Translated from Hebrew

At the Supreme Court sitting as the High Court of Justice

HCJ 4077/12

Before:	The Honorable Justice E. Rubinstein The Honorable Justice I. Amit The Honorable Justice D. Barak-Erez
The Petitioner:	Jane Doe
	V e r s u s
The Respondents:	1. The Ministry of Health 2. The Sperm Bank – In Vitro Fertilization Unit Rambam Medical Center 3. John Doe
	Petition to grant an order *nisi* and an interim order
Date of Hearing:	Heshvan 29, 5773 (November 14, 2012)
On behalf of the Petitioner:	Adv. Gali Nagdai
On behalf of the Respondents:	Adv. Danna Bricksman

Judgment

Justice E. Rubinstein:

1. The petition before us concerns an apparently precedential case of the request of a sperm donor, John Doe (Respondent 3), to retract his consent and donation due to changes that have occurred in his world view; such being subsequent to the Petitioner having her first-born daughter by his sperm donation, and being presently interested in undergoing another insemination procedure by the same donation, in order to maintain full identity of the genetic constitution of her children. The Petitioner seeks to receive the donor's additional sperm donation, which is stored at the sperm bank. The position of Respondents 1-2 is that there is no justification to allow this. We are concerned with an issue of a sort unimagined by our forefathers, which was impossible several decades ago, and which developments in medicine and technology have created.

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 and sensitive human questions. The

legal world has not yet had the time to properly address these issues, and it falters behind them, as it does following the other dramas of the superior technology era. This was described nearly two decades ago by author Y. Green (In Vitro Fertilization through the Prism of Consent (**1995**)):

> "The longing for a child is common knowledge that requires no proof. Spouses, who experience difficulties in having children, make and will make any effort in order to be blessed with children: emotional, physical and financial. They are also willing to 'sign' any undertaking, provided that their heart's desire is fulfilled. Medical technology in the fertility field has developed at an incredible pace in recent years. Solutions, which were considered science fiction only a few years ago, are slowly becoming an almost daily reality. There is a great blessing alongside this development, which grants more and more couples of various degrees of infertility a chance to expand the family. However, as chances increase and the potential of being blessed with children increases, so increases the risk involved in the various stages of the process, both to those born (sic.) and to the infant to be born in this way" (*ibid*, p. 9).

Before us is a chapter in this complex whole, on an unfinished road, and we will clearly not attempt – nor need we in this case – to encompass the full human issue, nor the legal one, relating to parenthood in the modern era; as we shall hereinafter see, this issue may be reviewed through the prism of more than one family of law, but none is exhaustive. As President Shamgar (Retired) stressed already at the outset:

> "Any conversation with respect to issues of birth affairs is, by nature, pretentious and stirs oversensitivity. It is pretentious – since before us are complex and multifaceted issues, the legal aspect of which is unable to exhaust their nature and description. There is a kaleidoscope of elements here, which are anchored in various disciplines, medical, philosophical, theological and social, which do not fit within the standard legal compartmentalization and are not fully exhausted by the employment of legal criteria alone. Thus, in such areas, cautious legal treading is suitable… These issues evoke oversensitivity, because they directly touch on the exposed nerve of existence. Although the vast majority of legal issues of various types are taken, by mere nature, from life, there are issues that attack the problematic nature of our human existence head-on, at the core, rather than indirectly…" (President Meir Shamgar "Issues on Matters of Fertilization and Birth" 39(a) *HaPraklit* 21 (1989).

3. This is also the case before us, and therefore we shall guide ourselves with this advice before we embark on the journey. This is the order of the discussion: firstly, we shall briefly address the normative framework concerned, the factual background of the case and the parties' claims; we shall examine the nature of the right to parenthood, and we shall examine the standing of the Petitioner vis-à-vis the standing of the donor, who asserts autonomy in

deciding the use of his sperm, in view of this right. We shall thereafter briefly address additional aspects of the issue, and mainly the contractual regulation of sperm donation. Finally, we shall articulate the evident need, in this case, for the in-principle regulation of the entire field by the legislator.

4. We shall forerun and state the principal part of our ruling. Needless to say, we feel – as does the attorney for the Respondents and even the anonymous donor himself – human sympathy for the Petitioner, who requests that her children by a sperm donation carry an identical genetic constitution, which apparently proved successful – thank God – with her first-born daughter. However, we have come to the conclusion that precedence should be afforded to the donor's position and to his personal autonomy. With all due understanding of the Petitioner's claims in the field of private law, contract law and even in the field of administrative law, with respect to the reliance interest – these do not amount in value to the dominancy of the aspect of personal autonomy under the circumstances of the case. The donor has formed his position, according to what he stated orally (his written response is more general) as a penitent (*Chozer B'Tshuva)*, and it appears that there is also a religious facet to his position. However, even without such facet, one can understand the position of a person who, after reflection, reached the conclusion – which had not occurred to him in the past, when deciding to donate sperm for such or other considerations – that he no longer wants there to be children by his sperm in the world, whom he did not choose and whose mother [he did not choose], with whom he has no relation and who will not be raised by him; it being [the case] even if he is not liable to them under the presently practiced law (and incidentally, there is a possibility that under Hebrew law, even if they are not entitled to child support from him, they are entitled to inherit him). In our opinion, the autonomy aspect overshadows the other considerations, as we shall explain below.

The Normative Framework

5. Sperm donation and the management of sperm banks in Israel are currently not regulated by primary legislation, but rather by the Public Health (Sperm Bank) Regulations, 5739-1979 (the "**Regulations**") and circulars of the Director General of the Ministry of Health, which are issued thereunder (these regulations were promulgated by the Minister of Health by virtue of the Consumer Services Act (Sperm Bank and Artificial Insemination), 5739-1979; for criticism, see Pinhas Shifman "**Determination of the Paternity of a Child Born by Artificial Insemination**", 10 *Mishpatim* 63, 85 (1980); further see (in respect of the status of administrative directives) Yoav Dotan **Administrative Directives** (1996), 27-39). The last Director General Circular, of May 22, 2008, entered into effect on January 1, 2009, and is the principal part of the normative basis, on the administrative directives' level, for our discussion at this point. The Director General Circular mainly regulates the conditions for recognition of a sperm bank and prescribes rules with respect to the retention of information regarding sperm units and donors – a problematic issue in and of itself, as we shall briefly mention hereinafter. The Director General Circular also defines the procedure required both of the donor and of the recipient of the donation.

6. The donor, alongside whose donation there is a certain financial benefit, fills out a "Donor Card" form (Exhibit B to the Respondents' response), which requires general details, including name, identity number, a general description of appearance, and data regarding physical examinations, which are intended to negate the existence of illnesses in his body. The donor also fills-out a "Consent of a Sperm Donor" form (Exhibit C to the Respondents' response), in which he declares by his signature as follows:

> "I agree to donate of my sperm for use thereof for the artificial insemination of women or for research purposes, according to the considerations of the sperm bank. I hereby agree and declare that I will not be entitled to receive any details of the identity of the women, and their identity shall remain confidential. Furthermore, my name and my identity or any detail about me will not be provided to any person and will also remain confidential, except for a cross-check of these data with a center for national donor registration and national registration of persons ineligible to marry".

This statement is required under Section 25(e) of the Director General Circular, which determines that "[T]he sperm of a donor **shall not be taken nor received nor used** for artificial insemination, unless the donor shall have given his consent to the use of the sperm" (emphasis added - E.R.). The donor also states that he is willing to undergo medical examinations and that to the best of his knowledge he is not suffering from an illness or family history, which might disqualify his donation. The forms do not address the issue of consent withdrawal or additional issues such as a quantitative limit of the possible amount of inseminations by the donation (such as inseminations that produced a pregnancy, as distinguished from unsuccessful attempts).

7. A similar personal data card is filled-out by the recipient of the donation (Exhibit D of the Respondents' response), which one of two consent forms is added to, in accordance with her family status: one consent form for spouses, and another consent form for a single mother [who is] a "single woman" (Exhibit E-1 and Exhibit E-2 to the Respondents' response). The second form, which is the one relevant to the case at hand, mainly includes a statement as to the explanation the recipient of the donation received with respect to complications and side effects (and a waiver of future claims in respect of such matters), and as to the practical prospects of impregnation as a result of the insemination. As pertains to the sperm and the donor, the recipient of the donation states as follows:

> "I consent that **the donor or donors** of the sperm that will be used in the insemination, or the sperm itself, be chosen by the physician **and according to his discretion and with his consent** and I will not be allowed to know the identity of the person whose sperm is used, or his attributes, or any other detail related to him or to his family" (emphasis added – E.R.).

8. As we can see, the only documents that include the parties' consent, each separately, do not address the issue of donation withdrawal at all. These matters were presented somewhat in length, since, in the situation before us – a ruling on which is "the lesser of two evils", and involves a measure of harm to one of the parties – it is appropriate to examine how to avoid such situations in the future, rather than merely how the current situation will be resolved.

The Case At Bar

9. **The Petitioner** is a single woman, born in 1974, holding Israeli and American citizenships, and a resident of the Unites States for the past 17 years. In 2010, the Petitioner's first-born daughter was born via fertilization treatments, during which use was made of the sperm donation of an anonymous unknown donor (Respondent 3, hereinafter the "**Donor**"), which the Petitioner received from the sperm bank at the Rambam Medical Center in Haifa (Respondent 2, hereinafter: the "**Sperm Bank**"), which is under the supervision of Respondent 1 (hereinafter: the "**State**"). Following the birth of her first daughter, the Petitioner purchased - apparently at the first opportunity she had – the option to use five additional sperm units of the Donor, to be kept at the Sperm Bank for an annual fee. For this purpose, the Petitioner filled out a sperm reservation form and paid the required amount. It was stated on this form that:

> "The sperm bank undertakes to use its best efforts to keep these sperm units, but will not be responsible in any manner for **a loss, harm or other use** of these sperm units" (emphasis added – E.R.; Res/3).

10. On December 1, 2011, the Sperm Bank received a letter from the Donor, in which he stated his wish that use of the sperm donation that he had made in the past be discontinued, among other things, in view of a change in his lifestyle (Res/4); following is his letter verbatim:

> "My name is _____, in the past I was a sperm provider to the sperm bank managed by you and I ceased this activity several years ago.
> Due to a change in my lifestyle, use of my sperm by the sperm bank at the present and future time raises a problem for me. I approached you several months ago with a request to cease use of my sperm. At first I was told that I had no right or say on the matter, and afterwards it was said that in any event the use of my sperm had already been discontinued, so that there was no problem.
> After a medical-legal inquiry, it was clarified to me that I have a veto right on the matter, despite the contract between us.
> My request to you is a formal letter of statement that no use is presently made nor will it be made in the future by the entity managed by you (the sperm bank)".

Following this letter, the Bank notified the Petitioner (on January 10, 2012), that she would no longer be able to use this sperm donation. Subsequently and in view of the Petitioner's appeals to the Bank's manager, the Bank's manager contacted the legal advisor to the Ministry of Health and forwarded the reply of the legal office to the Petitioner, whereby "[A] consent which is unlimited in time is not "everlasting" and the sperm donor who previously agreed to donate his sperm may recant at any time [so long] as "irreversible reality" has not been created". It was stated that under the facts of the case, such a reality had not been created, and it was assured that the money that had been paid for reservation of the sperm units would be refunded (letter of January 11, 2012 by Dr. A. Leitman, Manager of the Sperm Bank; Res/5). The Petitioner requested not to destroy the donation and to allow her to exhaust the legal avenues; the Sperm Bank's manager accepted her request.

The Petition

11. On May 22, 2012, the present petition was filed claiming that the Respondents' decision to prevent the Petitioner from using the sperm units that had been saved for her infringes upon her constitutional and contractual rights, is unreasonable and should be annulled. The Petitioner's claims may be separated, in general and for the sake of discussion, into two levels. **The first**, claims on the level of public law, and mainly the impingement on her right to parenthood. **The second**, on the level of civil law, rights by virtue of a contract between the parties, by virtue of proprietary ownership and more.

First Level – the Right to Parenthood

12. The Petitioner claims that there is presently no dispute as to the standing and importance of **the right to parenthood**, a "fundamental human right which every person is entitled to", a natural right which is established in Basic Law: Human Dignity and Liberty; hence, this right may be limited – as argued – only under the conditions of the Limitation Clause (to substantiate her position, the Petitioner referred to the rulings of this court in CA 451/88 **John Does vs. the State of Israel**, IsrSC 44(1), 337 (1990); in CFH 2401/95 **Nachmani vs. Nachmani**, IsrSC 50(4) 661 (1996); in HCJ 2458/01 **New Family vs. the Committee for Approval of Embryo Carrying Agreements, the Ministry of Health,** IsrSC 57(1) 419 (2002)). The Respondents' decision impinges – so it is mentioned – on her right, since following the birth of her first-born daughter it may "seal the Petitioner's fate, remaining a mother of a single child only, and forgoing her wish to have the family she was hoping to have" (Paragraph 21 of the Petition).

13. Moreover, per the Petitioner's position, there is a parallel infringement upon **her right to a family**, another derivative of the protection of human dignity and the autonomy of individual will. To her mind, this right has a higher status than the other constitutional human rights, such as the right to property and to freedom of occupation. Furthermore, beyond the infringement on her constitutional rights – so it is argued – the Respondents' decision is marred by **unreasonableness**, and is therefore void *ab initio*. It is further argued that the

Respondents' decision impinges upon her daughter's rights to siblings in general, and to biological siblings in particular.

Second Level – Contractual and Other Causes

14. The Petitioner also claims that the Donor gave his consent to use of his sperm – informed consent; and therefore his present request to prohibit the use of his sperm constitutes **a breach of contract,** both vis-à-vis the State and the Sperm Bank, and vis-à-vis herself, as a third party to the contract. Moreover, the State and the Bank are themselves in breach of the contract they entered with the Petitioner: the Petitioner fulfilled the procedure determined thereby as required; she gave financial consideration for the sperm units. As stated, at no stage of the proceedings was the possibility of the Donor withdrawing his consent raised before her. Since the Petitioner relied on this representation (in view of the manner of presentation of the sperm donation by the State and the Director General Circular) and chose to bring her first born daughter into the world from the Donor's donation, it may no longer be said, per her position, that an "irreversible reality" has not been created. It is difficult – so it is argued – to assume that the Petitioner would have consented to undergo the insemination process knowing that the Donor might change his mind at any time. It is further argued that the Donor sold his sperm, and therefore cannot retroactively demand that no use be made of the donation without cause under law, like any other sale contract that confers ownership upon the purchaser.

15. The Petitioner also claimed that a change in the circumstances of the Donor's life may not serve as cause for his retraction of the consent, and the reversal of the Respondents' decision does not constitute an impingement on the best interests of the child or on public policy. It was further argued that the damage to be caused to the Petitioner as a result of the upholding of the Respondents' decision is disproportionate; it is argued that the Petitioner's time to undergo another fertilization is running out, beyond the fact that the mere impediment to having additional children who have the same genetic constitution, as aforesaid, might prevent her from having more children. Conversely – it is so claimed – the Donor "has finished his part", and no cooperation is required of him for the purpose of continuing the process; he is not the parent of the child to be born, and therefore this does not involve the coercion of parenthood; his right to personal autonomy is thus not violated.

16. It is finally argued that upholding the Respondents' decision will have severe across-the-board implications on sperm recipients of donations in Israel. The donor's option to retract his consent at any time creates uncertainty in the planning of a future family, as it leaves the recipients of donations under the shadow of the "concern that the donor they chose will change his mind". This compromises the ability to plan a family according to the circumstances of every woman's life and wishes. This might – as asserted – lead to many donors withdrawing their consent, and gravely harm sperm banks in Israel and their stability. In order not to render the Petition redundant, an interim order has been sought to order the Respondents to prevent the disposal of the donation until the Petition is decided.

The Response of the Respondents and the Hearing before us

17. On July 10, 2012, the State's response was filed, which argued that indeed **it is undisputed that the core of the right to parenthood and the right to family gives rise to a protected constitutional right deriving from the right to dignity**, and established in Basic Law: Human Dignity and Liberty. However, the case at bar does not concern the exercise of the right to parenthood, but rather the right to birth children who are full biological siblings, and the right of a child to a sibling or a full biological sibling; these rights do not exist in law, and therefore the Petitioner cannot point to an infringement on her constitutional rights. The State emphasizes that the Petitioner's aspiration is understandable in and of itself, yet under the circumstances of the matter – even if the Petitioner's position is accepted as to the infringement on the rights conferred upon her – her right is outweighed by the right of the Donor not to be a biological parent against his will. It is argued that, although in re **Nachmani** it was decided to hold the right to parenthood superior to the right not to be a parent, the factual situation in that case was such that Ms. Nachmani no longer had the option of being impregnated by other sperm, i.e., a situation of the absence of a possibility of biological parenthood other than by means of Mr. Nachmani's sperm. This is not – so it is argued – the situation at hand, and the Petitioner has other options for exercising her right to parenthood. Furthermore, the Petitioner has no "biological link" to the sperm contemplated in the Petition, as was the case in re **Nachmani** (which, as may be recalled, concerned **fertilized ova**) – and a fertilization process has not commenced in the case at hand.

18. With respect to the second level of arguments, it is maintained that although the Sperm Bank offers recipients of donations a same-donor sperm storage service (for a fee), such storage, at most, creates "a priority" over other recipients of donations; such storage does not ensure use of the sperm, nor does it obligate the sperm donor or the bank to make use of the sperm in circumstances where this is impossible. It is further asserted that the Petitioner cannot claim that had she been aware that the Donor may retract his consent she would have used other sperm, because this right is available to each one of the sperm donors, whoever they are, so long as no irreversible reality has been created. It is emphasized that in the consent form that the Petitioner signed, it was clarified that the choice of sperm is ultimately entrusted to the physician according to his discretion; that is to say, the choice is subject to the discretion of the representative of the sperm bank from the outset, and is not guaranteed to the recipient of the donation in advance. On the contractual level, it is argued that a contract whose expiration date has not been determined is not in force and effect forever and ever, and after a reasonable time, in the framework of the duty of good faith, a party to the contract may – so it is claimed – notify the other party of his intention to be released from the contract; such – in view of the elapse of time and change of circumstance.

19. To reinforce its position, the State sought to draw an analogy from the Ova Donation Law, 5770-2010, which expressly regulates the option of an ovum donor to withdraw her consent "at any time prior to the performance of the act, which she agreed to designate the ova retrieved from her body to, and in

respect of consent to designate ova for implantation – at any time prior to the fertilization of the ova" (Section 44 of the Ova Donation Law). It is also claimed that a similar analogy may be drawn from the Patient's Rights Law, 5756-1996, which prescribes that the patient's consent is required not only at the medical treatment stage, but throughout the continued treatment in its entirety (Section 13(a) of the Patient's Rights Law). According to the State's position, it emerges from these two laws that the legislator adopted an approach whereby infringement upon a person's right to autonomy is only merited in rare events of concern of grave danger, or at the stage of "irreversible reality"; this is not the case in the matter at hand. It was agreed that an interim order be issued, which prevents the disposal of the sperm donation until the court rules on the Petition. It was also requested that the Donor be joined as a respondent in the Petition, as the person whose rights might be compromised as a result of the Petition.

20. The Donor, who was joined in as a respondent, had been requested to provide his response to the Petition (the decision of Justice Solberg of July 13, 2012, in which the interim order in consent was issued, as well as aforesaid), and after numerous attempts and efforts by the Sperm Bank's manager his response was received. At first, the Donor had notified the Sperm Bank's manager that he was willing to meet outside hospital grounds, in order to refrain from exposure "due to his current situation as a penitent", but failed to hold the appointment (notice by the State of August 15, 2012). Following the decision of November 6, 2012 (toward the hearing), in which the Donor's position had been requested once more, and it had been stated that if such response is not presented, "the court may consider this conduct in his ruling, without, of course, expressing an opinion as of this time", the Donor provided his position. In a letter of November 13, 2012, the Donor noted that, at the time of the donation "I had considered the act an ideal thing for childless women, and I am not playing innocent here, the money given was also a motive, but the desire to do good was the main thing"; however, "Afterwards, I changed my lifestyle and beliefs. The aforesaid act is presently incompatible with my world view, and in my opinion, the damage it holds is greater than the benefit, both to me, to my relatives, and to the woman who is the recipient of the donation and her children who are born by the sperm of a stranger". The Donor expressed his sympathy for the Petitioner's wishes, he also explained that since providing the donation, he got married and had a son; he is not interested in adding injury to his wife and hurting his children by adding a terrible uncertainty to their lives, "in the knowledge that they have siblings they do not know"; and it was further stated: "I am not interested in having a child born by me, without me being able to give him love, and without me loving his mother". At the bottom line, the Donor requested that use no longer be made of his sperm and expressed his apologies to the Petitioner for all the sorrow he had caused her as a result of these proceedings.

21. In the hearing before us, on November 14, 2012, the Petitioner's attorney reiterated her arguments with respect to the infringement on her right to parenthood and her reliance on the representation before her. At the same time, the State's attorney reiterated the difficulty in recognizing the Petitioner's right, and asserted the need to regulate the area through primary legislation.

Ruling

22. We are not dealing with a binary decision between "good and bad", or between right and wrong – both of the parties before us are "right" from their subjective point of view; we are dealing with human emotions of the both of them, and as pertains to the Donor – also internal feelings that derive from a current viewpoint. I believe that our decision must reflect the weight of the values of the law in a proportionate manner; there is no illegitimate position before us, as stressed by Justice (his former title) Witkon a long time ago:

> "As with most problems of law and of life in general, it is not the choice between good and bad that makes the decision difficult for us. The difficulty lies in the choice between various considerations, all of which are good and worthy of attention, yet in contradiction with one another, and we are required to determine the order of priority among them" (CA 461/62 **Zim Israel Navigation Company Ltd. vs. Maziar**, IsrSC 17(2)1319, 1337 (1963)).

Such is also the case before us. It does not concern the elimination of one of the interests that lie in the balance, but rather the relative preference of one over the other. As we have noted at the outset, this case raises questions of numerous fields of law. The issue may be looked at through the prism of contract law, property law, and, naturally, from the angle of administrative law. Each one of these perspectives may serve as fruitful grounds for a rich and innovative discussion. However, I believe that, at the end of the day, the most appropriate and correct perspective **for a ruling on the issue** is through the right to dignity and autonomy conferred upon any person to tell the story of his life, as we shall see below. Therefore, the discussion will principally revolve around this angle of the subject, yet, as aforesaid, we shall also address some of the claims raised by the parties on the other levels of discussion. We shall already state at this point that it is worthy to once more call upon the legislator to regulate the issue through primary legislation.

Preface – Of Interests and Rights

23. Legal reality often summons a fundamental contest between various legitimate considerations and values; obviously, such cases raise uncertainties and the need for an objective outline, to the greatest possible extent, of the craft of ascribing priority among them. Not every interest is protected by the law, and it depends upon circumstances even where a fundamental legal right has been recognized by law (of the classification of interests as rights, see HCJ 1514/01 **Gur Aryeh vs. Second Television and Radio Authority**, IsrLR 267, 275 (2001), in the judgment of President Barak, and compare to the dissenting opinion of Justice Dorner, ***ibid***, p. 284; HCJ 6126/94 **Senesh vs. the Chairman of the Broadcasting Authority**, IsrSC 53(3)817 (1994); Oren Gazal Ayal and Amnon Reichman, "**Public Interests as Human Rights**", 41 *Mishpatim* 97 (5771)). Thus – for example – freedom of speech, which is

recognized as a fundamental right in our legal system (HCJ 806/88 **Universal City Studios vs. Films and Plays Censorship Board**, IsrSC43(2)22 (1989)), receives legal protection on the political level, as the core of the right, but will not necessarily receive a similar protection on the level at the distant periphery of the recognized right, which collides with other interests; the farther you go from the core of the recognized right, so it is possible that under certain circumstances a certain act will not fall within the protection of the law. The question is thus twofold: whether the act falls under the definition of the fundamental right, and whether, under the circumstances, it is **protected** by the law, after the balance against other interests and rights (see ***ibid***, p. 33-34, President Barak). In order to complete the picture, we shall note that the classification of the considerations at stake as rights or as interests defines the formula of the balance between them, and the normative superiority of one value over the other or their equal value (see Re **Gur Aryeh**, p. 284); however, the mere classification and the balancing manner ("horizontal" or "vertical") do not necessarily decide the concrete question before the court, since a weighty interest in vertical balancing, such as the interest of the security of the State and the public, may prevail in certain cases over a fundamental right (see HCJ 7052/03 **Adalah – the Legal Center for Arab Minority Rights in Israel vs. Minister of the Interior**, [2006](1) IsrLR 202, 339 - President Barak; and compare with the position of former Deputy President Cheshin, p. 457-459, and the position of Justice (his former title) Rivlin, p. 555-559 (2006)).

24. The tough question – which was raised in re **Nachmani** under the special circumstances thereof – with respect to the classification of the right to parenthood against the right not to be a parent **and the normative status of the one against the other**, is not raised in the case at bar; because, as we shall see, harm to the core of the right to parenthood has not been proven, and, in fact, **if** harm has taken place in the matter at hand, it pertains to the right to autonomy; in this situation again, at most the issue concerns the right of the Donor to autonomy against the right of the Petitioner to autonomy, all as shall be specified below.

Of the Right to Parenthood

25. Indeed, on the one hand, the Petitioner stands before us with her heart's desire to bring into the world another child from the Donor's donation, having full genetic siblinghood with her daughter. On the other hand, there is the Donor, who asks to prevent further use of the sperm donation he made in the past, and prevent an insemination process, that would make him, against his will, a genetic father to at least one more child, even if without ties with the child and obligations to him. Justice Strasberg-Cohen described this in re **Nachmani** as two sides of the same coin (see re **Nachmani**, p. 682), yet, according to her statements as well, a mixture of interests lies at the balance, and even if these interests may be referred to under the general term of right to parenthood and the right no to be a parent, this matter is not thereby exhausted; see the essay of the scholar Daphne Barak-Erez, "**Of Symmetry and Neutrality: Reflections on the Nachmani Case**", *Iyunei Mishpat*, 20(1)197, 198 (5756). I shall note already at this point that I do not believe that this case requires legal

innovation with respect to the right to parenthood and the right not to be a parent, since the Petitioner's right to parenthood is undisputed, and the question is **whether one should recognize the interest of parenthood necessarily by the sperm** of the specific donor, as protected under one of these rights.

26. Indeed, despite the different reasoning in re **Nachmani** and the disagreement between the members of the panel, including among the justices of the majority, **it appears that there is presently no longer a dispute with respect to the status in-principle of the right to parenthood** – and this is true also in the case at bar. In other cases as well, the perception that the natural right to parenthood is conferred upon every person has been established, as emphasized in CFH 7015/94 **the Attorney General vs. Jane Doe**, IsrSC 50(1)48, 102:

> "It is the law of nature that a mother and father will naturally hold their son, raise him, love him and see to his needs until he grows and becomes a man. This is the instinct of existence and survival in us – 'the call of blood', the ancient longing of a mother to her child – and it is common to man, beast and bird. 'Even sea-monsters [jackals – M.C.] offer their breast and nurse their young' (**the Book of Lamentations**, 4:3)…this tie is stronger than anything, and is beyond society, religion and state…the law of the state did not create the rights of parents toward their children and toward the entire world. The law of the state addresses something already made, it aims to protect an inborn instinct within us, and it transforms an 'interest' of parents to a 'right' under law, to the rights of parents to hold their children" (Justice (his former title) M. Cheshin).

And elsewhere, Justice Cheshin emphasized:

> "The State argues and maintains as follows: a woman does not have the "right" to surrogacy; it is as though the issue of surrogacy is 'off-limits' and therefore a discrimination argument is an unmerited argument. According to this claim, because a woman is not entitled, *ex hypothesi*, to need a surrogacy process, a woman's claim of discrimination will consequently not be heard …I have found this argument difficult to comprehend…undoubtedly, the argument of a 'right' under law is a misplaced argument, certainly after the Surrogacy Law, which regulates the issue of surrogacy as it does. Whereas prior to the Law (and the regulations that preceded it), and there being no prohibition on surrogacy, one might argue that a woman, any woman, did have, a 'right' to surrogacy. In any event, the argument of a right to surrogacy is not to the point, yet, **the main thing is that the 'right' we speak of – the right to parenthood – is a right that nature brings to us; it is of this right that we speak, not of the right to surrogacy by law** (HCJ New Family, p. 445; emphasis added – E.R.).

27. These words are also relevant to the matter at hand (also see HCJ 2245/06 **Dovrin vs. the Israel Prison Service** (June 13, 2006): "Family and parenthood are the consummation of the natural urge for the continuity of generations and the self-fulfillment of the individual in society"; ***ibid***, paragraph 12 – Justice Procaccia). It is only natural that we mention at this point, that one of the first and foremost commandments is "[B]e fruitful and multiply and fill the earth" (**Genesis**, 1:28). And this is a deep aspiration, not to be taken lightly. Rachel says to Jacob (**Genesis**, 30: 1) "[G]ive me children, or else I die". The longing of the mothers, Sara, Rebecca and Rachel, and Hanna, the mother of Samuel, as well as the mother of Samson, all of these are documented in the Bible. The divine promise is " [T]here shall be no male or female barren among you..." (**Deuteronomy**, 7:14). The visitation of barren women is entrusted to the Almighty and to the righteous (**Genesis Rabbah**, 77), but the key of birth ("key of life" – "*Maftea'ch shel Haya*") is not entrusted to an agent and remains in the hands of the Almighty (Babylonian ***Ta'anit*** 2, 1-2); see also the ethics book ***Messillat Yesharim*** [lit. "Path of the Upright"] by the RaMHaL (Rabbi Moshe Haim Luzzato), the **Sanctity** chapter. Indeed, in any situation in which the person claiming a right to parenthood requires the approval of use of a new technology in order to enter the world of parenthood, a claim may be voiced that such person does not "hold the right to a particular treatment", he does not hold the right to insemination treatments, to surrogacy and the like. However, the core of the right to parenthood is the practical ability to bring children into the world. Just as the State does not require a "parenting license", so it may not prejudice a person's right to parenthood without weighty pertinent reasons (see CA 413/80 **Jane Doe vs. John Doe**, IsrSC 35(3)57, 81-82 (1981)). In such situations, wherein a person requires a certain medical treatment in order to be included in the parent circle, non-administration of the treatment infringes upon his right. Naturally, the right to parenthood is also relative, but there can be no dispute that in such cases there is a concrete infringement on the protected interest.

28. I shall briefly address the classification of the right to parenthood (also see the words of Justice Goldberg, re **Nachmani**, p. 723-724). This point was extensively articulated by Justice Strasberg-Cohen (in a dissenting opinion) in re **Nachmani**:

> "The classification of norms that regulate activity in relationships between man and his fellowman has occupied more than a few legal scholars and academics of various fields…legal rights in their strictest sense are the interests that the law protects by imposing duties on others in respect thereof. Conversely, legal rights, in their broadest sense, also include interests that are recognized by the law, against which there is no legal duty. These are liberties…Where a person has a right, which is a liberty or permission, he is under no duty toward the State or toward another to refrain from committing the act, just as he is under no duty to commit the act, which he is at liberty not to commit. A right, which is a freedom or a liberty, does not hold the power to

impose a duty on another and to demand that he commit an act, which he is free not to commit…

The right to be a parent is, by its very nature, essence and characteristics, a natural, innate right, inherent to human beings. It is a liberty against which there is no legal duty, neither in the relationship between the State and its citizens nor in the relationship between spouses. The right not to be a parent is also a liberty, it is the right of an individual to control and plan his life. Indeed, non-parenthood in and of itself is not the protected value. The protected value in non-parenthood is the liberty, privacy, free choice, self-fulfillment and the right to make intimate decisions..." (***ibid***, p. 681-682; emphasis added – E.R.).

And like her, Justice Dorner in the same case:

"Liberty in its fullest sense is not merely the freedom from outside interference by the government or by others. It also includes a person's ability to direct his lifestyle, fulfill his basic wishes and choose from a variety of possibilities while exercising discretion. In human society, one of the strongest expressions of an aspiration, without which many would not consider themselves to be free in the full sense of the word, is the aspiration for parenthood. This is not merely a natural-biological need. It concerns a freedom, which, in human society symbolizes the uniqueness of man. 'Any man who has no children is as good as dead' said Rabbi Yehoshua Ben Levi (***Nedarim***, 64, B [19]). Indeed, whether man or woman, most people consider having children to be an existential necessity that gives their lives meaning. Against this basic right, which constitutes a key layer in the definition of humanness, we are required to examine the right not to be a parent. The foundation of the right not to be a parent is the individual's autonomy against the interference of the authorities in his privacy." (re **Nachmani**, p. 714-715).

29. Hence, the right to parenthood is a liberty, in the legal sense thereof – the right that fellowman and the State not interfere in the individual's actions and not obstruct the fulfillment thereof; a right against which there is no positive duty to act. However, an additional distinction emerges from these words, which pertains to the two layers of this right. **The first layer**, which holds **value in and of itself**, is the ability to fulfill the reproductive ability and become a biological mother or father. **The second layer**, which is also the one underlying **the right not to be a parent**, is the ability of a person to choose **how** to fulfill his natural right, i.e., the first layer. The second layer is at the periphery of the right to parenthood, it is not intended to protect the value of bringing children into the world in itself, but rather other values, **such as the right to privacy, autonomy and the free choice of with whom, how and when**, if at all, to bring children into this world (including the ability **to plan a**

family). This point was articulated by the scholar Green in his aforementioned book:

> "There are two facets to the right to be a parent: one facet, which to distinguish from the other shall be referred to as the factual, biological-physical facet, namely the right to belong to the parent population and have the status of a parent. The other facet is the right to decide if, when, with whom and in what way to exercise the first facet of the right to parenthood" (**Green**, p. 68).

30. The right not to be a parent, as aforesaid, is based on the protected value of autonomy; on the face of it, in Israeli society in particular and perhaps in the free world in general, there is presently no **value in and of itself** in not being a parent; even if the Sages have said "[I]t is better for a man not to have been created than to have been created" (Babylonian, ***Eruvin***, 13, 72), they added in the same breath "[and] now that he has been created, let him examine his deeds". In re **Nachmani** (p. 710-711), Justice Tal emphasizes the commandment "[B]e fruitful and multiply" (**Genesis** 1:28), which we have mentioned, and the words of the Sages (Babylonian ***Yevamot*** 63, 2): "*Tanna*, Rabbi Eliezer says that every person not engaged in bearing fruit and multiplying is as though spilling blood". Indeed, Rabbi E.M. Shach, may he rest in peace, told the story of the Chofetz Chaim, Rabbi Israel Meir HaCohen, may he rest in peace ***(HaMe'ot***, the 19th-the 20th), who was deliberating in his times whether to give a couple a blessing for fertility because "children are an immense responsibility, it being a deposit from Heaven", and he saw the difficulty in raising children in a generation whose behavior is lawless and immoral (see Rabbi Asher Bergman **The Use of Torah** (Year 5758), 139). However, one way or another, everyone, or virtually everyone, would certainly agree that the right to parenthood includes a **core value** which stands on its own – to bring children into the world – **and** protects the value of autonomy. Scholar Barak-Erez wrote of this rationale in her aforementioned essay:

> "This assumption of symmetry between the rights requires further inspection. Albeit captivating, it is far from being self-evident. It is not at all clear whether the right to be a parent and the right not to be a parent should be discussed on the same level only due to their allegedly being symmetric. In other words, the existence of symmetry between the two rights may not be assumed merely because they hold both ends of the rope of parenthood.
>
> As a rule, the right to "have" and the right to "not have" are not always equivalent. Is the right to life completely equivalent to the right to die? ... This is not a sole example. From the fundamental principle of freedom of speech develops both the right to speak and the right to be silent. However, does it thence result that the right to speak is always equivalent to the right to be silent? … In order to decide the question of balancing the rights, one must address the justifications that underpin them … Justice Strasberg-Cohen determines that 'the right to parenthood derives from the

> right to self-fulfillment, liberty and dignity'. If the focus is on 'self-fulfillment', the right to parenthood is part of the idea of the autonomy of will: the law respects the individual's choices, including the choice of self-fulfillment through parenthood. When the right is perceived in this way, when it is the will that takes the focus, the balance between it and the decision to avoid parenthood is supposedly simple, since the court also respects this decision in the name of the autonomy of will.
>
> However, there is only a semblance of simplicity here. Firstly, even were we to deem the right to parenthood and the right to avoid parenthood merely as derivatives of the autonomy of will, the symmetry between them would not be imperative. We do not respect every will, nor should every will be respected to the same degree. Beyond this, the main criticism is directed against the narrow perception … in my opinion, one should unravel in it [in the right to parenthood – E.R.] many additional facets. The right to be a parent is an independent right, rather than a mere expression of the autonomy of individual will. The realization of the option of parenthood is not just a possible way of life, but rather it is rooted in human existence. One may find it a cure for loneliness; another will thereby cope with the consciousness of death. Indeed, the choice to avoid parenthood is a possible way of life, which society and law need to respect" (p. 199-200).

31. We shall also recall the position of Justice Goldberg, who noted in re **Nachmani** that "[I]n the dispute before us a positive right and a negative right face one another", both of which are derived from the **right to autonomy** (***ibid***, p. 723); but, in contrast, the position of Justice Turkel in that same case, who emphasized:

> "The modern view, social and legal, recognizes the autonomy of the will of the individual. Hence derive and stand, ostensibly, one against the other, the right to be a parent and the right not to be a parent… Indeed, as cited by Joseph Raz from the essays of Prof. Gans and Dr. Marmor: 'An autonomic person is a person who writes his life story himself'. However, to use this simile, is there indeed symmetry between the rights of each of the spouses to write his own life story himself? In my view, there is no symmetry between the rights, despite the 'external' similarity between them, and the right to be a parent may not be deemed merely as a derivative of the autonomy of will, which stands against the right not to be a parent. Still, even if we deem both of the rights as such derivatives, they are not of equal value and standing, as though existence and nonexistence are equal to one another, and as though they are the symbols 1 and 0 on the computer under the binary method" (***ibid***, p. 736-737).

I believe that this last position is closer to the position I support, whereby the right to parenthood includes an independent value component that exceeds the

right to the autonomy of will, unlike the right not to be a parent, which is anchored in the autonomy.

32. We have thus found that the **right to parenthood** is, on the face of it, a cardinal value in and of itself, natural and primeval, and with high-ranking on a human scale of values; this is joined by the autonomy embodied in the choices of the individual related thereto. We have also seen that, in contrast, the right **not to be a parent** does not include a protected independent value, but is rather intended to protect the personal autonomy of a person in his choice (not to be a parent, or not to be a co-parent with a certain woman or man). It shall be noted that even those who side with this right being only an interest, see it – so it appears – as an interest that should be protected legally; see the words of Justice Tal in **Re Nachmani** (***ibid***, p. 701), who had reservations with respect to this classification. Now that we have established the characterization of the right to parenthood and the right not to be a parent, we shall now move forward to an examination of the standing of the Petitioner and the Donor.

Of the Standing of the Petitioner

33. It appears that, in the case at bar, the infringement upon the Petitioner's right does not pertain **to the core of the right to parenthood**. The primary basis of this right is the practical ability to be included in the "parent circle", and bring a child into this world; there is no actual dispute that such option is, thank Heavens, available to her from a practical standpoint. The Petitioner is healthy and fit to bring a child into this world and is not bound (as was the situation with Ms. Nachmani at her time) to the Donor in the case at bar. She is able to act soon to receive another sperm donation at her preferred timing for undergoing additional insemination treatments. The Petitioner claims that impingement upon the ability to choose **with whom** to bring children into this world is sufficient in order to be sheltered by the legal right to parenthood. However, in practice, this is not an infringement upon the right to parenthood, but rather, as explained above, **at most**, and this is highly doubtful, an infringement upon the periphery protected by her right to autonomy (without, for now, addressing the question of the scope of protection, whether the right was indeed violated and whether, on proper balance, it is deserving of protection). It is a major question, and I believe that as a rule the answer thereto will not be positive, whether the right to autonomy has been infringed upon by the focusing thereof on the sperm of John Doe the Donor and no other, at any rate where an anonymous donor is concerned.

34. It is claimed in this respect that "once the Petitioner arrived at the decision to bring children into this world from one donor only, and once she executed this decision when giving birth to her first-born daughter…the Respondents' decision infringes upon the Petitioner's right to parenthood" (Paragraph 21 of the Petition). However, as emerges therefrom, the Petitioner is not seeking protection of the core of the right to parenthood or of her autonomy, but rather of her right to parenthood from a specific person, or **her right to a child having a specific genetic constitution**.

35. In order to assert the difficulty in legally protecting the Petitioner's interest to again conceive by the same genetic constitution, we shall compare her situation with the situation of a married woman who gave birth to a first child in wedlock, and whose husband promised her that they would have another child. This is not identical, of course, but both of them hold the same promise in-principle, that the second child to join the family would have the same genetic constitution of the first child, i.e. a biological son or daughter by the same father. Can the law enforce this promise when the husband decides to dissolve the marriage, and consequently also infringe on the mother's interest of parenthood to children of the same genetic constitution (or the right of the child to a full genetic sibling)? Can one point to a protected legal interest, other than the interest of reliance, and the *prima facie* interest that contracts should be honored, although, of course, one may not, as a rule, disparage them? It is my opinion that the answer to these questions cannot be affirmative, and the power of the interest of reliance and agreement is insufficient. Moreover, the infringed interest in the case of the married woman as described may even be stronger in relation to the case at hand, since her reliance is perhaps greater in view of the close relationship between her and her husband; it is recalled that in the case at hand the choice is also subject to the discretion of the treating physician, as aforesaid (see above, according to Annex E-2 to the Director General Circular). Indeed, on the face of it, one might argue that the contractual relationship in a case of sperm donation attests to a choice to follow a different path to parenthood, "businesslike" or "financial", of the type that grants security that is not extant in an intimate set of understandings. We shall hereinafter return to an analysis of the issue on this basis, and shall already state here that this proposition cannot be held.

Interim Summary

36. We have addressed the nature of the right to parenthood and the right not to be a parent. We have seen that **the first** includes a separate independent value, recognized by law, which concerns the mere possibility of bringing children into this world, as well as an additional protection of the value of the autonomy of the designated parent (in this case – the Petitioner); **the second** principally includes the value of the Donor's autonomy. In the case at hand, we have found that the Petitioner is not fighting here for her core right to parenthood, which, in itself, no one is infringing on, but is rather seeking protection over her choice and her desire for parenthood from a specific person. We shall now move forward to examine the standing of the Donor. Such examination shall address, *inter alia*, the Petitioner's claim that the Donor's right to autonomy is not infringed upon (see Paragraph 15 above).

Of the Status of the Donor

37. As aforesaid, the core of re **Nachmani** was the difficulty to weigh, one against the other, the will of Mr. Nachmani not to be included in the "parents group" against his wishes, and the wish of Ms. Nachmani to enter such group. Both parties held the entrance key together, with one pulling out and the other pulling in; things also went as far as the biological stage of fertilization, which naturally intensified the difficulty, and the infringement upon the core of the

parties' protected rights. In the case at hand, can the **Donor** point to a similar infringement? The issue we are concerned with indirectly raises a question complex in its own right that has yet to be fully addressed by law, which is **the determination of the paternity of a child born by sperm donation**; the question of what weight to ascribe the interest of autonomy – or none at all, as the Petitioner claims – of the Donor is inseparably linked to the question of in what social and legal sense he is a father.

38. In the case at hand, we shall not rule on this question, which may be deserving of determining by the legislator, but we shall hereinafter address it in the Halakhic context. The question before us is a complex question of values, and therefore the legislator takes precedence over the court in the ability to reach a comprehensive and balanced arrangement, within which the gamut of the considerations of principle and practicality that are relevant to regulation will be taken into account. This was carried out in the Ova Donation Law, and the Agreements for the Carriage of Fetuses Law (Approval of Agreement and Status of the Newborn), 5756-1996 (even if there may be such or other criticism of these arrangements).

39. The normative framework – which includes, as aforesaid, the aforementioned Consumer Services Act, the regulations promulgated thereunder and the Director General Circular – does not decide this question; the courts that addressed this issue also refrained from setting a broad "paternity test", which exceeded the concrete case of the parties before it. In **Re Salameh** (CA 449/79 **Salameh vs. Salameh**, IsrSC 34(2)779 (1980)), it was ruled that a husband, who had given his consent to an insemination procedure, is liable for child support for the child born by the sperm donation of a stranger. It was ruled that the origin of child support was contractual, and therefore the question of the husband's status as a father did not require deliberation. Presently, as a solution in-principle for this matter as aforesaid, the consent forms **of spouses** include an explicit undertaking by the male spouse to assume full legal responsibility over the child. It should be noted that in **Re Salameh** and in the other cases raised in case law, a relation of paternity of the anonymous donor was never claimed; but, such rulings are instructive in a qualified manner **with respect to the lack of status of the donor**. The discussion of the husband's obligations for child support implies that there is no intention to attribute a similar legal liability to the anonymous sperm donor:

> "At the base of these decisions, there implicitly lies the assumption that the **sperm donor** is not a father, although an unequivocal announcement in this spirit cannot be pointed to (Ruth Zafran "Family in the Genetic Era –Defining Parenthood in Families Created through Assisted Reproduction Techniques as a Test Case", ***Din U'Dvarim***, B 223, 252 (Year 5766); original emphasis – E.R.).

Indeed, as the author shows, there are also different voices (see AP (Tel Aviv) 10/99 **Jane Doe vs. the Attorney General**, IsrDC 5760(1)831, 855) – but, in any event, there is no positive determination of parenthood with respect to the donor. To summarize this point, on the face of it, current law does not attribute

"paternity" to a sperm donor in the classic legal sense of imposing child support. However, I believe it is clear that the mere fact that the donor does not owe legal duties to the infant born by his sperm **does not negate the infringement on his autonomy** – as the Petitioner claimed. We shall hereinafter address the mental implications of this infringement; prior thereto, we shall address the differences between the case at bar and re **Nachmani**.

40. Following the decision in re **Nachmani**, Mr. Nachmani was to become a father, both genetically and psychologically-socially: the theoretical child (who, as aforesaid, was not born at the conclusion of this sad story), was meant to know his father, and his father was meant to know him. Moreover, even if an indemnification contract could have been made between Mr. and Ms. Nachmani, which exempted the father from any future obligation, including the right (and the obligation inherent thereto) to visitation, beyond the aforementioned obligation of child support (since no consent of the unborn child to waive his rights was granted), the infant would have had the ability to insist upon his rights himself. It is also clear that it is not self-evident that an agreement between parents would negate, in effect, all of the father's duties (see Isaac Cohen "The Independent Legal Standing of a Minor in Family Law – Processes, Trends and Methods for Rebalance" ***Mishpatim*** 41 255 (5771)). Justice Strasberg-Cohen clarified these implications (in a dissenting opinion) in re **Nachmani:**

> "Refrainment from forcing parenthood on a person unwilling to assume it is reinforced in view of the nature and **hefty weight of parenthood**. Parenthood involves an inherent limitation of the future freedom of choice, in imposing on the parent a duty that encompasses most of the fields of life. A person's introduction into parent status involves a significant change of his rights and obligations. Once a person becomes a parent, the law imposes on him the duty to care for his child. This care is not a casual one, but rather the duty to place the best interests of the child at the top of his priorities. A parent cannot deny the needs of his child simply because it is inconvenient for him to fulfill them. The responsibility of a parent to the well being of his child also holds tortious and criminal aspects. This responsibility incorporates the normative expectation of our social values and legal system, from the individual, with respect to his functioning as a parent. The highly significant implications that stem from this status mandate that the decision to be a parent be entrusted to the person and to him alone" (***ibid***, p. 683-684; emphasis added – E.R.).

41. The situation at hand is materially **different**. As aforesaid, if the Petition is approved, there is a certain chance that the Donor will become the genetic father of additional children (to the extent that the medical treatment is successful). Indeed, in the practical sense, this is an anonymous donor – with respect to whom, unlike other places in the world and other proceedings such as adoption, the child **is not** entitled to request information at the age of majority) (Rule 24 of the Director General Circular; for a discussion on the question of donor anonymity, see **Report of the Public Committee for**

Examination of the Legislative Regulation of the Issue of Fertility and Reproduction in Israel, p. 34-36; Ruth Zafran "'Secrets and Lies' – the Right of AID Offspring to Seek Out their Biological Fathers" ***Mishpatim*** 35 519 (5765)). At this stage, it should be noted that the question of anonymity is a topic for debate in its own right, since against it stands the right of "a minor child, not to be suppressed all of the days of his life from knowing the identity of the father that had begot him" (see CA 548/78 **Sharon vs. Levi**, IsrSC 35(1)736, 758 – Justice (his former title) M. Elon); however, this question has not yet been examined in the context of the sperm donor. The fact of anonymity in the present state of affairs detaches the donor from nearly any "fatherly" context **other than the genetic context, which remains concealed**. On the face of it, according to present law, the donor owes no financial, social or other duty to the infant. In fact, it is not at all clear **if and how** the donor **would know** that he became a father, since, as aforesaid, this is subject to the success of the medical procedure, and without an inquiry on his part he will not learn about it. This also emerges from the statements of President Barak in re **Nachmani**, underscoring the situation of Mr. Nachmani compared with the one of an anonymous donor:

> "At the foundation of the understanding between the parties – whether we deem it a contract or an agreement which is not a contract, and whether we deem it common property or we deem it a unique "phenomenon of law" – is the premise of a shared life. Once this foundation is removed, the foundation on which the relation between the parties is based is removed. If Danny Nachmani had been asked prior to the commencement of the fertilization procedure, whether he would be willing to go through with it even after separating from Ruth Nachmani, his sure answer would have been negative. It may be assumed that this would have also been the answer of Ruth Nachmani. In truth, they had not entertained this question, but the essence of the agreement (or the understanding) between them – an agreement for the birth of their child in common – is based on this premise. This is the basis for any act in the fertilized ova. This is the foundation of their entire inter-being. This is the infrastructure of their parenthood. **It is not 'single family' parenthood**. **The sperm donor is not unknown**. It is co-parenting on each and every ground" (***ibid***, p. 790; emphasis added –E.R.).

42. It may be gathered from these words, that the infringement upon Mr. Nachmani's autonomy was a harsh one, and pertained to the core of the right not to be a parent. In contrast, the infringement in the case at hand is weaker, which does not pertain to the core of the right. The remaining link, excluding possible changes in the law, is principally genetic – "a genetic father", not a father in the full social and legal sense of the term. However, as we have reiterated above, the fact that, in the case at hand, the impingement is reduced to the genetic element of parenthood does not nullify the infringement upon the autonomy. It is this issue that we shall now address.

Infringement against the Donor

43. In the broad context, no few writings have addressed the weakening of the **model** for determining parenthood on a genetic basis compared with models of physiological parenthood, social-functional parenthood (or, by another name, "psychological parenthood"), and other models such as the model of the best interests of the child and models based on the parties' consent (for elaboration, see Y. Margalit "Of the Determination of Legal Parenthood in Consent as a Solution to the Challenges of Determining Legal Parenthood in Modern Times" 6 ***Din U'Dvarim*** 553 (5772), and mainly the review in Chapter E thereof). Without expressing a position with respect to the dilemma of determining parenthood in such situations, it is clear today, when the genetic model no longer stands alone, and all the more so in a case of sperm donation, wherein no one "operatively" claims the donor's paternity, that such genetic connection is possibly not the be-all and end-all (see CA 3077/90 **Jane Doe vs. John Doe**, IsrSC 49(2)578, 599-605 (1995)).

44. Indeed, after years of going hand in hand with the genetic model exclusively (a position reflected in two of the central legislative acts in respect of the determination of parenthood – Section 3(a) of the Women's Equal Rights Law, 5711-1951 and Section 14 of the Legal Capacity and Guardianship Law, 5722-1962 – despite there being no definition of the term parent), the legislator also went some distance in the movement away from the genetic model, in determining parenthood in the new Surrogacy Law not by the direct genetic model, but rather by a "parenthood order" (the Agreements for the Carriage of Fetuses Law, Section 10); similarly, Section 42 of the Ova Donation Law also prescribes: "An infant born as a result of an ovum donation, will be the child of the **recipient of the donation** for all intents and purposes" (emphasis added –E.R.), i.e., a determination of parenthood **without a genetic relation** to the recipient of the donation, but rather merely a physiological connection.

45. However, even if we were to find voices – and these are not the central voices – according to which the genetic link has weakened in the social and legal sense, especially in the context of sperm donation, it still carries a hefty weight; however, in any event, **the infringement upon the autonomy** is still concrete and strong, and it ultimately tips the balance in the case at bar. This is how the Donor himself described it in his aforementioned letter:

> "The aforesaid act [the sperm donation – E.R.] is presently incompatible with my world view… I am not interested in having a child born by me, without me being able to give him love, and without me loving his mother. I see a connection between my genetic constitution and these conditions…"

46. The harm to a man, as a result of his feeling – even if it came about later and at first he had believed otherwise – that a child who is the fruit of his loins "walks about the world", and he is unable or unwilling, whether on religious grounds or in terms of the resources of time and emotion, to dedicate his love and attention to him – is inevitable, and touches upon his subjective moral

conscience. The legal and Halakhic distinctions mentioned above are of no use to this person; this harm was described by the scholar Chaim Ganz:

> "My sights are set on the interests that people have not to be in situations in which they are not fulfilling what they consider to be their emotional and moral duties, or the interests they have not to be in situations in which they pay too high a price in order to fulfill their moral duties, or not to be in situations in which they are indecisive as to whether to fulfill their emotional and moral duties or feel guilty for not fulfilling the same (Chaim Ganz "The Frozen Embryos of the Nachmani Couple" ***Iyunei Mishpat*** 18 83, 99 (5754)).

47. It appears to me that these words may be on the mark with respect to the Donor's feelings in the case at hand, as reflected in his letter to the court. It is for this purpose that the rule determined is that society may not, in the absence of weighty reasons, interfere with the intimate questions of reproduction. We must keep in mind that the sperm donor is not expressing a position in principle against bringing children to the world, as he has also married and has had children. Rather, it is hard for him to feel that the children to be born by his donation will not be his children, nor will they have the benefit of his affection, nor will they be the fruit of his love. We cannot dispute the weight of these things. As stressed by Justice (his former title) Or in **Re Daaka**:

> "This right of a person to shape his life and his fate encompasses all of the central aspects of his life - where he shall live; what he shall do; whom he shall live with; what he shall believe in. It is central to the being of each and every individual in society. It bears an expression of recognition of the value of each and every individual as a world all its own. It is essential for the self-definition of every individual, in the sense that the gamut of the choices of each individual defines the individual's personality and life… The right to individual autonomy is not limited to this narrow sense, of the ability to choose. It also includes another tier – a physical one – of the right to autonomy, which pertains to a person's right to be left to his own devices…this right implies, *inter alia*, that every person has the liberty from interference with his person without his consent… the recognition of a person's right to autonomy is a basic component of our legal system, as the legal system of a democratic state…it constitutes one of the central expressions of the constitutional right of every person in Israel to dignity, which is established by Basic Law: Human Dignity and Liberty" (CA 2781/93 **Ali Daaka vs. the 'Carmel' Hospital, Haifa**, IsrSC 53(4)526, 570-571 (1999)).

48. Just as the initial choice, for such or other reasons, to make a sperm donation, with all of the implications entailed therein, was the Donor's – while his approach to values was different – so is the choice to retract his consent. As defined by the Director General Circular:

> "Donor sperm **shall not be taken, nor received nor used** for artificial insemination, unless the donor shall have given his consent to the use of the sperm" (Rule 25(e); emphasis added – E.R.).

That is to say, consent is required for the mere taking of the sperm, for its receipt by the Sperm Bank and for the use thereof. Thus, for instance, it is clear that if a sperm donor had regrets, at the stage in which no use whatsoever had been made with his sperm – the bank would not have conceived of claiming that the donor had no right to recant (and for the purpose of further discussion, that the donor breached the contract with the bank). The significance of this is not that a sperm donor's refusal for his sperm to continue to be used will be accepted under any circumstances; the stage in which the request is brought forth is relevant and even critical. There may be good and hefty reasons not to allow a sperm donor to recant, such as in a situation like the one created in re **Nachmani**; all the more so if conception has occurred. But other than under such circumstances, his right to retract and the infringement on this right bear actual weight and tip the scales. Indeed, he had given his consent and had received payment, however this is not an ordinary "transaction", but rather an issue that holds a fierce emotional aspect. The command of the conscience and feelings of the Donor is a matter of values and cannot be simply quantified in the legal sense; as emphasized by Justice Goldberg in re **Nachmani**:

> "[The issue – E.R.] is by nature not within the framework of an existing legal norm. It may not be cast in the legal molds of a contract or a quasi-contract. It is entirely within the emotional-moral-social-philosophical realm. Hence, an explanation of the normative vacuum and the inability of the customary legal rules to resolve the dispute" (***ibid***, p. 723).

Like him, Justice Kedmi stressed that "[T]he answer shall thus be found in the internal world of values of each one of us. I also do not hesitate to say that it may be found in the cache of emotions inside the heart of each one of us" (***ibid***, p. 735). Even if the case at bar is not the same "borderline case" as was re **Nachmani**, we must acknowledge our limits when assessing the degree of harm to the donor, whose present point of view imposes such and other moral duties on him, in which bringing children into the world, who **would not** grow up to be his actual children, is opposed to. We shall mention again, that the entry, as argued, of the Donor into the religious world brings with it a harm that stems from this world of values. As aforesaid, a common opinion in the Halakha prohibits a Jew from making a sperm donation due to the prohibitions of emitting sperm in vain, the concern of future mishaps such as consanguineous marriage, levirate marriage (*Yibbum*) or renunciation thereof (*Halizah*) (see Paragraph 57 below). We shall also hereinafter address the status of the infant. Insistence on autonomy in the question of what will be done with a man's sperm does not need to come from a religious source; but entrance into the religious world may enhance it, as probably occurred in this case, and this should be respected. Again – this is no trivial matter; sperm is a type of man's continuity, hence the importance of the autonomy of a man to

decide as to the use thereof, even if he initially believed otherwise. This is "high-level autonomy".

49. Finally, the harm to the Donor is not limited to the ability to choose not to be a father, but rather also extends to his autonomy to decide with respect to his status as a father. That is to say, a man who sees the genetic-biological parenthood or the "blood relation" as giving rise to moral duties of his as a father is harmed in his autonomy by both the denial of the choice, in and of itself, and by the nonfulfillment of his duties according to his conscientious or religious approach.

The decision in the case at bar

50. I believe, that in view of the analysis presented thus far, in the conflict of interests at hand, the Donor's wish to not be a genetic father to additional descendants prevails, within the bounds of autonomy, over the Petitioner's interest to bring children into the world, sharing the same genetic constitution; this last interest is legally insufficient to nullify of the Donor's right to change his mind. The parental liberty requires the cooperation of two people, within a marriage or another family unit, including – although with much lower force – within a single-sex family unit, through sperm donation; and it may be through a third party such as the Sperm Bank. Obviously, there are differences between the aforesaid situations, which may, under different circumstances, change the outcome; however, in the matter at hand I found no grounds to justify subjecting the Donor's wishes to the purpose of upholding the Petitioner's wishes.

51. The protection of the Petitioner's right to have children sharing the same genetic constitution stops where it clearly conflicts with the Donor's right. In a regime of relative rights, there is no right which grants its holder absolute superiority of exercise. Therefore, the acceptable interests underlying the Petitioner's arguments yield to the Donor's right to autonomy (see and compare with the opinion of Justice Mazza in re **Nachmani**, p. 750-751).

52. I am afraid that – with all human understanding for the Petitioner's feelings – the interest of conceiving from a certain individual, as stated in the Respondents' reply, is not recognized by law and is not protectable. Moreover, even if we were to assume that the matter at hand may be deemed as violation to the Petitioner's autonomy to choose with whom to have children, the Petitioner would receive no protection; since as aforesaid, we are concerned with a **liberty**, the fulfillment of which requires the cooperation of another:

> "The right to be a parent and the right not to be a parent are two rights which despite being two sides of the same coin, do not share identical characteristics. Each in itself lies within the framework of individual liberties; the distinction between the two levels of rights is not in the one being a positive right versus another being a negative one, but in the fact that the right to be a parent belongs to the group of rights which require the cooperation of another individual for its consummation, whereas the right not to be parent is reduced to the individual himself… if

> the right to be a parent had been one of the rights in the strict sense, with a respective duty against it, there would be no need – on the theoretical level – for consent from the outset, since once there is a duty the only remaining question is that of the appropriate remedy. Since the right is a liberty against which there is no corresponding duty, but rather an opposing right, and since two are needed for its consummation, the individual in need of the cooperation must obtain the same from the other party by obtaining his consent throughout. The right to be a parent requires – in the event of refusal by the partner – a positive coercive judicial act, whereas the right not to be a parent requires non-intervention and non-interference with the liberty of the individual who refuses to become a parent. Since the "refusing" partner has a right to not be a parent, he should not be subjected to such coercive order. Fulfilling the right of the individual seeking to be a parent by imposing a duty on an individual who does not is contrary to the essence of the liberty and violates its spirit" (the **Nachmani** case, p. 682-683 – Justice Strasberg-Cohen).

In re **Nachmani** – in which two rights weighed on the scale: the core right to be a parent, i.e. the mere ability to become a parent on the one hand, and on the other hand the right to autonomy, i.e. the right not to be a parent – it was ruled that under the circumstances the right to be a parent prevails. In the case at bar, on the other hand, the Petitioner cannot indicate violation of the right to be a parent. The issue at hand is her desire to conceive from the sperm of a specific person, against the wishes of that person to not be a parent again – even if, as aforesaid, a merely genetic parent – by way of sperm donation, it seems that there is no room to rule in favor of her petition.

53. It should be emphasized, as aforesaid, that in the case at bar, the Petitioner has indicated, **at the most**, violation of the right to autonomy. There is no violation of the Petitioner's right to become a parent herself, and the question is from whom she shall conceive; therefore – even if we assume, for the sake of the discussion, that the Petitioner's right to autonomy has been violated, and as aforesaid, I do not believe that it has been violated, and certainly not severely so– as opposed to the **Nachmani** affair, the conflict and ruling in the case at bar pertain to the Petitioner's right to autonomy versus the Donor's right to autonomy; and as mentioned, "we do not respect every wish, and not all wishes are to be equally respected" (**Barak-Erez**, p. 199). In the contest between these two "autonomies" it seems – without, of course, wishing to hurt the Petitioner's aspirations and feelings – that the Donor prevails. His case concerns an "active" legal measure – use of his sperm, whereas her case concerns a "passive" circumstance – preventing the use of the Donor's sperm.

54. It may be that the interest of contractual reliance was violated in this case, and perhaps also additional public considerations and interests (such as the lateral effects and the need to preserve the stability of the Sperm Bank). However, the law, as in similar cases, avoids coercion with respect to the intimate questions of human life **in the absence of weighty considerations** (see the aforementioned CA 413/80; Pinchas Shifman "An Involuntary Parent –

Misrepresentation Regarding the Use of Birth Control", 18 *Mishpatim*, 459 (5749)). And we shall reiterate – the force of the Petitioner's interest – with no offense, cannot tip the scales against the Donor's autonomy.

55. We spoke at length, since – as aforesaid in the preface – the avoidance of future cases is to be considered, and the possible lateral effects should also be addressed. The issue at hand calls for the intervention of the legislator. At this point it should be mentioned, as noted by the scholar Y. Green in another book he wrote on the issue ("**Procreation in the Modern Era: Law and Halakha** (2008), p. 99): "Caution should be exercised when holding a discussion on the in-principle, theoretical level, which is detached from the specific case to be decided. There is nothing "easier" than a theoretical discussion, but the solution is required for the specific case. It seems that the discussion in the appeal in re Nachmani demonstrates so".

Ostensibly, the aforesaid should have sufficed to conclude the discussion in the present case, however, I deem it fit to briefly discuss the position of the Hebrew Law on the issue of sperm donation and the status of the donor, since in some of the contexts contemplated, and in particular on the issue of attributing the newborn to the sperm donor, Hebrew Law has significant weight in shaping the Israeli law as well as some of the arguments on other levels of the discussion mentioned, and explain why the outcome in the case at bar does not change.

The Position of Jewish Law

56. The possibility of giving birth as a result of artificial insemination, although by chance, is mentioned already in the Talmud (Babylonian, **Tractate Hagigah** 14, 72-15, 71) in reference to the prohibition of the High Priest to marry a woman who is not a virgin (**Leviticus** 21, 13 and 15): a pregnant woman who claims to still be a virgin is permitted to the High Priest since "she may have conceived in the bath", i.e. from the penetration of sperm to the uterus, other than by way of sexual intercourse but by chance, while washing in a bath to which human sperm was ejaculated. The Halacha distinguishes between questions such as whether the technique of artificial insemination is in itself permitted (and in the present context, whether sperm donation is prohibited), and the Halakhic and legal consequences of insemination that has taken place. Regarding the mere donation of sperm by a Jew, Prof. Rabbi Avraham Steinberg writes "New Technologies in Fertility Treatments – Halakhic Aspects" a chapter from his book in "Halakhic Medicine", which was discussed at the Rabbinical Judges convention in 5772, that "a Jew who donates sperm to an unknown woman violates the prohibition of wasting sperm…", this is according to various sources such as Rabbi Moshe Feinstein (**Letters of Moshe Even HaEzer** I titles 10-11) and Rabbi A.I. Waldinberg, et al. (**Tzitz Eliezer** 9, 51).

57. Regarding the status of the newborn, Halakhic literature offers – amongst the modern adjudicators and their interpreters – different opinions, of which some are stringent (i.e. frown upon the mere artificial insemination from an unknown Jewish donor, and consider the donor to be the newborn's father, and therefore – in the case of a married woman – there is a fear of bastardry), and

some are lenient, severing the tie and not necessarily attributing the newborn to the sperm donor, and also permit him to enter the assembly with no fear of bastardry. One of the Halakhic questions is whether the child is deemed a "Shtuki", i.e., "one who knows his mother but not his father" (Mishnah, Kiddushin, 84 42), who is an doubtful bastard; see, among other interesting articles and dissenting opinions in **Techumin** 24 (5764); Rabbi M. Ralbag, in his article, "Attribution of a Newborn Conceived by Artificial Insemination" (p. 139), concludes that "a child who is born to a single woman by way of artificial insemination and with sperm taken from the sperm bank, either abroad or in Israel, shall not be deemed a Shtuki, who is prohibited for fear of bastardry, but is legitimate and may marry a legitimate Jewish woman" (p. 147). This is supported, *inter alia*, by central opinions in Halakhic adjudicative literature such as Rabbi Moshe Feinstein, Rabbi Shalom Mashash and others. On the other hand, see Rabbi Y. Epstein, "The Pedigree of a Newborn Conceived by Sperm From a Sperm Bank", ***ibid***, p. 147, who concludes that "it seems that the child who is conceived by the fertilization of a single woman without knowing who is the sperm owner, increases the number of Shtukim in the world, and it should be avoided as much as possible" (p. 155); further see: Rabbi G. Orenstein "IVF – Attribution of the Newborn and the Command of Propagation", ***ibid*** p. 156, whose general approach (p. 156-157) is that the newborn is attributed to the father, which obviously adds to the Donor's dilemma. Also see: Prof. Rabbi Avraham Steinberg, **Halakhic Medical Encyclopedia** (Second Edition, 5748), p. 148; and his article "Artificial Insemination", **Weekly Torah Portion Leviticus**, edited by A. Cohen and M. Vigoda (5774), 102; A. Green "Procreate", p. 125-180. Prof. Rabbi Steinberg in his aforementioned essay "New Technologies in Fertility Treatments – Halakhic Aspects" believes that in general, "artificial insemination of a married woman by an unknown donor who is a Jew is prohibited, since this act entails so many Halakhic and moral-social faults". And he explains, that some believe that the prohibition is from the Torah, and some believe otherwise, and attribute the prohibition to moral-social considerations, such as detachment of the child bearer from marriage and turning "the birth of children into an arbitrary mechanical issue, denied of all the human qualities which make man God's partner in the act of creation". He further notes that there may be Halakhic complications of prohibited marriage of relatives and questions of inheritance – among other things, the newborn shall not receive, *de facto*, part of the inheritance of the sperm owner, even under methods which consider him his son. The sperm owner-donor – according to that method – is the newborn's father for all intents and purposes, and therefore the newborn is "prohibited to the relatives of the sperm owner, inherits his assets, his mother is exempt from Yibum and Halizah and he is liable for his child support" (I shall note that with respect to child support and similar issues, there are also other opinions). The aforesaid is in addition to the fact that "*a priori*, the artificial insemination of a single woman is prohibited. Under special circumstances, one should seek advice", and there are cases in which this shall be permitted, "such as when a single woman has made efforts to marry, and failed, and she reaches the end of her fertile years and she longs for a child, to be 'a cane to her hand and a hoe for her burial' (**Yevamot** 65, 2), all in accordance with the rabbinical judge's discretion, and the permitted conditions of artificial insemination". I shall add: in other words, the case of a

woman who wants a child also in order to have someone to lean on in her old age – that would justify seeking the advice – and probably leniency.

58. And see, recently, the ruling of the Rabbinical Courts in (Beer Sheba) 90215/01 **Jane Doe v. the Attorney General** (Kislev 15, 5773, November 29, 2012), which concerned the status of a minor who was born to a single mother from artificial insemination, and the identity of the sperm donor was unknown. The Court ruled that the minor is allowed to enter the assembly, giving specific reason that artificial insemination creates no fear of bastardry, and it was, *inter alia*, stated (Paragraph H): "clearly if the newborn conceived by artificial insemination it not attributed to his father, there is also no fear of bastardry", since "the law that sperm is attributed to the sperm donor is not sufficiently clear and proven". And I shall add, that already two decades ago, Rabbi S. M. Amar, the present Rishon LeZion (Sephardic Chief Rabbi of Israel) and then a Rabbinical Judge in Petach Tikva, wrote in his book **Hear Shlomo B'**, (Even HaEzer, Article B, p. 150-156) with respect to a child conceived by artificial insemination, that he should be permitted, and see the summary of the Halacha there, and this is also, as far as I am aware, his clear opinion today. Also see interpretation by Sara Hatab to the ruling of the Judicial Court in Beer Sheba ("Inglorious Bastards", **Tsedek – Makor Rishon** (Justice, Primary Source), Shvat 14, 5773 – January 25, 2013).

59. From the research literature which quotes the words of adjudicators, we will note that Prof. M. Corinaldi, in his book, **"Laws of Personal Status, Family and Inheritance – Between Religion and State, New Trends** (5764) also addresses the approach of the Hebrew law to the issue of sperm donation, pursuant to his previous essay – "The Legal Status of a Child who is Conceived by an Artificial Fertilization from an Unknown Donor or by an Ovum Donation" **Jewish Law Annual** 18-19, **295** (5752-5754). His starting point is the answer of Rabbi Peretz, one of the authors of Tosafot (annotations to the Talmud) in the 13th century (of whose opinion has two versions); see p. 79-81. According to Rabbi Peretz, "a baby born to a married woman from the sperm of an unknown man – and not through prohibited intercourse – e.g. conception through a sheet – is not a bastard ("legitimate newborn") since there is no forbidden intercourse or partner". This answer is the Halakhic foundation, for example, for the aforementioned opinion of Rabbi Moshe Feinstein, see references on p. 81, note 30; in addition, the words of Rabbi A.I. Waldinberg are quoted (Tzitz Eliezer 9, 51 Section 200, 249), similarly to the opinion of Rabbi Feinstein, who believes that in the absence of ordinary intercourse, there is no fear of bastardry, since "anyway he did not come close to a woman, and it was for monetary consideration that he gave his sperm for that purpose, and the woman conceived anyway, without him positively taking action to consummate the conception. Moreover, in this case the act of the physician followed, in the absence of which the sperm of that man is allegedly discarded into the trees and stones…". Prof. Corinaldi concludes that the Halacha also makes room for a method whereby a man who agrees to the use of his sperm for an unknown woman "is deemed as a man who deposits his sperm in such a way as to expire the natural connection, and there is no genealogical connection formed between himself and the newborn – who is deemed as lacking pedigree on the father's side"; and Rabbi Bazmach Uziel

(**Shaarey Uziel** B' 234) speaks in the same spirit. "For a man's pedigree is not attributed to him unless created in the usual manner through physical intimacy…" (p. 82-83). Dr. Michael Vigoda – "The Status of Those whose Conception is from the Sperm Bank", **Weekly Torah Portion** 5767 (282) – notes that Rabbi Yechiel Yaacov Weinberg, in Q&A **Sridey Esh** (Rabbi A.A. Weingurt's Edition) A', 49, considered an individual who was born by fertilization to be a Shtuki and is deemed as a bastard, but on the other hand Rabbi Ovadia Yosef ruled leniently. The author also quotes Rabbi Asher Weiss who tends to be lenient, as the insemination is completely detached from intercourse (similar to the aforementioned opinions of Rabbi Finstein and Rabbi Waldinberg); and see additional references there. Dr. Vigoda's conclusion is that "it seems that the proper solution is to properly regulate, at the very least, this highly sensitive issue and set forth rules of registration and control to ensure, on the one hand, that a woman shall not receive sperm from a relative or an illegitimate person, and enable the prevention of relative-marriages, and on the other hand, keep in confidence the identity of the donors… it is important to verify that the informed consent of those who need the services of sperm banks shall include an understanding of the Halakhic meanings of the procedure, and the sooner the better". With respect to the Sperm Bank, also see the lecture of the Rabbinical Judge, Rabbi David Malka, "Halakhic Aspects in the Activity of a 'Sperm Bank'", the **Rabbinical Judges Conference**, 5768. With respect to the Halakhic concept of parentage, also see Eran Shiloh, "More on the Halakhic Concept of Parentage – 'For Your Son to be Removed'" **Weekly Torah Portion**, 324 (5768).

60. It transpires from all of the aforesaid, that on the one hand there is a substantial school, mighty pillars to lean against, taking the position which detaches the parental connection from the donor, and some believe otherwise. As in this issue on the whole, I shall join Dr. Vigoda in his call for the legislator to intervene, and to my mind, in the directions he suggested. However, in the current state of affairs, a donor might find himself under a concern with respect to his Halakhic status in the various aspects, regarding both the donation itself and its consequences, and this might constitute a component of and support a position which has reservations regarding the donation and its consequences as expressed by him in the case at hand, without myself riveting or necessarily joining that.

The set of contracts between the parties and other arguments

61. Ostensibly, as aforesaid, we could have viewed this case also through the glasses of the private law and the contracts law; the term contract has different meanings and interpretations, but it is common to consider a document which expresses the parties' wishes and reflects a "promise" that is to be respected as a contract to which the contract law shall apply anyway (see Gabriela Shalev, **Contract Law – General Part, Towards Codification of the Civil Law** (5765) p. 13). Apparently, the aforementioned set of forms creates two contracts between three parties – between the donor and the Sperm Bank, and between the Sperm Bank and the recipient of the donation; indeed, there is no contract between the donor and the recipient of the donation. However, the application of contract law shall not change the outcome; the same values and

consideration discussed thus far shall also be expressed here, through the principled concepts: the principle of good faith; public policy; and the principles of justice in the enforcement of a contract. Good faith, for example, is a window through which the values of our legal system and the values of public law flow into private law. The bottom line is therefore that the implementation of the aforementioned law and principles lead to the same outcome also according to contract law, although the potential problems as a result thereof are complex (for example, the question may rise, whether the contracts in the case at hand should be viewed as standard contracts pursuant to the Standard Contracts Law 5743-1982); it would not be appropriate to rule on these questions within a coincidental discussion, without sufficient foundation for the discussion.

62. In re **Nachmani**, Justice Dorner stressed why according to her, the contract law should not be applied to that case:

> "… An agreement to have children is not a contract. It is presumed that spouses would not be interested in applying contract law to matters of that sort… anyway, even if it would have been proven that this was the parties' intention, it would still not be in their powers to give the agreement between them the effect of a contract, since a contract to have children is against public policy…
>
> Nevertheless, the fact that an agreement to have children is not a contract does not entirely nullify the legal effect of the agreement or even a representation of consent, since in balancing the parties' rights there is room to also consider the fulfilment of the agreement between them, or the existence of a representation of an understanding. An agreement, as does a representation, may entail expectations and even reliance. These are to be considered among the other considerations affecting the balance (***ibid***, p. **717**)).

Indeed, the picture in the case at bar is different: and in my opinion the set of agreements in the case at bar should not be deemed as void in view of public policy (see paragraph 35 of the Petition); it seems that the continuity of sperm banks, which assist many people every year to consummate the right to bring children into the world, is a public interest; therefore, the creation of a consensual and steady set of agreements which sustains the sperm banks is a public interest, and of course a clear interest of the parties. Certain reinforcement may be found in the attitude of case law to the aforementioned issue of child support; the Courts' willingness to recognize child support of a husband of a recipient of a donation by virtue of a contractual undertaking between them reinforces the conclusion that the contract law and the private law may resolve such issues. In this matter, see the **Salameh** case; FC (Jer) 10681/98 **John Does v. John Roe** (September 19, 2000); and the opinion of Justices Or (p. 764) and Zamir (p. 780) and President Barak (p. 790) in the **Nachmani** case; also see Y. Margalit "Towards Determining Legal Parentage by Agreement in Israel", 42 *Mishpatim* 835; 887, (5772). Further reinforcement may be found in the approach of Israeli law to the violation of a

marriage promise, an approach which deems the consent to marry a non-enforceable consent, however a compensable one (see CA 5258/98 **Jane Doe v. John Doe**, IsrSC 58(6) 209, 220-225 (2004)). Nevertheless, I must pose a "warning sign" here; as we are not concerned with "regular" contract law, of the economic sphere. The issue at hand comprises significant emotional components, and the perspective of contract law is only one part of the picture.

63. Still in the sphere of contract law, the Respondents argued, and rightly so, that the contract between the donor of sperm and the sperm bank can be viewed as a contract which is not limited in time, and therefore such that each of the parties may terminate following a change of circumstances, subject to the duty of good faith. Indeed, supplementary interpretation of a contract in which no time limit has been set forth as an **integral part thereof**, leads to the conclusion that the parties did not presumably intend to be bound by the contract indefinitely. (CA 9609/01 **Mul HaYam v. Adv. Segev**, IsrSC 58(4) 106, 141 (2004)). The Petitioner claims that the Donor's part **ends** upon the sale of the sperm to the bank, and the present case does not concern the termination of an indefinite contract. I cannot agree with this; there is great doubt in my mind whether we can draw an analogy to the sale of a car, for example, to the sale of sperm. I believe, with all due cautiousness, that an individual selling his sperm – if we call the donation a "sale" – does not confer upon others proprietary ownership of the "usual" kind in his unique genetic constitution (and so, for example, it does not seem that he confers the right to genetic "duplication" – had it been possible, of course); in other words, the sperm bank does not acquire "proprietary ownership" of the genetic code of the donor in a manner which detaches him – as per the Petitioner's claim – from the continuation of the process (and the same is relevant also to arguments regarding the acquisition of the right to preserve sperm units or any other proprietary right). This is a complicated question, but it seems that it can be assumed that this is a contract with no time limit, which does not confer a proprietary-ownership right – and therefore a party to the contract may withdraw his consent.

64. As aforementioned, this possibility is not a "veto right" of the donor throughout; the "point of no return", wherein **the balance of rights and interests** shall change, and that donor shall loose the legal possibility to terminate the contract and retract his donation, may vary in accordance with various considerations; these include, *inter alia*, the force of the consent and the way in which it was expressed at the outset (e.g. the difference between written and oral contracts), the point in time in which the termination of the contract is requested; the type of process and physiological affinity under discussion (in this way, for example, I doubt – as aforesaid – whether a way back is possible in case the sperm donation has already been fertilized into an ovum of the recipient of the donation within an IVF, and certainly, *a fortiori*, there will be no way back when a pregnancy is carried by the recipient of the donation's body or a surrogate mother's body); the law pertaining to the determination of parentage in such a case, the consent of the other parties to the cancellation of the process (since there may be more than two parties to the contract – e.g. in the case of full surrogacy); and obviously, the best interest of the born child – and the list is not a closed list (for the beginning of a

discussion of these issues, see Y. Margalit, ***ibid***, p. 874). Note that the dispositive consent in itself does not define the point of no return; it is determined by law. Such is the case also in the Ova Donation Law, from which the Respondents wish to conclude; see Section 44, whereby a donor or a patient may withdraw from a consent that was given with respect to the extraction of ova from her body "at any time prior to the performance of the procedure to which she had agreed to designate the ova extracted from her body, and with respect to consent to designate ova for implantation – at any time prior to the fertilization of the ova, and she will be under no civil or criminal liability for the withdrawal of her consent as aforesaid". It should be noted at this point, that even if the legislator made no statement in the matter at hand, this Law can serve us at least as reinforcement of the conclusion to which we have arrived, since it addresses, in essence, a very similar issue.

65. In the case at bar – as indicated above – not one of the contractual documents between the parties include reference to the possibility that for reasons other than the quality of sperm or its medical suitability, the recipient of the donation shall be unable to be inseminated by the sperm donation which she selected according to the general data available to her; most certainly there is no concrete addressing of the question of retrieving the donation – hence the Petitioner's **reliance**. The mere option to pay for safeguarding of sperm units implies that possibly the formulators of the said forms did not perceive a possibility of withdrawal of consent. However, as emphasized above, *a priori* and regardless of the donor's wishes, the wishes of the recipient of the donation are **subject to the discretion of the attending physician** (Annex E-2) in all aspects pertaining to the selection of sperm to be used, and the bank further disclaims any responsibility "in any manner whatsoever for the loss, damage or other use of such sperm units" (Res/3). In such a case, in which the parties did not address in advance the possibility of withdrawn willingness regarding the use of the sperm, it should be incorrect to assume for them that it does not exist (since the contract nevertheless does not, as aforesaid, prevail their lawful rights). Moreover, this issue also affects the legitimate reliance interest of the Petitioner, which unequivocally carries weight, but does not tip the scales, *inter alia*, in consideration of the aforementioned contractual situation. Furthermore, in terms of the aforementioned point of no return, additional considerations lead to the acceptance of the Donor's withdrawal of consent, and in particular the lack of any physiological **affinity** thereto by the Petitioner at this point in time.

66. Finally, and without making a definitive ruling, I shall also mention the rule stipulated in Section 3(4) of the Contracts Law (Remedies for Breach of Contract), 5731-1970, which determines the "justice exclusion" to the enforcement of a contract (see Gabriela Shalev and Yehuda Adar – **Contract Law – Remedies: Towards the Codification of Civil Law** (5769) p. 230). This issue was also discussed in re. **Nachmani**, as stressed by Justice Strasberg-Cohen (dissenting opinion):

> "In the field of liberties, the law avoids forcing an individual to do that which he is not compelled to do, also in other contexts in the sphere of inter-personal relationships between humans. Every

> individual has the right to be married. However, there is not dispute that an individual who had been promised marriage, a promise that was broken, shall not receive from the Court a remedy of enforcing that promise. Every person has a right to start a family and have children. However, there is no dispute that the State – whether directly or through the Courts – shall not enforce an individual to have children against his will, even if he had promised his spouse to do so, and even if the spouse has relied thereon and perhaps even entered the marriage upon reliance and expectation of the same. And why is this not done? Not only because a mandatory injunction cannot force action (other than, perhaps, by way of contempt of court proceedings until the "recalcitrant" shall accede), but because of the in-principle and normative reason therefor, which is the law's refraining to call upon coercive measures for the purpose of fulfilling the heart's desires of one spouse, in contrary to the wishes of the other" (***ibid***, p. 683).

In my opinion, the aforementioned considerations are also relevant with respect to this exclusion, such that the contract – even if we accept the breach argument – may be viewed, in its current form and under the circumstances, as a non-enforceable contract (for a discussion of the considerations within the exclusion of justice, see **Shalev & Adar**, p. 231). Indeed, this brief discussion is far from exhausting the questions raised by this case; as aforesaid, I did not find that contract law indicates a weighty interest that calls for an outcome different to the one we reached. However, the tarrying in regulating the whole issue by legislation is evident.

Lateral Effects of the Case and a Call upon the Legislator

67. The main concern arising from the case at bar is the damage to the stability of the sperm banks in Israel, through the issuance of a "carte blanche" for donors to withdraw their donation as well as through recipients of donations who, similarly to the Petitioner, asked the specific sperm bank to reserve additional donations for them, and shall realize that this option is not guaranteed. The stability of this institution is, as aforesaid, a public and human interest of the highest degree. The uncertainty in this area – a result of the unsteady normative arrangement – undermines, *a priori*, the public's possibility to rely on the receipt of a sperm donation. The solution therefor is in the hands of the legislator.

68. For a review of the numerous problems arising from the lacking normative arrangement, see for example HCJ **Salameh**, p. 784; HCJ 998/96 **Yarus Hakak v. the Director General of the Ministry of Health** (February 11, 1997); **Shifman**, p. 85; **Margalit** "Towards the Determination of Consensual Legal Parentage", p. 885-889; **Shamgar**, p. 37-38; **Corinaldi**, p. 325-326. We are concerned with morally sensitive and complex issues, which should not remain in the sphere of uncertainty and partial regulation. We refer not only to the aforementioned lacking forms but also to additional aspects, such as determining fatherhood and the issue of anonymity, limitation of the number of sperm units from a single donor, the medical examinations for donors and

recipients of donations and the way of management of the sperm banks (for background, see the comprehensive audit by the State Comptroller, **Annual Report 57B for 2006**, p. 417-447). It would not be farfetched to assume that had the issue been handled thoroughly, the unfortunate case at bar could have been prevented, or, in the very least, all concerned parties would have known their rights in advance, rather than in retrospect.

69. In the meanwhile, and as a temporary measure, it is appropriate that the Respondents shall amend the consent forms of donors and recipients of donations in order to ensure that all concerned parties are aware of and understand their rights. So long as there is no legislation in this field, to regulate and define the donor's option to withdraw his consent, sperm banks must present recipients of donations with an accurate picture of the legal situation, in order to not promise what might not be fulfilled.

Comments before conclusion

70. My colleague, Justice Barak Erez referred (paragraph 14) to the sensitive issue of organ donation and to the fact that organs are not deemed as negotiable merchandise, although it is currently acknowledged by the Organ Implantation law 5768-2008; in this matter, she mentioned also other bodily donations, but stressed that "the recognition of the possibility to donate blood, sperm or ova did not turn them into 'assets' for all intents and purposes". I shall note that in HCJ 5413/07 **Jane Doe v. the State of Israel** (2007) I had the opportunity to address the approach of the comparative law and the Hebrew law in the area of organ donation from the living (see paragraph 9). I consent with my Colleague's comment, and shall stress the special sensitivity in these issues which require – on the one hand – a broad human perspective, and on the other hand, taking one step at a time in making the arrangements.

71. My colleague further justly referred (paragraph 19) to Directive 1.2202 of the Attorney General (of Heshvan 1, 5763-October 27, 2003) in the matter of "the obtaining of sperm *post-mortem* and the use thereof". I was the Attorney General at the time this directive was issued, and I remember the in-depth discussions involved therein, "from a broad moral-social perspective, which attributes significant weight to the concrete wishes of the individual in question (the deceased)…" (Section 4). It was further stated there, that "the Attorney General's position is based mostly on two central principles: one is respecting the deceased's wish which derives from the principle of the individual's autonomy and right to his body, and the second is the wish of his spouse…" (Section 9). In the matter at hand, however, I shall stress that the individual's autonomy of will played a major role in the decision therein, and was a leitmotif of the Directive.

72. Reading the opinion of my colleague, Justice Amit, I shall note that his comment (in paragraph 8) regarding Section 3(4) of the Contract (Remedies) Law is based on FH 21/80 **Wertheimer v. Harrari**, IsrSC 35(3) 252 (1981); but see **Sahlev & Adar** paragraph 6.60-6.62 on p. 229-231 and note 189 there, with respect to the legal outline. As for justice itself, we are considering the enforcement of the contract on which the donor is signed, and enforcement is requested **with respect to him**, which is the reason for the reference made to

the section in this context; and as recalled, to my mind, the decision lies in another legal field, such that the question I addressed related to the legal tool in the civil realm for applying these principles.

73. With respect to the relationship between the donor and the spouse in re **Nachmani** (paragraph 21 of my colleague, and paragraphs 40-42 of my opinion) as compared to the case at bar, indeed this is a "genetic" father who shall probably remain anonymous to his child, as obviously his child shall remain to him, rather than the "known" fatherhood discussed in re **Nachmani**. However, in my opinion the question, ultimately, is not whether the biological father shall come across the newborn, as could have been the case therein, but rather what goes through this father's mind, knowing that there is a child born of his sperm in the world, and such issue, as aforesaid, may permeate and deeply disturb his peace of mind, all in accordance to the individual in question and his feelings (as also noted by my colleague in paragraph 24).

Conclusion

74. The Petitioner's desire and wish to bring into the world another child from the sperm donation of the Donor are understood, and are also hard not to sympathize with. However, we cannot legally enforce that wish under the circumstances herein. The Donor's right to autonomy prevails over the interests at the basis of the Petition. The **Nachmani** case did not recognize an in-principle right to have children with a specific person; it recognized that in **the absence** of any other possibility to bring a child into the world, and under exceptional circumstances (*inter alia*, after the consummation of an IVF) the right to be a parent might prevail over the right of another person to not be a parent and to autonomy. This is not the situation in the case at bar. The Petitioner's right to be a parent, and her ability to parent, are not dependent on the sperm donor; furthermore, the Petitioner has no "advanced" affinity to the sperm, other than the payment for the storage of the specific sperm donation, prior to the Donor's request to withdraw his donation. Under these circumstances, the Donor's right to autonomy prevails. However, the current case highlights – as aforesaid – the necessity to regulate this area by the legislator, and as a first step, on the governance level, to amend the consent forms and the Director General's circular. We do hope that the Petitioner shall be able to consummate her right to be a parent as she wishes later on in life; the distress that was surely caused to her is not little, and we are deeply sorry for this. Indeed, the decision to donate sperm – and I find this term suitable also in view of the symbolic amount of money received by donors for providing the sperm – must be taken seriously and after considerable deliberation. Donors must know that their informed consent to give sperm to another person is relied upon by other human beings who wish to plan their lives and bring children into the world. Therefore, this decision cannot be easily revoked, and the revocation cannot be guaranteed under all circumstances, and it depends on the stage of the procedure; i.e. in the absence of a full normative arrangement, it is contingent on the circumstances, pursuant to the considerations reviewed above.

75. To conclude, we do not accept the Petition. Under the circumstances, there is no order for settlements.

Justice D. Barak-Erez

1. "If only I had a son, a little boy, with dark curly hair, and bright", wrote the poet, Rachel. It is hard to resist the natural yearning for parentage. However, despite the sympathy it raises, the focus of the Petition before us is nevertheless different. The question is not whether the Petitioner will be able to consummate her desire to be a mother of children, but rather whether she is entitled, under the circumstances, to consummate her plan to be a mother of children who all share one genetic father, and therefore share the same dark (or golden) curly hair.

2. Being the question at hand, I consent with the outcome reached by my colleague, Justice **E. Rubinstein** – although not without regret. I share the main conclusions of my colleague's comprehensive judgment; however I would like to clarify my opinion with respect to some of the reasons underlying the same, considering the legal and human complexity of the Petition.

The Framework of Discussion – Private Law or Public Law

3. *A priori*, the Petition before us was presented as based on contractual foundations. The Petitioner had her first daughter through the use of a sperm donation made by Respondent 3 (the "**Donor**"), which she received from the Sperm Bank of Rambam Medical Center, Respondent 2 (the "**Sperm Bank**"). After the birth of her daughter, the Petitioner made annual payments to the Sperm Bank to store for her additional sperm units donated by Respondent 3. Payment for the storage of the sperm units was arranged through a form of the Sperm Bank, titled, "Request for Storage of Sperm Units". The Donor, on his part, provided his sperm units to the Sperm Bank after having signed consent for their purpose of fertilizing women who apply to the Sperm Bank for that purpose, or for research purposes. In other words, the sperm donation was also regulated in a contractual form between the Donor and the Sperm Bank. The Petitioner therefore argues, that the contract law requires the acceptance of her Petition, as *pacta sunt servanda*. She argues that the contracts entered between the Donor and the Sperm Bank or between herself and the Sperm Bank contain no reservation regarding the regret of the sperm donor, and therefore the signed undertakings are valid and binding.

4. The first question to be reviewed is then whether the contractual framework upon which the Petition is based is the correct or exhaustive, normative framework for the discussion of the rights of the parties. Like my colleague, Justice **Rubinstein**, I believe that the answer to this question is negative. Indeed, there are two contracts executed with the Sperm Bank in the background of the parties' arguments – the Donor's donation contract on the one hand, and the Petitioner's purchase contract on the other. However, the existence of these contracts is not independent of the set of values at the basis of the legal system. The foundational values of the system "permeate" as well into the realm of contract law and affect their basic perceptions, including their public policy (see: Aharon Barak "Protected Human Rights and the

Private Law" **Klinghoffer Book on Public Law 163** (Itzchak Zamir, Editor, 1993); Daphne Barak-Erez & Israel Gilad "Human Rights in Contract Law and Tort Law: the Quiet Revolution" *Kiryat HaMishpat* H **11** (**2009**)). A different, and possibly more worthy, way to present the issue is that the constitutional law is the basic foundation on which other fields of law are built, which are therefore also shaped by the values and principles of constitutional law.

5. Hence, in my opinion, the correct path in examining the question before us should be based, first and foremost, on identifying the public rights and interests which are relevant to the case at bar. However, I will demonstrate below that in fact, the private law's perspective of this case does not yield a clear and unequivocal outcome as the Petitioner claimed. Moreover: insofar as we are concerned with principles from the sphere of private law, more than one legal framework may be perceived as relevant to the discussion of the case at bar – the law of property, contract law (including the distinction between a for-consideration contract and a gift contract) and more (for the possible effect of the legal sphere within which the issue is discussed, compare: Daphne Barak-Erez "Of Symmetry and Neutrality: Reflections on the Nachmani Case" 20 *Iyune*i *Mishpat* 197, 207-212 **(**1996**)** (hereinafter: "**Barak-Erez, Symmetry**)).

Public law: the right to be a parent, the right to dignity and the right to autonomy of will

6. In the present case, several rights play side by side in the legal arena, which should be well defined and distinguished. The Petitioner comes before this Court on behalf of two rights which she claims – the right to be a parent and the right to autonomy of will (which was also consummated under the circumstances in her contract with the Sperm Bank). Indeed, the right to be a parent was already recognized in the ruling of this Court, including in the present context, which concerns the desire to consummate the right through fertilization technology, in the series of rulings known as the "**Nachmani** Affair" (see: CA 5587/93 **Nachmani v. Nachmani**, IsrSC 49(1) 485 (1995) (the "**First Nachmani** Case"); CFH 2401/95 **Nachmani v. Nachmani**, IsrSC 50(4) 661 (1996) (the "**Second Nachmani** Case"; as well as other cases (also see: HCJ 2458/01 **New Family v. the Committee for the Approval of Embryo Carrying Agreements, the Ministry of Health**, IsrSC 57(1) 419 (2002)). The same applies to the right to autonomy of will, which was defined in the case law as one of the expressions of the right to human dignity (see for example: CA 294/92 **Chevra Kadisah Burial Society "Jerusalem Community" v. Kastenbaum**, IsrSC 46(2) 464 (1992)). In fact, the Petitioner's arguments, by virtue of the two rights, merge at least in part. Indeed, she presented an argument seeking to be founded upon the right to be a parent, but in fact she is seeking protection of the right to be a parent in a specific way – through control of the identity of the genetic father of her children. Considering the fact that she may consummate her choice to become a mother also through other sperm donors, her request is actually in the periphery of the right to be a parent, rather than in the center thereof, and it is

connected, to a large extent, to the desire to protect the Petitioner's autonomy of will in all aspects pertaining to the consummation of the right to be a parent.

7. Against the Petitioner's right to autonomy in consummation of the right to be a parent, stands the Donor's negative right not to be a parent (in the format of anonymous biological parentage). This right to avoid parentage (and for the sake of accuracy, the genetic parentage of an additional child) is a right that is fundamentally tied to human dignity. Insofar as we are concerned with the right to be a parent, under the present circumstances the collision of rights can be described as the collision between a peripheral expression of the right to be a parent in its positive aspect (a demand to consummate it with respect to a specific genetic father) and the objection to be a parent, which is closer to the core of this right in its negative aspect (since it is a general objection to genetic parenting in the framework of sperm donation, and not just the genetic parenting with respect to a specific mother). The right to not become a genetic parent, which is derived from the negative aspect of the right to be a parent, is in some ways similar to other expressions of the right not to be a parent, but is also different from them – considering the lessened burdens entailed in merely genetic parenting, as distinct from parenting which creates further affinities between a father and a newborn, and imposes additional legal obligations. Hence, the balances pertaining to the scope of its protection shall also be different. See and compare: Glenn Cohen, **The right not to be a Genetic Parent**, 81 USC L. Rev. **1115** (**2008**) (in this article, wherein the author calls to recognize the right to avoid genetic parentage as a distinct right, he expresses his opinion that the waiver thereof is to be allowed, but only when the waiver is explicitly and clearly made). In any case, for the continuation of the discussion, the reference to the recognition of this right shall suffice. The balance between this right and the Petitioner's rights is yet to be reviewed.

8. Part of the complexity which the case at bar arises derives from the fact that the parties herein raise arguments concerning different aspects of the very same right – the right to human dignity, within which the Israeli constitutional law has recognized both the right to autonomy and the right to be a parent on its various aspects (including the right to avoid parenting). This is not a "vertical" balance made within the limitation clause of the basic laws, but rather a "horizontal" balance between rights, and to a great extent, between different aspects of the very same right.

9. In the past, this Court was required to face the question of balancing the right to be a parent and the right not to be a parent, in re **Nachmani**. After numerous disagreements, the majority opinion in the additional hearing supported the mother's right in that case to consummate her right to be a parent. In other words, in the balance between the right to be a parent and the right to non-parenting, the right to be a parent prevailed in that case. However, the circumstances of the case and the nature of the conflicting rights therein were different. In re **Nachmani** the Court was required to rule in the question of ova which were fertilized with the father's sperm, under circumstances in which the woman's chances to fertilize other ova of hers were extremely low, perhaps non-existing, i.e. deciding in favor of the woman was based on the protection of her right to any biological parenting – as distinct from protection

of the manner of consummation of the right to be a biological parent, such as in the case at bar. The potential father's objection was raised at a time when the reliance of the woman on his consent was decisive and irreversible. The case at bar differs from re **Nachmani** in some important aspects. First of all, we are not concerned with the mere possibility of the Petitioner to become a mother. Second, we cannot indicate significant reliance such as in re **Nachmani**. The Petitioner paid to store additional sperm units of the Donor only after having given birth to her daughter. Indeed, as per her claim, which was not contradicted by the Ministry of Health, according to the policy of the Sperm Bank she only could have asked that sperm units are stored for her after the success of the first fertility treatment. This matter was not sufficiently clarified to us, but even if this is so, the Petitioner did not rely on the option to store the Donor's sperm units prior to the fertilization process. Moreover, if the Donor's position is accepted, the Petitioner shall not be required to undergo additional difficult physical treatments (such as the additional ova extraction). Essentially, the injury to the Petitioner is expressed in dashed, unfulfilled expectations. It is noteworthy that in protecting the rights of the female spouse in re **Nachmani** – by recognizing the existence of reliance – Israeli law (justifiably) went much further than the common practice of other systems. To compare, it is noted that in the matter of **Evans v. United Kingdom, App. No. 6339/05** (2006), which addressed an issue similar to the **Nachmani** affair, the European Court recognized the right of a father to withdraw his consent to an IVF procedure even at a stage in which his sperm was already used for fertilization (similarly to the ruling in England in this matter – **Evans v. Amicus Healthcare and others [2004] 3 All E.R.** 1025. Anyway, as aforesaid, there is no doubt that the irreversible nature of the situation created in re **Nachmani**, as well as its affinity to the core of the right to be a parent, varies from the case at bar. It is important to emphasize that the point of "no return" in re **Nachmani** was the creation of the fertilized ovum, and therefore, in my opinion, there is no doubt (an addition which I make in reference to the opinion of my colleague, Justice **Rubinstein** in Paragraph 65 of his ruling) that had the fertilization of the Petitioner's ova by the Donor's sperm been completed in the case at bar, he could not have withdrawn his consent. In that state of affairs, accepting the Donor's position might have forced the Petitioner to repeat the painful procedure of ova extraction, and again go through the agonizing anticipation for the outcome of their fertilization (which is never guaranteed). This cannot be accepted.

10. In fact, the comparison to re **Nachmani** is illuminating in one other aspect pertaining to the grounds at the basis of the Donor's objection to the continuation of the fertilization procedure. In the **First Nachmani** Case, Justice **T. Strasberg-Cohen** supported – at that time as part of the majority opinion, and later in a dissenting opinion in the additional hearing – the prioritizing of the right not to be a parent, also in consideration of the economic burdens entailed therein (***ibid***, p. 501). In contrast, in the case at bar, the argument on behalf of the right not to be a parent is not at all based on the fear of monetary obligations towards the anticipated newborn, but is rather made on behalf of emotion, pain and identity (compare: **Barak-Erez**, **Symmetry**, p. 201). From this perspective, it is easy to be convinced that the emotional injury to the Donor is significant – clearly he is not motivated by

additional reasons of an economic nature. Indeed, in some way the hurt to the Donor is less acute than in the case wherein the question is whether use can be made of a sperm donation for the purpose of first-time fertilization (a case wherein avoiding use of the sperm shall absolutely prevent the situation of being a parent to a child whom the Donor shall not know and not raise). The injury entailed by genetic parentage of the Donor to a boy (or a girl, in this case) unknown to him has already been partly inflicted, as far as he is concerned. However, one cannot dismiss the damage caused to the Donor by increasing the hurt through genetic parentage of additional children, against his will and understanding.

11. The distinction between the protection of the right to be a parent and the limited protection of the desire to consummate the right to be a parent in a specific way is also recognized in other contexts. Despite the in-principle recognition of the right to be a parent, parents cannot, under the usual circumstances, choose the sex of the fetus, although this can be done through using relatively simple technology and scientific tools. The right to be a parent, in this context, is the right to be a parent of a child, not a child whose sex was pre-chosen. The right to choose the sex of the fetus is regulated, for the time being, in the circular of the Director General of the Ministry of Health, and is only granted in very limited contexts (see: **The Ministry of Health, Director General Circular**" Selecting the sex of the fetus in IVF Procedures" (2004)), under circumstances of a genetic disease in the family, which is identified with one of the sexes. (see further: Ruth Zafran "the Scope of Legitimacy in Selecting the Genetic Characteristics of a Newborn by his Parents – Selecting the Newborn's Sex for Social Reasons as a Test Case" 6 *Mishpat Ve'Asakim*, 451 (2007)). Indeed, a distinction can be made between preference with respect to the newborn's sex for emotional and cultural reasons and preference such as the Petitioner's, to bring additional children into the world, to be full biological siblings to her daughter, a preference which may have rational reasons (such as in contexts in which a donation of organs is needed in the family). Therefore, the comparison between the situations is not complete. Moreover: apparently, the Petitioner's preference is also a known preference among those who are assisted by fertilization technologies in similar situations (see for example, the instance brought by Anne Reichman Schiff, **Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity**, 80, Iowa L. Rev. 265 (1995)). However, the said comparison indicates the fact that the protection of the right to be a parent does not mean protection for the full liberty with respect to the manner of its consummation. For that purpose, balances are required against other rights and interests, including the rights of the sperm donor, in the case at bar.

12. One might add, that also with respect to other rights, there is a distinction between the broad protection for the core of the right, and the limited protection for specific choices regarding its consummation, the price entailed in which it is to be balanced against other rights or other social interests. For example, the Israeli law recognized the right to education as a basic right. This right includes the rights of the parents to be senior partners in the formulation of their child's education. However, this right does not mean the right to

always determine to which school their child shall attend and what would be the curriculum in that school (compare: Yoram Rabin, **the Right to Education** (2002)).

The law of property and the bounds of commodification

13. A first connecting point between the realm of human rights and that of the private law, in which the Petitioner claims her rights are grounded, is expressed in the assumption that the Petitioner has acquired full ownership of the Donor's sperm. This assumption is based on the perspective that "everything is negotiable", and raises a discussion regarding the boundaries of commodification. The question is whether body organs, or other intimate aspects of the human behavior, are indeed commodities for all intents and purposes. Is sperm donation really a tradable commodity, no different to a chair or a table, which were sold for a fair price? The answer to this question is not at all obvious. Not everything is for sale. As technology develops, new questions arise with respect to the scope of tradable commodities and the level of willingness to deem anything which can be technically transferred as a commodity (see, in general, Rethinking Commodification (edited by Martha M. Ertman & Joan C. Williams, 2005; Lori Andrews & Dorothy Nelkin), Body Bazaar – The Market for Human Tissue (2001); Michael Sandel, Justice – What is the Right Thing to Do? 88-112 (2012)).

14. At this time in Israel, human organs are not a regular, tradable commodity (for different opinions on this issue, see and compare: Joshua Weisman "Organs as Assets" 16 *Mishpatim*, 500 (1986); Gad Tedeschy "The Ownership of Organs Taken from a Living Person" 38 *HaPraklit*, 281 (1991)). Indeed, for pragmatic reasons, the possibility to donate body organs has been recognized, when the donation does not harm the donor's health (see: HCJ 5785/03 **Gidban v. the State of Israel, the Ministry of Health**, IsrSC 58(1) 29 (2003)). Today, this possibility is anchored in the Organ Implantation Law 5768-2008 (the "**Organ Implantation Law**") (see mostly Sections **13-17** of the Law). In addition, the transfer of tissues and cells which are perceived as renewable or non-vital is possible in the format of a donation or a quasi-donation (to which the Organ Implantation Law does not apply – the definition of "organ" in Section 1 of the Law excludes "Blood, bone marrow, ovum and sperm"). Blood donation is considered as not only possible, but also desired, and the Law recognizes the possibility to receive with respect thereto an "insurance" for the receipt of blood donation to the person, his spouse and children under the age of 18 (according to the blood insurance regulations of MADA). Over the years, in recognition of the renowned importance of the consummation of the right to be a parent, certain physiological aspects of the fertilization process also became transferrable, in a format which is defined as a donation, but in fact entails certain consideration, which is defined as compensation for effort and inconvenience, as opposed to payment of an actual price. The field of sperm donation has been regulated for quite some time now (pursuant to the People's Health Regulations (Sperm Bank) 5739-1979 (the "**Sperm Bank Regulations**")). Later on, the issues of surrogacy procedure were also regulated (pursuant to the Embryo Carrying Agreements Law (Approval of Agreement and Status of the Newborn) 5756-1996 (the "**Surrogacy Law**")),

as was the issue of ova donation (pursuant to the Ova Donation Law 5770-2010 (the "**Ova Donation Law**")). It is important to note that in all of these instances, the laws or regulations did not recognize sperm, a uterus or ova to be an "ordinary" commodity on the market. On the contrary; despite the fact that in all of these cases payment is made to those defined as "donors", such payment is limited in scope, supervised and defined as compensation for effort and inconvenience, as distinguished from consideration for the body parts or the use thereof (see: Section 6 of the Surrogacy Law and Section 43(a) of the Ova Donation Law, similar to Section 22 of the Organ Implantation Law). The issue is not specifically regulated in the regulations pertaining to sperm donation, since this is not an overall arrangement within primary legislation. The decisions to open the door for such limited transference of body organs were no simple decisions. On the one hand, it is a necessity that should not be condemned, or at least is understandable, but on the other hand, they threaten to turn people into commodities or a container for potential commodities, which literally has a price. The disputes in this question continue. The recognition of the possibility to donate blood, sperm or ova did not turn them into "assets" for all intents and purposes.

15. The decision regarding the transferability or partial tradability of body organs, or renewable body organs as in the present case, does not need to be all embracing. As we realized, the arrangement applicable to sperm donations recognizes the possibility to transfer sperm for the use of the Sperm Bank, against some consideration, which is not a full market "price". However, this does not mean that the sperm thus turns into an ordinary tradable commodity. The limited commodification is embodied in strict regulation of the price and limitations on the transfer of sperm to third parties (which is only allowed for the purpose of fertilization or research). We face the question of whether the limited tradability of sperm cells should also be asserted through a withdrawal right, to be enfolded in the consent to donate sperm, and which allows the donor to withdraw his consent prior to the fertilization process. I believe that the answer to this question, in instances such as the case before us, in which the Petitioner did not change her position to the worse, is positive.

16. The necessity to recognize the limitations that should be imposed on viewing body organs as tradable and transferrable property may be demonstrated through examples that go beyond the facts of the current case. Would we perceive a situation whereby the "neutral" attitude towards the proprietary and business nature of purchasing the rights to the sperm cells would lead us to recognize the possibility to cast an attachment thereon? Would a person who donates his body to science be prohibited from reversing this decision, even though he signed an undertaking of a decisive nature in this matter?

17. This attitude is also reflected in the Ova Donation Law. Pursuant to Section 44(a) of that Law, "a donor… may withdraw her given consent… at any time prior to the performance of the procedure for which she agreed to designate the ova which were extracted from her body, and with respect to a consent to designate ova for implantation – at any time prior to the fertilization of the ova, and she will be under no civil or criminal liability for the withdrawal of her consent as aforesaid". The explanatory notes to the bill of the Ova

Donation Law, 5767-2007, are illustrative of the issue we are concerned with: "the consent of a woman to donate ova from her body in accordance with the provisions of the proposed law, involves significant results – giving birth to a child who is the biological child of that woman, while she waives any parentage affinity towards him. Therefore, such a donor should be allowed to withdraw her consent with respect to the procedures performed in the ova extracted from her body, at any time prior to the performance of the procedure to which she has agreed to designate such ova, and with respect to consent to designate ova for implantation – at any time prior to the fertilization of the ovum" (explanatory notes to Section 42 of the bill).

18. Indeed, Israeli law does not specifically regulate the issue of withdrawal of consent in all aspects pertaining to sperm donations, since the issue is not yet established in primary legislation. However, it would be reasonable to conclude that the statutory arrangement applicable to ova donation reflects the perception of the Israeli legislator regarding the limitation, which would be appropriate to apply to the use of reproduction substances that are provided by way of donation. It is possible and appropriate to apply here the principle whereby acts of legislation that regulate similar issues should be interpreted such that they are consistent with one another, in a manner that promotes the values of the system.

19. The reluctance to apply a full property regime to sperm cells is also expressed in the regulation of the use of sperm cells of a deceased person. The use of sperm cells under such circumstances is decided in consideration of the wishes of the person from whom it was taken, and not on the grounds of proprietary principles. In Israeli law, the position that guides the regulating of this issue, as formulated by the Attorney General, is that the use of sperm cells of a deceased person is based on the assumption of his estimated wishes. See: "The Retrieval and Use of Sperm After Death " **the Attorney General Guidelines no.** 1.2202 (5763). A similar approach is also expressed in the rulings of the courts of other legal systems. In the precedential judgment, wherein a dispute took place over the rights to sperm of a deceased person, between a sperm bank and his widow – **Parpalaix v. Cecos** (1984), the court in France rejected the position of the sperm bank which claimed a proprietary right, and favored the widow, who presented indications to the deceased's wishes that she will be fertilized by his sperm (further see: E. Donald Shapiro & Benedene Sonnenblick, **The widow and the Sperm: The Law of Post-Mortem Insemination**, 1 J.L. Health 229 (1986-1987); Gail A. Katz, **Parpalaix c. Cecos: Protecting Intent in Reproducting Technology**, 11 Harv. J. L. & Tech. 683 (1998)). Likewise, in **Hecht v. Kane**, 16 Cal. App. 4th 836 (1993), in which the parties to the dispute were the spouse of a person who had committed suicide, and his adult children. The California Court rejected the attitude that considers the frozen sperm units, which the deceased left behind, as property for all intents and purposes, belonging in his estate. This ruling stated that the question of using the sperm units should be answered after further investigation regarding the deceased's wishes. The ruling further clarified that insofar as his spouse shall be granted rights to these sperm units, she will be able to use them only in an attempt to conceive thereby, and not for any other purpose. This reservation once again brought into focus the

limitation of treating sperm units as "ordinary" property (further see: Bonnie Steinbock, **Sperm as Property**, 6 Stan. L. & Pol'y Rev. 57 (1995); Ernest Waintraub, **Are Sperm Cells a Form of Property? A Biological Inquiry into the Legal Status of the Sperm Cell**, 11 Quinnipiac Health L. J. 1 (2007).

Contract law: Contract Interpretation and Waiver of Right

20. From the law of property to contract law. Insofar as we are in the realm of contract law, the first question is the scope of liability of the sperm donor, pursuant to the language of the undertaking form that he has signed. And to be more concrete: does the language confer upon him a right to change his mind, or alternatively – deny him the right to reverse?

21. The letter of consent, which a sperm donor is required to sign, appears in Annex C to the **Circular of the Director General of the Ministry of Health** "Rules regarding the management of a Sperm Bank and Instructions for the Performance of Artificial Insemination" (2007). This letter of consent includes the following language of undertaking: "I agree to donate from my sperm for the use thereof for artificial insemination of women or for research purposes, as per the considerations of the Sperm Bank". This language does not include explicit reference to the sperm donor being granted a right to change his mind. Yet, nor does it explicitly deny such a right. In other words, the (current) letter of consent signed by sperm donors is silent in this matter. An interpretive question therefore arises: how should this silence be interpreted? Considering the fact that the sperm donation pertains to the personality of the donor and his dignity, it is appropriate that the waiver of the right to reverse be regulated, at least, by an explicit reference to the issue in the letter of consent. A separate question is whether it is appropriate to allow an individual to irrevocably waive the right to withdraw the donation under circumstances in which no irrevocable reliance has been created by a fertilization procedure that has already begun. However, it may be stated that, in the least, the arrangement that denies the right to reverse in cases such as the one before us (prior to the use of the donor's sperm for the purpose of fertilization) should be explicit and clear (as also noted by Cohen in his aforesaid article). This is emphasized even more if we take into account the view of the sperm donation as a "donation" or "gift", in contrast to a "sale", as shall be specified below.

22. In order to complete the picture, it is important to reiterate that the Petitioner signed the documents pertaining to the storage of sperm units only after having given birth to her first child. These documents too, make no explicit reference to the question of the donor's withdrawal, and they further state that the Sperm Bank shall not be liable for the "loss, damage or other use of such sperm units".

23. It is noteworthy that such issues, which are so sensitive and so essential for the parties involved, as well as for the public interest in its broad sense, should be explicitly regulated, rather than requiring, in retrospect, the interpretation of experts – not only for legal considerations but first and foremost for reasons of fairness. Undoubtedly, one of the important lessons to be learned from this case is the preparation of suitable forms for the signature of sperm donors and

women who wish to conceive by sperm donation, to be also accompanied by detailed and clear explanatory sheets.

Contract law: a for-consideration contract or a gift

24. Insofar as the case is also reviewed from the contractual perspective, it is appropriate to further inquire whether the consent to sperm donation is a regular consent, or one which is rooted in the Gift Law (pursuant to the Gift Law 5728-1968 (the "**Gift Law**")), or should at least be discussed while concluding from this law (see and compare: Mordechai A. Rabello, **The Gift Law, 5728-1968** 212 (Second Edition, 1996)). A major difference between the law which applies to a regular contract and that which applies to a gift contract (whether totally unilateral or accompanied by a condition is an obligation) is the recognition of the right of reversal which is granted under certain conditions to the giver of the gift, out of recognition that he is performing an act of benevolence, an act which benefits the other. Section 5(b) of the Gift Law 5728-1968 (the "**Gift Law**") stipulates, "so long as the receiver of the gift did not change his situation in reliance of the commitment, the giving party may withdraw it, unless he had waived this permission in writing". Section 5(c) recognizes the possibility of withdrawal of a gift also due to "considerable deterioration in the financial condition of the giving party". These provisions do not necessarily apply to the case at bar, since one may assume that the gift in this case was concluded in an act of conferral (Section 2 of the Gift Law). Furthermore, the sperm donation still involves payment, although not large. However, if only by way of syllogism, these arrangements indicate that the legislator chose to be compassionate and measured towards those who *a priori* expressed these virtues through their own altruistic act. In this context, it is particularly worthy to emphasize the following two: first of all, Section 5(b) stipulates that the prevention of withdrawal from the person who obligates himself to the gift requires "a written waiver of this permission". In other words, the wavier of the giver of the gift of the right to withdraw his obligation requires specific and formal arrangement. Secondly, Section 5(c) of the Gift Law refers to a change in the economic situation of the giving party since it concerns the typical case that the Law addresses – a gift of economic value. Insofar as a sperm donation is concerned, by way of syllogism, a change in the personal situation may be relevant, for the same reasons.

25. Indeed, sperm donors often do not attribute much importance to the personal aspect entailed in the donation. However, in those cases in which the sperm donor later feels sadness and remorse regarding his willingness to take part in this process, should society treat him with the same legal rigidity which should apply to a merchant who canceled a merchandise transaction? I think not. This is required by the virtue of humanness. In my opinion, in the present case, it is of no particular importance that the donor had a "change of heart" following repentance ("Tshuva"). The main issue is that he feels true remorse regarding the sperm donation, whether the reasons therefor are religious, moral or emotional (for a distinction between the right to freedom of religion and protection of religious feelings, see and compare: Danny Statman & Gideon Sapir "The Freedom of Religion, Freedom from Religion and Protection of Religious Feelings" 21 *Mechkarei Mishapt* 5, (2004)). I wish to further note,

in this context (in reference to section 61 of my colleague's ruling), that I do not believe that the review of the Halakhic sources which he refers to eventually affect the conclusion we reached in this case. It seems that my colleague, Justice **Rubinstein**, does not believe so either. On the contrary, as my colleague noted, some adjudicators take a stance that detaches the parentage affinity between the sperm donor and the newborn, and consider the sperm of the donor to be "abandoned" (see: Michael Corinaldi "The Legal Status of a Newborn Conceived by Artificial Fertilization" 4 *Kiryat Ha'Mishpat* 361, (2004)). Also amongst the stringent adjudicators, who recognize the affinity of the newborn to the sperm donor, some limit this stringency to certain issues only (prohibition of incest) and not to others (such as child support and inheritance) (see: Yossi Green "Is There a Solution to the Problem of Bastardry through Medical Technologies in the field of Fertilization?" 7 *Moznei Mishpat* 411, 422-425 (2010)). Under these circumstances, in my opinion, no weight is to be attributed to the fact that other, more stringent, approaches can also be taken, of which the Donor himself did not claim.

Contract law, contractual adversary and normative duality

26. Insofar as the Petitioner's argument is seeking foundation in contract law, it is important to pay attention as well to the lack of contractual adversary between her and the sperm donor. Insofar as the Petitioner has a contractual right, such right derives from an agreement she had with the Sperm Bank (which on its part obtained the sperm donation within a separate contractual arrangement with the Donor). The payment made by the Petitioner was also transferred by her to the Sperm Bank, unrelated to the earlier payment made by the Sperm Bank to the Donor. Hence, the correct perspective for the review of the scope of her contractual rights should focus on the contract she has with the Sperm Bank. This contract is not only subject to the regime of contract law, but is also under the yoke of public law – being a contract made with a public body, in this case a governmental hospital. It is further subject to public law, alongside contract law, according to the concept that is called "normative duality" (see, for example, Daphne Barak-Erez, **Citizen Subject - Consumer, Law and Government in a Changing State** 234-238 (2012)). The governmental hospital is also expected to act in the framework of this contract out of commitment to the principles of public law that it is bound to. In this context, it must also examine whether the case calls for the application of the rule of rescission, which enables an administrative authority to be released from a contract it entered for the purpose of protecting an important public interest (see: Daphne Barak-Erez, "The Rescission of a Government Contract: A Test Case of Normative Duality" 11 *Ha'Mishpat*, 111 (2007)). The public interest in this case also includes the protection of the rights of sperm donors, as shall be specified below.

27. As a rule, we must additionally review the question before us from the perspective of the duties of the governmental hospital towards the sperm donor. The governmental hospital is to also take into consideration the donor's rights. In fact, the question is not if the governmental hospital should be considerate towards the donor, but rather what should the scope of such

consideration be. To illustrate, a simpler case than the one before us can be imagined – that of a donor who regrets his donation after its delivery had been completed and before a specific woman had asked to make use of his sperm for the purpose of fertilization. Under these circumstances, would a stringent attitude of the sperm bank, whereby once the sperm donation is completed there is no longer room for regret, be accepted as reasonable? I think the negative answer to this question is obvious. On the other hand, the answer to the opposite extreme case is also clear, when use has already been made of the sperm for the purpose of fertilizing ova, such as in re **Nachmani**, and therefore reversal is no longer a possibility. The case at bar is an interim case. For the reasons explained thus far, I believe that here too, the "point of no return" is yet unformulated.

Comparative law and the limitations thereof

28. A new and complex question such as the one before us, ostensibly directs us to the almost infinite reserves of comparative law, as a source for inspiration and learning. In fact, this is a blessing, which in the present circumstances is of limited benefit. The answer to the question is necessarily founded on ethical and ideological views, which are often culture and geography dependent. Indeed, a sample review of other systems – wherein the discussion is often still unconcluded – indicates that there is no agreed answer to the question. Moreover, the answer provided for the question depends on resolving other questions, such as the question whether the identity of the sperm donors may be disclosed to the children born from their sperm upon their maturity. For example, in England, sperm donors are allowed to withdraw their donation (see: Human Fertilization and Embryology Act 1990, Schedule 3, Section 4(2). Further see: Peter D. Sozou & Others, **Withdrawal of Consent by Sperm Donors**, 339 British Medical Journal 975 (2009)). The English attitude regarding this issue is part of a broader perception which also recognizes the possibility of withdrawal of a donation when an ovum had already been fertilized by the donor's sperm, as ruled in re **Evans**, mentioned above, which expresses an opinion different than that of Israeli law, as formulated in re **Nachmani** (further see: Heather Draper, **Gametes, consent and points of no return** 10(2) Human Fertility 105 (2007)). Recognizing the option granted to sperm donors to withdraw their donation is expressed in Australian legislation (wherein the issue is not regulated on a federal level, but rather by state legislation only. See: Human Reproductive Technology Act 1991, Section 22 with respect to Western Australia, and Assisted Reproductive Treatment Act 2008, Section 20 with respect to Victoria). Canada offers another approach. The regulations which regulate the issue there – Assisted Human Reproduction (Section 8 Consent) Regulations, 2007, issued under the Assisted Human Reproduction Act, 2004 – distinguish between a situation in which sperm or ovum are provided for the purpose of fertilization within a relationship with the provider of sperm or ovum, and sperm or ovum donation for a third party. While in the first situation consent may be withdrawn at any time so long as no use was made of the sperm or ovum, this cannot be done in the latter situation, if notice had been given by the third party that the donated substance was designated for him (in fact, as in the case of the Petitioner). This arrangement is considered to set the "point of no return" much earlier,

and was criticized on these grounds. See: The Standing Senate Committee on Social Affairs, Science and Technology, Ninth Report (14 February 2007), at p. 2. And further see: Porsha L. Cills, **Does Donating Sperm Give the Right to Withdraw Consent? The Implications of In Vitro Fertilization in the United Kingdom and Canada**, 28 Penn. Int'l L. Rev. 111 (2009). A relatively unconventional approach may be found in Spanish Law (Law 14/2006 dated May 26, 2006 on Fertility Assisting Technologies – Técnicas de reproducción humana asistida). Section 5 of this Law allows the sperm donor to withdraw consent, but limits this right to circumstances under which he needs the sperm cells for his own needs, and stipulates that under such circumstances the donor shall be required to compensate the relevant sperm bank. The Bill that was drafted by the American Law Institute regarding this issue – Model Act Governing Assisted Reproductive Technology – includes a detailed arrangement with respect to the manner of granting consent to IVF procedures, by all parties involved therein, including the donor. According to Section 201 of this bill, the information regarding the consent and its boundaries should also be provided orally as well as in writing, while explicitly addressing the question of the right to withdraw the donation, and the time at which it expires. The section further stipulates that the right of withdrawal is effective only so long as the sperm cells were not transferred, but this rule is intimately connected to the overall regulation of the issue of informed consent and the information provided prior to its granting.

Expectations, heart's-desires, protected expectations and rights

29. The Petitioner's heart-desire to be a mother of children who all share the same genetic father is therefore not fulfilled. Her expectations are frustrated. However, from the legal aspect, such expectations do not enjoy full legal protection. Essentially, the Petitioner did not rely on the possibility to receive additional sperm donations from the same donor prior to giving birth to her firstborn. She paid in order to secure the use of the donor's additional sperm units only after successfully conceiving from the donor's sperm. As transpires from the above discussion, it is possible that even the reliance of a woman on the purchase of several sperm units by the same donor would not suffice to prevail over the donor's right not to be a parent, under circumstances in which no further injury is caused to the woman. Nevertheless, in the case at bar, we cannot indicate reliance of the petitioner on the possibility to secure the use of several sperm units of the same donor prior to the original fertilization from which she had her daughter, as distinct from interrupting her expectations further down the road.

30. An additional perspective to review the case pertains to the comparison between the Petitioner's expectations to consummate parentage of several children with one genetic father, and the ability to protect this kind of expectation in the ordinary course of life. Indeed, in most cases, partners who choose to make a home and bring children into the world hope and plan that, insofar as they wish to have several children, their lives will enable them to jointly parent children who are full biological siblings to each other. This expectation may materialize, and indeed it often does. However, this is not always the case. Partners may separate, for example. In such cases, even if one

of them did have an expectation to consummate joint parenting of several children with the partner from whom they separated – such expectation is not a protected one. Indeed, there is additional hardship in the situation of the Petitioner, who has no direct connection to the person from whose sperm she conceived. She cannot persuade him and directly appeal to his feelings, as distinct from the case of a "regular" separation. Truly, the Petitioner differs from a woman who conceived by a partner with whom she has an ongoing relationship which naturally experiences ups and downs, and in which it is obvious that family planning is the responsibility of both partners, and not just one of them. The comparison is therefore incomplete. However, it highlights the fact that the law does not protect, under regular circumstances, the expectation to give birth to full biological siblings. My conclusion in this context is similar to the conclusion reached by my colleague Justice **Rubinstein** (Section 35 of his ruling). In a broader perspective, the absence of legal protection of a family model which is close to that of a traditional family, a family which includes several biological siblings, integrates into the growing recognition that our society includes different types of families, whose members can and should experience happiness in their lives (further see: Sylvia Fogel Bijawi "Families in Israel – between the Familial and Post-Modernism" **Gender, sex, Politics** (Dafna Azrieli and Others, Editors, 1999)).

31. In view of the considerations presented in the discussion thus far, it is also doubtful whether the Petitioner's expectations are worthy of full protection. Such full protection would cause a disproportionate harm towards the sperm donor. In addition, broader policy considerations might add to the aforesaid, pertaining to over-deterrence of potential sperm donors in the future (and particularly in consideration of the fact that already now there is chronic shortage of sperm donors. See: **Background Document regarding Sperm Donation in Israel 2** (the Knesset's Research and Information Center, March 1, 2005)). It can further be assumed that these considerations shall also be reviewed when additional questions regarding the rights of sperm donors are raised in the future, e.g. with respect to the expectations of children who are born from sperm donation to seek out the identity of the biological father (see and compare: Ruth Zafran "Secrets and Lies – The Right of an Offspring to Seek Out their Biological Fathers, 35 *Mishpatim* 519 (2005)). To emphasize: the Petitioner in this case is not paying the price of protecting these future donors, insofar as they shall seek such protection. The required outcome in the case at bar is also the desired outcome in other instances, and not vice versa.

Technology, Science and Law

32. The case at bar is yet another example of the new challenges presented by scientific and technological progress. From a medical aspect, a woman who seeks conception may select the preferred sperm donor after having reviewed his specifications as well as the availability of a sperm unit "inventory" provided by him. The availability of such possibilities to her join many other situations in which technology creates new opportunities – freezing ova or storing sperm (for future use thereof), early detection of embryo genetic diseases, and more. These situations repeatedly raise the question of whether the availability of a certain mode of action, as a matter of science and

technology, necessarily entails the existence of a right to use it, and that the exercise of such right is not to be limited. In the present case, since there is a technical possibility to use the additional sperm units of the Donor, the assumption lying at the foundations of the Petition was that it would be possible to actually use them, without limitation. Indeed, the technology opens up new horizons, allowing us additional choices. However, the fact that certain scientific and technological possibilities allow us to take certain steps does not, in itself, confer the right to do so. Surely this must be considered when against the possibility to use the technology stands, not only a vague concern of potential implications for society, but a concrete sperm donor whose rights are expected to be injured.

Legislation and preliminary arrangements

33. The situation revealed to us with respect to the regulation of sperm donations is far from satisfactory. Such an essential issue, with implications on the consummation of the right to be a parent, as well as on family law in general, is lacking proper legislative regulation. The operation of a sperm bank is only loosely regulated by legislation, and even this is only by secondary legislation – the Sperm Bank Regulations. These regulations limited the management of a sperm bank to recognition by the Director General of the Ministry of Health, and further stipulated that the artificial insemination from a donor shall only be performed in a hospital which has a sperm bank and by sperm which was obtained from this bank. More detailed arrangements only exist in the form of a circular of the Director General of the Ministry of Health, as explained earlier, and this, too, lacks reference to fundamental issues, such as the one before us. The current situation therefore has two flaws: first of all, the current regulation does not address essential and important questions; second, in any event, the regulation is not by primary legislation which contains preliminary arrangements, as required by the Court's ruling (see: HCJ 3267/97 **Rubinstein v. The Minister of Defense**, IsrSC 52(5) 481 (1998); HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel v. the Prime Minister of Israel**, IsrSC 61(1) 1 (2006)). This state of affairs is improper, as a matter of principle, and further contributes to situations in which expectations are created in the hearts of the involved parties, in the absence of clear regulation. This is stated *a fortiori*, since the issue of sperm donations is not regulated by primary legislation at all, as distinguished from situations where primary legislation exists, but it is not sufficiently detailed (for various approaches regarding the scope and status of the duty to stipulate preliminary legislative arrangements, see: Gideon Sapir "Preliminary Arrangements", 32 *Iyunei Mishapt* 5 (2010); Yoav Dotan "Preliminary Arrangements and the New Principle of Legality" 42 *Mishpatim* 379 (2012); Barak Medinah "The Constitutional Rule regarding the Duty to Stipulate 'Preliminary Arrangements' by Law – Response to Yoav Dotan and Gideon Sapir" 42 *Mishpatim* 449 (2012)). A law addressing the issue, had one been enacted, could have clarified what is the "point of no return" in a sperm donation process, in terms of the donor's ability to withdraw his consent, and further stipulate rules in other matters of general public importance, such as the scope of use of sperm units donated by a single donor (through determining a clear boundary in this area). A law regulating the issue may also set forth arrangements pertaining to the scope of information which the sperm donor is entitled to receive (e.g., could he know whether children were born from his sperm). For example, under the current circumstances, a clear rule which would have "blocked" such information could possibly make it somewhat easier for the donor, since the implementation thereof would have spared him the positive knowledge that his sperm was practically used for a successful fertilization (although such a rule would not necessarily guarantee that future donors will not seek to withdraw their donation).

Of the law and beyond

34. Be that as it may, one can sympathize with the Petitioner, even though the law is not on her side. Although the Donor's refusal regarding use of his sperm for additional fertilization is founded on emotional grounds, which can be respected, the Petitioner's struggle and pain might lead him to further deliberation, after the legal proceeding is concluded. He is under no legal obligation to do so. He can most certainly consider it *ex gratia*.

Justice

Justice I. Amit

1. I concur with the outcome reached by my two colleagues, and like them, I too face the outcome we reached with a heavy heart.

Since my colleagues elaborated in their thorough analysis of the field, I shall limit myself to the odds and ends that they have left behind, and try to shed light on other aspects of the issue that are presented to this Court for the first time.

The Petitioner and the Donor in the prism of civil law

2. The outcome of the Petition is derived from the legal tools that we shall choose for analyzing the issue at hand. My opinion is that had we chosen the "realm" of civil law only, it seems that the Petitioner would have prevailed.

3. Two contractual systems apply to the "asset" under our discussion. The one – between the Donor and the Sperm Bank, and the other – between the Petitioner and the Sperm Bank, and there is no contractual adversary between the Donor and the Petitioner.

"Sale" is defined in Section 1 of the Sale Law 5728-1968 (the "**Sale Law**") as "the transfer of an asset in consideration for a price". In the relationships between the Donor and the Sperm Bank, the Donor may be deemed as having sold his sperm for a consideration – not symbolic but also not particularly high – and the ownership of the sperm transferred to the Sperm Bank, under Section 33 of the Sale Law, which stipulates that in the absence of another understanding, the ownership of the object of sale is transferred by delivery. My colleague, Justice **Rubinstein**, believes that sperm donation should not be deemed as a sale, since it is impossible to transfer proprietary ownership in the Donor's genetic code in order, for example, to "duplicate" him genetically (Section 63 of his ruling). My colleague, Justice **Barak-Erez**, indicated the ruling of the California court, which ruled that the deceased's spouse is entitled to receive his sperm units in order to try and conceive thereby, and not for any other purpose, as an additional example which illustrates that we are not concerned with regular property (Section 19 of her ruling).

However, these examples do not preclude the classification of the donation as a sale transaction, and the proprietary nature of the deal, since there is no

prevention that a sale contract shall be executed for a specific purpose, while limiting the buyer with regards to the use of the object of sale, without this derogating from the validity of the transaction as a sale transaction, which transfers the ownership of the object of sale. In the case at bar, the form signed by the Donor explicitly states that the donation is made for the purpose of fertilization, or for research purposes. The contractual limitation with respect to the non-use of the Donor's genetic constitution for purposes other than fertility or research, does not, in itself, derogate from the validity of the sale contract and the effect of the proprietary transfer made thereunder.

4. My colleague believes that due to the nature of the object of sale, it should be assumed that the Donor did not intend for the contract to be indefinite, and since no expiry date has been determined therein, a built-in contractual withdrawal option exists, which requires the Donor's ongoing consent throughout the process. However, if we consider the sperm donation to be a sale transaction, this is not an indefinite contract, but rather a one-time agreement, exhausted upon the transfer of sperm to the Sperm Bank against the payment received by the Respondent, and therefore the Respondent cannot retract the contract. As far as I know, also according to the common practice at governmental and private sperm banks, the Donor's consent is not required in each and every instance in which any use is made of the sperm donated by him.

   My colleague believes that an interpretive question arises regarding the way to interpret the silence of the letter of consent on which the sperm donor is signed with respect to the right to withdraw his consent. However, this question already includes the assumption that regular contract law should not be applied in our case. Indeed, a regular sale contract does not include a "withdrawal clause", and the withdrawal of consent is deemed by contract law as a **breach** of contract, which entitles the injured party to the remedies set forth in the contract or by law.

5. Even if we view the Donor not as one who has sold his sperm but rather as one who gave it as a gift – by reason of the use of the word "sperm donation" and the consideration, which totals several hundred Shekels only – this shall not suffice to change the outcome of the transfer of ownership of the sperm. The term "movable property" is defined in Section 1 of the Movable Property Law, 5731-1971 (the "**Movable Property Law**" as "tangible assets, other than land" and the Law also applies to rights, *mutatis mutandis* (Section 13(a) of the Movable Property Law). Hence, the Donor can be deemed as one who gave "movable property" as a gift, which was completed upon delivery of the sperm to the Sperm Bank. The ownership of a movable gift transfers immediately upon delivery, according to Section 2 of the Gift Law, 5728-1968 (the "**Gift Law**"), which stipulates that "a gift is completed upon the transfer of the object of gift by the giving party to the recipient, while both agree that the object was given as a gift". The aforesaid, together with Section 6 of the Gift Law, which stipulates that in the absence of specific provisions of the law, the "ownership in the object of gift transfers to the recipient upon delivery of the object to his hand, or by the delivery of a document which entitles him to receive, and if the object is in the possession of the recipient – upon the

delivery of notice by the giving party to the recipient regarding the gift". Since we are concerned with a concluded gift, Section 5 of the Gift Law, pertaining to an **undertaking** to give a gift and the possibility of the giving party to withdraw the gift under certain circumstances, does not apply.

6. The aforesaid notwithstanding, I am willing to assume that had the Petitioner not been in the picture at all, then in the event that the Donor would have asked to retract the sale/gift transaction for reasonable arguments, there would be room to accept his demand, and had the Sperm Bank refused to do so, we would probably deem its position as insistence upon a right in bad faith, considering the special nature of the object of sale/gift. However, the state of affairs changes upon the introduction of a third party, which modifies the set of considerations. There are many examples therefor in legislation and case law, such as the provision of Section 15(b) of the Agency Law 5725-1965, which stipulates that if the third party did not know of the termination of agency, it is entitled to consider it as ongoing. This provision was elaborately discussed in the rulings in CA 4092/90 **Mitelberg v. Niger**, IsrSC 48(2) 529 (1994), and CFH 1522/94 **Niger v. Mitelberg**, IsrSC 49(5) 231 (1996), and see the opinion of Justice Cheshin in the appeal (p. 553):

> "We do know, that Shmuel did not change his situation, that no third party came to the house, and the dispute remained *inter partes* – between the same parties and with no intervention of a third party. …to reiterate: had the interest of a third party been introduced into the system, we may have ruled otherwise. However, this did not happen, and therefore we ruled as we did".

7. On the level of the relationships between the Petitioner and the Sperm Bank, the Petitioner may be viewed as having acquired the Donor's sperm units. Indeed the sperm was not transferred to her physical possession, as sperm units are only stored at the sperm bank, through a special freezing method (in liquid nitrogen, at a temperature of minus 196 degrees), however the Sperm Bank agreed to store the Respondent's sperm for the Petitioner, as indicated by the form which title is "Request for Storage of Sperm Units". This fortifies the Petitioner's status as **owner** of the sperm, in view of the definition of storage in Section 1 of the Guarantee Law 5727-1967, as "lawful possession, which is not by virtue of ownership" – the lawful possession is by the Bank, however the Petitioner is the owner. Note that the Petitioner's consent to subject the use of the sperm to a physician's medical-professional discretion does not prejudice her proprietary ownership of the sperm. A condition whereby the Petitioner exempts the Sperm Bank from liability regarding "loss, damage or other use of such sperm units", has nothing to do with the issue of the Donor's withdrawal, and can be seen as an exemption clause in guarantee-owner relationships.

8. My colleague proposed to apply the exclusion of unjust enforcement pursuant to Section 3(4) of the Contracts Law (Remedies for Breach of Contract) 5733-1973 (the "**Remedies Law**"). However, this exclusion is applicable to the relationships between the Donor and the Sperm Bank, and there is doubt whether it can be applied to the relationships between the Donor and the

Petitioner, since the ownership in the Sperm already transferred to the Petitioner, and also due to the absence of contractual adversary between the two (compare FH 21/80 **Wertheimer v. Harrari** IsrSC 35(3) 253 (1981), in which the majority opinion ruled that Section 3(4) of the Remedies Law applies to relationships between the first buyer and the seller, and justice considerations of the direct parties to the contract may be taken into account, whereas justice considerations of the second buyer may not). In any case, the application of justice considerations under Section 3(4) of the Remedies Law in favor of the Donor, cannot guide us on our way to solving the riddle, since the question of what is the just solution under the circumstances is the very question in dispute between the parties.

9. The aforesaid legal analysis, in the prism of civil law, is based on the assumption that sperm may be seen as "Movable property" as defined by the Movable property Law (See Section 5 above, and similar definition in the Interpretation Ordinance [New Version] and the Interpretation Law 5741-1981) and as a tradable asset, in proprietary and contractual aspects. The opinion of some adjudicators in accordance with Hebrew law, who deem the donor's sperm to be "abandoned", also ostensibly supports the proprietary aspect, as one of the clear characteristics of the right to ownership is the right to abandon or destroy the object of ownership (Joshua Weisman **Property law: General Part** 89, 108 (1993) ("**Weisman Property Law**")).

However, the question whether a human body organ is an "asset", in which ownership may be transferred, is not clear of doubts. It is hard to deem as "property" something that the legal system does not allow the purchase of ownership in, and the Israeli legal system objects to human trafficking and objects to organ trafficking, even though it does allow the donation thereof (Weisman Property Law, p. 91; Joshua Weisman "Organs as Assets" 16 *Mishpatim* 500 (1987)). With respect to renewable organs such as sperm, ovum, bone marrow or blood, and in contrast to organs such as kidney or cornea, the mere donation does not prevent the donor of personal use of the asset, which shall be available to him again in the future. Moreover, as far as I know, and with due cautiousness, as we were provided no factual foundation on the matter, there is trade and "import" of sperm from abroad to sperm banks in Israel (and perhaps also "export" of sperm overseas), which indicates the tradability of sperm as an asset for all intents and purposes. Therefore, it is easier to consider such "organs" as "assets", and it seems that this is why the legislator allowed their transfer from one person to another, and allowed the receipt of some consideration therefor (Gad Tedeschy ""Property and Transferability: the Ownership of an Organ Taken from a Living Person" 38 *Hapraklit* 281, 282 (1998); Daphna Lewinsohn-Zamir "Transplantation from a Living Body in Israel: Experience and Problems" 38 *Hapraklit* 300 (1988)).

On the other hand, an argument may be raised whereby sperm or ovum cannot be compared to other renewable organs, and not even to organs such as kidney or cornea, since the masculine and feminine gametes (sperm cells and ovum cells) enable the birth of a child, thus "perpetuating" the donor's genetic constitution for eternity. Through this prism, the donation of sperm or ovum is a very fateful matter.

The bottom line is, that even if there is room to implement civil law to the donation of sperm, and although "commercially" the definition of sperm differs from other body organs, we do not conclude that this is a regular "asset", and the sale of sperm is not the same as that of moveable objects, to which trade practice and market price can be applied. Therefore, apparently there is no dispute that as a rule, the donor should be allowed to withdraw his consent, so long as we are concerned with the relationships between himself and the Sperm Bank only. The real relevant question is whether sperm is such a special "asset", whose unique characteristics are of such force as to overcome the weight of a third party (the Petitioner) who enters the scene?

10. The answer to this question is a matter of ideology, and like my colleagues, I too believe that civil law is not the only applicable law in this case, and is definitely not exhaustive, and we must seek answer in other legal realms (on the importance of the classification and delineation of the legal realm, see: Isaac Amit "On the blurring of bounds and boundaries and uncertainty in the law" 6 *Din U'dvarim* 17 (2011)). The decision of which legal tool is selected, or in which "realm" of the law to classify the issue under discussion, is in itself a principled decision that might affect the final outcome.

Analogy to ovum donation

11. The legislator did not regulate the issue of sperm donation by primary legislation and therefore there is no legislative reference to the issue of withdrawal of consent by the donor. A private bill regarding sperm donations was submitted to the Knesset in March 2011 by Knesset Member Otniel Schneller, and it allows withdrawal of consent by the donor, only in such cases in which the sperm donor wishes to designate his sperm in advance for a specific recipient of the donation, and when he wishes to withdraw the donation prior to the performance of insemination in the recipient of the donation.

The circular of the Director General of the Ministry of Health, stipulating rules pertaining to the management of sperm banks (circular no. 20/27 dated November 8, 2007) refers to withdrawal of consent only in such cases in which a woman wishes to conceive a child in joint parenthood with a person who is not her spouse, and then they are both required to present an agreement which addresses the possibility of the parties to withdraw their consent, and what would be the use of the genetic constitution upon such occurrence (Section 31B of the circular). In Section 25(e) of the Director General's circular it is stated that "Donor's sperm shall not be obtained, received or used for the purpose of artificial insemination, upon the fulfilment of one of the following: […] the donor did not give his consent in writing, on a form as specified in the donor's file". Apparently, it can be argued that the donor's consent needs to be obtained in each and every stage, but it transpires from the form on which the donor signs, that his consent for the provision of sperm and the use thereof is given simultaneously and after the sperm is obtained and received, there is no need to receive separate consent for the use thereof. As aforesaid, and as far as I know (no factual foundation was presented to us with regards to this matter), this is also the common practice, and the various sperm

banks do not inform the donor, all the same obtain his consent, prior to making use of his sperm.

12. Therefore, there is currently no reference by the legislator, or by the secondary legislator, to the question whether a sperm donor is allowed to withdraw his consent, and until what stage. Upon facing a void, we must resort to analogy. The law of analogy is currently established in our law by the Act of Foundations of Law 5740-1980, which stipulates that "had the Court encountered a legal question to be resolved, and found no answer thereto in a legislative act, in case law or by analogy…". And yet, with respect to an issue that is very close to the matter at hand, the legislator had set forth an arrangement in the Ova Donation Law, 5770-2010 (the "**Ova Donation Law**"). Section 16 of the ova donation Law stipulates four acts which the donor is entitled to order with respect to the ova extracted from her body, as follows: implantation of the ova; freezing ova for the purpose of future use by herself; research; exterminating of the ova. Consent with regards to implantation may be given for a specific or unlimited time. The possibility to withdraw consent is set forth by Section 44(a) of the Law, as follows:

> **Withdrawal of consent and change of designation**
> (a) A donor or a patient may withdraw consent given by her pursuant to Sections 15, 16 or 27, as the case may be, at any time prior to the performance of the act to which she agreed to designate the ova which were extracted from her body, **and with respect to consent to designate ova for implantation – at any time prior to the fertilization of the ova**, and she will be under no civil or criminal liability for such withdrawal of consent.

An ovum donor is therefore allowed to withdraw her consent until that point in time in which the donated ovum has been fertilized. If and insofar as we adopt this solution by way of syllogism also to the case at bar, then we reached a solution for the issue submitted to us, and we are not obligated to resort to "the principles of liberty, justice, equity and peace of the Jewish heritage" and to the Hebrew law on which my colleague, Justice **Rubinstein**, elaborated in his ruling.

13. As determined by the legislator, the moment a shared genetic constitution is created, the interest of the donor no longer stands alone, and she cannot withdraw her consent due to the introduction of a third party – the other partner to the genetic constitution. In this perspective, it can be argued that the analogy between ovum donation and sperm donation is naturally called for – so long as no use has been made of the sperm, the donor may withdraw his consent, but upon use of the sperm and fertilization of the ovum, we face a "point of no return" in view of the shared genetic constitution which was created (with reflection to civil law, see Section 4 of the Movable Property Law, which addresses the combination and mixing of movable property).

Why does the Ova Donation Law establish the **fertilization** stage (and not the stage of implantation or re-implantation) as the "point of no return" with respect to the donor? Did the legislator seek to avoid the need to address the

medical-legal-moral-philosophical-religious issues pertaining to the time of creation of life and the status of a number of cells that have divided following an IVF? I found no grounds for this assumption in the Ova Donation Law, in the explanatory notes thereto or in the legislative history, however it can be supported by common sense.

According to this explanation, setting the "point of no return" at the time of the fertilization of the ovum is not arbitrary. In this way, as long as no use has been made of the Respondent's sperm, it can be argued that the Petitioner has no right to a specific child from his sperm, since so long as the child is not conceived (non-existence), the concrete right to his birth is yet unestablished (compare to statements made regarding "wrongful life" – David Heyd "The Right to be born free of birth defects?" **Moral Dilemmas in Medicine,** 255, 258-259 (Raphael Cohen-Almagor, Editor, 2002)). This is not the case in the post-fertilization stage, when the vague right to a specific child now has a concrete object, and a right is established for the mother to bring into the world the child that had already begun to be created (for a discussion of the time of formation of actual existence as opposed to potential existence, see: David Heyd, **Are "Wrongful Life" Claims Philosophically Valid**? 21 *Israel L. Rev.* 574, p. 578 (1986). Some believe that after the fertilization, the interest of the embryo taking shape to be born is added to the set of balances (for a dissenting opinion, see Andrei Marmor "The Frozen Embryos of the Nachmani Couple: A Reply to Chaim Ganz "*Iyyunei Mishpat* 19. 433, 436-439 (1995)).

14. The simple meaning of the analogy is therefore supportive of the conclusion that also with respect to the sperm donor, the point of no return is the fertilization of the ovum. However, in my opinion, an in-depth review of the issue may lead the analogy to the Ova Donation Law to a different outcome, and at least to a conclusion that no analogy can be drawn between the case at bar and the arrangement set forth in that Law, in view of the material differences between sperm donation and ovum donation.

In contrast to ovum donation, the issue of sperm donations is yet unregulated by primary legislation. Even according to the private bill of Knesset Member Schneller, as well as pursuant to the current circular of the Director General, all that is required for a sperm donation in Israel is the obtainment of the donor's consent on the proper form. On the other hand, ova donors are required to receive a written approval from an approval committee which comprises of physicians, a social worker, a psychologist, an attorney and a representative of the public or a cleric; the donor is provided with specific written and oral explanation regarding the essence of the procedure and the donation; she is required to undergo a medical and psychological examination in order to confirm her fitness to give the donation; the approval committee is to be convinced that the donor's consent was given "of sound and disposing mind, out of her free will and free of family, social, economic or other pressure" (Section 12 of the Ova Donation Law). The reason for the aforesaid procedure derives from the fact that the donation of ovum involves a complex procedure for the donor, as distinct from sperm donation, which does not involve invasive procedures or medication treatment.

15. The procedure of sperm donation also varies greatly from that of an ovum donation. Sperm donation is performed, as aforesaid, through a sperm bank, and the sperm units are stored in freezing for many years, such that the recipients of donations can select from the supply available to them the sperm that meets their needs and desires. The sperm bank serves as a mediator between the sperm donor and the recipient of the donation, and in addition to the service of storing the sperm under the required conditions it is further responsible for the obtainment of the sperm from the donor and the transfer thereof to the recipient of the donation. In a sperm donation, the donor who already delivered the sperm unit is not at all involved in the procedure, and the recipient of the donation may acquire sperm units, which the donor gave at a time which is of no relevance to her, and is no longer depending on cooperation on his part.

This is not the case with the procedure of ova donation, which requires cooperation between the donor and the recipient of the donation. This is a complex procedure, in the course of which the donor undergoes hormonal treatment over a period of several weeks, aimed to stimulate the ovaries. During that period of time, the donor is being monitored, including ultrasound checkups and blood tests, and she is obligated to avoid smoking, drinking alcohol and having unprotected sexual intercourse. Concurrently, the recipient of the donation also undergoes hormonal treatment, which is aimed to thicken the endometrium such that it can accept the implanted ova. All of the above is carried out while "synchronizing" the menstrual cycle of the donor and the recipient of the donation, such that the uterus of the recipient of the donation shall be ready to receive the ova soon after its extraction from the donor. **Immediately** upon the extraction of ova from the donor (within a time frame that does not exceed several hours), they are fertilized by sperm in various techniques which are not relevant to the issue at hand, and which are related, *inter alia*, to the quality of sperm. The fertilized ovum is incubated in the laboratory, and after several days (48 hours to five days) the conceived embryos – or perhaps the divided cells – are inserted into the recipient of the donation's uterus. In contrast to sperm donation, the donation procedure involves risks for the donor, and contrary to sperm donation, the possibility to freeze ova is limited, since the quality of an ovum decreases after freezing and defrosting. For this reason, as far as I know, there is currently no "ova bank" in Israel, in contrast to an "embryo bank" of fertilized ova.

I elaborated on the medical procedure not in order to enrich the reader's knowledge of the wonders of creation and of technology and medicine, but rather to indicate the material difference between sperm donation and ovum donation. The procedure of sperm donation is simple, does not require any medical procedure, and the main medical burden is carried by the recipient of the donation. On the other hand, the procedure of ovum donation requires lengthy cooperation between the anonymous donor, who carries the main burden, and recipient of the donation.

16. As aforesaid, a [ova] donor may not withdraw her consent from the moment of fertilization of the ova, which is performed, as a rule, immediately after the extraction. The donor may not withdraw her consent even if the ova have not

yet been implanted in the recipient of the donation's uterus, and even if the sperm by which the ovum has been fertilized is from an unknown donor who is not the recipient of the donation's spouse, even though the recipient of the donation does not ostensibly have a "strong" reliance interest, since the ova were not yet implanted in her uterus, and therefore the avoidance of conception does not involve an invasive procedure on her body.

The explanatory notes to this section state as follows: (Governmental Bills 2007, 311):

> "A woman's consent to donate ova from her body pursuant to the provisions of the proposed law entails significant outcomes – the birth of a child who is the biological child of that woman, while she waives any parenthood affinity toward him. Therefore, such donor should be allowed to withdraw her consent with respect to the procedures performed in the ova extracted from her body, at any time prior to the performance of the procedure to which she has agreed to designate such ova, and with respect to consent to designate ova for implantation – at any time prior to the fertilization of the ovum. The donor shall be under no civil or criminal liability due to her aforesaid withdrawal. A donor who so withdrew her consent, shall return the compensation given to her for the extraction of ova for implantation purposes or for her consent to allocate the excess ova extracted from her body for implantation".

The explanatory notes seem to be "unsynchronized" with the language of the Law, which sets the point of no return at the stage of fertilization. It is ostensibly reasonable that had the legislator wanted to allow a donor to withdraw her consent, in view of the significant outcome of the birth of a child and waiver of parentage affinity towards him, he would have also allowed the donor to withdraw her consent prior to the **implantation** of the ova in the recipient of the donation, and in case of an unsuccessful implantation, allow her to withdraw her consent prior to an additional implantation in the recipient of the donation (which in turn requires receipt of a renewed approval in order to examine if the conditions stipulated by law for the implantation – Section 19(c) of the Law – still exist).

The reason for the determination of the time of fertilization as the point of no return is based in the aforementioned stages of fertilization and implantation, which are separated by several days at the most. Considering the complex procedure that the donor undergoes, the legislator enables her to withdraw her consent at any time until her share is completed and the ovum is extracted from her body and fertilized immediately thereafter. The extraction of the ovum and the fertilization should be viewed as one stage, and considering the implantation being performed within no longer than several days, perhaps the three stages (ovum extraction-fertilization-implantation) should also be deemed as one. After the donor had completed her share, the power of decision is transferred to the recipient of the donation, who also began hormonal treatments, although less complex. For this reason, there is doubt if one can

draw an analogy to the consent withdrawal right which is granted to the ovum donor – whose cooperation is required up until the extraction of ova and the fertilization which is performed immediately thereafter – to a sperm donor who has no part in the medical procedure entailed in the fertilization and whose cooperation is not at all required before the fertilization.

17. Moreover, it can be argued that an analogy to the Ova Donation Law is called for in the case at bar, however such analogy leads us to an entirely different conclusion. Hence, the donor may indeed withdraw her consent until the stage of fertilization, but in fact, considering that the extraction of ovum and the fertilization are performed "as one" (at most within several hours apart), it can be stated that the donor is prevented from withdrawal, the moment of extraction of the ovum from her body. Similarly, the sperm donor shall be prevented from withdrawal after the sperm leaves his body. In other words, since the point of no return is, *de facto*, not the fertilization but actually the extraction of ova, which are then immediately fertilized, the analogy to the case at bar is the moment of ejaculation and delivery of sperm.

18. In view of the aforesaid, there is doubt whether an analogy can be drawn from the Ova Donation Law to the case at bar, and in any case, the analogy to the Ova Donation Law does not lead us to an unequivocal answer to the issue at hand.

19. **Interim summary**: we resolved that in the settling of the competition between the Petitioner and the Donor from the perspective of civil law, the Petitioner ostensibly prevails; however, the choice whether to follow civil law depends on the principled question of how much we are willing to attribute to the uniqueness of sperm as an "asset". On the one hand, we can allegedly conclude, by way of syllogism, from the arrangement set forth in the Ova Donation Law, that in the case at bar as well, the point of no return is the stage of fertilization; however on the other hand, in view of the differences in the procedure entailed in ova donation, an analogy to that arrangement might lead to the outcome that the point of no return is the delivery of sperm, and, in the least, that there is no room for such syllogism.

Having failed to find an answer to the question before us, we must continue wandering the paths of law in search for a solution.

Analogy from a woman who does not need sperm donation

20. My colleagues indicated that a married woman or a woman who has a spouse and does not need a sperm donation also has no conferred right that all of her children be born from her spouse, and she is not "immune" from separation and divorce, or – god forbid – death of her partner. Thus they conclude that the rights of the Petitioner should not be secured to a greater extent than in the ordinary state of affairs.

However, the comparison to a woman who has a spouse is incomplete, not from the point of view of the recipient of the donation and not from that of the father. A recipient of donation such as the Petitioner has a possibility to secure

in advance, at a high level of certainty – subject to medical and other constraints – that all of her children be born from the same genetic father, since to that end she paid and "secured" the donor's sperm units. On the other hand, an "ordinary" spouse may bear an economic price (child support and property division) and an emotional-mental-social price involved in the process of divorce and separation, whereas the sperm donor pays no price for his withdrawal of consent (other than, perhaps, an obligation to return the amount received at the time for the sperm donation). Hence, the concern pertaining to negative lateral effects in issuing a "carte blanche" to all donors to withdraw their donation, as elaborated by my colleague in Sections 68-70 of his ruling.

Analogy to and distinction from the Nachmani case

21. My colleagues indicate several distinctions between the case at bar and the **Nachmani** case which indicate that the level of expectations and reliance of the Petitioner in this case, is far lower than that of the female spouse in re **Nachmani**. According to this method, the necessary outcome is that the Petitioner be denied.

However, this is not the case from the perspective of the donor in the case at bar, whose injury is far lower than that of the male spouse in re **Nachmani**. A involuntary father, who knows the identity of the mother and the child born to him against his wishes, and might also come across him in everyday life, as in re **Nachmani**, cannot be compared to the anonymous donor in the case at bar. In the ordinary state of affairs, the donor is not even supposed to know whether use has been made of his sperm for fertilization, how many times it has been used, if the use of his sperm was successful, whether his sperm was used for the fertilization of a married woman or a single one and the identity of the happy mother. In this aspect, the emotional injury to the donor in the case at bar is much smaller than that of the male spouse in re **Nachmani**. According to this method, the reduced magnitude of the injury to the Donor, tips the scales in the direction of the Petitioner.

Hence, also the comparison to re **Nachmani** may yield different outcomes. The injury to the Petitioner is smaller than that of the female spouse in re **Nachmani**, but so is the injury to the Donor smaller than that of the male spouse in re **Nachmani**.

Analogy from the laws of rescission of contract and administrative promise

22. My colleague proposed, *inter alia*, to apply to the hospital the principles of public law and the rule of rescission of contract. I shall add to the aforesaid an analogy to the law of administrative promise, which allows an authority to withdraw its promise upon the existence of legal justification.

Indeed in the case at bar we are concerned with a governmental hospital, but according to the Sperm Bank Regulations pertaining to sperm donation, a hospital is not necessarily a governmental hospital, and the implementation of the principles of public law shall not always be applicable. Essentially, the rule

of rescission is contingent on public interest (essential public needs), and an administrative promise withdrawal is contingent on legal justification. This does not promote the issue at hand, since the question whether there is a justification or public interest to allow the Donor to withdraw his consent, is the very core of the dispute before us.

Between autonomy and parenthood, and between a right and an interest

23. My colleague, Justice **Rubinstein**, based his opinion on a principled preference of the Donor's **right** to autonomy, over the Petitioner's **interest** to conceive specifically by his sperm.

The case law and legal literature provides us with the distinction between protection or injury of a **right**, and protection or injury of an **interest** (see, for example: Oren Gazelle Ayal and Amnon Reichman "Public Interests as Human Rights?" 41 *Mishpatim* 97 (2011); Zamir Ben Bashat, Erez Nachum & Amir Colton "The Public's Right to Know: Reflections following APA **398/07 The Movement for Freedom of Information v. the Tax Authority**" 5 *He'aarat Din* 106 (2009) and the references there). Between rights it is common to make a horizontal-internal balance, whereas the balance between a right and an interest is vertical-external (Gideon Sapir "Old versus New – on Vertical Balancing and Proportionality" 22 *Mechkarei Mishpat* 471 (2006)).

The mere distinction between a right and an interest sometimes serves to determine a different level of legal protection, in the words of my colleague: "the classification of the considerations at stake as rights or as interests defines the formula of the balance between them, and the normative superiority of one value over the other or their equal value". Alas, sometimes it is unclear whether the outcome preceded the classification or vice versa (Michael Dan Birnhack "Constitutional Geometry: The Methodology of the Supreme Court in Value-based Decisions" 19 *Mechkarei Mishpat* 591 (2003)). In my opinion, the injury to the Petitioner should not be classified as an injury to an interest, but rather as an injury to the **positive right to be a parent**, against which stands the injury to the Donor's **negative right to autonomy**, as per Section 6 of the ruling of my colleague, Justice Barak-Erez (on the right to be a parent in the context of fertilization, see: Vardit Ravitsky "The Right to be a Parent in the Era of Technological Fertilization" **Moral Dilemmas in Medicine** 137, 141 (Rafael Cohen-Almagor, Editor, 2002)). Therefore, a horizontal balance is called for between the two conflicting rights, and the distance from the core of the right shall be expressed in the outcome of the balance and not in the mere classification as interest against right.

24. The outcome of the balance depends on the distance of the right from the core of the right, and this may provide an answer to the issue before us. The farther the right is from its core, the lesser its force and vice versa, the weaker the force of the right is, it shall be positioned further away from the core of the right. Clearly this is not a scientific-physical measurement of the distance of the right from the "magnetic pole" wherein it stands, and the force of the right also derives from the motives at its basis. To demonstrate:

Would we recognize the Petitioner's (*sic*) right to withdraw his consent had he declared that he objects the use of his sperm for the fertilization of a single woman, but is consenting with regards to the fertilizing of a married woman?

And had the Donor casted a "veto" on the use of his sperm for the fertilization of a woman from a certain ethnic group, as distinguished from another ethnic group?

[Parenthetically – Section 13(e)(4) of the Ova Donation Law requires informing the recipient of donation if the donor is married or of a religion different than hers].

And had the Donor's withdrawal of consent been totally arbitrary, with no reasoning and no explanation? And had it been based in greed, attempting to get the Petitioner to pay him additional amounts?

I believe that in the aforesaid cases we would say that the Donor's right is weakened, and removed further from the core of the right, since the motivations on which it is founded are not "solid", and as such, we shall not be willing to view as justifications for the withdrawal of consent. Therefore, I believe that the Donor's "change of heart" with respect to this willingness to donate sperm is not enough, and we should further examine the reasons and motivations which lead him to withdraw his consent, and accordingly determine the degree of the right, and consequently – its distance from the core of the right.

25. The difficulty multiplies in view of issues that are not limited to the balance between the Donor and the Petitioner. For example, would the outcome change had it transpired that the daughter conceived by the recipient of the donation from the Donor's sperm has an interest of her own in the birth of the "potential sibling", such as her need of bone marrow donation? (And I am not referring to the legal-ethical questions that such a situation of "my sister's keeper" might raise).

26. The task of concluding is not ours, and we shall leave, questions and challenges to be resolved when they occur.

In the case at bar, it seems that the (positive) right of the Petitioner to conceive from the same genetic father is distant from the core of the right to be a parent, whereas the (negative) right of the Donor not to be an involuntary father is at the core of the right to autonomy, and I see no relevance, in this respect, to the fact that the Donor already has an offspring from his sperm. To the Donor, the question is "to be or not to be" – whether to at all be a father to another offspring carrying his genetic constitution or not, whereas for the Petitioner the question is not whether to be a mother but rather **who** shall be the father. Indeed, it cannot be denied that the Petitioner's wishes that all of her children shall carry the same genetic constitution are of considerable force. In the case at bar, the ovum is of the Petitioner's and even if her petition is denied her children will still carry her genetic constitution, and shall be half-siblings. This is different from a theoretical case in which also the ovum is not from the recipient of the donation, and the use of the sperm of a different donor for each

fertilization shall mean that the children are not even genetically half-siblings, which would have increased the force of the recipient of the donation's right.

The bottom line in the case at bar is that in the competition between the Donor's core-negative right (the right to autonomy) and a right which is not the core of the positive right (the right to be a parent), the Donor prevails. I shall end with a short quotation from the letter sent by the Donor to the Court, speaking for itself: "I am not interested in having a child without being able to provide love to him, and without me loving his mother".

To conclude, I concur, although with a heavy heart, with the outcome reached by my colleagues.

Justice

Decided as per the ruling of Justice E. Rubinstein.

Issued today, 25 Shvat 5773 (February 5, 2013).

Justice Justice Justice