This rule of interpretation tells us that different laws that pertain to the same matter or that have a similar or identical purpose (*in pari materia*) must be treated as one system of law with a comprehensive purpose, composed of different parts that complement each other: this is the legislative template. This legislative template has one main purpose, and every law that composes this template plays a different role in realizing the purpose of this template (see: HCJ 1756/10 *Holon Municipality v. Minister of the Interior* [39], para. 33 *per* Justice D. Barak-Erez (hereinafter: *Holon Municipality* case); CA 2449/08 *Tuashi v. Mercantile Discount Bank Ltd.* [40], paras. 22-26 of my opinion; HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Social Affairs* [41], para. 42 *per* Justice M. Cheshin; AHARON BARAK, INTERPRETATION IN LAW: STATUTORY INTERPRETATION 341-45 (5753-1993) (hereinafter: BARAK, STATUTORY INTERPRETATION) (Heb.)). This Court has recognized several legislative templates: thus, for example, the Hours of Work and Rest Law, 5711-1951, the Minimum Wage Law, 5747-1987, the Male and Female Workers Equal Pay Law, 5756-1996, the Employment of Workers by Manpower Contractors Law, 5756-1996, and the Foreign Workers Law, 5751-1991, all belong to one legislative template (see: *Gluten* case, paras. 11-12 of my opinion). It is similarly possible to identify a legislative template in the area of electronic media and radio broadcasts (see: HCJ 1030/99 *MK Oron v. Speaker of the Knesset* [42], paras. 16-22 *per* Justice T. Orr (hereinafter: *Oron* case); as well as in the area of environmental protection and prevention of pollution, see: CA 4239/15 *Dor Alon Energy Israel 1998 Ltd. v. Tax Authority* [43], paras. 17-19 *per* Justice N. Sohlberg; *Holon Municipality* case, paras. 30-31; HCJ 4128/02 *Adam Teva veDin – Israel Union for Environmental Defense v. Prime Minister* [44] paras. 14-15 *per* President A. Barak; and relating to road accident compensation, see: CA 420/83 *Ashur v. Migdal Insurance Co. Ltd.* [45], para. 22 *per* Justice A. Barak (27.5.1990); Aharon Barak, *Interpretation of the Civil Codex "Israel Style"*, GAD TEDESCHI MEMORIAL VOLUME – ESSAYS IN CIVIL LAW 115, 147-48 (5756-1996) (Heb.)).

38. Similarly, I believe that the various statutes that regulate assistance through medical reproductive techniques must be viewed as part of a legislative template. In the framework of

this template one may mention the Ova Donation Law; the Agreements Law; the Public Health (*In Vitro* Fertilization) Regulations, 5747-1987 (hereinafter: IVF Regulations); and Public Health (Sperm Bank) Regulations, 5739-1979, Declaration of Control of Products and Services (Sperm Bank and Artificial Insemination), 5739-1979, and Circular of the Director General of the Ministry of Health, 2.1.14, "Rules Concerning the Administration of a Sperm Bank and Guidelines for Performing Artificial Insemination" (June 29, 1979) (hereinafter: Ministry of Health Rules). I base my position on several grounds: *first*, these laws share the common purpose of regulating the use of various medical reproductive techniques, they determine the relationship among these techniques, they permit certain techniques and prohibit others, and they include several guiding principles such as ensuring the well-being of women involved in the process and ensuring a link between the prospective parents and the child in these processes (see, e.g., in relation to the link: sec. 11 of the IVF Regulations, which was struck down in HCJ 5087/94 *Zabaro v. Minister of Health* [46]; sec. 23 of the Ministry of Health Rules; secs. 10 and 12 of the Agreements Law; sec. 42(a) of the Ova Donation Law; and see also reference to the link in the various arrangements for recourse to assisted reproductive techniques in the recommendations of the public committees on which these laws were based – Aloni Commission, 22-23, 48; Mor Yosef Committee, 76-77). *Second*, from the fact that the provisions of these laws complement each other and refer to each other (see, e.g., reference to a "recognized department" under the IVF Regulations in sec. 2 of the Ova Donation Law and in sec. 1 of the Agreements Law; reference to the IVF Regulations in the Explanatory Notes to the Ova Donation Law, 292, and in the Explanatory Notes to the Agreements Bill, 259; and reference to the Agreements Law in secs. 4(b), 12(b) and 11 in the Ova Donation Law); and *third*, from their close material relationship (see: Blecher-Prigat & Zafran, 403-20; reference to the various arrangements as one whole in the report of the Mor Yosef Committee, 8-9; DOLGIN AND SHEPHERD, 328-34, at para. 19 above). We find, therefore, that a legislative template exists in regard to the regulation of assistance through medical reproductive techniques, and also that the Agreements Law is part of this legislative template. The primary purpose of this legislative template is to regulate assistance through medical reproductive techniques in order to realize the right to become a parent, while ensuring the health of those involved in the process, and regulating the link between the newborns and the parents. Adapting the purpose of the legislative template to the said Law shows that the objective purpose of the Agreements Law is to regulate the process of surrogacy in Israel in order to realize the right to become a parent, while preserving the dignity and the well-being of the surrogate mothers, and to regulate the status of the newborn

and its link to the prospective parents. As we have said, this purpose also comports with the presumption concerning realization of human rights.

39. Thus, the lion's share of the subjective purpose is consistent with the objective purpose, but the other part – which is concerned with restricting availability exclusively to heterosexual couples – does not comport with the objective purpose. In examining the general purpose of the Law, I believe that the subjective purpose that comports with the objective purpose is to be preferred over one that contradicts it, for several reasons. First, in examining the general purpose of the Agreements Law on the basis of its two purposes, the effect of the time that has elapsed since the Law was enacted should be taken into account. As noted by Justice M. Cheshin in the *Biological Parents* case: "Everything flows. We never dip twice into the same river, and the law, as a system of norms that seeks to integrate into life and navigate the path of human beings, must consider time as a factor of prime importance. Time is the fourth dimension, both in our lives, and in the law" (para. 17; and see: CFH 2121/12 *Anon. v. Dayan Urbach* [47], para. 48 *per* President A. Grunis; CA 9183/09 *Football Association Premier League Ltd. v. Anon.* [48], para. 6 *per* Justice H. Melcer; *New Family* case, para. 53 *per* Justice M Cheshin; BARAK, STATUTORY INTERPRETATION, 242-44, 246-47, 264-71). In truth, we are not dealing with an archaic law, but with a law that was enacted in 1996. However, we may also not ignore the significant social changes that Israeli society has undergone since the nineties, including changes in the traditional family unit (see: *Anon. v. Anon.*, para. 20 *per* Justice H. Melcer, para. 14 *per* Justice I. Amit; Pinhas Shifman, *On the New Family: Opening Lines for Discussion*, 28 TEL AVIV U. L. REV. 643, 648-9, 667-70 (2005) (Heb.)) and changes in the approach of society to assisted reproductive techniques (see: recommendations of the Mor Yosef Committee to allow surrogacy for single women as well, and altruistic surrogacy for single men – Mor Yosef Committee, 15, 63; the changes in the Ministry of Health Rules over the years; Haim Abraham, *Parenthood, Surrogacy and the State*, 9 HUKIM 171, 175-95 (2017) (Heb.)); Tali Marcus, *It Takes (Only) Two to Tango? On the Possibility of Recognizing More than Two Parents for One Child*, 44 MISHPATIM 45, 416-19 (2014) (Heb.)). Secondly, given that we are concerned with statutory provisions that involve human rights, greater weight should be attributed to the objective purpose (see: HCJ 1892/14 *Association for Civil Rights in Israel v. Minister of Public Security* [49], para. 115 and the references there; AAA 4105/09 *Haifa Municipality v. Sephardic Jewish Community Association, Haifa* [50], para. 24 *per* Justice M. Naor (2.2.2012); AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 255, 421-27 (2003) (Heb.)). And *third*, in light of the

interpretive principle that a non-discriminatory purpose should be preferred over a discriminatory purpose (see: HCJ 7245/10 *Adalah – Legal Center for Arab Minority Rights v. Ministry of Social Affairs* [51], paras. 6-7 *per* Justice E. Hayut; HCJ 6698/95 *Ka'adan v. Israel Land Administration* [52], para. 13 *per* President A. Barak; HCJ 142/89 *Laor Movement v. Speaker of the Knesset* [53], para. 9 *per* Deputy President A. Barak). My approach is that the said societal changes, taken together with the rules for prioritizing the objective purpose when dealing with human rights, and preferring a non-discriminatory purpose, indicate that the objective purpose, which largely comports with the subjective purpose, should be preferred. Therefore, we should hold that the condition allowing only heterosexual couples to enter into surrogacy agreements is not part of the purpose of the Law. Thus, the purpose of the Agreements Law is to regulate the surrogacy process in Israel, while ensuring the dignity and well-being of the surrogate mother and regulating the status of the prospective parents and their link to the child.

40. Is this purpose a proper one? In my opinion, the answer to this question is affirmative. Indeed, the Agreements Law does somewhat violate the constitutional right to become a parent. However, the rule is that a law that violates a constitutional right may serve a proper purpose if that purpose "is intended to realize social purposes that are consistent with the values of the state as a whole, and that display sensitivity to the place of human rights in the overall social system" (*Adalah* case, para. 62 *per* President A. Barak; *Israel Medical Association* case, para. 107 *per* Deputy President E. Rubinstein *Quality Government* case, paras. 52-53 *per* President A. Barak; HCJ 2605/05 *Academic Center for Law and Business, Human Rights Division v. Minister of Finance* [54], para. 45 *per* President D. Beinisch). My position is that the social goals that underpin the Agreements Law – regulation of recourse to surrogacy as a medical reproductive technique, preservation of the health of those involved in the process, regulation of the status of the newborn children and their relationship to the prospective parents, and realization of the right to become parents – are important social goals that justify a certain violation of human rights. These goals make it possible to realize the right to become a parent, and they protect women from exploitation. In addition, they ensure that each child that comes into the world as a result of these assisted reproductive techniques will have a link to a particular parent, thus also preventing abuse of the said techniques (such as creating children for commercial purposes) and promoting the well-being of the children. Therefore, in my view, the Agreements Law reflects a proper purpose, and as such it complies with the third condition of the limitations clause (see: HCJ 566/11 *Mamet*

Megged v. Minister of the Interior [55], para. 17 of my opinion (hereinafter: *Mamet Megged* case)). Having found that the Agreements Law meets the first three conditions of the limitations clause, I will now focus the discussion on the condition of proportionality, with its three sub-criteria.

41. First, the *rational connection criterion*. Does the requirement for a genetic link bear a rational connection to the purpose that the Law seeks to realize? I believe that the answer to this is yes. As will be recalled, the purpose of the Agreements Law is to regulate the process of surrogacy in Israel, while ensuring the dignity and well-being of the surrogate mother and regulating the status of the prospective parents and their link to the child. The Law's requirement of a genetic link is rationally connected both to the regulatory purpose of the Law, and to the realization of the link between the prospective parent and the prospective child.

With respect to the regulatory purpose, the legislature saw fit to restrict access to surrogacy to a person who is capable of having a genetic link to the child. As noted above, this exclusivity of access says that only a person who is able to supply his or her own genetic material in order to create the embryo that is implanted in the surrogate can enter into a surrogacy agreement. This, therefore, is a regulatory constraint adopted by the Law that is connected to the regulatory purpose of the Law in that it permits entering into an agreement only on the said condition. As explained above, this condition is relevant to approval of the surrogacy process, and it therefore also complies with the case-law criteria with respect to a link that is not "arbitrary, unreasonable or unfair" (see: *Quality Government* case, para. 58 *per* President A. Barak; HCJ 4769/95 *Menahem v. Minister of Transport* [56], para. 23 *per* Justice D. Beinisch). Moreover, a clear line can also be drawn between this requirement and the legislative purpose relating to the existence of a link between the parents and the child, for as we have said, the mechanism set by the Agreements Law for the purpose of a link between the prospective parents and the child is based on the genetic link between them (see above, para. 27; *AB* case, paras. 283-87, 293-94). As such, I find that the requirement for a genetic link has a rational connection with the realization of the purpose of the Law.

42. Second is the *criterion of the least harmful means*. The question here is whether there exists a means that similarly serves the purpose of the law, but which entails a lesser violation of the constitutional rights. In my view, the existing arrangement meets this sub-criterion as well. In examining the requirement for a genetic link as provided in sec. 2(4) of the Law, of

particular relevance is the legislative purpose with respect to ensuring the existence of a link between the prospective parents and the child. The means chosen to realize this purpose is the requirement that the newborn be genetically related to one of the prospective parents. Therefore, at this stage we must ask whether a means exists that realizes the purpose of ensuring the connection between the parents and the child to the same degree, but at the same time is less harmful to the right to become a parent (see: *Nir* case, paras. 47-49 of my opinion; AHARON BARAK, PROPORTIONALITY IN LAW 395, 411 (2010) (Heb.)). In my opinion, the answer is negative. I will explain.

One could, indeed, argue that the purpose of ensuring the link between the prospective parents and the child could be realized through their emotional connection at the stages of initiation, approval and implementation of the surrogacy process, without any genetic connection (see the dissenting opinion in the *AB* case, paras. 177-85). It is true that the emotional parental link cannot simply be dismissed, and we need not address the nature of this link in the present framework (see, *inter alia*, recognition of this approach in this Court: *Anon.* case, para. 3 *per* Justice D. Barak-Erez, para. 2 *per* Justice H. Melcer; *A. v. Minister of Health* case, para. 29, 43-45 *per* Justice E. Rubinstein; *Mamet Megged* case, para. 14 of my opinion; LAA 5082/05 *Attorney General v. Anon.*, paras. 22, 36 *per* President A. Barak; in the Supreme Court of the United States: *Lehr v. Robertson*, 463 U.S. 248, 259-264 (1983); *Troxel v. Granville*, 530 U.S. 57, 87-89 (2000); and in the Grand Chamber of the European Court of Human Rights: *Paradiso & Campenelli v. Italy* (app. No. 25358/12), §§ 140, 148-149; and see: DOLGIN & SHEPHERD, at 329-31)). It is clear to me that the Law assumed that every prospective parent would establish the said emotional and psychological connection with the prospective child – a link that has existed between parents and children from time immemorial. However, in order to allow a person to bring a child into the world with the assistance of medical reproductive techniques, it was determined that an *additional* link is required beyond that emotional connection that exists in any case. Thus, for example, in the artificial insemination process, a genetic and physiological link with the prospective mother is required; and similarly, in the process of IVF a physiological – or absent that, a genetic – link is required. We see, therefore, that the condition of the existence of an additional link between prospective parents and a child born with the assistance of medical reproductive techniques is not met without some *additional* connection between at least one of the prospective parents and the child, besides the emotional connection.

What additional link is required in the surrogacy process? In view of the fact that the surrogacy process by its nature severs the connection between the surrogate mother and the child, the existence of a physiological link is not a relevant alternative here. Hence, the *only* means that serves the purpose of legislation requiring a link between the parents and the child is that of a genetic link between the prospective parents and the child as a condition for approving a surrogacy agreement. As such, I find that there is no means that realizes the purpose *to the same extent* and causes a lesser violation of the constitutional right under discussion. Therefore, the Law is in compliance with the second sub-condition.

43. Third is the *criterion of proportionality stricto sensu*. In the framework of this sub-criterion, we must decide whether the benefit derived from adding the requirement for a genetic link for the approval of the surrogacy process is greater than the damage caused by this requirement as a result of the violation of the constitutional right of Petitioners 5-6 to become parents. My view is that the benefit outweighs the harm, and that the Agreements Law also complies with this condition. I will explain.

Let us begin with the benefit of the requirement for a genetic link. Above I discussed the great importance attributed in Israel and in the Western world to the genetic link in general, and in the surrogacy process in particular. I also explained that this regulatory element is consistent with the ethical decision of the Israeli legislature, and with that of other legislatures, in regard to the great importance of the genetic link to parents in the surrogacy process. I also explained that the legislature sought to confine surrogacy to circumstances in which an additional link to the emotional link engendered by the parental connection would be forged in the framework of the broad regulation of assisted reproductive techniques, in which some kind of link in addition to the emotional link is required. Similarly, I pointed out that this link helps in addressing some of the potential problems raised by assisted reproductive techniques such as surrogacy, and it constitutes a fulcrum for assistance through such techniques (see above, para. 27). In this case, the requirement for a genetic link reflects benefits that are in keeping with the purpose of the Agreements Law – ensuring the connection between the newborn and the prospective parents, and helping regulate the use of surrogacy on the basis of relevant distinctions. These benefits cannot be brushed aside, and the proof is that most states in the Western world that permit surrogacy have adopted similar models requiring a genetic link between the child and the prospective parent.

I will now discuss the harm caused by the demand for a genetic link. This requirement undeniably entails a result that is harmful to the right of Petitioners 5-6, and of other men and women like them that fate has not been kind enough to allow to become parents. However, this harm is not at the core of the right to become a parent, and it does not affect the existence of this right. Rather, it affects its mode of realization (see: *Moshe* case, para. 2 *per* President M. Naor, para. 12 of my opinion, and para. 26 *per* Justice E. Hayut). This is because Israeli law does not negate the right of the Petitioners to become parents in general, but rather, prevents their access to a particular, special track because they do not comply with the criteria required for this track. Blocking the track leaves open a wide range of ways for realizing their yearning for parenthood, for example, by means of adoption, by means of joint or shared parenting agreements, or by any other legal means. True, these possibilities are not a precise alternative to realizing of the right to become a parent by way of the process of surrogacy, but their existence means that the right is limited only in its means of realization, and it is far from being totally nullified. Hence, the harm to the right to become a parent in our case is not great. Moreover, I find that there is substance in the Respondents' contention that removal of the requirement for a genetic link in the surrogacy process will lead to a great similarity between that process and the process of adoption. As explained by Justice N. Hendel in the *Anon.* case, Israeli law today recognizes parenthood on the basis of four alternative, complementary foundations – genetic link, physiological link, adoption, and a link to a link (para. 7 of his opinion). In its present format, the process of surrogacy rests on the first foundation, in view of the requirement for a genetic link. As stated, this classification therefore shows us that the genetic link constitutes a significant means of distinction between surrogacy and adoption. Unfortunately, since parenthood through a genetic link is not possible for Petitioners 5-6, this means of distinction does not exist as far as they are concerned, and therefore the alternatives of adoption and surrogacy become more similar to one another. Therefore, the harm inflicted by the requirement for a genetic link is confined and limited: it relates to one out of a number of possibilities for realizing the right to become a parent, it also affects a very particular way of realizing the right to parenthood (surrogacy with no genetic link), which is not significantly different from another way of realizing the right to become a parent (adoption). This is even more so when the particular nature of the process of surrogacy and the many dilemmas to which it gives rise are considered.

I therefore find that the requirement for a genetic link in the surrogacy process is of considerable benefit, and the harm it causes is limited. My position regarding the overall

balance is that this benefit outweighs the constitutional harm that it entails. Accordingly, I have reached the conclusion that the Agreements Law also meets the third sub-criterion of proportionality, and that the harm done to the right of Petitioners 5-6 to become parents is proportional.

Summation

44. From the above it emerges that the requirement of the Agreements Law for a genetic link complies with the limitations clause, and therefore its constitutionality is not flawed. Although the circumstances of Petitioners 5-6 arouse empathy, on the basis of all that has been said above I do not find that there is room, in the framework of the present petition, to change the principles expressed in the Agreements Law with respect to the requirement for a genetic link. I will therefore recommend to my colleagues that we deny the petition in regard to those Petitioners.

Before Concluding

45. In the framework of this petition, the Petitioners ask that we order that the portals to the surrogacy process be opened so that also those who wish to establish a non-heterosexual family framework will be able to pass through them with pride. As stated, in view of the fact that the legislature addresses this issue in the Bill that passed its first reading last month, we have decided to allow it time and not to decide the matter at present. However, I wish to devote a few words to the existing legislative situation, and to shed some light on issues that apparently arouse more than a little discomfort.

46. I find it hard to come to terms with a situation in which single people and single-sex couples are prevented from realizing their right to become parents by entering into surrogacy agreements when their heterosexual brothers and sisters enjoy this right. A legal arrangement that grants a right with constitutional status to one group and excludes another group because of its identity, preferences, orientations or ways of life, is an arrangement that appears discriminatory and is hard to accept. For myself, I see no justification for preferring heterosexual parenthood over single-sex parenthood in general, and particularly insofar as the right to become a parent – in terms of all the techniques for its realization – is concerned (*cf.*: *Mamet Megged* case, paras. 5 and 10 of my opinion; *Moshe* case, para. 8 *per* Justice (emer.) E. Arbel).

This unfounded preferential treatment turns its back on the value of human dignity that appears in the Basic Laws of the State of Israel, and the principle of equality that is derived from it. Even though equality is not specifically mentioned in the Basic Laws, the principle of equality has long been recognized as part of "the soul of our entire constitutional regime" (HCJ 98/69 *Bergman v. Minister of Finance* [57], 698). It was accorded the status of a supra-statutory constitutional right deriving from Basic Law: Human Dignity and Liberty (see, e.g., *Association of Banks* case, para. 3 of my opinion; *Sabah* case, para. 13 of my opinion; *Quality Government* case, paras. 36-43 *per* President A. Barak), and it is a common thread running throughout the foundational documents of our State. It was Theodor Herzl who wrote in ALTNEULAND: "Let me tell you, then, that my associates and I make no distinctions between one man and another. We do not ask to what race or religion a man belongs. If he is a man, that is enough for us." This principle also appears in the writings of Ze'ev Jabotinsky, who stated that "human rights and citizens' rights are the property of the person and the citizen, *qua* person and citizen. This is a first principle. There is no room for negotiating or for reckoning who is entitled to rights and who is not" (Ze'ev Jabotinsky, *Untitled Notes*, PLITONIM 23, 29 (5714-1954) (Heb.)), and it is captured in the words of the Declaration of Independence, namely, that the State of Israel "will ensure complete equality of social and political rights to all its inhabitants …".

47. The prohibition against discrimination on the basis of sexual orientation is one of the basic elements of the principle of equality, and Israeli law has managed over the years to weave it into the web of legislation and case law (for a review see: AAA 343/09 *Jerusalem Open House for Pride v. Jerusalem Municipality* [58], para. 54 *per* Justice I. Amit). However, our legal system has unfortunately been left trailing behind in many aspects that are at the heart of the lives of LGBT citizens, and particularly recognition and equal rights for gay partnerships and families (see: Yotam Zeira & Barak Medina, *The Right to Equality and Sexual Orientation*, LGBTQ RIGHTS IN ISRAEL: GENDER IDENTITY, SEXUAL ORIENTATION AND THE LAW, 159, 176-88 (EINAV MORGENSTERN, YANIV LOSHINSKI AND ALON HAREL eds., 2016) (Heb.)). This legal situation comprises a severe violation of human dignity, for it places a group of citizens with equal obligations and rights in an inferior position to that of the rest of Israeli society with no material justification. This violation, and the value of a legal system that is prepared to entertain change, was discussed by US Supreme Court Justice Anthony M. Kennedy, who stated in the context of a case related to our matter:

> *There is dignity in the bond between two men or two women* who seek to marry and in their autonomy to make such profound choices […] If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied […] *It is now clear that the challenged laws burden the liberty of same-sex couples*, and it must be further acknowledged that they abridge central precepts of equality" (*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (emphasis added – S.J.).

In the context of the subject of this petition, I had the opportunity of saying the following in the *Mamet Megged* case (albeit in a dissenting opinion with regard to the result):

> As long as the interpretation of the Committee for the Approval of Embryo Carrying of the Embryo Carrying Agreements Law remains in force, and the Law itself has not been changed by the legislature or found unconstitutional by the Court, same-sex couples find themselves in a categorically inferior position. Unlike heterosexual couples, same-sex couples can resort to surrogacy arrangements only outside of Israel […] The policy of the Respondent in all that regards parenthood discriminates against same-sex couples, and this, alongside totally preventing same-sex couples from turning to the track of surrogacy in Israel. This general policy […] is discriminatory. This policy seeks to establish the heterosexual couple as "natural" […] This discriminatory policy, alongside the deep violation of human dignity and equality, also harms the constitutional right of every person to family life (paras. 5 and 10 of my opinion).

48. It bears saying that over and above the moral flaw involved, the distinction between heterosexual and homosexual parenthood lacks any basis in academic research that has studied the welfare of the newborn. See, for example, Triger and Mass's article, which addressed the various arguments raised against same-sex parenthood systematically and in depth, and shows, through broad research from different areas, that they have no basis. Thus, for example, it was demonstrated that children who are raised in single-sex families do not

have particular difficulties as opposed to children who grew up in families with a father and a mother – either from the point of view of the child's development, or from the point of view of the partnership of the parents in raising the child, as well as from other aspects (see: Triger and Mass, 448-53). Other studies have looked into and dismissed various claims concerning the apparently negative ramifications of single-sex arrangements in the surrogacy process. These studies indicate that there are good connections with the surrogate mother in the course of the pregnancy and thereafter, and they also determine that it is not possible to identify any difference between the situation of children who were born to heterosexual families and that of children born to single-sex families through assisted reproductive techniques (see: Lucy Blake, et al., *Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins*, 16 FERTILITY & STERILITY 1503 (2016); The Ethics Committee of the American Society for Reproductive Medicine, *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons: A Committee Opinion*, 100 FERTILITY & STERILITY 1524, 1526 (2013); and see *Moshe* case, para. 23 *per* Justice (emer.) E. Arbel and the references there.

49. Moreover, I am also struggling to find a relevant reason for the distinction between single women and single men in relation to realizing the right to become a parent (see and *cf.* HCJ 2078/96 *Vitz v. Minister of Health* [59]; *New Family* case, para. 26 *per* Justice M. Cheshin; *Moshe* case, para. 21 *per* Justice (emer.) E. Arbel, para. 17 *per* Justice E Hayut; and in the U.K.: *Z (A Child)* (No 2) [2016] EWHC 1191 (Fam) (20 May 2016)). It is clear that the principle of equality also extends to the difference in gender between women and men, and it seems to me, without setting the matter in stone, that limiting access to assisted reproductive techniques for one gender and not for another raises questions. Thus, for example, a distinction between men and women with respect to the realization of the right to become parents is liable, *prima facie*, to broadcast, even unwittingly, an approach whereby single-parent family units headed by a woman are preferable, and therefore a higher normative value is to be accorded to a single female's yearning for parenthood than to that of a single man; it is liable to hint at a basic assumption whereby this family structure is more proper and desirable; and it may echo archaic social approaches whereby the role of a woman as a parent is more central than that of a man as a parent (*cf. Sessions v. Morales-Santana*, 198 L. Ed. 2d 150 (2017); Ben-Asher, *The Curing Law*, 1913-15; Jean Strout, *Dads and Dicta: The Values of Acknowledging Fathers' Interests*, 21 CARDOZO J. L. & GENDER 135, 148-149 (2015)) – and in this it may possibly reflect a discriminatory basic assumption (*cf.* LAA 919/15 *A. v. B.*.

[60] paras. 103, 105, 107 *per* Justice U. Vogelman; my opinion in LCA 8821/09 *Prozansky v. Layla Tov Production Co. Ltd.* [61]).

50. We see, therefore, that the current surrogacy arrangement gives rise to considerable fundamental difficulties. With the caution required at this interim stage, I dwelt above on the substantial harm to single-sex couples and to single men, and on the shaky social-ethical basis on which the distinctions in the Law stand. In view of our decision to postpone our ruling on the petition in order to allow for completion of the legislative process, this is neither the place nor the time to deliberate on the merits of the arguments presented by the Respondents in their response to the petition. However since we cannot suffice by leaving the matter without comment, I will note – without making any firm determination – that although I listened attentively to the Respondent's arguments and considered them carefully, I was left with an uncomfortable feeling as to the compatibility of this arrangement with the values of the Basic Laws and their provisions. Those who are involved in this very weighty matter must consider this.

Conclusion

51. In this decision, we are postponing determining the very important issues that I addressed above. We do so out of respect for the legislature and for the relationship between the judiciary and the legislature. This relationship is a complex one, based on dialogue between the Court and the legislature. This dialogue turns on the basic principles and the laws of the State of Israel. In that framework, the two branches aspire to advance the goals of the State and address the challenges that face it in an optimal manner, while preserving the basic rights of every person by virtue of the Basic Laws. At the end of this dialogue, the expectation is that a legal result will be achieved that is in keeping with the fundamental principles of the State and that protects individual freedoms. At present, it is the turn of the legislative branch to have its say. Presumably it will fulfill its constitutional obligations and act to realize constitutional rights (see, at length: Aharon Barak, *The Constitutional Right to Protection of Life, Body and Dignity*, 17 LAW AND GOVERNMENT 9, 16-19, 29-27, 31-35 (5776-2016) (Heb.)). As always, this Court will listen very carefully to what the legislative branch has to say. And as always, its doors will be open and its ear bent to any person who claims that his constitutional right has been violated. This is so in regard to the further handling of the present petition, as well as to future petitions.

President M. Naor

1. I concur in the opinion and decision of my colleague Deputy President S. Joubran, and will add just a few of my own comments.

2. In the course of the deliberations on the petition before us, the State announced that the Ministry of Health wishes to advance an amendment to the Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) Law, 5756-1996 (hereinafter: Agreements Law), which will also enable single women to enter into surrogacy agreements. Several days ago, the State updated us on the progress of the legislative process and noted that the bill to amend the Agreements Law (Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) (Amendment no. 2) Bill, 5777-2017 (hereinafter: the Bill) was due for a vote on the first reading that same day (July 17, 2017). Indeed, the Bill passed its first reading that day, and was sent for further discussion to the Labor, Welfare and Health Committee of the Knesset for the purpose of preparation for its second and third readings . Under the circumstances, passage of the Bill in its first reading and it being sent for preparation for its second and third readings created a new situation. At the time, we did indeed express our displeasure at the way in which the Respondents conducted themselves in this process, which expressed itself in submitting a memo of the Bill at the last minute, on the eve of the oral hearing. Now, however, this has indeed come to pass. Accordingly, we have decided as stated by Deputy President Joubran, not to decide at the present time on the issue at hand (other than in relation to the constitutionality of the requirement for a genetic link). This means that we who have or will soon have completed our tenure on the Court – my colleague Deputy President (emer.) Rubinstein, Deputy President Joubran and myself – will not be party to the final judgment, insofar as one may be necessary after the exhaustion of the legislative process. We are a "house of judgment" and not a "house of judges."

3. As a rule, a court may address the legal questions before it even when a bill on that same subject is pending in the Knesset (see and *cf.*: FH 25/80 *Katashvili v. State of Israel* [62]; HJC 6665/12 *A. Sig Ltd. v. Director General of the Ministry of Health* [63], para. 27 *per* Justice M. Mazuz). At the same time, in light of the principle of mutual respect among the branches if government, in relevant cases it is appropriate to refrain from competing with the legislature, and to give the Knesset the opportunity to complete the legislative process within a reasonable time (*cf.*: HCJ 8893/16 *Cabel v. Minister of Communication* [64], in which we granted the State's request for an extension of the period for submitting a response due to the

progress of legislation that would have affected the petition there). It is appropriate to do so in the present case, particularly considering the complexity of the issues that have been raised in the petition and the advanced stage of the legislative process. I will not deny that the Respondents have refrained from estimating when the legislative process is expected to be completed, thus giving rise to concern that they will not make progress as required (and *cf.* other cases in which consideration of petitions was postponed for many months, and even years, until the completion of the legislative process: HCJ 5436/07 *Movement for Quality Government in Israel v. National Authority for Religious Services* [65], ; HCJ 8300/02 *Nasser v. Government of Israel* [66], paras. 2-5 *per* President (emer.) D. Beinisch). Moreover, the Bill in its present formulation does not provide a response to the Petitioners, and on reading the responses of the Respondents one can cautiously surmise that the chance of this changing is not great. To this must be added the fact that when realization of the right to parenthood is at stake, prolongation of the proceedings is liable to lead to an irreversible situation. Finally, it must be borne in mind that the Agreements Law was enacted more than 20 years ago, and since then it has been deliberated in various legal proceedings, in some of which reservations were expressed regarding its scope. In recent years, there have even been attempts – unsuccessful – to amend it. For this reason, and in view of the additional considerations mentioned above, I believe it right to rule, as proposed by Deputy President Joubran, that the Respondents must submit notice of the progress of the legislation within six months.

4. Notwithstanding the above, and considering the fact that this petition has been pending for several years and oral argument has been heard in this Court, I would like to address briefly the definition of "prospective parents" in sec. 1 of the Agreements Law. What I will say is in the category of musings alone, and cannot limit the discretion of the justices who will replace us in these proceedings, if it should be necessary. What I am about to say is directed at the ears of the legislature as considerations that would seem to warrant attention.

5. The Agreements Law was originally intended to provide a solution to a limited number of childless couples, while preserving the rights of all those involved in the process – first and foremost the surrogate mother (see: Report of the Mor Yosef Committee, at 53-54); *New Family* case [9], 434-35, 442-43; HCJ 625/10 *A. v. Committee for the Approval of Embryo Carrying* [67], para. 8 *per* Deputy President E. Rivlin). This being the case, the application of the Law was confined to prospective parents who are "a man and a woman who are a couple, who can never bring children into the world due to a physiological condition that prevents the woman from carrying a child or when pregnancy poses a risk to her life." Several

constitutional petitions have been submitted against the Law in the past – now is not the place to go into details – which in turn led to the establishment of various public committees. The latest committee to deal with this subject, including the question of expanding the circle of those eligible for surrogacy, was the Mor Yosef Committee. The Report of the Committee (submitted in May 2012) stated that "the Committee has been convinced of the strong desire of same-sex couples to bring children into the world and has heard that they regard surrogacy as having great potential … [that] constitutes a good solution … in light of the fact that it preserves the genetic link to one of the partners …" (at 57). Accordingly, the Committee assumed that in the absence of other significant interests, single men and women *should not* be prevented from bringing children into the world by way of surrogacy. However, the Committee also specified several opposing considerations: first, the concern was expressed that surrogacy would change from a specific solution for particularly difficult medical cases into an accepted way of bringing children into the world, and as a result it would be difficult to safeguard the well-being of the surrogates. Second, the concern was expressed that opening up surrogacy to broad populations would come at the expense of women who are suffering from a medical problem. Finally, there was a concern that broadening the scope of those eligible for the procedure would turn surrogacy into a solution only for the rich. In view of these considerations, the Committee ultimately recommended distinguishing between women and men in the sense that men would be permitted to enter into surrogacy agreements on an altruistic basis alone.

6. In the petition before us, the Respondents explained that, in their view, expanding the scope of those eligible for surrogacy requires legislation. At the same time, they argued, in light of the considerations mentioned in the Mor Yosef Report, there is apparently a relevant distinction between single men or male couples and between women who suffer from a medical problem. Accordingly, as stated above, the Bill that is being considered seeks to expand the circle of those entitled to surrogacy to single women only. In my opinion, there is substance to the approach that entering into surrogacy agreements should be permitted only in a controlled fashion, and to the argument that turning surrogacy into the "major route" for bringing children into the world is problematic. Surrogacy involves health and emotional risks to the surrogate, and in certain cases it is also liable to spill over into exploitation of women and their objectivization (see: Nuphar Lipkin and Etti Semama, *From Worthy Act to an Off-the-Shelf Product: Creeping Normativization of Surrogacy in Israel*, 15 MISHPAT U-MIMSHAL 435, 442 (5773-2013) (Heb.) (hereinafter: Lipkin & Semama)). These risks, which

are inherent in the surrogacy process, were raised before the Mor Yosef Committee and they figured in their recommendations. Indeed, one cannot ignore the physical, emotional and ethical difficulties that are liable to arise in the surrogacy process. Nevertheless, since entering into controlled, monitored surrogacy agreements has been permitted in Israel, I see no apparent justification for distinguishing between women with medical problems and single men or male couples in this matter. These two groups are not able to bring children into the world other than by artificial insemination and reproductive techniques. At the same time, we have not been shown factual data indicating that expanding the arrangement in the Law would necessarily lead to a *significant increase in demand* for surrogacy in Israel. Apart from gender, there is therefore no material difference between the groups. In all events – *and this is the main point* – both the Mor Yosef Committee and the Respondents themselves *did not* argue that such a difference exists (and see and *cf*. also: *Mamet Megged* case). The considerations of the Committee, like those of the Respondents, focused, as we have said, on the extent of the demand for surrogacy and the risks this entails. However, it seems right to solve these problems in an egalitarian manner. For example, it is possible (and maybe desirable) to tighten up the control and monitoring of the surrogacy process and to improve the terms of these agreements (see: Lipkin & Semama, at 490-97). Furthermore, it is possible to limit the number of times that a couple or an individual are permitted to enter into a surrogacy agreement, or to prohibit the surrogacy process in the case of a person who already has a child (see also: sec. 5(b) of the Bill). Similarly, the possibility exists of prohibiting commercial surrogacy, and to permit only altruistic surrogacy, as is the practice in some European states (but see: Report of the Mor Yosef Committee, in which it was recommended by majority opinion to permit commercial surrogacy in Israel, at 61-62; and *cf*. sec. 15 of the Organ Transplant Law, 5768-2008). In the final analysis, even though approval of surrogacy agreements is no simple matter, *prima facie* it would seem that there is no difference between women and single men or male couples that justifies discrimination. Let me again emphasize that I am not laying down the law on the present issues. These are only comments as I see things. In any case, the legislature, which must now address these issues, will have to think about them. Insofar as the legislative processes in the Knesset are not concluded within reasonable time, the subject will return for adjudication before this Court, which will deliberate and decide as it sees fit.

7. With respect to the constitutionality of the requirement for a genetic link as a condition for entering into a surrogacy agreement, I accept the ruling of Deputy President Joubran that

the requirement of the Law that there be a genetic link between one of the prospective parents and the child meets the criteria of the limitations clause. Bringing a child into the world without a genetic or physiological link to the prospective parent gives rise to complex social, ethical and moral questions, and providing an answer to these questions in a courtroom is liable to entail broad consequences that have not been elucidated in the present proceedings. Unlike surrogacy with a genetic link, which has been discussed from every perspective over the years, in the courts and by other institutional actors, discussion of the issue of reproduction without a genetic or physiological link has not yet been exhausted. This is even more evident in view of the position of the Mor Yosef Committee, which saw fit to recommend expanding the circle of those eligible for surrogacy as long as a genetic or physiological link exists with at least one of the prospective parents. I therefore accept the position that in relation to the issue of the genetic connection, the petition should be denied. It is important to clarify, however, that our decision on this subject does not, of course, prevent the legislature from considering it, like any other matter, in the framework of the ongoing legislative process. I will also mention, with the required caution, that one cannot rule out in advance a situation in which, as a result of particular changes that may occur in the future, the legislature will once again be called upon to address this issue. I do not make light of the plight of the Petitioners. Indeed, as I have said in the past, the very fact that there are different ways to become a parent does not necessarily mean that the state must allow the realization of them all (*Moshe* case, para. 2 of my opinion). At the same time, without laying down the law on issues that are pending in other proceedings (see, e.g., HCJ 3217/16 *Israel Religious Action Center – The Movement for Progressive Judaism in Israel v. Ministry of Welfare and Social Services* [68], which deals with the scope of those entitled to adopt children), we should strive for alternative solutions that will enable the Petitioners to realize their right to parenthood.

8. To summarize: I concur in the opinion of my colleague Deputy President Joubran, whereby the petition concerning the requirement for a genetic link must be denied. As for expanding the circle of those eligible for surrogacy to include single males and male couples, at the present stage this issue should remain without a final decision due to the ongoing legislative processes and taking into account the principle of mutual respect between the branches of government.

Deputy President (emer.) E. Rubinstein

1. I concur in the outcome reached by Deputy President Joubran. The issues that arise for deliberation in this case add to the human, social and legal complexity that has been created in the present era, in which technological developments in the medical field on the one hand, and social developments in the area of family on the other, have engendered situations that our forefathers could not have imagined. In HCJ *407712 A. v. Ministry of Health* [30], I had the opportunity, in a different context, to say the following (para. 2):

> The "genetic era" and the increasing use in recent decades of artificial reproductive techniques have brought a real blessing to many who would have remained childless "in the old world". Reality has changed immeasurably, and technology presently enables many of those whose path to parenthood was previously blocked, to bring children into the world and have a family. This is one of the dramatic developments, which creates a new social and legal reality, and gives rise to complex, sensitive human questions. The legal world has not yet had the time to properly address these issues, and it falters behind them…

This "faltering along" continues to this day, and therefore issues arise such as the one before us. There are no bounds to a person's desire for a child. My colleague Justice Barak-Erez, at the beginning of her opinion in the above case, quoted from the poem "Barren" by the poet Rachel: "A son! If I only … had one little boy, Dark, sable-curled and so smart …"; and I would add from the end of the poem: "But I'll still weep like Rachel the Mother. And I'll still plead like Channah at Shiloh. I'll await him. I'll await…". Whose heart would not identify with this prayer?

2. The point is that these issues, which change the known reality, such as the situation of single women and men and same-sex couples, should in principle be addressed by the legislature, which sees the entire picture in all its aspects. My colleague (in para. 6) quoted from the *Moshe* case (para. 46), and I will repeat what he said in order to complete the picture:

> 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 will not 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.

These words appear to me to be in keeping with what my colleague has now proposed, that is, postponement of the decision at a time in which the legislature is acting as reported. I support his proposal, and the constitutional arguments will be reserved for the petition when it comes.

3. I also concur in the determination as to the importance of the genetic link, for it seems to me that anyone reading the judgment in the *Moshe* case cannot fail to form the impression that its basic assumption is genetic parenthood for the purpose of the Agreements Law, alongside severance between the surrogate mother and the prospective parents. It is true that the "genetic model," which was the focus of legislation in the past, has been weakened to a certain degree (see in detail the above *A. v. Ministry of Health*. case, para. 44), but the genetic link still carries great weight (para. 45).

4. I will conclude with the comment that regarding all the subjects raised by my colleague at the end of his written opinion, there is room for gradual progression in order to arrive at appropriate, correct results from the overall social aspect as well. This Court should, in my opinion, address these issues while observing the progress of the legislation, without slamming the door on judicial intervention. I will only mention that, on the one hand, the Mor Yosef Committee recommended expanding the circle of those eligible for surrogacy to single women, while on the other hand, it recommended the establishment of altruistic

surrogacy for single men. However, the memorandum of the Law that was submitted at the time – which differs from the present one with the change of Government – expanded the circle of those eligible for commercial surrogacy to include single men as well (see my opinion in the *Moshe* case, para. 45). The reason given by the Committee – that expanding the circle may numerically limit the possibilities available for single women – bothered me, even upon carefully reading what my colleague Deputy President Joubran and my colleague the President wrote, and their thoughts regarding a solution. As for myself, I think that, in general, a committee is established in order that its conclusions be adopted, unless it has clearly deviated from what is reasonable. But of course, the legislature is permitted to think differently and act differently. On the other hand, there is the question of equality, which is no small thing: we are all created *imago dei*, nor does time stand still, socially and personally.

5. This judgment, in its various opinions, comprises recommendations – even if cautious – to the legislature. In order to "glide over the lips of sleepers" (Song of Songs 7:10), and to show the progress that has been made by Israeli law, I would like to cite a summary of a memo written by Supreme Court President Itzhak Olshan during his tenure (1954-1965 – the date of the memo is unknown), who is quoted by Professor Pnina Lahav in her article, *The Pains and Gains of Writing the Biography of Chief Justice Simon Agranat*, HARRIS, KEDAR, LAHAV & LICHOVSKI (eds.), THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY (2002) 147, 157-158. I cite these words not due to agreement with their content, but as an historical comment. President Olshan wrote (I do not have the original Hebrew text) – and according to him the subject had already arisen in discussions with judges in the past – that it is not recommended to make recommendations in a written opinion (he does not explain exactly which recommendations he means, and it may not necessarily be only legislative recommendations), particularly not in criminal matters. He says that it puts the authorities in a difficult position, for if they do not accept the recommendation, they are liable to be seen as offending the Court. On the other hand, the authorities may have good reasons for not accepting the recommendation, but they will be seen as offensive. President Olshan says that he raised the subject because he had been approached on the matter. Prof. Lahav, the author, notes that the memo is of interest both because it refers to informal connections between the governmental branches, and because although President Olshan was very careful to preserve and fight for judicial independence, he also preserved the relationship with the executive branch and was prepared to deliver its requests to the judges. She points out that the

proclivity of courts for writing recommendations is common; it is something that could be said to contradict the principle of separation of powers, but on the other hand it could be seen as a "safety valve" attesting to the discomfort of the Court in applying a particular law as against considerations of justice, and prohibiting it would dilute judicial opinion and prevent the Court from sounding a moral voice. According to the author, the justices did not comply with the "rebuke" of the President, but the very fact that the memo was issued is an indication of the leadership of President Olshan.

As I noted, I cited these words as an historical comment, although I disagree with the position expressed in the memo, and I would add that in my opinion, on the basis of long years of practice and common sense, it is absolutely inappropriate to withhold judicial recommendations that are generally based on long professional, institutional and personal experience, and on consideration of the distressing situations that the Court encounters. On the contrary, the fifty years that have elapsed since President Olshan retired have shown us that there was and is great value to judicial recommendations. Many of them have found their way into legislation and governmental actions, and have contributed to their improvement. Even if caution is wise in making recommendations on matters of principle that are controversial, lack of action on the part of the legislature sometimes compels the Court to have its say. In any case, in general, not only is there nothing wrong with making judicial recommendations, but they are a good thing, for the benefit of all. The dialogue between the branches is important – that is the nature of democracy. The ability to listen is invaluable, and it is of course multi-directional. The spirit of our generation in the context of judicial recommendations was aptly described by Justice Melcer in describing academic discourse (see: *Desta* case, paras. 6-7 of his opinion, and the references cited there).

6. I will conclude with what I wrote in the *Moshe* case (para. 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 egg 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 8 HUKKIM (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?*, 7 MOZNEI MISHPAT 411 (2010)). This expansion lays first and foremost in the hands of the Legislature, which is charged with weighting the balances..

Subsequently, it was said that there is a need (in that context) for a "guide" in the form of statutory directives, which would not require any great legislative effort. This applies, *mutatis mutandis*, in the present case. The last word has not yet been said.

7. This judgment is being handed down on the day of the retirement of my good friend, Deputy President Selim Joubran. I have merited to serve alongside him in friendship and with affection throughout the whole period of our tenure, since we were sworn in on the same day in 2004. Deputy President Joubran – a proud Israeli, a proud Christian Arab – has in the period of his tenure made a great contribution to Israeli law and Israeli society, both with his substantive jurisprudence in his learned opinions, and with his incomparably amiable personality as a colleague, a friend, and a public personality. The "golden mean" approach that he represented in the law, which is particularly close to my heart, has contributed greatly to the peaceful settlement of conflicts, as a lover of peace and a pursuer of peace. May my friend continue in the ways of peace, of health and of contentment.

Justice E. Hayut

1. What is the appropriate scope of the circle of persons eligible for assistance through the surrogacy process in Israel?

This is an issue that the Petitioners have once again laid at the door of this Court in the present petition. The petition raises arguments against the constitutionality of the arrangement provided in the Agreements Law, most of which concern the violation of the right to parenthood and the right to equality of single-sex couples (Petitioners 1-4) and men and women who do not have partners (hereinafter: single men and women), including women who, due to the inability to become pregnant or to donate their own ovum to the reproductive

process (Petitioners 5-6) will not have a genetic link to the child as required by sec. 2(4) of the Agreements Law.

2. This Court first considered the matter of the appropriate scope of those eligible for assistance through the surrogacy process in the *New Family* case, but this was in one single derivative only – a single but fertile woman who was not able to become pregnant and give birth. The judgment determined by majority opinion that denial of the right of a single woman to be included within the definition of "prospective parents" in the Agreements Law, and confining the process of surrogacy under the Law exclusively to "a man and a woman who are a couple", appeared to constitute a violation of the principle of equality and discriminated against women such as the petitioner without justification. At the same time, the Court denied the petition for the reason that it dealt with a "new and complex" issue that should be developed gradually, in small steps, through legislative processes and not by way of case law that intervenes in the legislation of the Knesset. In the *New Family* case, the Court therefore confined itself to a call to the legislature to the effect that –

> … it think about the plight of single women such as the Petitioner; that it give serious consideration, weighing one against the other, the reasons for and reasons against the application of the Law to single women; and that it decide on the merits of the question one way or another. Indeed, the plight of single women is genuine, their plight is not less than that of couples, and those single women deserve to have the legislature think specifically about them and about the prohibitions it placed on their path to surrogacy (at 461) (for an analysis of the status of calls such as this on the part of the Court to the legislature, see: Liav Orgad and Shai Lavi, *Judicial Directive: Empirical and Normative Assessment*, 34 TEL AVIV L. REV. 437 (2011) (Heb.)).

3. More than 14 years have passed since judgment was rendered in the *New Family* case, but the definition of "prospective parents" in the Agreements Law has remained unchanged. As pointed out by my colleague Deputy President Joubran, some 8 years after the judgment in the *New Family* case, the Director General of the Ministry of Health appointed a public committee to examine the statutory regulation of the subject of fertility and reproduction in Israel, and this committee submitted a report in May 2012 (the Mor Yosef Report) in which it

recommended, *inter alia*, to expand the circle of those eligible for assistance through surrogacy under the Agreements Law to include a single woman who has a medical condition preventing her from becoming pregnant, and a single man (with respect to whom it was recommended to permit only an altruistic surrogacy track). Also, in 2014, in the wake of the Mor Yosef Report, a governmental bill was formulated which expanded the circle of those eligible for surrogacy in Israel such that both single women and men would be able to employ the process for payment in Israel (Embryo Carrying Agreements (Approval of Agreements and Status of the Newborn) (Amendment no. 2) Bill, 5774-2014). However, this Bill was not moved forward, and when the rule of continuity was not applied to it, it lapsed.

4. The present petition was submitted on Feb. 2, 2015. On July 17, 2017, after we – sitting as an expanded bench – had completed hearing the objections to the *order nisi* that had been issued, we were informed that the Embryo Carrying Agreements (Approval of Agreements and Status of the Newborn) (Amendment no. 2) Bill, 5777-2017 (hereinafter: the Bill) had been published and introduced in the Knesset on July 5, 2017. Under this Bill, the circle of women eligible for surrogacy in Israel would be expanded to include single women who suffer from a medical problem that necessitates undergoing the process, on condition that the genetic link between the prospective mother and the newborn is preserved. We were also informed that the Bill had passed its first reading and was sent to the Labor, Welfare and Health Committee of the Knesset for preparation for its second and third reading.

5. In view of the conduct of the legislature regarding this issue over the years, it may be assumed that our deliberations on the present petition served as a fairly significant accelerant in the present legislative process. At the same time, and even though the Bill currently under consideration is more limited than the 2014 version (it does not include single men), I agree with my colleague Deputy President Joubran and with my colleague President Naor that at this stage, we should not enter into a "race" with the legislature, which should be allowed to complete the legislative process before we decide on the present petition insofar as it concerns Petitioners 1-4, given the principle of mutual respect between the branches by which we should abide. I therefore concur in this context in the position of my colleagues that we postpone handing down a judgment on the petition (insofar as it concerns Petitioners 1-4) for a period of six months, in order to allow the Knesset to complete the legislative process that it has begun.

6. As opposed to this, like my colleagues, I too am of the opinion that with respect to Petitioners 5-6, the petition should already be denied at this stage.

As will be recalled, Petitioners 5-6 (hereinafter: the Petitioners) are single women who, due to medical problems are not able to carry a pregnancy nor are they able to donate their own ova for the purpose of fertilization and implantation into the womb of a surrogate. As described in the petition, Petitioner 5 has no children, and after attempts to become pregnant from fertilized ova implanted in her womb were not successful, her doctors determined that she could not become pregnant. Petitioner 5 is in possession of several frozen fertilized eggs that were prepared in the framework of her earlier attempts to become pregnant, and after she was told that she would not be able to carry a pregnancy herself, she turned to Respondent 1 (hereinafter: the Committee for Approval of Embryo Carrying or the Committee) with a request to allow her to embark on a process of surrogacy using these ova. The Committee for Approval of Embryo Carrying rejected Petitioner 5's request outright, due to her personal status as a single woman and due to the provision of sec. 2(4) of the Agreements Law that makes the process of surrogacy conditional upon the existence of a genetic link between the prospective parents and the child. Petitioner 6 is also a single woman who, as the result of a medical issue, cannot carry a pregnancy, nor can she donate her own ova for the purpose of surrogacy. Petitioner 6 has one child who was born after she became pregnant through the donation of another woman's ovum that was fertilized by a sperm donation. After she gave birth to her son, Petitioner 6 was told she would not be able to carry further pregnancies, and that several fertilized ova remained carrying the same genetic load as that of her son. Petitioner 6, too, approached the Committee asking to be allowed to embark upon the surrogacy process, in the framework of which those fertilized ova would be implanted in the womb of the surrogate mother. The Committee also rejected the request of Petitioner 6 for the same reasons as those grounding its rejection of the request of Petitioner 5. Alongside the arguments common to them and to the other Petitioners regarding the discriminatory definition of "prospective parents" in the Agreements Law, the Petitioners further argue that denying the possibility of surrogacy to a person who has no possibility of having a genetic link to the child, as provided in sec. 2(4) of the Agreements Law, violates the right to parenthood and to equality, and that for them, this causes harm in addition to the harm caused to them by virtue of their being single women.

7. This Court has not infrequently discussed the importance attributed by society to the human desire of many for progeny who will carry their genetic material and who will be

related to them "by blood" (see: *New Family* case, 447; CA 488/77 *A.. v. Attorney General* [69], 441-42; and see further in this context: Yehezkel Margalit, *The Rise, Fall and Rise Again of the Genetic Foundation for Legal Parentage Determination*, 3 MEDICAL LAW AND BIO-ETHICS 125 (5770-2010) (Heb.)). Now, as I pointed out in one of the cases in another context:

> The biological-genetic connection between parent and child is not the be-all and end-all. No less important (and sometimes even more important) "raw material" constituting and fashioning the relationships between parents and their children is the emotional link and the commitment to the well-being of the children and raising them. At the same time, and has already been mentioned, real and significant justification is required in order to deny a person the possibility of realizing the right to parenthood that includes a blood tie between himself and the child (*Moshe* case, para. 33 of my opinion); see also Yehezkel Margalit, *Determining Legal Parenthood by Agreement as a Possible Solution to the Challenges of the New Era*, 6 DIN U-DEVARIM 553 (2012) (Heb.); Yehezkel Margalit, *Towards Determining Legal Parenthood by Agreement in Israel*, 42 MISHPATIM 835 (2012) (Heb.)).

It may also be said that the medical limitations due to which the Petitioners are unable to form a genetic link to the child, alongside their single status, places them in certain senses at the top of the ladder of those who encounter difficulty in realizing their right to parenthood. However, the question facing us is not whether realization of the right to parenthood must be allowed in the case of a person who cannot have a genetic relationship with a child, but whether that person should be allowed to realize this right by way of the process of surrogacy under the Agreements Law.

8. In the *New Family* case, Justice M. Cheshin said as follows:

> … people are not always ready and able to absorb and digest the achievements of science and technology. This is the general case. *A fortiori* in relation to the subject of surrogacy, in which the most sensitive and intimate aspects of a person are involved.

Justice Cheshin further mentioned there that in view of the novelty and the complexity of the issue of surrogacy from various perspectives, it is appropriate that this process develop in a gradual, proportionate manner (at 459-60). Indeed, the issue of the scope of the circle of persons eligible to realize the right of parenthood by means of surrogacy is a complex one that involves medical, social and ethical considerations, the sensitivity of which cannot be overstated. This applies to the process of surrogacy in general, and all the more so where the prospective parent lacks a genetic link to the child. First, in the absence of a genetic link, we are not concerned with denying a person the possibility of realizing parenthood that includes a blood relationship between himself and the child. It can therefore be said that the prospective parent has no special interest in bringing a child into the world by way of surrogacy in particular. In effect, it can be said that absent a genetic or physiological link to the prospective parent, we are dealing with the production of children for the purpose of adoption (see: *Anon.* case, paras. 25-26 *per* Justice N. Hendel; and Mor Yosef Report, at 6 and 61 (note 28)). And insofar as the matter is one of a variation of adoption, the question naturally arises why the prospective parent, who has no particular interest in the process of surrogacy, should not be directed to the adoption track, with all its advantages from the point of view of benefitting children who already exist.

Similarly, in this context of surrogacy with no genetic link, ethical questions that are not simple arise concerning, *inter alia*, the possibility of creating children who are in certain senses "children by order", with all the ramifications from the point of view of the surrogate mothers who participate in the process; questions about "industrialization" of these processes; and concerns about a concept of property taking root with regard to children created in this framework (Lipkin and Semama, 441-43). As my colleague the President pointed out, it may not be right to rule out in advance the possibility of considering the process of non-genetically linked surrogacy in the future, and it may be that the experience that will continue to accumulate regarding surrogacy in Israel and the world will warrant legislative reconsideration of the issue. However, like my colleagues, I too think that the petition does not show constitutional grounds for striking down the provision of sec. 2(4) requiring such a link. This is similar to the approach adopted in this context in most states that permit surrogacy, and respectively, to the approach adopted by the Israeli legislature in additional statutes that attribute importance to the genetic link in the context of parent-child relationships (see paras. 25-26 *per* Deputy President S. Joubran).

9. In summary, I concur in the opinion and decision of my colleague Deputy President S. Joubran.

Justice H. Melcer

1. I concur with the result reached by my colleague Deputy President S. Joubran. I choose not to express a detailed opinion with respect to his main reasoning, for in view of what appears in the *decision* part of my colleague's opinion, I am likely to deal further with this petition, alongside my colleague Justice Hayut (and other justices who will join the panel).

Nevertheless, I will permit myself to make several comments regarding the right of Petitioners 5-6 (in relation to whom the petition is denied) to realize their aspiration for parenthood by way of surrogacy, specifically in the legal situation pertaining at present and the future, and concerning the link between legislative initiatives and the case law of this Court.

I will discuss these subjects in their order.

The right of Petitioners 5-6 to realize their aspiration for parenthood specifically by means of surrogacy

2. Petitioners 5-6 wish to realize their aspiration for parenthood by means of surrogacy, without having a genetic link (their ova) or a physiological link (pregnancy) to the child.

In LFA 7141/15 *A. v. B.* [23], I explained the similarity and the difference between the right to parenthood (which is not necessarily biological) and the right to continuity (which is at base genetic). Both these rights are in my view *constitutional rights*, as I explained there.

In the present case, Petitioners 5-6 wish to obtain approval to enter into an agreement with a "surrogate mother", but various provisions in the existing Agreements Law stand in their way, including the requirement for a biological link, as expressed in sec. 2(4) which provides as follows:

> The implantation of a fertilized egg for the purpose of impregnation of a surrogate mother in order for the child who will be born to be given to prospective parents will *not be performed* unless all the following are fulfilled:

….

(4) The sperm used for the *in vitro* fertilization is that of the prospective father and the ovum is not that of the surrogate mother.

These provisions indeed violate the rights of Petitioners 5-6 to parenthood, but as my colleagues showed, it *cannot* be said that the requirement for a genetic link, in this context of surrogacy, fails with respect to the criteria of the limitations clause. However, the right of Petitioners 5-6 (and others like them) to parenthood may possibly be realized in other ways that do not require a genetic link.

Moreover, in the case of *Anon.* [11], I called upon the legislature to consider finding a means for helping those belonging in this category. This is how I stated it there:

> Thus, just as in the past, the institution of adoption provided for the problem of childlessness, now it can be expanded, either to enable individuals who have no available alternative … to resort to new medical technologies in order to become parents, or to be considered such, even without a genetic link …Following these paths is intended to provide a response to a reality within which technology usually precedes the law. The legislature and the courts are therefore asked in these cases to pour the essence of the good, well-grounded existing principles into legal containers that have not been in use before (as if these were old wine that improves over time and simply requires a newer container). *Cf.*: STEVEN BREYER, ACTIVE LIBERTY 64 (2009); see also my opinion in CA 9183/09 *Football Association Premier League Ltd. v. Anon.* [48] (13.05.2012)).

3. In conclusion: my heart goes out to Petitioners 5-6 to whom we could not extend more help in this process, given the existing legal situation. Nevertheless, I would point out that this does not detract from the possibility on the part of the said Petitioners to present their case and the interests of those like them to the Knesset during the deliberations that are to be held in the Labor, Welfare and Health Committee (hereinafter: Labor Committee) in preparation for the second and third readings of the Embryo Carrying Agreements (Approval of Agreements and Status of the Newborn) (Amendment no. 2) Bill, 5777-2017 (hereinafter:

the Bill) that was introduced in the Knesset on July 5, 2017 and passed its first reading on July 17, 2017.

4. Owing to the fact that the Bill passed its first reading, the Respondents requested that we not decide upon the petition, and we have granted this request partially, as described in the opinions of my colleagues. On this issue of the constitutional dialogue, which is important, I will add several comments below, as a type of introduction for the future.

The ramifications of legislative initiatives for pending processes

5. In principle we (as well as the administrative authorities) are supposed to decide according to the existing law. See: HCJ 3872/93 *Mitral Ltd. v. Prime Minister and Minister of Religion* [70]. However, over the years exceptions to this rule have emerged. A comprehensive discussion of them appears in a recently published article: Bell Yosef, *A Mixed Blessing – The Normative Status of Legislative Initiatives*, 40 TEL AVIV U. L. REV. 253 (2017) (Heb.). See also: Aharon Barak, *Partnership and Dialogue between the Legislative and the Executive Authority and the Judiciary*, 4 MOZNEI MISHPAT 51, 68 (2005) (Heb.); Barak Medina, *Strategic Considerations behind Normative Explanations: Lessons from Israel's Supreme Court Expropriations Case: A Reply to Haim Sandberg*, 11 INT'L J. CONST. L. 771, 773-776 (2013); ALISON L. YOUNG, DEMOCRATIC DIALOGUE AND THE CONSTITUTION (Oxford University Press, 2017) (hereinafter: YOUNG)).

A related issue concerns the question of whether the reviewing court should give directives to the legislature when it strikes down a law – how to legislate a future law that will be immune, as it were, to constitutional judicial review – or whether it should confine itself to a constitutional analysis of the new law that will be brought before it, after the legislature has had its say.

In the *Desta* case [1], I discussed this question and said as follows:

> There is much theoretical discussion of the dialogue between the judiciary and the legislature that develops in such situations (for the theoretical literature on the subject, see the article by Liav Orgad and Shay Lavie, *Judicial Directive: Empirical and Normative Assessment*, 34 Tel Aviv U. Law Review 437, 440

(2011) (Hebrew) (hereinafter: Orgad & Lavie, *Judicial Directive*), and see: Ittai Bar Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. Rev. 1915, 1954-1958 (2011); AHARON BARAK, THE JUDGE IN A DEMOCRACY 382-389 (2004) (Hebrew) (English: Princeton, 2008) ; GIDEON SAPIR, THE CONSTITUTIONAL REVOLUTION IN ISRAEL: PAST, PRESENT & FUTURE 219-222 (2010) (Hebrew)).

The answers to this question can be classified into three categories, although the dividing line between them is sometimes blurred (the analysis, references and presentation below are based upon the article Orgad & Lavie, *Judicial Directive*):

(a) One model is that of "judicial advice". Judicial advice is an approach that allows the judge to recommend necessary legislative changes to the legislature. It does not express a *demand*, but rather a legal *preference*, while leaving discretion to the legislature (compare: Nitya Duclos & Kent Roach, *Constitutional Remedies as "Constitutional Hints"*: *A Comment on R. v. Schachter*, 36 McGill L.J. 1 (1991)).

(b) A second model is that of the "constitutional roadmap". The constitutional roadmap is a technique that allows the judge to recommend to the legislature, expressly or impliedly, how to overcome the defects in the current law. In the constitutional context, it constitutes a sort of recommended path to correcting the constitutional defect found by the court (see: Erik Luna, *Constitutional Road Maps*, 90 CRIM. L. & CRIMINOLOGY 1125 (2000)).

(c) A third model is the "fire alarm". The fire alarm is a technique that allows the judge to warn the legislature of defects in the current law. In the constitutional context, this concerns cases in which the court just barely accepts the constitutionality of the law, but explains that although the law is "still constitutional", it may become unconstitutional in the future (see: Neal Kumar

Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1719 (1998)).

7. In Israel, in HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance*, IsrSC 51 (4) 367, 412-413 (1997) (hereinafter: the *Investment Managers* case), President A. Barak employed the "constitutional roadmap" approach, informing the Knesset of the alternatives that it might adopt in order to create an arrangement that would pass constitutional review in place of the provision that the Court had declared void in that case, emphasizing: "Choosing the proper balance point is given to the legislature" (*ibid*.).

A tendency toward approach (a) appeared in later decisions (for example, by some of the justices in the *Eitan* case), or toward approach (c) (for example, in the *Admissions Committees* case: HCJ 2311/11 *Sabah v. Knesset* (Sept. 17, 2014), or the judgment in the matter of raising the electoral threshold: HCJ 3166/14 *Gutman v. Attorney General* (March 12, 2015)). However, there has been no decisive verdict on this issue to date, and I do not propose that we adopt one here. However, I do think it appropriate to emphasize that it would be proper, in my opinion, to tell the legislators not only what is not constitutional, but also to provide them with general guidelines as to what can be expected to meet constitutional requirements, as President Barak did in the *Investment Managers* case. Beyond that, I believe that the said dialogue must continue openly, comprehensively and with mutual respect.

This is the place to note that in the meantime a tendency has developed, at least in Europe, towards a *fourth* approach that takes the view that a court that declares a law unconstitutional must not suggest to the (national) legislature how to fix the law (see: the majority opinion in *Hirst v. United Kingdom (No. 2)* 42 EHRR 41 (2006), decided by the European Court of Human

Rights, and which was influenced, *inter alia*, by the need to grant relative freedom to the EU member states. As opposed to this, see the leading article supporting substantive dialogue: Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited – Or "Much Ado About Metaphors"*, 45 OSGOODE HALL L.J. 1 (2007)).

6. Now, after having presented the comparative law on this issue, and the theoretical streams that indicate the possible routes for dealing with it, I will return to the matter at hand.

It appears to me that the legislators, when they discuss the Bill in preparation for its second and third readings, must give thought to the words of my colleague the President, and my colleagues who are retiring from this Court (and therefore from this panel), which were uttered by way of "judicial advice" in relation to the subjects that remain pending in this petition. Moreover, the Respondents have made it clear that issues that the Petitioners raised could be discussed in the framework of the deliberations of the Labor Committee. The same applies, in my view, to the situation discussed in the *Moshe* case – a petition that was denied by a majority of four judges against three, and which presented, according to all the judges, a problem that called for a solution, preferably within the borders of Israel, without sending those petitioners (one of whom had a genetic connection and the other a physiological one) to a foreign country in other to fulfill their yearning for parenthood.

7. How is the matter of Petitioners 1-4 therefore distinguishable from that of Petitioners 5-6, such that we leave the petition of the first group pending? I will now answer that briefly.

8. The matter concerning Petitioners 1-4 does not encounter the barrier of an absence of a genetic link (at least with respect to one of the couples). At this stage, therefore, their request ought not to be rejected in advance, for it may be possible to find a solution for the issues that they raise within the framework of particular constitutional remedies, which my colleague Justice E. Hayut and myself were ready to consider in the framework of our dissenting opinion in the *Moshe* case.

However, the legislature takes precedence in this regard, and a first step has already been taken in the framework of the Bill. Therefore, we found that we should wait for the process to ripen by virtue of the *principle of mutual respect between the branches*. However,

the Bill, even if it is approved within a reasonable period of time, still does not, apparently, provide a solution for Petitioners 1-4 and others like them. Thus, their right to claim that a constitutional omission in this area violates their basic constitutional rights must be preserved. Recognition of this, if it should be given, and if the violation is not protected in the framework of the limitations clause, might justify obligating the legislature to act (see: Aharon Barak, *The Constitutional Right to Protection of Life, Body and Liberty*, 15 MORDECHAI KREMNITZER VOLUME (ARIEL BENDOR, HALED GHANAYIM, ILAN SABAN eds., 2017) (Heb.)), or the development of a suitable constitutional remedy. I say this here, without laying down the law, as a milestone or traffic sign in the framework of the above models (*cf.*: YOUNG, at 131).

9. In conclusion: this judgment is being handed down on the day of the retirement of my colleague Deputy President Selim Joubran. In translation from Arabic to Hebrew, the name Selim has two, separate or perhaps complementary, meanings: *completeness and health*. I know how much my colleague wanted his opinion in the case before us to be *complete* and to address *all* the aspects of the petition, so that his opinion would give expression to his *complete* judicial approach, which supports *equality*. The irony is that due to his pursuit of peace and in light of the above legislative initiative, which appeared only recently, he is forced to leave the labor for others to complete (the legislature, and if there is no choice – this Court).

It remains to me, therefore, only to wish our colleague Selim good health – which, as we have said, is the other meaning of his name – and that he continue to engage in productive activity, and to say to him who has in our eyes symbolized the possibility of co-existence with mutual respect, recognition and appreciation – goodbye and may peace be with you.

Decided in accordance with paragraphs 18 and 44 of the partial opinion and decision of Deputy President S. Joubran.

Given this day, 11 Av 5777 (Aug. 3, 2017).