CFH 2401/95

Ruth Nahmani

v

1. Daniel Nahmani

2. Attorney-General

3. Assuta Ltd

The Supreme Court sitting as the Court of Civil Appeals

[12 September 1996]

Before President A. Barak and Justices G. Bach, E. Goldberg, T. Or, E. Mazza, Y. Kedmi, I. Zamir, T. Strasberg-Cohen, D. Dorner, Ts. E. Tal, Y. Türkel

Further Hearing of Civil Appeal 5587/93 on the judgment of the Haifa District Court (Justice H. Ariel) on 2 September 1993 in OM 599/92.

Facts: Ruth and Daniel Nahmani, a married couple, were unable to have a child because of an operation that Ruth underwent. They therefore decided to try *in-vitro* fertilization of Ruth's ova with Daniel's sperm, with a view to implanting the fertilized ova in a surrogate mother. Under Israeli law, surrogacy was not permitted and *in-vitro* fertilization was only permitted for implantation in the woman from whom the ova were taken. Because of the great expense of the *in-vitro* fertilization procedure in the United States, the couple petitioned the Supreme Court, sitting as the High Court of Justice, to allow the *in-vitro* fertilization procedure to be conducted in Israel, for the purpose of surrogacy in the United States. In that proceeding (HCJ 1237/91), a consent judgment was given allowing the *in-vitro* fertilization procedure to be done in Israel. The procedure was carried out at Assuta Hospital.

Subsequently, Daniel left Ruth and went to live with another woman, who bore him a child. Ruth applied to Assuta Hospital to release the fertilized ova into her possession for the purpose of the surrogacy procedure in the United States, but Daniel opposed this. Assuta Hospital therefore refused to release the fertilized ova. Ruth applied to the Haifa District Court for an order against the hospital to release the fertilized ova, and in its judgment the District Court gave such an order.

Daniel appealed the judgment of the District Court to the Supreme Court. In the appeal (CA 5587/93), the Supreme Court, with a majority of four of the five justices

that heard the case, allowed the appeal of Daniel Nahmani and reversed the order of the District Court.

Ruth petitioned the Supreme Court to hold a further hearing of the appeal, and this further hearing was subsequently held before a panel of eleven justices.

Held: A majority of seven of the Supreme Court justices reversed the judgment in the appeal, with four justices dissenting.

(Majority opinion — Justice Ts. E. Tal) The husband was estopped from opposing the continuation of procedure by promissory estoppel, since he gave his consent, his wife reasonably relied on this consent, and she did so irreversibly, by fertilizing her ova with her husband's sperm. Furthermore, Jewish heritage, which is one of the fundamental principles of the Israeli legal system, considers having children an important value, whereas not having children is not considered a value at all.

(Majority opinion — Justice D. Dorner) The liberty of not having unwanted children is in essence secondary compared to the right to have children. Subject to this principle, the balancing between the rights of the parties is made by taking into account the current stage of the procedure, the representations made by the spouses, the expectations raised by the representations and any reliance on them, and the alternatives that exist for realizing the right of parenthood. In this case, the basic principles and considerations lead to a preference of the wife to be a parent over the right of the husband not to be a parent.

(Majority opinion — Justice E. Goldberg) In the absence of any normative arrangement, the case should be decided according to the basic value of justice. The just solution is the one that results in the lesser of evils. Justice demands that we do not, retroactively, undermine the position of someone who was entitled to rely on a representation of another, as the petitioner was entitled to do in this case.

(Majority opinion — Justice Y. Kedmi) Before fertilization, each spouse can change his decision to be a parent, and his basic right not to be a parent prevails over the contractual right of his partner to demand performance of the agreement between them. After fertilization, the right of the spouse wishing to complete the procedure of bringing the child into the world and to become a parent is strengthened by the fertilization of the ovum. From this point onward, the right of the spouse wishing to complete the process of bringing the child into the world overrides the right of the one wishing to destroy the fertilized ovum.

(Majority opinion — Justice Y. Türkel) The ethical weight of the right to be a parent is immeasurably greater than the weight of the right not to be a parent. Doing 'ethical justice' compels us to prefer the former right to the latter.

(Majority opinion — Justice G. Bach) Where there is no express statute to guide us, we must avail ourselves of our sense of justice, and make our ruling according to what seems to us to be more just, in view of all the circumstances of the case before us. Even if the scales of justice were evenly balanced, then the fact that preferring

Ruth's position created the possibility of granting life and bringing a living person into our world, would tip the scales.

(Majority opinion — Justice E. Mazza) The restriction that Daniel wishes to impose on Ruth's right to be a mother, although it appears to be a specific restriction, is really a quasi-general one, since Ruth has no real alternative to becoming a mother other than by use of her ova that were fertilized with Daniel's sperm. The restriction that Ruth wishes to impose on Daniel's right not to be a father against his will is a specific restriction. Imposing a specific restriction on Daniel's right is preferable to imposing a quasi-general restriction on Ruth's right to be a mother. The violation caused by the specific restriction to Daniel's right is, necessarily, less than the violation caused by the quasi-general restriction to Ruth's right. Where all other factors are equal, justice requires us to prefer the lesser violation to the greater violation.

(Minority opinion — Justice T. Strasberg-Cohen) Consent is required for each stage of the *in-vitro* fertilization procedure up to the point of no-return, which is the implantation of the ova in the woman's body. In the absence of such consent, Daniel cannot be compelled to consent to Ruth's aspiration against his will by means of a judicial order, either in the name of the law, or in the name of justice or in the name of life.

(Minority opinion — Justice T. Or) The consent of the parties to cooperate towards realization of an *in-vitro* fertilization procedure is a framework consent. It is founded on the basic assumption that the marital relationship between the parties will continue. But it does not include consent, *ab initio*, to all the stages and aspects of the fertilization procedure. The consent is based on the understanding that at each stage of the procedure the joint consent of both spouses will be required.

(Minority opinion — Justice I. Zamir) If, before the procedure began, Daniel were asked whether, if he separated from Ruth, he would consent to implantation of the ovum, which would make him and Ruth joint parents of a child, his answer, as a reasonable person, would be no. His initial consent to the procedure should therefore not be regarded as consent even in the circumstances of a separation. For the same reason, Daniel is not estopped from opposing the continuation of the fertilization procedure, since he never represented that he consented to the continuation of the procedure even if he separated from Ruth.

(Minority opinion — President A. Barak) Continuing consent is required for every stage of the fertilization procedure. This cannot be waived *ab initio* for reasons of public policy. Justice requires equality between the spouses in decision making. Refusing to give consent to the continuation of the fertilization procedure because the relationship has ended does not constitute bad faith.

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Statutes cited:

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Contracts (General part) Law, 5733-1973, ss Administrative Courts Law, 5752-1992, s. 22. 14(b), 25, 30, 31, 61(b).
Contracts (Remedies for Breach of Contract) Law, 5731-1970, s. 3(4).
Criminal Procedure Law [Consolidated Version], 5742-1982, s. 3.
Foundations of Justice Law, 5740-1980, s. 1.
Immovable Property Law, 5731-1971, s. 10.
Labour Court Law, 5729-1969, s. 33.
Land Law, 5729-1969, s. 10.
Penal Law, 5737-1977, ss. 314, 316, 316(a), Chapter 10, Article 2.
Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, 5756-1996, ss. 2, 2(1), 5, 5(c), 7.
Tenant's Protection Law [Consolidated Version], 5732-1972, s. 132(a).
Torts Ordinance [New Version], s. 84.
Unjust Enrichment Law, 5739-1979, s. 2.

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Public Health (*In-vitro* Fertilization) Regulations, 5747-1987, rr. 2, 2(a), 3, 8, 8(b)(1), 8(b)(2), 8(b)(3), 8(c)(3), 9, 11, 14, 14(c).

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[1] CrimA 95/51 *Podamski v. Attorney-General* [1952] IsrSC 6 341.
[2] CA 451/88 *A v. State of Israel* [1990] IsrSC 44(1) 330.
[3] CA 614/76 *A v. B* [1977] IsrSC 31(3) 85.
[4] CA 5464/93 *A v. B (a minor)* [1994] IsrSC 48(3) 857.
[5] CA 577/83 *Attorney-General v. A* [1984] IsrSC 38(1) 461.
[6] BAA 663/90 *A v. Bar Association Tel-Aviv District Committee* [1993] IsrSC 47(3) 397.
[7] HCJ 4267/93, *Amitai — Citizens for Good Government v. Prime Minister* [1993] IsrSC 47(5) 441.
[8] CA 488/77 *A v. Attorney-General* [1978] IsrSC 32(3) 421.
[9] CA 413/80 *A v. B* [1981] IsrSC 35(3) 57.
[10] CA 623/80 *A v. Attorney-General* [1981] IsrSC 35(2) 72.
[11] HCJ 702/81 *Mintzer v. Israel Bar Association Central Committee* [1982] IsrSC 36(2) 1.
[12] FH 22/73 *Ben-Shahar v. Mahlav* [1974] IsrSC 28(2) 89.

[13] CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* [1963] IsrSC 17 1319; IsrSJ 5 120.

[14] LCA 4298/92 *Ezra v. Tel-Mond Local Council* [1993] IsrSC 47(5) 94.

[15] CA 518/82 *Zaitsov v. Katz* [1986] IsrSC 40(2) 85.

[16] CA 398/65 *Rimon v. Trustee in bankruptcy of Shepsals* [1966] IsrSC 20(1) 401.

[17] CA 214/89 *Avneri v. Shapira* [1989] IsrSC 43(3) 840.

[18] FH 4/82 *Kut v. Kut* [1984] IsrSC 38(3) 197.

[19] HCJ 200/83 *Wathad v. Minister of Finance* [1984] IsrSC 38(3) 113.

[20] HCJ 4712/96 *Meretz Democratic Israel Party v. Jerusalem District Commissioner of Police* [1996] IsrSC 50(2) 822.

[21] CA 499/81 *Odeh v. Haduri* [1984] IsrSC 38(4) 729.

[22] CA 506/88 *Shefer v. State of Israel* [1994] IsrSC 48(1) 87; [1992-4] IsrLR 170.

[23] HCJ 73/53 *Kol HaAm Ltd v. Minister of Interior* [1953] IsrSC 7 871; IsrSJ 1 90.

[24] HCJ 153/83 *Levy v. Southern District Commander* [1984] IsrSC 38(3) 393; IsrSJ 7 109.

[25] HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Commissioner of Police* [1984] IsrSC 38(2) 449.

[26] MApp 298/86 *Citrin v. Tel-Aviv District Disciplinary Tribunal of Bar Association* [1987] IsrSC 41(2) 337.

[27] CA 496/88 *Henfeld v. Ramat Hasharon Sports Association* [1988] IsrSC 42(3) 717.

[28] HCJ 1601/90 *Shalit v. Peres* [1991] IsrSC 45(3) 353; IsrSJ 10 204.

[29] HCJ 4112/90 *Association of Civil Rights in Israel v. Southern Commander* [1990] IsrSC 44(3) 353.

[30] HCJ 3412/91 *Sufian v. IDF Commander in Gaza Strip* [1993] IsrSC 47(2) 848.

[31] CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [1993] IsrSC 47(5) 189.

[32] CA 2266/93 *A v. B* [1995] IsrSC 49(1) 221.

[33] HCJ 753/87 *Borstein v. Minister of Interior* [1988] IsrSC 42(4) 462.

[34] HCJ 721/94 *El-Al Israel Airlines v. Danielowitz* [1994] IsrSC 48(5) 749; [1992-4] IsrLR 478.

[35] CA 154/80 *Borchard Lines Ltd, London v. Hydrobaton Ltd* [1984] IsrSC 38(2) 213.

[36] CA 554/83 *Atta Textile Company Ltd v. Estate of Zolotolov* [1987] IsrSC 41(1) 282.

[37] CA 275/83 *Netanya Municipality v. Sahaf, Israeli Development Works Co. Ltd* [1986] IsrSC 40(3) 235.

[38] HCJ 846/93 *Barak v. National Labour Court*, Dinim 37 823.

[39] HCJ 932/91 *Central Pension Fund of Federation Employees Ltd v. National Labour Court* [1992] IsrSC 46(2) 430.

[40] CA 4956/90 *Paz-Gas Marketing Co. Ltd v. Gazit Hadarom Ltd* [1992] IsrSC 46(4) 35.

[41] CA 248/86 *Estate of Lily Hananshwili v. Rotem Insurance Co. Ltd* [1991] IsrSC 45(2) 529.

[42] CA 840/75 *Jewish National Fund v. Tevel* [1976] IsrSC 30(3) 540.

[43] CA 555/71 *Amsterdramer v. Moskovitz* [1972] IsrSC 26(1) 793.

[44] HCJ 5087/94 — unreported.

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American cases cited:

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[48] *Griswold v. Connecticut* 381 U.S. 479 (1965).

[49] *Eisenstadt v. Baird* 405 U.S. 438 (1972).

[50] *K.S. v. G.S.* 440 A. 2d 64 (1981).

[51] *Kass v. Kass* WL 110368 (1995).

[52] *Skinner v. Oklahoma* 316 U.S. 535 (1942).

[53] *Roe v. Wade* 410 U.S. 113 (1973).

[54] *Planned Parenthood of Missouri v. Danforth* 428 U.S. 52 (1976).

[55] *Lochner v. New York* 198 US 45, 25 S.Ct 539, 49 L.Ed 937 (1905).

[56] *In re Baby M* 525 A. 2d 1128 (1987).

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[57] *Layton v. Martin* [1986] 2 F.L.R. 227 (Ch.).

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[58] Rabbi Moshe ben Maimon (Maimonides), *Mishneh Torah*, *Hilechot Ishut* (Laws of Marriage), 15, paras. 2, 5.

[59] Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Even HaEzer*, 1.

[60] Rabbi Yosef Karo, *Shulhan Aruch*, *Even HaEzer*, 1, 1; 154, 4.

[61] Mishnah, Tractate *Yevamot* 6, 6.

[62] Dr Avraham Steinberg ed., *Encyclopaedia of Jewish Medical Ethics*, vol. 2, the entry '*In-vitro* fertilization', at p. 115 *et seq.*; vol. 4, *Responsum* of Rabbi Shaul Yisraeli pp. 28, 41.

[63] *Responsum* of Rabbi Shalom Shalush, 'Fertilization in a Surrogate Womb', in *Orchot*, the magazine of the Haifa Religious Council, no. 39, p. 31.

[64] Deuteronomy 4, 42; 16, 20; 19, 2-5.

[65] Genesis 1, 28; 30, 1.

[66] *Bereishit Rabba* 79, 9 on Genesis.

[67] Jeremiah 22, 10.

[68] Babylonian Talmud, Tractate *Moed Katan*, 27b.

[69] Mishnah, Tractate *Gittin*, 4, 5.

[70] Babylonian Talmud, Tractate *Yevamot*, 63b, 65b.

[71] Babylonian Talmud, Tractate *Berachot*, 3b, 10a.

[72] II Kings 20, 1.

[73] Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Hoshen Mishpat*, 1.

[74] Babylonian Talmud, Tractate *Shabbat*, 10a.

[75] Rabbi Yehoshua ben Alexander HaCohen Falk, *Drisha*, on Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Hoshen Mishpat*, 1, 2.

[76] Babylonian Talmud, Tractate *Nedarim*, 64b.

[77] Babylonian Talmud, Tractate *Makkot*, 10a.

[78] Rabbi Moshe ben Maimon (Maimonides), *Mishneh Torah*, *Hilechot Rotzeah uShemirat Nefesh* (Laws of Homicide and Preservation of Life), 7, 1.

[79] I Samuel 1, 27.

[80] II Samuel 19, 1.

For the petitioner — Z. Gruber.

For the first respondent — D. Har-Even.

JUDGMENT

Justice T. Strasberg-Cohen

Introduction

1. The Nahmani case, which was considered on appeal (CA 5587/93 *Nahmani v. Nahmani* IsrSC 49(1) 485), now comes before us for a further hearing. For the purposes of this hearing we shall briefly review the facts. After several years of marriage without children, and after Ruth Nahmani underwent surgery, as a result of which she lost the ability to conceive naturally, the Nahmani couple decided to have children by means of *in-vitro* fertilization. Ova taken from Ruth's body were fertilized with Daniel's sperm, frozen and stored at the hospital. The couple entered into a contract with an institute in the United States to find a surrogate who would bear their child. But before this stage of the procedure had been reached, Daniel Nahmani left home, established a new family and fathered a daughter, while he was still married to Ruth, who refused to be divorced. Ruth contacted the hospital and asked for the fertilized ova in order to continue the procedure, and when she was refused, she filed suit in the Haifa District Court, which ruled in her favour. This court allowed the appeal of Daniel Nahmani, by a majority decision with Justice Tal dissenting, and this led to the further hearing.

2. The emotions, morals and norms associated with this issue naturally lead to a lack of consensus. Differences of opinion concerning a problematic issue such as this are to be expected and are legitimate, and are reflected in both the decision on appeal and this decision (see also Ch. Gans, 'The Frozen Embryos of the Nahmani Couple', 18 *Tel-Aviv Uni. L. Rev.*, 1994, at p. 83; Dr A. Marmor, 'The Frozen Embryos of the Nahmani Couple: a Response to Chaim Gans', 19 *Tel-Aviv Uni. L. Rev.*, 1995, at p. 433; and Ch. Gans, 'The Frozen Embryos of the Nahmani Couple: a Reply to Andrei Marmor', 19 *Tel-Aviv Uni. L. Rev.*, 1995, at p. 453). The problem before us has two diametrically opposed solutions. We must choose a solution that is consistent with both the law and the fundamental principles of our legal system, and that is based upon the values and norms of our society.

I have re-examined the matter before us with an open heart and mind. I again reviewed the appeal judgment, the opinions of my colleagues in this proceeding and the erudite articles published after judgment was given. I have reconsidered and re-examined my earlier position and tested it against the opposing position, and in the final analysis, I do not see any reason to change it.

In the judgment on appeal, I discussed at length the nature, novelty and difficulty of the matter before us, and I shall not repeat myself. Nonetheless, it is appropriate that what was covered extensively in that decision should be referred to in this. Moreover, I shall make clarifications to my position, which will constitute an integral part of my remarks in the judgment on appeal. The two opinions should be regarded as one.

In the first opinion, the issue was examined and analyzed from every possible angle. In it I concluded, after having examined and analyzed the fundamental rights of the individual, that a spouse does not have an enforceable right, where that right would lead to imposing parental status on an 'objecting' spouse. It was held that there is no basis in the various areas of private law, whether in law, statute or case-law, for granting shared genetic material to one of the spouses without the consent of the other. The opinion concluded that the fertilized ova — which are pre-embryonic — have no independent 'right' to life, nor have they any kind of status that would give precedence to someone interested in the continuation of the procedure over someone who does not wish this. Comparative law was brought to show that the majority of countries in the enlightened western world — whether in statute or as a result of recommendations made by commissions that considered the issue — require both spouses to consent to each stage of the procedure, including the stage of implantation, and without consent from both spouses, the procedure cannot continue. This can also be seen in the Public Health (*In-vitro* Fertilization) Regulations, 5747-1987, and it was also the recommendation made by the Professional Public Commission for Examining the Issue of *In-vitro* Fertilization, 1994, whose members included renowned experts from several relevant fields. It can also be seen from the recently enacted Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, 5756-1996.

Court intervention

3. It has been argued that the appeal decision avoided intervention in the case or taking a stand, and that the outcome was a matter of chance resulting from the status of the litigants, with the stronger party having the advantage. These claims have no basis. I too am of the opinion that there should be legal intervention, even in cases involving normative value judgments, as well as in matters ruled by emotion; indeed, the appeal decision did just that. It did not refrain from taking a stand or from intervening, as suggested by Dr. D. Barak-Erez ('On Symmetry and Neutrality: Reflections on the Nahmani Case', 20 *Tel-Aviv Uni. L. Rev.* (1996) 197). The decision adopted a position

by refusing to force parenthood on a person. This constitutes ethical, normative and legal intervention. It is not avoiding making a decision. It is a decision made responsibly. The outcome was not a matter of chance resulting from the status of the litigant, as plaintiff or defendant (as claimed by Dr Barak-Erez, *ibid*.). The outcome would have been identical had a suit been filed by Daniel Nahmani for an injunction preventing the ova from being given to Ruth Nahmani, or had a suit been filed by the institution where the ova are stored because it had been given conflicting instructions. The decision does not give legitimacy to the maxim 'might is right', but instead it applies the law in its wider sense. It does so in a way that reflects the legal policy outlined by the principles and norms that are fundamental to our legal system, a policy that recognizes the basic rights of the individual, his freedom of choice, and a refusal to force on him a status that he does not agree to take upon himself.

Indeed, 1e have not been called upon to interpret a particular statute, and we are not required to implement any such statute. In this case, as in others, we are called upon to decide issues that are not governed by any special statute. We must establish a legal norm that has ethical significance. In doing so, we are not operating in a vacuum. We have at our disposal the rich world of existing law with all its branches that affect the issue under discussion.

The case as an exception

4. The matter before us is exceptional in that it is the first and only case being litigated. But it is not exceptional with regard to the situation that it presents to us. What do I mean by this? As science presents us with new, previously-unknown possibilities, and as more and more couples use *in-vitro* fertilization, the problem before us will take on an increasing general importance. Quarrels and separations between spouses are — unfortunately — a common phenomenon in our society. Whenever a couple quarrels about the use of fertilized ova, it occurs between spouses who have separated, and one of them does not agree to continue the procedure. The rule established by this court will have implications for all of these people, and the question of whether consent is required by each spouse to every stage in the *in-vitro* fertilization process prior to implantation in the womb must receive a clear, principled answer. The same is true of the question whether a spouse who refuses to continue the procedure that will lead to his becoming a parent against his will should be compelled to do so. Our determination in this case is likely to have implications that go beyond the specific circumstances in this instance, and affect every field where an individual has

rights that have no corresponding obligations, and where the consent of those involved is required to achieve a common goal.

As I said in the judgment on appeal, foremost in my mind has been Ruth Nahmani's longing for motherhood, her anguish and frustration at not being able to achieve it, and the improbability that she will become a biological mother. But we should not consider only the specific case before us, and sympathy and understanding for Ruth Nahmani's aspiration is insufficient for giving rise to a legal remedy to her problem. This issue cannot be decided on the basis of the wishes of one of the parties; it must be decided according to the rights and duties of the parties vis-à-vis one another, and these are enshrined in our legal system and provide the basis for an answer.

The right of parenthood

5. It would appear that no one disputes the status and fundamental importance of parenthood in the life of the individual and in society. These have been basic principles of human culture throughout history. Human society exists by virtue of procreation. Realizing the natural instinct to be fruitful and multiply is a religious commandment of the Torah (see Rabbi Moshe ben Maimon (Maimonides), *Mishneh Torah*, *Hilechot Ishut* (Laws of Marriage), 15, 2 [58]; Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Even HaEzer*, 1, 1 [59]; Rabbi Yosef Karo, *Shulhan Aruch*, *Even HaEzer*, 1, 1 [60]; H. H. Cohn, *HaMishpat* (Bialik Institute, 1991) 579, 580). This is a basic need for ensuring the continuation of society and the self-realization of the individual. The importance of parenthood and its status as a basic constitutional right has found expression in American case-law, see: K. D. Alpern ed., *The Ethics of Reproductive Technology*, New York, Oxford, 1992, p. 252, and the decisions cited there. With respect to the status of this right, the Court of Appeals of the State of Tennessee said in *Davis v. Davis* (1990) [47] at pp. 4-5:

> 'The United States Supreme Court in *Skinner v. Oklahoma*… recognized [that] the right to procreate is one of a citizen's "basic civil rights". Conversely, the court has clearly held that an individual has a right to prevent procreation. "The decision whether to bear or beget a child is a constitutionally protected choice." *Cary v. Population Serv. Int'l*, … *Eisenstadt v. Baird* … see *Griswold v. Connecticut* … *Matter of Romero*…'

The dispute is not about the importance of parenthood and the status of the right to be a parent. That is not the question at issue. In principle, the

relevant question is: is it possible, because of the great importance of parenthood, to force parenthood on someone who does not want it, and to use the machinery of the legal system to achieve such coercion? In order to answer this question, it is first necessary to make a correct classification of parenthood as a value, in the relationship between the potential parents.

Classification of rights

6. The classification of norms that regulate activity in relationships between man and his fellow-man has not infrequently occupied legal scholars and academics in various fields. The scholar Dias deals extensively with what is sweepingly called 'rights', and indicates the lack of clarity that prevails on this issue and on the distinctions gradually reached by scholars.

> 'Claims, Liberties, Powers and Immunities are subsumed under the term "rights" in ordinary speech, but for the sake of clarity and precision it is essential to appreciate that this word has undergone four shifts in meaning. They connote four different ideas concerning the activity, or potential activity, of one person with reference to another' (R. W. M. Dias, *Jurisprudence*, London, 5th ed., 1985, at p. 23).

Dias presents a list of thinkers and jurists (Sir Edward Coke, Hobbes, Bentham and others) who contributed to the conceptual classification of 'rights', and he mentions the American jurist Hofeld, who revised and completed a table made by the scholar Salmond, and prepared a table known as the Hofeld Table, which categorizes the *claims, liberties, powers and immunities* that are called 'rights', according to their status, substance and implications (*ibid*., at p. 23).

In CrimA 99/51 *Podamski v. Attorney-General* [1], Justice Agranat — with regard to the classification of rights — gives a summary of several principles that he says are derived from the writings of recognized legal scholars, who classified rights into rights entailing legal obligations or legal liberties or legal privileges. Legal rights, in the narrowest sense, are interests that the law protects by imposing duties on others with regard to those interests. By contrast, legal rights in the widest sense also include interests that are recognized by the law but do not entail a legal duty. These are the liberties (see Salmond, *On Jurisprudence*, London, 11th ed., by G. Williams, 1957, at pp. 269, 273). Where a person has a right that is a liberty or a privilege, he is under no duty toward either the State or another to refrain from carrying out the act, just as he is under no duty to carry out an act that

he is free not to do. A right that is a freedom or a liberty cannot impose a duty on another and require him to perform an act that he is free not to do.

> 'Sometimes a right takes the form of a "liberty" or a "privilege": in such a case, the duty that we are obliged to uphold is not to interfere with, or disturb, the exercise of the right…' (H. H. Cohn, *HaMishpat*, *supra*, at p. 512).

Moreover, at p. 513:

> '"Basic rights", or "human rights", or "civil rights" are rights to which a person is entitled by law, as a human being. Some say that these rights were born with us, or are inherent in us; but whatever may be the case, we are concerned, as stated, not with "natural" rights but with legal rights.'

Below the freedom to be a parent will be called a 'right'.

Classification of the right to parenthood

7. The right to be a parent is, by its very nature, essence and characteristics, a natural, innate right, inherent in human beings. It is a *liberty* that does not entail a legal obligation, either in relations between the State and its citizens, or in relations between spouses. The right not to be a parent is also a liberty. It is the right of the individual to control and plan his life. Indeed, non-parenthood in itself is not the protected value. The protected value in non-parenthood is the liberty, privacy, freewill, self-realization and the right to make intimate decisions without interference. These are protected basic values of supreme importance, *from which the liberty not to be coerced into parenthood is derived* (see also: CA 451/88 *A v. State of Israel* [2], at p. 337; H. Fenwick, *Civil Liberties*, London, 1993, at p. 295). Regarding freewill as a liberty leads to the conclusion that every person is free to choose and decide whether or not to be a parent, and a person wishing to be a parent cannot coerce another into becoming one in order to become a parent himself. This also means that the State may not impose parenthood on a person, either directly or through the courts. Consequently, I do not accept the position of those who consider the right not to be a parent as a right of less value than the right to be a parent.

The right to be a parent and the right not to be a parent are two rights which, although they are two sides of the same coin, have different characteristics. Each in itself can be found within the framework of civil liberties; the distinction between the two levels of rights does not lie in the one being a positive right and the other a negative right, but in the right to

parenthood belonging to the group of rights requiring cooperation of another individual in order to achieve it, whereas the right to non-parenthood does not extend beyond the particular individual (see Ch. Gans, 'The Frozen Embryos of the Nahmani Couple', *supra*, and Ch. Gans, 'The Frozen Embryos of the Nahmani Couple: a Reply to Andrei Marmor', *supra*). This distinction affects the question of the limits of proper legal intervention.

Had the right to be a parent been a right in the narrow sense, entailing an obligation, consent *ab initio* would not theoretically be needed, since when the obligation exists, all that remains is to examine what is the proper relief. Since the right is a liberty that does not entail an obligation but entails an opposing right, and since it requires two persons to achieve it, the person needing cooperation must obtain it from the other by receiving his consent throughout the procedure.

The right to be a parent — when the spouse refuses — requires a coercive, positive judicial act, whereas the right not to be a parent requires no intervention or interference in the freedom of the person who is unwilling to undertake parenthood. Since the 'refusing' parent has a right not to be a parent, such a coercive order should not be made against him. *Realizing the right of someone who wants parenthood by imposing an obligation on someone who does not want it conflicts with the essence of the freedom and deals it a mortal blow.*

Non-coercion of parenthood

8. In the sphere of liberties, the law refrains from forcing someone to do what he is not obliged to do, and this is also the case in other contexts within the sphere of inter-personal relationships. Every person has a right to marry. Nonetheless, no-one disputes that a person to whom a promise of marriage is made and breached will not receive from the court a relief of enforcing the promise. Every person has a right to establish a family and have children. Nonetheless, no-one disputes that the State — directly or through the court — may not coerce a person to have children if he does not want to, even if he promised his spouse to do so, and even if the spouse relied on this and maybe even entered into the marriage by relying on this and with an expectation that this is what will happen. Why do we not do this? Not merely because a mandatory injunction cannot compel performance (other than perhaps by way of contempt of court proceedings until the 'refuser' wants to do it), but because of the fundamental and normative reason for this, namely the refusal of the law to employ coercive measures to realize the wishes of one of the spouses contrary to the wishes of the other (*Griswold v.*

Connecticut (1965) [48], at pp. 1688-1689; *Eisenstadt v. Baird* (1972) [49], at p. 1038; P. Shifman, 'Parent against one's will — false representation about use of contraception', 18 *Mishpahah* 1988, at p. 459).

9. Refraining from forcing parenthood on someone who is not prepared to undertake it is especially important in view of the nature and significance of parenthood. Parenthood involves an inherent restriction on future freedom of choice, by imposing on the parent an obligation that encompasses most aspects of life. Entering into the status of parent involves a substantial change in a person's rights and obligations. When a person becomes a parent, the law imposes on him an obligation to care for his child. We are not talking of a mere concern, but of an obligation to place the best interests of the child as his foremost concern. A parent cannot deny the needs of his child merely because it is inconvenient for him to fulfil them. A parent's responsibility for his child's well-being also has a tortious and criminal aspect. This responsibility embodies the normative expectation that our social values and legal system have of the individual, with respect to his functioning as a parent. The very significant implications deriving from this status necessitate that the decision to be a parent is made only by the person concerned (see also P. Shifman, *Family Law in Israel*, vol. 2, The Harry Sacher Institute for Research of Legislation and Comparative Law (1989), 174; CA 614/76 *A v. B* [3], at p. 93; CA 5464/93 *A v. B* [4]).

There are some who consider the paternity of Daniel Nahmani —should the procedure continue and result in the birth of a child — as merely an economic burden of which he can rid himself. There are some who hold that when Daniel gave his consent to begin the procedure, he need not be consulted again and the procedure may be continued, irrespective of his wishes. This is the opinion of some of my colleagues, as well as Dr Marmor in 'The Frozen Embryos of the Nahmani Couple: a Response to Chaim Gans', *supra*, with which Prof. Gans disagrees in 'The Frozen Embryos of the Nahmani Couple: a Reply to Andrei Marmor', *supra*). Dr Marmor holds that the procedure can be divided into two: the technical stage — when the husband gives over his genetic material — and the 'parental' stage — the continuation of the procedure to its end. In his view, when the husband gives over his genetic material, the husband's role is ended, and this should be sufficient for continuing the procedure without him. His cooperation is not needed for continuing the procedure. Since he is not liable to raise the child that will be born, his right to personal autonomy is not affected. In his opinion, the right of a woman to carry out an abortion derives from an

unwillingness to impose on her options that will be very limited if she becomes a mother in such a way that her right to an autonomous life is nullified. This is not the case — in his opinion — with respect to the husband.

10. I find it difficult to agree with such theses. I do not accept that the consent of a married couple to the fertilization procedure with a view to parenthood is completed by giving over the genetic material which ends in fertilization. The two decisive stages in the fertilization treatment are: first, *in-vitro* fertilization of the woman's ova with the man's sperm; and second, the implanting of these in the body of a surrogate mother. The two stages are different in nature and they are carried out on different dates. The two spouses are partners in all the stages of the procedure, and they should not be regarded as having done their part when they have given over the genetic material. This material is part of its owners and continues to be so even after it has been separated from them. The interest of each of the spouses in the procedure is existential, and it has lifelong implications. I do not think that the husband can be considered merely a technical means for realizing the wife's motherhood. Bringing a child into the world without the father's consent should not be regarded solely as an economic burden from which he may exempt himself — moreover, under the law he cannot exempt himself from it. A decision to bring a child into the world is a joint decision of supreme importance in the lives of both parents. The great importance of parenthood as a value, the obligation it imposes on both parents, and the expectations that society has of the parents and of each one of them to their children are the factors that should give full weight to the husband's right — as well as the wife's — not to bring a child into the world against their will. The special status of parenthood in the field of the basic rights of the individual and the burden of obligations that it involves is the source for the principle that parenthood should not be forced upon someone who does not want it.

11. Recognizing the need for ongoing consent in order to bring a child into the world creates equality, which is a fundamental value in our legal system. Giving the wife the possibility of terminating an unwanted pregnancy, and giving the husband — as well as the wife, if she wishes it — the possibility of stopping the *in-vitro* fertilization procedure is an expression of this value. The possibility of stopping the procedure is blocked only when a right that takes precedence comes into the picture; this, in the case of pregnancy, is the wife's right not to become a mother against her will and her

right over her body. These two rights give her the right to have an abortion without the husband's consent. The wife's right over her body derives from the same fundamental values of personal liberties and personal autonomy, which are the basis of a person's right not to be a parent against his will. Only when a third factor enters the picture, such as the right of the wife over her body, which takes precedence, does the right not to be a parent give way to it.

The nature of consent

12. An examination of the issue before us from the perspective of basic rights is an examination of one of the many aspects of this issue, and as I said in the judgment on appeal[*]:

> '… consideration of the question before us from the viewpoint of human rights is insufficient to decide it, for we are not concerned with a couple where one of the spouses wishes to bring children into the world and the other opposes this, and the law does not force itself on the "objector"; we are concerned rather with spouses who have gone a long way together and given their genetic material from which ova were fertilized and put in frozen storage, in order to bring a child into the world with the help of a surrogate mother. Should the husband be forced to continue the procedure even in this situation? I suspect that he should not. The reasoning for this position requires consideration of the nature of the consent of the spouses and the legal regime within which it operates.'

13. The fertilization procedure for joint parenthood embodies, by its very nature and as an essential condition, the consent of both spouses. What is the nature of the consent on a crucial, sensitive, and intimate subject such as having a child? Generally, consent is an accord of the wills of two or more persons, which makes their individual wills into a common will. Consents between married spouses can be distinguished into two categories: a general, main and central consent, which is a consent to live together as a couple, and goal-oriented consents for achieving a specific goal within the framework of married life, of which the most important is the consent to bring children into the world. The specific consent is reached within the framework of the main consent, and it is entitled to exist only within that framework and as long as it continues, unless the spouses have decided otherwise. When there is a main consent to a joint relationship, any decision that is of major significance to

[*] *Ibid*., at p. 503 {20}.

both parties to the relationship and that derives from that relationship, cannot be made by one of the partners. A consent of a married couple to a procedure leading to parenthood, which is the most important of the goal-oriented consents, requires the procedure to be begun with consent and to be continued with consent. Both spouses will face the consequences of such a consent together. Therefore, someone who agrees to fertilization but does not agree to implantation cannot be bound by his consent to the first stage of the fertilization. Each spouse has the right to withdraw his consent when the marriage has been undermined and the main consent has collapsed. Consent to the *in-vitro* fertilization procedure — from a theoretical and conceptual perspective — is like consent to the natural procedure of fertilization. Just as someone who has agreed to bring children into the world naturally can withdraw his consent, so too someone who began the *in-vitro* fertilization process can refuse to agree to continue the procedure or withdraw his consent. I am aware that in the first case the 'objector' who withdrew his consent cannot be 'compelled', whereas in the second case there is no such problem, since the fertilized ova are situated outside the bodies of the two spouses; but the question and the answer thereto lie in the normative, theoretical, conceptual sphere and not in the practical sphere. The question is whether it should be done, and not whether it can be done. My answer is that it should not be done; rather, we need the consent of both spouses throughout the procedure.

14. Admittedly, the right to withdraw the initial consent creates a degree of uncertainty, but this exists in many spheres of married life, and it does not deter people from entering into it. A decision to bring a child into the world by means of *in-vitro* fertilization is a serious and momentous one. The difficulties and risks involved in this procedure far from guarantee success. The refusal of a spouse to continue the procedure is merely one of the possible risks. A couple starts the procedure against a background of a working marriage, notwithstanding the risks and uncertainty as to the success of their marriage and the success of the procedure. It can be said that a situation in which, after the *in-vitro* fertilization, there is no right to withdraw on any condition or in any case, may deter spouses from entering into a procedure from which there is no way out, no less that the fear that that the procedure will be stopped as a result of the collapse of the marriage, something that is feared by my colleague Justice Tal.

The consent of the Nahmani couple

15. 'What is the status of the consent that was given; what is its scope, what is its nature? Is it subject to any legal framework, and if so, what is that framework? Was an agreement made between the parties, and if so what is its basis and what are its implications? What are the ramifications of the change of circumstances that occurred subsequently on this agreement? Is the person who gave his consent entitled to revoke it and what is the remedy that can be granted, if any?'[*] I answered these questions extensively in the judgment on appeal, where I emphasized the problematic status of an undertaking to change personal status, where I said:

> 'In our case the agreement was made in special circumstances, on an intimate, personal and sensitive matter that lies within the sphere of the human psyche. Notwithstanding, I do not think that this case does not involve any agreement whatsoever. The Nahmani couple expressed consent, determination and resolve with regard to a very serious matter and they took steps to carry out their consent. When two persons continue to give their consent and do not revoke it, their wishes should be respected and the agreement should be acted upon in so far as it concerns matters that they have agreed (provided that they indeed agreed them). Such an agreement — as long as the parties still agree with regard to it — is valid vis-à-vis third parties such as the medical institution or other parties involved in the *in-vitro* fertilization procedure, and these should respect the joint wishes of the parties (within the framework of the law). Notwithstanding, we are not concerned with an ordinary contract but with an unique contract. It certainly does not fall into the category of "perfect" contracts. Since it has contractual elements, it can be classed among the "weak" contracts. Therefore the legal framework that applies to it will also not be the framework of the laws of contract in the strict and narrow sense.'[†]

16. My colleague Justice Tal holds that we are dealing with an unenforceable extra-contractual agreement, but in his opinion Ruth does not require anything of Daniel, and his consent is not needed for the implantation. Is it really the case that Ruth is making no demands of Daniel?

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[*] *Ibid*., at p. 507 {26}.

[†] *Ibid*., at pp. 509-510 {29}.

I suspect that the opposite is true. She demands that his opinion should not be taken into account, that he should be removed from the picture and that his refusal should be ignored. She demands that she should be allowed use of the genetic material against his will in order to bring a child into the world. She demands that the court should give consent instead of Daniel and instruct the hospital to give her the ova so that she can continue a procedure that will lead to the birth of her and Daniel's joint child, without his consent. To this end she asks that his consent to fertilization should be interpreted as consent to bringing a child into the world against his will, even if he will not raise the child.

Against this background, what is the significance of my colleague's determination that Ruth does not require anything of Daniel and that his consent is unnecessary at the time of implantation? The significance is that Daniel's consent is frozen in time and place, and constitutes a firm resolve at a given moment — the moment of fertilization — exactly as in a regular contract. From this moment onwards — which in our case is the period from the time when the procedure was started until the implantation of the ova — the spouses are 'bound' by their consent and each can do as he pleases with the other's genetic material without the other's consent and against his will. This is a rigid and narrow statement, even within the framework of the laws of contract themselves, and all the more so in the special and sensitive 'contract' before us, in which the laws of contract should not be applied strictly, but in keeping with the nature, background and circumstances of the relationship. The contractual aspect does not operate in a legal vacuum of its own. It constitutes part of the laws of contract in their wider sense, and it should not be severed from them absolutely. It follows that we must examine the consent of the couple and each one of them and their implications, by using the tools available to us, which we must borrow from the sphere of law that is closest to the matter, namely the contractual sphere in its wider sense, adapted to the sensitive material with which we are dealing. In this framework, the agreement between Ruth and Daniel is a special agreement built on the foundation of a functioning married life. It anticipates a joint future, and the birth of a child wanted by both into the family unit. It is unenforceable and ought not to be enforced in the absence of a joint will of both parties throughout the process.

Agreement, representation and estoppel

17. In order that the consent should have legal effect, the law makes certain requirements, some formal and some substantive. These requirements

are not mere obstacles. Underlying them are normative, social and ethical ideals that require the existence of certain elements or a certain form of elements, in order to create a binding legal obligation. They are all needed to create reliability, stability, clarity and certainty and to ensure that the person making the commitment knows what he can expect, and understands the significance of expressing his will. This is the case with every consent, but all the more so with regard to 'informed consent', which requires awareness of the circumstances in which the consent will operate. The consent required for bringing a child into the world in this way is 'informed consent' at each stage of the procedure. Consent at the stage of fertilizing the ova cannot be used to infer 'informed consent' to the continuation of the procedure in circumstances that are totally different to those that prevailed when the procedure began.

18. Was there any express or implied consent or promise on the part of Daniel to continue the procedure in any circumstances and under any conditions, and is he estopped or prevented from changing his mind? My answer to these questions is no. Within the framework of the main consent to a joint lifestyle, the Nahmani couple reached a joint decision to bring a child into the world. They began the procedure and carried out the first stage of fertilizing the ova and freezing them. Before the consent had matured and before the joint goal was achieved, the family unit fell apart and the main consent collapsed. From a factual perspective it is clear that, from this stage onwards, there no longer existed the main consent to a joint lifestyle, and there was no consent to bring a child into the world outside this framework. The court is asked to give the goal-oriented consent that never reached fruition an existence of its own, even though the main consent, within which framework it operated, has broken down and no longer exists. I suspect that this should not be done, and without consent to the continuation of the procedure, parenthood should not be forced on Daniel against his will.

19. The law recognizes the right of a person who gave his consent to change his mind in circumstances that are different from those in which the consent is supposed to be realized. For example, consent to give a child up for adoption, which was given before the child was born, is a consent without awareness of the circumstances that will exist when the adoption will take place. It is specifically for this reason that the law allows the person who gave his consent to change his mind. 'If consent was given *before* the birth of the adoptee, the court may invalidate it for this reason only, namely because of the date when it was given…' (CA 577/83 *Attorney-General v. A* [5], at p.

484). In this matter also consent may be withdrawn, until a third factor enters the picture — the best interests of the child — which is a higher value that overrides the right to withdraw the consent. In this way the principle that I wish to apply in our case is applied.

20. Both from a factual and a legal perspective, there was no consent, and certainly no informed consent, on the part of Daniel to continue the procedure in the circumstances of a breakdown of the family unit. It is reasonable that when the couple began the procedure by consent, they assumed that their marriage would continue, and in this framework their joint child would be born. Reality has dealt them a hard blow. The circumstances have changed utterly, and although Daniel created the change —

> 'We are not sitting in judgment on the acts of Daniel Nahmani in the moral sphere and "punishing" him for his behaviour. These are not the criteria for deciding the question whether he has a right to object to the continuation of the procedure. The relationship between spouses is not static. It is by nature dynamic and subject to crises. The feelings of spouses are not always stable. They may change even without any connection to a complex procedure such as *in-vitro* fertilization. An initial consent to this procedure is not an informed one in the full sense of the word because of the inability to foresee — emotionally and psychologically — what will happen in the future. Spouses do not always deal successfully with the difficulties in their lives together, especially when they are faced with a procedure such as in this case, with its emotional, physical and economic difficulties and the subjective and objective problems that it involves.'[*]

21. Daniel did not promise Ruth that the procedure would continue whatever the conditions or circumstances, and such a promise cannot be inferred from his consent to begin the procedure when their family life was intact. The learned District Court judge did not reach any finding of fact that Daniel promised Ruth to continue the procedure even without the joint family unit and, indeed the evidence does not show that Daniel made such a promise or representation. The learned judge inferred from the initial consent a continuing and irrevocable consent. As I have explained both in the judgment on appeal and in this opinion, I do not accept this position. It is not required

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[*] *Ibid*., at p. 512 {33}.

by the facts of the case, it is inconsistent with our experience of life and it is incompatible with recognized and accepted principles of law. What can be seen from the evidence and is plausible from the circumstances is the absence of a promise to bring a child into the world even if the marriage collapsed and the family unit broke up. The absence of such a promise is inherent in the circumstances surrounding the goal-oriented consent to joint parenthood of the couple within the framework of the main consent to married life.

22. Daniel did not make any representation upon which Ruth could rely, and in practice Ruth did not rely on any representation, and did not begin the procedure on the basis of such a reliance. She did not adversely change her position *by relying* on any representation. The only representation that can be inferred from the circumstances is a limited representation of consent within the framework of the existing family unit, assuming that it will continue to exist. The procedure began when their family life was functioning, with expectations that it would continue to be so, and that the child that would be born would become a part of it. The expectations proved vain and the main consent, and consequently the goal-oriented consent, no longer exist. An initial consent given to begin the *in-vitro* fertilization procedure is not a promise to bring a child into the world in any circumstances whatsoever. It is a promise that is limited to the conditions and circumstances in which it is given.

It follows that Ruth's expectation that she could bring Daniel's child into the world notwithstanding his opposition, against his will and not into a family unit jointly with him is a wish but not an enforceable right; but not every wish of one person imposes an enforceable legal obligation on another; not every desire of one person constitutes a basis for a judicial order against another. Not all walks of life should be controlled by court orders. There are spheres — and marriage and family planning are some of the most obvious — where *judicial enforcement* halts at the threshold of the litigants. When a couple enter into a marriage, each promises the other that they will live together forever. This promise, which no-one thinks is enforceable, exists on the level of good intentions, expectations, hopes and desires. There is no remedy in the law that can guarantee its existence, nor should there be. The same is true also of a promise for joint parenthood. Enforcing parenthood is not a legitimate option when we are speaking of actions that require the consent of both spouses. As I stated in the judgment on appeal:

> 'The relationship between spouses should be based on love, friendship, understanding, support, trust and consideration.

> Sometimes this relationship collapses, expectations fade, hopes vanish and dreams are shattered. Not in every case can the victim find a remedy for his injuries in court orders, where enforcement is impossible, is improper in view of the circumstances and under the law, and is inconsistent with the basic rights of the individual in our society.'[*]

23. Consent loses its significance only when the fertilized ova have been implanted in the woman's body. Then the *body* of the surrogate mother enters into the picture — and no interference can be allowed to this without her consent. It may be that one day, when science allows even pregnancy to take place outside the woman's womb, we will be confronted with a new problem that must be faced. Who can foresee the future? At present, we reach the point of no return only when the ova are implanted in the body of the surrogate mother, when the value of the woman's right to protection of her body, control of her body and non-interference with her body takes precedence. The relevant considerations for fixing the point of no return at the latest time and place in the procedure derive from a balance between the conflicting rights and interests. Until the stage of implantation, the value of free choice takes precedence and consent is required. From that moment onwards, rights and interests that override the interests protected by the principle of consent enter the picture. In a natural pregnancy, the point of no return is reached when the pregnancy begins, because from which point onwards the woman does not need her partner's consent to perform an abortion because of her control over her own body and her right that it should not be interfered with. With *in-vitro* fertilization, this point is reached upon implantation of the ova in the woman's body, since then the woman's right over her body enters the picture, and this overrides the need for consent to the continuation of the procedure.

The need for consent in different legal systems

24. Most western countries, Europe, England, the United States, Canada and others, require continuing consent throughout the procedure, for each stage. I discussed this extensively in the judgment on appeal, so I will say nothing more. In all of those countries, each spouse may withdraw consent at any stage of the procedure. In some of the countries, there is legislation to this effect, such as, for example, in England: the Human Fertilization And Embryology Act, 1990 (Schedule 3, sect. 4). Pursuant to this law, effective

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[*] *Ibid*., at p. 522 {48}.

consent is required, and this incorporates the possibility of *a change and withdrawal of consent at any time* before use of the fertilized ova. The withdrawal of consent by one of the parties obliges the authority storing the fertilized ova to destroy them. This is also the case in Western Australia: the Human Reproductive Technology Act, 1991 (ss. 22(4) and 26(1)(a)(i)).

In the United States, Canada and other Western countries, the issue is not regulated by legislation, but rather by the recommendations of commissions that were appointed to investigate the issue. In some of these countries — because of the great importance attributed to consent in such a fateful matter — it was recommend that the couple should agree between themselves in advance as to the fate of the ova in the event of a separation, and their agreement would then be honoured (there was no such agreement in our case). The vast majority of these countries give the couple the prerogative of making a joint decision whether to continue the procedure or terminate it, and they require the express consent of both to each stage of the procedure, which will be stopped if one of the parties expresses opposition to its continuation (for the position of legislation and the recommendations of the various commissions in the various countries, see the judgment on appeal).[*]

The American Medical Association submitted recommendations according to which *continuing consent* is required, and it did not accept the view according to which consent at the time of fertilization only is sufficient (see: American Medical Association, *Board of Trustees Report*, JAMA, vol. 263, no. 18, 1990, at p. 2486).

In the surrogacy agreements that are common in the United States, among bodies that deal with them, there is a section that requires the consent of both spouses to implantation in the womb of the surrogate, and the signature of both of them on a surrogacy agreement. This was also the case with the agreement which was supposed to be signed by the Nahmani couple but which was never signed. In a judgment of the United States Federal Court *K.S. v. G.S.* (1981) [50], *the court expressed the opinion that once consent is given*, it is deemed to continue; but the court further held that as soon as the consent is expressly terminated, the procedure cannot continue. The petitioner refers to the judgment in *Kass v. Kass* (1995) [51], (See *New York Law Journal*, 23 January 1995), *where the written agreement between the parties was interpreted as providing* for the continuation of the procedure in the event that the couple separated, and the court honoured this agreement

[*] *Ibid*., at p. 503 {20}.

and gave it validity. Here there is no such agreement. Consequently, this decision has no bearing on our case.

In Israel, the issue has not been regulated in direct legislation. The Public Health (*In-vitro* Fertilization) Regulations, which I considered extensively in the judgment on appeal, require consent of the husband at all stages of the *in-vitro* fertilization.

The public commission established in Israel to examine the issue of *in-vitro* fertilization and to submit its recommendations, unanimously recommended that:

> '… in the absence of *joint and continuing consent*, no use should be made of the fertilized ova that were frozen until the end of the freezing period agreed by the spouses *but consent that was given at the beginning of the treatment shall be deemed to continue as long as neither of the spouses revokes it in writing*' (emphases supplied).
>
> 'The Commission considered the possibility that the genetic mother or the genetic father would have no other way of realizing genetic parenthood. But giving permission to have a child in such a situation, without joint consent, means forcing fatherhood or motherhood, both from the legal viewpoint and from the emotional viewpoint, in that there will be a child who is born without their consent. The commission was of the opinion that a man or woman should not be forced to be a father or mother against their will, even if they initially consented to this' (see the *Report of the Professional Public Commission for Examining the Issue of* In-vitro *Fertilization* (1994), 36).

On 7 March 1996, the Knesset passed the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law. Section 2(1) of this law requires written consent between the surrogate mother and the parents availing themselves of her services. The conditions and the procedure for approving the agreement are set out in the law, which stipulates in section 5(c) that 'the approvals committee may reconsider an approval that was given if the facts, circumstances or conditions that served as a basis for its decision have undergone a substantive change, as long as the *fertilized ova have not been implanted* in the surrogate mother in accordance with the surrogacy agreement' (emphasis supplied). The point of no return is the *moment of implanting the ova*. Until this point, the continuing consent of both partners to the procedure is required. This issue was expressly included on the agenda

of the Knesset Committee, when the first draft law contained the words 'as long as the *fertilization* has not been carried out in accordance with the agreement, the committee may reconsider…' was changed in the law to 'as long as the fertilized ova have not been implanted…' (see the discussions of the Knesset Labour and Social Affairs Committee on 9 Jan 1996, at p. 14, 17). The aforesaid approach derives from the basic ethical recognition that regards parenthood as a journey taken by two people together — a journey that can only begin by virtue of consent between them, and that can only continue by virtue of continuing consent between them.

25. In all the countries that require the continuing consent of both spouses, the ova can be destroyed either by joint agreement of the couple or due to the passage of time. In Israel, too, the ova are destroyed after five years (regulation 9 of the Public Health (*In-vitro* Fertilization) Regulations), unless both spouses request an extension of the period. This is a result of the outlook that regards the consent of both spouses throughout as essential and imperative, and from the outlook that the ova are the 'quasi-property' of the two owners of the genetic material and they do not have, in themselves, a 'status' worthy of protection (see also Gans, 'The Frozen Embryos of the Nahmani Couple', *supra*, at p. 86). Their status is pre-embryonic. With regard to the status of the ova, as regarded in the western world, in Israel and in Jewish law, I can only refer to what I wrote in the judgment on appeal, and I will not expand on it.[*]

26. My colleague Justice Tal sees support for his approach in Jewish law; but it is very questionable whether my colleague's position reflects the approach of all aspects of Jewish law. 'Even Jewish law, which imposes a commandment to be fruitful and multiply on the man, but not on the woman (Mishnah, Tractate *Yevamot* 6, 6 [61]), does not see fit to compel him if he does not fulfil his obligation. The refusal gives the woman a ground for divorce but not a ground for enforcement and coercion (Maimonides, *Mishneh Torah*, *Hilechot Ishut* (Laws of Marriage), 15, 5, [58]; Rabbi Yosef Karo, *Shulchan Aruch*, *Even HaEzer*, 154, 4 [60]). See the responsum of Rabbi S. Yisraeli, 'On Consent and Retraction in Pregnancy and Birth by *In-vitro* Fertilization' in *Encyclopaedia of Jewish Medical Law*, Dr A. Steinberg ed., vol. 4, p. 28, 41 [62]; *ibid.*, vol. 2, under '*In-vitro* fertilization', p. 115 [62], the responsum of Rabbi Shalom Shalush, 'Fertilization in a Surrogate

[*] *Ibid*., at p. 519-520 {44-47}.

Womb', *Orchot*, the magazine of the Haifa Religious Council, no. 39, p. 31 [63] (see also the judgment on appeal).*

Before I end this opinion, I would like to associate myself with the remarks of my colleagues Justices Or, Zamir and President Barak. I would also like to add some remarks with regard to what is stated in the opinions of some of my colleagues whose positions are different from mine, and which came to my attention after writing this opinion.

The right to life

27. My colleagues, Justices Goldberg and Kedmi discussed the biological aspect of parenthood and the transfer of the genetic material from generation to generation. My colleague Justice Türkel granted Ruth Nahmani's wish by emphasizing the 'right to life' and the enormous value of 'human life'. The 'value of life' and the 'right to life' cannot be belittled, for we hold them to be amongst the most exalted and sacred rights, if not the most sacred right of all. But the fertilized ovum is not a living creature. The fertilized ovum is genetic material of both spouses in a pre-embryonic state, frozen soon after fertilization. It is composed of several separate cells, without any distinction between what will become a foetus and what will become a placenta. We are not dealing with preservation of existing life, but with advancing the potential for life. We are not speaking of preserving life that has been created, but with the creation of life *ex nihilo*. A society in which the individual is entitled to plan his family and have children, a society which does not compel someone to create life, not even as a moral injunction (except as a religious injunction), cannot force someone to create life against his will, in the name of the right to life. The creation of life is a totally separate issue from the preservation of existing life. Every enlightened society struggles with the question whether to create life at any cost. Medicine and technology allow for the creation of life by means that are becoming more and more removed from the natural means of creation it. The day may not be far off when it will be possible to replace the mother's womb with an artificial one that will carry the foetus and the whole process of creating life can take place in laboratories. The moral questions will continue to reverberate in the air and will become even more acute. Most of the states of the United States and most European countries that venerate the sanctity of life prohibit the creation of life by means of a surrogate mother, for moral, ethical, ideological, sociological, medical and other reasons. Various bodies,

* *Ibid*., at pp. 500, 506 {15, 24}.

including the 'Israel Women's Network', regard surrogacy as immoral and encouraging a type of female slavery, which offers the womb for hire. The topic of *in-vitro* fertilization involves existential questions concerning the nature of life. One cannot find in the sacred and supreme value of life a reason or justification for forcing either of the spouses to create life by means of an *in-vitro* fertilization procedure; the consent of each of the spouses to the implanting of the frozen ova in the surrogate cannot be waived. The procedure cannot be continued without the consent of the two spouses that donated their genetic material. The sanctity of life has nothing to do with considerations for continuing the fertilization procedure, by coercion, at this early stage prior to the creation of life.

'Justice'

28. It is only natural that in the case before us, which has existential, emotional and normative human aspects, opinions are divided and there is no single solution. But recruiting 'justice' for one view, thereby negating it from the opposing view, is to do an injustice to the opposing view, and possibly even to justice itself.

Man is commanded to pursue justice: 'Justice, justice you shall pursue' (Deuteronomy 16, 20 [64]); the law strives to do 'justice'; but the difficult and paramount question has always been, what is 'justice', what is its meaning, what are its characteristics, how is it defined and how is it attained. These questions have occupied the greatest scholars of the Bible, the Talmud, philosophy, literature, law and religion in all generations and cultures. Justice has many aspects and many facets: social, personal, political, national, economic, legal, etc.. Some see in human justice an attempt to imitate divine justice (*imitatio Dei*); some regard equality as the embodiment of justice. Others regard the dispensing of just law as compliance with the rules that fall within the scope of the 'rules of natural justice'.

The difficulty in defining and discovering justice is discussed by Justice Cohn, *HaMishpat*, *supra*, at p. 84:

> '… Justice is not a science that can be discovered or defined: it is an attribute of the soul; and the fact that it is beautiful and humane, does not make it easier to define. It can be compared to the beauty of a Beethoven symphony or of a Gothic cathedral that one cannot prove… It is usually the case, for example, that each of the litigants who stands before a judge genuinely feels and believes that justice is on his side; the sense of justice of the

> successful litigant is satisfied, whereas the sense of justice of the losing litigant is severely injured, and he is convinced that an injustice has been done to him… So it can be seen that the human sense of justice cannot serve as a yardstick for an objective party, in addition to the fact that it cannot even be defined or measured. Moreover, one cannot know, and one certainly cannot determine, whether one person's sense of justice is more reliable or trustworthy than that of another: from its subjective perspective, each of them is right, but even from an objective point of view, each of them may be right, or partially right.'

Concerning the many and vague connotations of the term 'justice', the scholar C.K. Allen says:

> 'Ever since men have begun to reflect upon their relations with one another and upon the vicissitudes of the human lot, they have been preoccupied with the meaning of justice… I choose at random a miscellany of the adjectives which, in my reading, I have found attached to different kinds of justice — distributive, synallgamatic, natural, positive, universal, particular, written, unwritten, political, social, economic, commutative, recognitive, juridical, sub-juridical, constitutional, administrative, tributary, providential, educative, corporative, national, international, parental.
>
> A very little ingenuity would extend the vocabulary indefinitely. There seems to be no end to this classification and sub-classification and its instructiveness is not always proportionate to its subtlety. There is a danger of the cadaver being so minutely dissected that little of its anatomy is left visible to normal sight' (C. K. Allen, *Aspects of Justice*, London, 1958, at pp. 3-4).

In recent decades, we find scholars that have given up trying to find an exhaustive and uniform definition of the nature of 'justice'. In this regard Ronald Dworkin says:

> 'In the end, however, political theory can make no contribution to how we govern ourselves *except by struggling* against all the impulses that drag us back into our own culture, *toward generality and some reflective basis for deciding* which of our

> traditional distinctions and discriminations are genuine and which spurious, which contribute to the flourishing of the ideals we want, after reflection, to embrace, and which serve only to protect us from the personal costs of that demanding process. We cannot leave justice to convention and anecdote' (Ronald Dworkin, *A Matter of Principle*, Cambridge, 1985, at p. 219) (emphases supplied).

29. 'Justice' for one person may be 'injustice' to another, or an 'injustice' to society; the exercising of a right by one person may involve a violation of the right of another, which will prevent him from exercising his own right; every litigant believes that justice is on his side, and that feeling stays with him even when he has lost the case, and then he feels that he has suffered an 'injustice'. Socio-economic 'justice' in a certain society may be perceived as 'injustice' in another society. Is not the repair of a wrong to one person at the expense of another, merely because the first person was harmed and even if he has no right against the other, an 'injustice' to the other? Is the granting of compensation to a person who was injured, without him having a cause of action to receive relief, by making another person liable, because he is injured and the other person can pay, doing 'justice'? The law does not require a person who has promised marriage to fulfil his promise, and it does not compel him to do so. The relief granted is compensation. The law does not require a person to have children with his spouse even if he promised to do so and changed his mind. A person who breaks a promise causes disappointment and frustration to the other. His behaviour is not 'just', but the law will not require him to keep his promise in the name of 'justice'. The law does not intervene when a woman aborts a foetus against the father's will: is that 'just' to him? According to his feeling of frustration, unfairness and loss, it is not just; notwithstanding, the law will prevent the man from interfering and will protect another interest which it regards as preferable; autonomy over the body.

30. The scholar Hare said that not only do people disagree as to the just solution to a particular problem, but it is possible that there is no completely 'just' solution to a particular problem:

> 'By this I mean not merely that people can disagree about the just solution to a particular dilemma, but that there may be no completely just solution' (R. M. Hare, *Moral thinking*, Oxford, 1981, at p. 158).

Doing justice in a trial cannot be fully expressed in a formula. It is a complex process of finding a balance between various factors, including equality. The scholar Dias says:

> 'Justice is not some "thing", which can be captured in a formula once and for all; it is a process, a complex and shifting balance between many factors including equality. As Freidrich observed "Justice is never given, it is always a task to be achieved".' (Dias, *Jurisprudence*, *supra*, at p. 66).

31. Notwithstanding the difficulty in discovering and defining justice, the desire to do justice is an inner imperative of every judge. The exercising of judicial discretion constitutes an effort to achieve justice. The judge's subjective sense of justice guides his judicial discretion to achieve legal justice, which is an integral part of the law. In his aforementioned book, Cohn says at pp. 93-94:

> '… *One must not distinguish between the nature and purpose of the law and the 'legal justice' in its application*. We have already seen that people are different from one other, also in that each of them has his own sense of justice, and an individual sense of justice is, to some degree or other, a function of individual interests. Should every person exercise his own sense of justice and act accordingly, then I fear that the world would revert to utter chaos. By upholding the law, man makes his contribution towards the existence of the world… This is what we have said: if statute and the law is upheld, social justice will be done, and the purpose of this is merely to foster peace between men.
>
> *... Legal justice is always manifested in acts and omissions that comply with the norms that bind everyone and apply equally to everyone...*' (emphases supplied).

He also says:

> 'Of the many meanings of justice, which we have already discussed, we have chosen very specific meanings in which we see "justice" that constitutes an integral part of the "law" as we have defined it. *This "justice" is consistent, to a large degree, with what Pound termed "the philosophical, political and moral ideas*" that — as we have seen — also in his opinion constitute an integral part of the law.' (H. H. Cohn, *HaMishpat*, *supra*, at p. 83; emphasis supplied).

32. Justice, as an abstract concept, is neutral in our case. A finding in favour of Daniel Nahmani is doing an 'injustice' to Ruth Nahmani, and a finding in her favour is doing an 'injustice' to him. We must seek 'justice' that is consistent with the 'philosophical, political and moral ideas' that are an integral part of the law.

My decision in the matter before us, that the implantation process should not proceed without Daniel's consent, is a decision of justice in law. It is not a random or partisan decision. It is not an intuitive decision based merely on subjective feelings and an inner voice. It is a decision based on the values of justice of the legal system, which are incorporated in it and are its very essence: the rights of the individual, personal autonomy, relationships between spouses in the field of fertility, the result of a joint decision which requires two people to carry it out, the establishment refraining from forcing parenthood on someone, the need for cooperation and consent between spouses on a subject hidden in the recesses of the human soul and inherent in the delicate fabric of intimacy and parenthood. The decision that I have reached is the result of a process of various balances between values, rights and desires that conflict with one other. It represents — to the best of my understanding and feeling — the dispensing of legal justice, in its complete and coherent sense. Loyalty to the basic norms, to the fundamental principles of the legal system, to basic human rights, to the liberties of the individual and equality in exercising and realizing these rights and applying the law in its wider sense, will ensure that a just trial that is normative, ethical, principled and worthwhile. 'Gut feelings' or 'subjective feelings' are likely to lead us on the path of granting a right to someone who does not have one and forcing the will of one person — by means of the law — on another, so that duties that he does not have will be imposed on him, and this coercion constitutes a violation of his basic rights, which we are mandated to safeguard. All of the aforesaid emphasizes the difficulty inherent in attaching the label of 'justice' to one of the two possible solutions.

Conclusion

33. I am aware of Ruth's distress and frustration, of which I have been mindful throughout. I am aware that Ruth's harm from the non-realization of her parenthood is greater than Daniel's harm if parenthood is imposed on him: Ruth's contribution to the fertilization involved suffering and effort beyond those involved in Daniel's contribution; Daniel left the home, established a new family, achieved parenthood, while for Ruth this is apparently the last chance to realize biological motherhood. Daniel should be

mindful of this balance and consider whether as a result he ought to consent to allow Ruth to try to realize her aspiration. No-one can, or should, consent in his stead, and he should not be forced to consent by means of a judicial order that will replace his consent. Such a balance does not replace the required consent, and it does not create a legal right capable of judicial enforcement. Such a balance cannot avail us when a right is a liberty without a corresponding duty and when there is no basis for establishing a right to force parenthood on someone against his will.

34. In summary of my position I will say that, in my opinion, a person has the liberty to be a parent and thereby fulfil a basic human yearning, but he does not have a right that imposes on another a duty to make him a parent, and to make himself a parent. In the absence of mutual consent to bring a child into the world, the right to be a parent — as part of the right of self-realization — cannot limit the autonomy given to another person and the freedom of choice given to him to direct and plan his life. Two people are needed to bring a child into the world, and this implies a need for continuing consent of both of them to achieve this purpose. Without joint consent, a person should not be obliged to continue a procedure that is likely to result in an unwanted parenthood. Consent to begin a procedure of *in-vitro* fertilization within the framework of a main agreement for a joint life and joint parenthood cannot be considered sufficient consent or continuing consent, and even if it can be considered as such, each party is entitled to retract it when there is such a drastic change of circumstances as in our case. Consent is required for each stage up to the point of no return, which is the implantation of the ova in the woman's body. In the absence of such consent, Daniel cannot be compelled to consent to Ruth's aspiration. Daniel did not agreed to bring a child into the world in all conditions, circumstances and frameworks. He made no such promise, made no such representation, and when the framework within which the original consent of the two spouses operated fell apart, the procedure cannot be continued without obtaining Daniel's consent or by ignoring his refusal to consent to the continuation of the procedure. Parenthood cannot be forced upon him against his will by means of a judicial order, neither in the name of the law, nor in the name of justice nor in the name of life.

Therefore my opinion remains as before, that the petition should be denied.

Justice Ts. E. Tal

The case of the Nahmani couple is again placed before this court for its decision, pursuant to the decision of President Shamgar, who ruled that a further hearing should be held on the judgment of the Supreme Court in CA 5587/93.[*]

Let us briefly review the main facts and proceedings of the Nahmani case. The couple married in 1984, and after three years the wife was compelled to undergo a hysterectomy. In 1988 the couple decided to try and have a child by means of *in-vitro* fertilization of the wife's ova with the husband's sperm, and implantation of the fertilized genetic material in the womb of a surrogate. Surrogacy was not permitted in Israel at that time, and so they decided to carry out the fertilization stage in Israel and implantation in the United States at a surrogacy centre there. After the fertilization took place, but before the implantation stage was carried out, disputes arose between the couple. The husband left home and went to live with another woman, who became pregnant and bore him a child.

The wife applied to Assuta Hospital, where the fertilized ova were deposited in cold storage, and she asked to receive it in order to carry out the implantation. The hospital refused, because of the husband's objection, both in a letter to the hospital and in a letter to the surrogacy centre in the United States. The wife applied to the Haifa District Court, where his honour Justice H. Ariel ruled that she was entitled to receive the fertilized ova.[†] Among the reasons given by the judge, a central role was given to the consent between the spouses, and to the fact that the husband could not withdraw his consent. The husband filed an appeal on the judgment, and the appeal was allowed by majority opinion.

I have once again studied the matter, as well as the remarks of my colleagues both in the appeal and in this proceeding, and I have not changed my opinion, which was the minority opinion in the aforementioned CA 5587/93.

My opinion was based on the principle that we do not listen to a man who wants to terminate a pregnancy, even when the pregnancy was obtained by deception and fraud, because we do not interfere with a woman's body

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[*] IsrSC 49(1) 485; [1995-6] IsrLR 1.

[†] IsrDC 5754(1) 142.

against her will. Similarly, a man should not be heard with regard to termination of a fertilization procedure, when such a termination — retroactively — makes the interference in the woman's body futile, and her dignity and modesty are violated. Also, the man is estopped from withdrawing his consent, by virtue of the principle of reasonable reliance, when the woman has adversely and irrevocably changed her position. As explained there, estoppel by virtue of reliance is no longer merely a defence argument, but also constitutes a cause of action and a ground for enforcement.

I reaffirm what I wrote there, and I would like to add a few remarks. We do not have any provision in the law according to which we can solve the dispute before us. Even the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, which recently came into force, contains no provision that regulates a situation like the one before us. The silence of the legislator can be interpreted in several ways. See BAA 663/90 *A v. Bar Association Tel-Aviv District Committee* [6], at p. 404; HCJ 4267/93, *Amitai — Citizens for Good Government v. Prime Minister* [7], at p. 457.

It cannot be said that the silence of legislation amounts to a negative arrangement. The issue is too important, problematic and complex for an arrangement to be derived from silence.

It would seem that the silence of statute derives from the disparity that always exists between the rate of development in the fields of science and technology, and the ability of the law to absorb these changes and embody them in legislation. The Supreme Court of Australia described this disparity in *Mount Isa Mines Ltd v. Pusey* (1970) [46]:

> 'Law, marching with medicine, but in the rear and limping a little.'

The law is silent in our case because it is 'limping behind medicine', and consequently we have before us a field of medical law that has not yet been regulated by the legislator.

Development of the law

A lacuna in the law imposes on the court the duty to develop the law in order to provide a response to cases brought before it. It may not sit idly, as if it were better not to take any positive action. See in this regard J.C. Gray, *The Nature and Sources of the Law*, New York, 2nd edition, 1948, at p. 302:

> 'When a case comes before a court for decision, it may be that nothing can be drawn from the sources heretofore mentioned; there may be no statute, no judicial precedent, no professional opinion, no custom, bearing on the question involved, and yet the court must decide the case somehow; the decision of cases is what courts are for… And I do not know of any system of Law where a judge is held to be justified in refusing to pass upon a controversy because there is no person or book or custom to tell him how to decide it. He must find out for himself; he must determine what the Law ought to be; he must have recourse to the principles of morality.'

In what manner and with what tools should we develop the law? Prof. Barak distinguishes between different types of legal creation, and in our case, it is important to distinguish between the following two: filling a lacuna and developing the law. In his article, 'Types of Legal Creation: Interpretation, Filling a Lacuna and Development of the Law', 39 *Hapraklit*, (1990) 267, 269-270, he said the following:

> 'The second way in which a judge determines the law is by filling a lacuna… a lacuna exists where a legal norm or legal arrangement is incomplete, and this incompleteness conflicts with the purpose of the norm or the purpose of the arrangement. Just as there exists a gap in a stone wall, where the builder forgot to put in one of the stones needed to complete the wall…
>
> The third way in which a judge determines the law is by developing the law… central to this is the judge's activity as a creator of a new legal norm, which is required by the needs of life, other than by interpreting an existing normative text, or creating a new normative text in order to fill a lacuna in an existing normative text.'

Prof. Barak repeated these remarks in his book *Interpretation in Law*, vol. 1, *The General Theory of Interpretation*, Nevo, 1992, at p. 609, where he says:

> 'Development of the law is a judicial activity, in which framework the judge creates a new norm or declares an existing norm to be invalid… this activity is based on the need to adapt the law to the reality of life. Legal institutions and arrangements,

> which served society in the past, may no longer be consistent with the needs of the present and the future.'

According to this distinction, the case before us belongs to the field of development of the law, and not the field of filling a lacuna, since there is no defective or inadequate norm before us. Because of the rate at which life has developed, the legislator has not yet addressed all of the questions in the field of fertilization and genetics, and therefore we must create a proper norm to apply to the case before us.

In doing so, we must: a) consider the conflicting interests; b) determine the legitimate expectations of both parties; c) weigh up the proper legal policy considerations.

The conflicting interests

There are two main rights competing with one another: the right to be a parent and the right not to be a parent. However, since there is no provision in the law that applies to the case, it would be more precise to say the *interest* in being a parent and the *interest* in not being a parent. What is the nature of these interests? The interest in being a parent is one of the most basic aspirations of man, and needs no explanation. In CA 488/77 *A v. Attorney-General* [8], at p. 441, it was said:

> 'In general, a person has no more precious possession than the emotional bond between parents and their natural child, in which they see the fruit of their love, their own flesh and bone, and the succeeding generation that bears their genes.'

And in CA 451/88 *A v. State of Israel* [2], at p. 337, it was said:

> 'The right to parenthood is a basic human right to which everyone is entitled…'

The Supreme Court of the United States, in *Skinner v. Oklahoma* (1942) [52], considered the question whether the right to parenthood is a protected constitutional right, and it concluded that the right to parenthood is 'one of the basic civil rights of man' and that this right is 'fundamental to the very existence and survival of the race' (*ibid*., at p. 541).

Against this existential interest lies the opposite interest, not to be a parent, or, to be more precise, not to be a parent against one's will. When we come to balance these conflicting interests, we should remember that despite the symmetrical forms of speech, 'to be a parent' and 'not to be a parent', these interests are not equal. The interest in parenthood constitutes a basic

and existential value both for the individual and for the whole of society. On the other hand, there is no inherent value in non-parenthood. The value that is protected in the interest of non-parenthood is the value of privacy, namely the freedom and right of the individual not to suffer interference in his intimate decisions. See in this regard the article of Dr Barak-Erez, 'On Symmetry and Neutrality: Reflections on the Nahmani Case', *supra*, at pp. 198-200:

> '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 merely because they are *prima facie* symmetrical. In other words, we cannot assume the existence of symmetry between the two rights just because they hold two ends of the cord of parenthood.
>
> As a rule, the right to "something" and the right to "nothing" are not always equal. Is the right to life entirely equivalent to the right to die? Indeed, a moral position whereby every person has a right to live and a right to die, and the two of these are rights of equal weight, is possible. Whoever accepts this outlook will support full recognition of realizing the right to die, even by means of active "euthanasia". But another, asymmetrical, position is possible. Thus, for instance, the "equivalent" approach to life and death has been rejected in Jewish thought. From CA 506/88 *Shefer v. State of Israel* we can see the approach of the court that the right to life has a higher status, and therefore, at most, it is possible to recognize passive "euthanasia" (in certain circumstances). In other words, the something and the nothing are not always of equal weight.
>
> …
>
> … Even were we to regard the right to parenthood and the right not to be a parent merely as derivatives of the autonomy of the will, there would not necessarily be symmetry between them. We do not respect every desire, and not every desire should be respected to the same extent. Moreover, the main criticism is directed against the narrow view of the judgment regarding the right to parenthood. Is it correct to see in it a right that is "derived from the right to self-realization, liberty and dignity"? Is that all that it involves? In my opinion, we can find many other facets to it. The right to be a parent is an independent right, and not just an expression of the autonomy of the private will. Realizing the option of parenthood is not merely a possible way

> of life, but it is rooted in human existence. There are some who will regard it as cure for loneliness; others will use it to deal with the thought of death. Indeed, the choice of refraining from parenthood is a possible way of life, which society and the law must respect. However the choice of parenthood is not just a decision concerning a way of life; it has much greater significance for human existence. It expresses a basic existential need. Moreover, the decision to become a parent also has an element of self-realization, particularly in modern society, which emphasizes self-realization as a value. But the right to parenthood does not derive only from self-realization. The right to life is an independent basic right, and it is not a derivative of the autonomy of the will; the same is true of the right to parenthood. From this perspective, the symmetry created by the judgment between the right to parenthood and a decision (legitimate, in itself) not to be a parent (as an expression of personal freedom) is undermined, or at least requires further consideration.'

Let us turn to our case. First, we are not speaking of forced parenthood. We are speaking of a person who gave his consent to parenthood, but who wants his consent to be required also during the continuation of the procedure. The interest of society in non-forced parenthood does not necessarily lead to the conclusion that his consent is required over an extended period. The interest in preventing parenthood against a person's will is satisfied by requiring a one-time irrevocable consent.

Secondly, for the woman, it can be assumed that that this is her only possibility of realizing her parenthood.

The cumulative weight of these two factors leads to a clear conclusion that the interest of being a parent takes precedence. We can reach the same conclusion by comparing the damage that is likely to be caused by denying the rights. If you take parenthood away from someone, it is as if you have taken away his life. In the Bible we find the desperate cry of our ancestress Rachel, 'Give me children, else I die' (Genesis 30, 1 [65]). Similarly, from the teachings of the Rabbis we learn that 'whoever has no children is considered as a dead person' (*Bereishit Rabba* 79, 9 on Genesis [66]). Similarly, they interpreted the verse in Jeremiah 22, 10 [68]: '"Do not weep for the dead, nor bemoan him; weep indeed for him who goes" — Rabbi Yehuda said: for him who goes without children' (Babylonian Talmud,

Tractate *Moed Katan* 27b [69]). By contrast, denying the interest of non-parenthood amounts to no more than imposing burdens that may not be desirable to that person. Without belittling the weight of these burdens, they are not equivalent to 'taking the life' of the spouse.

Even in *Davis v. Davis* [47] the court decided in favour of the husband's position, only because at that stage the wife was not asking for the fertilized genetic material for herself, but for another woman. The court said there that had the wife wanted the fertilized material for herself, and had the situation been such that she had no alternative for realizing her right to motherhood, the court inclined to the opinion that the wife's right to motherhood should take precedence over the husband's right not to become a father.

In summary of this point, I will say that the woman's interest in motherhood is greater, and overrides the man's opposite interest.

The legitimate expectations of the parties

One of the tasks of a judge, when engaging in judicial legislation, is to realize the legitimate expectations of the parties. When we say 'legitimate', we do not mean expectations embodied in the law, for if there were a statute or precedent in our case, we would not need to resort to judicial legislation; 'legitimate', in the sense of expectations that merit protection according to the system of values accepted by society.

The importance of this task was discussed by Prof. Barak in his article 'Judicial Legislation', 13 *Mishpatim*, 1983, 25, at p. 71:

> '…We should refrain… from choosing that option that harms reasonable expectations. The reasons for this are many. Harm to a reasonable expectation harms the sense of justice, disrupts proper social life, harms the public's faith in the law, and denies any possibility of planning behaviour.'

Realization of the parties' expectations is important in every sphere of judicial legislation, but it has special importance in our case. The development of fertilization and reproduction techniques requires the law to recognize the importance of the emotional aspect of the persons involved in these techniques. See in this respect A. E. Stumpf, 'Redefining Mother: A Legal Matrix For New Reproductive Technologies', 96 *Yale L. J.* (1986-7), 187.

The case before us concerns two spouses who travelled a long distance in each other's company. It is true that one cannot know with certainty what the

spouses originally thought about a situation in which they might separate. But this uncertainty is not characteristic merely of family law. The law reconstructs a person's intentions in two ways; presumed intention and imputed intention: presumed intention, according to experience of life and common sense, and according to the special circumstances of each case; imputed intention, when there is no way of assessing the presumed intention of the parties, and the law — for its own purposes — attributes to someone an intention without his knowledge, and maybe even against his will.

Our case involves a woman who underwent gynaecological surgery and was forced to undergo complex, invasive and painful procedures in order to extract the ova, in the knowledge that this was almost certainly her last opportunity to bring a child of her own into the world. It is difficult to assume that she would have agreed to undergo these treatments in the knowledge that her husband could change his mind at any time that he wished. It is inconceivable that someone should agree that her last and only glimmer of hope should be dependent on the whim of her spouse, who might change his mind at any time.

It can therefore be said that the presumed intention of the woman was that a change of mind on the part of the man would not affect the procedure that had been begun.

And what is the husband's position? He was required at the outset to make a decision to agree to fertilize the ova with his sperm. Can it be presumed that he would have refrained from this had he known that he could not subsequently change his mind? Not necessarily. Husbands do not refrain from having sexual relations merely because their wishes will not be consulted later with regard to an abortion (following CA 413/80 *A v. B* [9]).

It therefore seems to me that we should assume that the presumed intention of both parties in this case was that neither party has a right to stop the continuation of the procedure.

With regard to 'imputed' intention, an intention can be imputed for considerations of justice or considerations of policy. The considerations of justice have already been set out above, and we will mention them briefly. Giving a right to the husband to destroy the ova (or to prevent their use — which is the same thing) will deprive the woman of her only chance of having a child, while he has had children by another woman. On the other hand, giving the wife the ability to continue the procedure will impose on him undesired burdens. There is no basis whatsoever for comparing these

evils. Moreover, we are speaking of a man who gave his consent, and in reliance on this the woman consented to interference in her body and painful treatments, and also adversely and irrevocably changed her position. She did so by relying on a representation that the procedure would continue; thus the criteria for 'promissory estoppel' were met, as I explained in CA 5587/93.[*] Now, after all of this, the husband wants to change his mind. Of cases such as this, it is said that 'whoever changes course has the disadvantage'. And when we consider whether to impute to the husband an intention that he could change his mind whenever he wanted, it seems to me undesirable to do so.

Another of the considerations of justice is that neither party should be given an unfair advantage. Saying that, in the absence of express consent, either party may change his mind whenever he wishes, disturbs the equilibrium and equality between the parties. A need for the continuing consent of both spouses throughout the procedure gives the party wanting the procedure to be stopped a right of veto over the other party. This right leaves the party that wants to continue the procedure entirely at the mercy of the other party, who may consent and change his mind a moment later. This result is unacceptable. Instead, it should be held that in the absence of explicit consent with regard to a case of separation, an intention should be imputed to the parties that no party can change his mind.

In this matter also let us turn to the legal literature concerning *Davis v. Davis* [47] for the purpose of comparison and inspiration.

The consideration that the party uninterested in implantation should not be given 'control' over the other party was discussed in detail in the article of A. R. Panitch, 'The *Davis* Dilemma; How to Prevent Battles Over Frozen Preembryos', 41 *Case W. Res. L. Rev.* (1991) 543, 572-573.

> 'One approach would be to require mutual spousal consent as a prerequisite to implantation of all preembryos created through IVF. This approach would require obtaining consent twice from each spouse — once when the IVF procedure is initiated and again before each implantation.
>
> …
>
> This rule would also have disadvantages, however. Most significantly it would grant tremendous power to one spouse over the other. It would mean that even though both spouses

[*] *Ibid*..

> initially consented to having a child through IVF, neither could proceed with certainty that the other would not truncate the process. Such an outcome would surely frustrate the spouse seeking implantation, who will have invested large financial expense, time, energy, and, in the wife's case, physical pain. *The required second consent for implantation could become a tool for manipulation and abuse between spouses, especially under circumstances of a pending divorce. Any spouse ultimately denied the chance to have a child through IVF would probably suffer considerable emotional stress*' (emphases supplied).

After the author considers the advantages and disadvantages of this approach, she reaches the conclusion that the consent given at the time of fertilization should be sufficient, on the basis of the laws of estoppel:

> 'Fairness considerations require a determination of whether it would be more equitable to allow the spouse who wants to prevent the possibility of a birth to prevail, or instead to allow the spouse who wants to continue the process of procreation to prevail. One fact is of vital importance in making this judgment; the spouse who opposes implantation wanted a child at one time and submitted to the IVF process with that end in mind. The two spouses once agreed on this issue and initiated the IVF procedure in reliance on that mutual wish. Given this background, *the greater injustice would be to deny implantation to the spouse who detrimentally relied on the other's words and conduct.*
>
> Protection against this sort of injustice is recognized by the well established doctrine of estoppel…
>
> The elements of estoppel are satisfied in a dispute such as *Davis*. The knowing action of the objecting spouse is the undertaking of IVF for the purpose of producing a child. The prejudice to the other spouse consists of money, time and the psychological commitment necessarily expended in pursuing the full procedure. *The injury would include not only the time and money spent, but also the last opportunity to have a child*' (at pp. 574-575; emphases supplied).

See also B. L. Henderson, 'Achieving Consistent Disposition of Frozen Embryos in Marital Dissolution under Florida Law', 17 *Nova L. Rev.* (1992) 549.

The conclusion arising from all of the aforesaid is that in the absence of an express stipulation between the parties concerning the fate of the ova in a case of separation, it should be presumed that their intention was that one party would be unable to stop the procedure against the will of the party interested in the implantation. And if their intention cannot be presumed, this intention should be imputed to them. According to weighty considerations of justice, the right of reliance and legitimate expectations, these expectations should be fulfilled without the need for continuing consent in order to continue the procedure once the fertilization was carried out by consent.

Policy considerations

Besides the abovementioned considerations, there are additional policy considerations according to which it should be held that consent of the parties only at the time of fertilization is sufficient.

First, legal stability and legal certainty demand that the period of time during which the consent of the parties is required should be reduced to a minimum. Apart from the two spouses, additional parties and bodies are involved in the procedure, including the surrogate mother and the medical institution. Allowing the possibility of unilateral cancellation is likely to increase the number of cases in which there are fluctuations and reversals, and it will make it more difficult to carry out the procedure.

This consideration has been mentioned in the context of adoption, and it was said that the court should restrict the number of cases where parents are allowed to withdraw their consent. In CA 623/80 *A v. Attorney-General* [10], at p. 77, Justice Shamgar said:

> '… The results of the described approach, as established in Israel, are also dictated by logic and life experience: it will be very difficult to complete the adoption of a minor if, even though the parents gave their consent, it would be necessary to fear or expect, each morning of the months that necessarily pass between the parents giving their consent and the granting of the adoption order, that perhaps the natural parents will suddenly change their minds, of their own initiative or through the influence of others, whatever their considerations or reasons may be.'

Another consideration is that we should seek for an arrangement that will encourage couples that are unable to conceive naturally, to make use of methods of artificial insemination, and we should refrain from an arrangement that is likely to deter and prevent couples from using such methods. The determination that each party can change his mind whenever he so desires will certainly serve as a deterrent. This is true of both spouses, but especially of the woman who must undergo long and complex treatments. This is especially so when, as in the case before us, a single and last opportunity is involved.

On the other hand, there is no reason to believe that a determination that consent at the time of fertilization is irreversible will serve as a deterrent. The couple will consider all the factors before carrying out the fertilization, in the knowledge that they are irrevocably bound by their consent, unless the change of heart is a joint one. We have already pointed out above that the inability of husbands to demand that their wives have abortions does not constitute a deterrent to starting the process.

Considerations of proper legal policy, together with the ethical considerations and considerations of justice enumerated above, all combine to point to a clear and unequivocal conclusion: we should reaffirm the result reached by the District Court, and order the hospital to allow the woman to carry out the continuation of the treatment required for the purpose of surrogacy.

The right to abort

We can compare the question in this case to a similar issue, namely the issue of abortions.

The right of the woman, in certain circumstances, to abort a pregnancy is recognized in our legal system, even though there is public debate as to the grounds that justify an abortion, as reflected in statute (see chapter 10, article 2, of the Penal Law, 5737-1977). Exercising this right may harm the interests of the man; notwithstanding, it has been established that there is no need for his consent, and he even does not have any standing before the 'abortions committee' under section 316(a) of the Penal Law (see CA 413/80 *A v. B* [9]).

In an article devoted to our case, Prof. Chaim Gans sought to reach the conclusion that:

> 'I said, that if women have the right to abort at the beginning of their pregnancy on the basis of their right to control their lives, Daniel Nahmani ought to have a right to stop the proceedings

> leading to surrogacy of the ova impregnated with his sperm. Since I have shown that women have such a right, Nahmani also has such a right' (Gans, 'The Frozen Embryos of the Nahmani Couple', *supra*, at p. 91).

However, the conclusion reached by Gans does not stand up to scrutiny. The preference that the law gives to the woman to decide about an abortion, while discriminating against the man and despite his objection, derives *solely from the fact that we are speaking of a decision concerning her body*. The woman alone carries the embryo, and therefore the decision to abort is hers alone. The symmetrical analogy regarding a similar right for the man is merely an imaginary and spurious analogy.

In an article that was published after the decision in *Roe v. Wade* (1973) [53], which developed the right of abortion, it was said that:

> 'Allowing women the exclusive right to decide whether the child should be born may discriminate against men, but at some point the law must recognize that there are differences between men and women, and must reflect those differences' (R. A. Gilbert, 'Abortion: The Father's Rights', 24 *Cin. L. Rev.* (1973) 443).

Indeed, the Supreme Court of the United States so held in *Planned Parenthood v. Danforth* (1976) [54], at p. 71:

> 'We recognize, of course, that when a woman, with the approval of her physician, but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. *Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor*' (emphasis supplied).

Even under our law the principle that the husband has no right to oppose the abortion derives from the same reasons. The learned Prof. Shifman summarized the matter as follows:

> 'The main emphasis on the woman's right to control her body has led to the man having no standing in decisions regarding the termination of pregnancy. Thus it has been held in Israel, following similar rulings in the United States and Britain, that

> the man is not entitled to prevent the woman from terminating her pregnancy, just as he is not entitled to demand that she abort if she wishes to continue the pregnancy. The woman's decision to terminate her pregnancy may harm the man's expectations of being a father, i.e., of the birth of a child originating in their joint genetic material, whose creation was, perhaps, the result of their joint decision. If the man is married to the woman, the woman's decision to abort might constitute a breach of legitimate expectations created by the marriage, which is conceived as a framework whose purposes include the bringing of children into the world.
>
> Nonetheless, these considerations do not give the man, even if he is married to the woman, a right equal to hers in making the decision concerning termination of the pregnancy. The woman's preference derives from her interests in control over her body. These interests give her absolute discretion whether to initiate a termination of a pregnancy or not' (Shifman, *Family Law in Israel*, vol. 2, at p. 213).

It follows that, were it not for the decisive factor — the embryo being part of the woman's body, or in the words of the Rabbis: 'An embryo is an organic part of its mother' — the woman would not have a right to destroy the embryo against the wishes of her spouse. Therefore, the logical conclusion from the laws of abortion is the opposite of the one that Gans sought to deduce. *When not speaking of interference in her body, the woman is not entitled to destroy the embryo without her spouse's consent; in exactly the same way, the man is not entitled to destroy the ova* against the woman's wishes (and is not preventing the use of them the same as destroying them?).

We should decide that the husband is not entitled to destroy the ova against the wife's wishes. On the contrary, the wife is entitled to continue the implantation procedure, notwithstanding the husband's opposition.

Equality

A substantial part of the majority opinion in CA 5587/93,[*] the subject of this hearing, was devoted to the principle of equality between the sexes. This is a fundamental legal principle, and therefore we must consider whether the solution proposed here stands up to the test of equality. In other words, do the

[*] *Ibid*..

considerations and principles proposed hitherto remain unchanged in the opposite case, where the woman is the one who wishes to destroy the fertilized genetic material, and the husband is the one who wishes to continue the implantation process in the womb of a surrogate mother?

Admittedly, there was someone who argued that the advantage that the law gives the woman in the laws of abortion also exists in disputes over the fate of fertilized ova. However, as has been explained above, this position cannot be accepted. The woman's advantage in the laws of abortion derives solely from the fact that the embryo is a 'part of its mother', and where this factor does not exist, there is no reason to depart from the principle of equality.

The answer to our question is clear and unequivocal. In the 'opposite' case, when the man wishes to continue the procedure by means of another surrogate mother, the woman cannot object. The same considerations apply to the same extent, and it should be held that consent given at the time of fertilization is sufficient, and therefore the husband is entitled to continue the procedure even against the wife's wishes, and it need not be said, when this is his only opportunity to bring children into the world. The considerations of justice and proper legal policy then work in favour of the husband:

> 'There are several forms which a disagreement between progenitors could take. The woman may want the embryo to be brought to term, and the man may want the embryo terminated. In that case, it would seem appropriate for the woman to be allowed to gestate the embryo. The Supreme Court's abortion and contraception decisions have indicated that the right of procreation is the right of an individual which does not require the agreement of the individual's partner. In particular, the woman has been held to have a right to abort without the husband's consent and the right not to abort over the wish of the husband that she abort.
>
> But what if the positions were reversed and the woman wished to terminate the embryo and her male partner wished to have it brought to term? When an embryo conceived naturally is developing within a woman during the first two trimesters, it is clear that the woman's decision whether or not to terminate it takes precedence over the desires of the man who provided the sperm… it is at least arguable that the man's wishes should be honored when the embryo's continued existence need not be

> balanced against the physical and psychological needs of the woman carrying it. The man clearly would not have the right to force the female progenitor to gestate the embryo, but there seems to be no reason not to give him custody of the embryo for gestation in a surrogate mother' (L. B. Andrews, 'The Legal Status of the Embryo', 32 *Loy. L. Rev*. (1986-87) 357, 406-407).

It follows that the proposed solution stands up to the test of equality and does not discriminate at all between the sexes. On the contrary, it limits the discrimination between the sexes in the laws of abortion merely to those cases where it is relevant, i.e., where the woman's autonomy over her body is concerned. But in the field of *in-vitro* fertilization absolute equality should be applied, and it should be held that the party interested in the implantation of the ova is entitled to do this, notwithstanding the opposition of the spouse.

Jewish heritage

There is no doubt that the fundamental principles of our legal system, according to the Foundations of Justice Law, 5740-1980, include Jewish heritage (see A. Barak, *Interpretation in Law*, vol. 1, *The General Theory of Interpretation supra*, at p. 616). Notwithstanding his criticism of the Foundations of Justice Law, Prof. Barak says that the arrangement prescribed therein is preferable to the arrangement that preceded the statute. In his words, 'an arrangement that refers to Jewish heritage, which is our heritage, is preferable to an arrangement that refers to a foreign heritage' (*ibid.*).

It should be pointed out that reference to Jewish heritage comes after defining the legal question that requires decision, and the inspiration comes within the framework of this question. In our case, we have defined the question as follows: how should we balance between the value of parenthood and the value of non-parenthood?

Our heritage regards parenthood and having children as one of the highest values. In the Bible, we see that man was blessed:

> 'And God blessed them and God said to them: be fruitful and multiply, and fill the earth and subdue it…' (Genesis 1, 28 [65]).

This value is emphasized many times in the sayings of the Rabbis, and we will limit ourselves to one reference from the Mishnah (*Gittin* 4, 5 [69]): 'The world was created only for being fruitful and multiplying, as it is said (Isaiah 45, 18): "He did not create it empty, he made it to be inhabited".'

It need not be said that non-parenthood is not one of the values of Jewish heritage. On the contrary, we find among the sayings of the Rabbis that:

> 'It has been taught: Rabbi Eliezer says: whoever does not engage in the commandment of being fruitful and multiplying is as if he spills blood' (Babylonian Talmud, Tractate *Yevamot* 63b [70]).

The Rabbis also explained in the Talmud (Babylonian Talmud, Tractate *Berachot* 10a [71]), with regard to Isaiah's prophecy to King Hezekiah (II Kings 20, 1 [72]): 'Give instructions to your house for you are dying and you shall not live' that he would die in this world, and he would not have life in the world to come, because he had not engaged in the commandment of being fruitful and multiplying.

In relations between spouses, Jewish law holds that the husband has an obligation to his wife, to help her bring children in to the world. Admittedly, this obligation is not enforceable, but a lack of enforcement is not relevant in our case, since the question of enforcement does not arise at all. The husband is liable to help, and he most certainly is not permitted to sabotage the process. In the judgment in CA 5587/93,[*] I cited the source for the existence of this obligation, which is in the Talmud (Babylonian Talmud, Tractate *Yevamot* 65b [70]), to which I refer.

Conclusion

The outcome of this case stems from its beginning. In his decision to hold a further hearing, President Shamgar said that:

> 'I think, with all due respect, that the questions that arose in Civil Appeal 5587/93 were examined thoroughly, comprehensively and in an illuminating manner, both in the majority opinion and the minority opinion. But the matter is novel and original, and without doubt of special importance in our world which is changing its appearance from a scientific and social perspective.'

Now, after considering the issues in breadth and depth, it can be seen that the 'novelty' of the matter did indeed justify a further hearing. It is the nature of a novel and original issue that one cannot understand it fully without revision and additional study.

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[*] *Ibid*..

After such study, I have reached the conclusion that ideally decisions concerning fertilized ova should be made by both spouses and with the consent of both. However, where there is no consent between the parties, as in the case before us, the spouse wishing to continue with the implantation procedure should be allowed to do so, notwithstanding the opposition of the other spouse.

Justice D. Dorner

1. In this dispute between Ruth Nahmani (hereafter — the wife) and her husband Daniel Nahmani (hereafter — the husband) over the fate of their joint genetic material — the fertilized ova — the wife's right, in my opinion, take precedence.

The facts

2. The couple married about twelve years ago. Like most couples, they wanted children. But the wife contracted a dangerous illness, and she was compelled to undergo a hysterectomy. Nevertheless, the couple did not give up their hope of children, and they decided to try *in-vitro* fertilization. The wife agreed that during the surgery to remove her womb, the surgeon would not harm her ovaries, and he would move them aside in such a way that they would not be damaged by the radiation that was to follow. By doing this, the wife — who fully consulted her husband in her decision — endangered her health.

The surgery was successful. The couple began to search for a 'surrogate' mother in whom the ova, which would be taken from the wife and fertilized with the husband's sperm, could be implanted. But this search failed. The couple discovered that in view of the Public Health (*In-vitro* Fertilization) Regulations, 5747-1987, it was prohibited to implant fertilized ova in the womb of a 'surrogate'. For lack of any other option, the couple decided to carry out the whole procedure in the United States. For this purpose they flew to the United States and even succeeded, with considerable effort, in raising approximately 30,000 dollars. However, they soon discovered that this amount fell far short of the amount required. This economic obstacle left them with only one possibility. The couple began a legal battle. Their plan was that the fertilization should take place in Israel, whereas the implantation and 'surrogacy' stages should take place in the United States. When they tried to carry out their plan, Assuta hospital made the fertility treatment conditional on the consent of the Ministry of Health. When this consent was

not given, the couple petitioned the High Court of Justice. After more than three years, in the middle of 1991, the battle ended. The Ministry of Health agreed to the petitioners' plan, and the consent was given the force of a judgment.

Immediately following this, the couple began to carry out their plan. Over eight months, the wife underwent a series of difficult medical procedures, in which ova were removed from her body. Eleven of these were successfully fertilized with the husband's sperm, and they were frozen for the purpose of their future implantation. Throughout this entire period, the couple went through the procedure together and the husband supported, encouraged and helped his wife. At the same time, the couple began the procedures for making a contract with a 'surrogacy' institute in the United States. At the end of January 1992, the wife and the husband signed an agreement with the institute, which dealt with the financial aspects of the procedure. The couple also made payments necessary for the procedure.

While the spouses were at the crucial stage of the procedure, in March 1992 — two months after signing the agreement with the 'surrogacy' institute — the husband decided to leave home and to move in with his girlfriend. A daughter was also born. He refused to give his consent to the continuation of the procedure and to the implantation of the fertilized ova. The wife has no practical possibility of repeating the procedure.

3. On the basis of these facts, my colleague Justice Strasberg-Cohen held, in paragraph 33 of her opinion, that there is no doubt that in the balance of harm, the harm to Ruth from not realizing her parenthood is greater than the harm to Daniel if parenthood is forced on him. It would appear, therefore, that even the majority in the judgment that is the subject of this further hearing (hereafter — the Nahmani appeal) do not dispute that in this case the scales of justice in the struggle between the parties are tipped in favour of the wife. But the conclusion of Justice Strasberg-Cohen is that 'we should not consider only the specific case before us, and sympathy and understanding for Ruth Nahmani's aspiration is insufficient for giving rise to a legal remedy to her problem' (paragraph 4), and that there is no proper basis that gives the court power to force parenthood on a person against his will (paragraph 33).

Even Prof. David Hed, who teaches the philosophy of morality at the Hebrew University of Jerusalem, reached the conclusion that in this case a rift exists between the moral duty and the legal duty. He said the following in a newspaper interview:

> 'He [the husband] agreed to *in-vitro* fertilization with his wife. This decision required her to undergo painful treatments that endangered her health, treatments that also gave her great expectations. The price that she paid for the fertility treatment was immeasurably higher than the price that he paid, and this fact imposes on him a moral duty to let her complete the procedure, even if he lives apart from her. That is, so to speak, the price of the divorce. True, the price is enormous, but from a moral perspective I would expect him to bear it. In addition, her chance of having a child, if this ovum is not fertilized, is low… [nonetheless] the law cannot oblige a person to be a father against his will… since half of the genetic material of that ovum is his' (square parentheses supplied) (Hebrew University of Jerusalem Graduate Newspaper, 1996, 26).

The question that arises before us is whether the husband's right not to be a parent, based on his 'ownership' of half of the genetic material of the ova fertilized with his sperm, really takes precedence over the right of Ruth, who also contributed half of the genetic material of these ova, to be a parent.

4. Indeed, not every moral duty is a duty in law. But the law must lead to a just result. Prof. Dworkin, who denies the existence of judicial discretion, believes that the court should decide difficult cases on the basis of principles, morality and justice. He wrote as follows:

> 'I call a "principle" a standard that is to be observed… because it is a requirement of justice or fairness or some other dimension of morality' (R. Dworkin, *Taking Rights Seriously*, London, 1979, at p. 22).

Even according to the approach that advocates the existence of judicial discretion, legal norms must be interpreted on the basis of the principles of morality, justice and human rights. In cases where fundamental principles conflict with one other, the conflict will be resolved by a proper balance between the conflicting values. See Barak, *Interpretation in Law*, vol. 1, *The General Theory of Interpretation*, *supra*, at p. 301. See also D. Lyons, *Moral Aspects of Legal Theory*, Essays on Law, Justice and Political Responsibility, Cambridge, 1993, at pp. 64-101.

Referring to the relationship between justice and law, Cohn wrote in *HaMishpat*, *supra*, at p. 83:

> '… The law must include an inventory of standards that take their place when other sources of law are insufficient. This does not necessarily concern considerations "beyond the letter of the law". It would be more accurate to say that justice is a subset of the law, one of its limbs. It falls within the raw material available to the judge when he comes to determine the "law"; and subject to the supremacy of legislation, it influences — and it must influence — not only the creation of the "law" as part of the general law, but also the dispensing of justice between litigants.'

5. The aspiration to do justice lies at the basis of the law. This was already discussed by Aristotle, when he wrote:

> τὸ γὰρ ἁμάρτημα οὐκ ἐν τῷ νόμῳ οὐδ᾽ ἐν τῷ νομοθέτῃ ἀλλ᾽ ἐν τῇ φύσει τοῦ πράγματός ἐστιν... ὅταν οὖν λέγῃ μὲν ὁ νόμος καθόλου, συμβῇ δ᾽ ἐπὶ τούτου παρὰ τὸ καθόλου, τότε ὀρθῶς ἔχει, ἃ παραλείπει ὁ νομοθέτης καὶ ἥμαρτεν ἁπλῶς εἰπών, ἐπανορθοῦν τὸ ἐλλειφθέν... διὸ δίκαιον μέν ἐστι, καὶ βέλτιόν τινος δικαίου, οὐ τοῦ ἁπλῶς δὲ ἀλλὰ τοῦ διὰ τὸ ἁπλῶς ἁμαρτήματος.
>
> '… for the error is not in the law nor in the legislator, but in the nature of the case: … Whenever at all events the law speaks in a generality, and thereafter a case arises which is an exception to the generality, it is then right, where the legislator, by speaking in a generality, makes an omission or an error, to correct the omission… Therefore it [equity] is just and better than some justice, not better than the generality, but better than the error resulting from the generality' (Aristotle, *Nicomachean Ethics*, 5, 10, translated by the editor).

Aristotle solved the dilemma by holding that when equity is done by the judge in a case that comes before him, this is a part of justice, even if this is not expressly stipulated in statute.

Sometimes, when it turns out that the law does not achieve justice, the law is changed or adapted to the circumstances that have arisen, in a way that a just outcome is obtained. Thus, for example, the English rules of equity were developed as a result of the need to soften the rigidity of the rules of the common law, which in certain cases led to unjust results. The rules of equity

allowed a degree of flexibility in implementing the rules of the common law while taking account of the circumstances of each specific case, and they gave relief that was unavailable under the common law.

The doctrine of estoppel is associated with the rules of equity. This doctrine was intended to prevent an unjust result that would apparently be required by the law, by estopping litigants, in certain circumstances, from making in the court legal and factual arguments that are in themselves correct. See H. G. Hanbury & R. H. Mausty, *Modern Equity*, London, 13th ed., by J. E. Martin, 1989, at pp. 5-51; G. Spencer Bower and A. K. Turner, *The Law Relating To Estoppel By Representation*, London, 3rd ed., 1977, at p. 4.

The rules of equity also exist in Jewish law sources. Justice Elon discussed this in HCJ 702/81 *Mintzer v. Bar Association Central Committee* [11], at p. 18:

> '… the principled approach of Jewish law regarding the need for fixed and stable criteria and standards *as a rule* did not prevent it from requiring the judge trying a case to endeavour to find a solution for an *exceptional* case, if and when such a solution was required according to the criteria of justice…'

Rabbi Yaakov ben Asher (*Arba'ah Turim*, *Hoshen Mishpat* 1 [73]) cited the saying of the Rabbis (Babylonian Talmud, Tractate *Shabbat* 10a [74]) that 'any judge who judges according to the absolute truth…'. This was interpreted by Rabbi Yehoshua Falk as meaning:

> 'Their intention in saying the absolute truth was that one should judge the matter according to the time and place truthfully, and one should not always rule according to the strict law of the Torah, for sometimes the judge should rule beyond the letter of the law according to the time and the matter; and when he does not do this, even though he judges truly, it is not the absolute truth. In this vein the Rabbis said (Babylonian Talmud, Tractate *Bava Metzia*, 30b) "Jerusalem was only destroyed because they based their rulings on the law of the Torah and not beyond the letter of the law".' (Rabbi Yehoshua ben Alexander HaCohen Falk, *Drisha*, on Rabbi Yaakov ben Asher, *Arba'ah Turim*, *Hoshen Mishpat* 1, 2 [75]).

The close relationship between the law and justice also finds expression in our case-law. In FH 22/73 *Ben-Shahar v. Mahlav* [12], at p. 96, it was held —

contrary to the law in England and the United States — that a litigant should be exempted from complying with his undertaking under a consent judgment, as long as he is in a condition of helplessness. This is what Justice Berinson wrote:

> 'In Israel, perhaps more than with any other people, law and justice are synonyms, and the concept of just law is very deeply rooted in the nation's conscience…
>
> Counsel for the petitioner also referred to the well-known expression that "hard cases make bad law", since, according to him, in this case, in order to grant relief to the respondent who is in distress, the court innovated a far-reaching rule giving it discretionary power far beyond what courts have appropriated for themselves hitherto, or what has been given to them under any legislation. To this a reply can be made in the words of Lord Blackburn in *River Wear Commissioners v. Adamson* (1877) 2 App. Cas. 743, 770, that "this is a bad law making hard cases". I cannot believe that our law is so bad that it cannot help a respondent in great distress that befell him after judgment was given.'

And in his remarks when retiring from the judiciary, Justice Berinson emphasized:

> '… The law and justice are one, if you make proper use and interpretation of the law. Law is law if it is just law… and I have always found that justice is within reach if you wholeheartedly wish to reach it…' ('Remarks made by Justice Berinson on his Retirement from the Judiciary', 8 *Mishpatim* (1977) 3, 5).

See also I. Zamir, 'In Honour of Justice Zvi Berinson', 2 *Mishpat Umimshal* (1994) 325, 327-330.

6. The issue before us arises because of scientific advances. Human biology, on one hand, and the right of a person to control his body, on the other hand, had hitherto established clear limits for the rights of husband and wife. Until the stage of pregnancy, each of the spouses is free to engage in sexual relations for the purpose of procreation or to refuse to engage in such relations, but from that stage on, the right of the wife carrying the embryo in her womb overrides the right of the husband, in so far as this concerns the relationship between them, and the decision to continue the pregnancy or terminate it is hers, and the husband — unlike the statutory committee

empowered to approve the termination of pregnancy — is not entitled to force his will on her. See sections 314-316 of the Penal Law; CA 413/80 *A v. B* [9], at p. 67.

Scientific-technological advances today allow couples that cannot have children naturally to bring children into the world. The ability of the spouses to interfere in the procreation process, which is being carried out with innovative methods, to influence it and even to stop it has increased. In consequence, the position of the law and its involvement in the disputes surrounding the use of the new procreation techniques are sought more frequently. New areas have even been created where the intervention of the law is required.

The legal issues that are arising are new and fundamental. They involve many principles and factors, from which we must, in a careful process of evaluation, ascertain the correct and fair rules that should be applied. In the words of Justice Witkon in CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* [13], at p. 1337 {138}:

> '… As with most problems in law and in life in general, it is not the choice between good and bad that makes our decision difficult. The difficulty is in choosing between various considerations, all of which are good and deserving of attention, but which conflict with one other, and we must determine which will take precedence.'

Had the matter before us been governed by an established rule of law, the court would be obliged to interpret it in a way consistent with other principles of the legal system and consistent with the demands of justice. When no such rule exists, the principles of law and justice can operate together to establish the appropriate rule.

7. In the case before us, we need to balance between the right to be a parent and the right not to be a parent. Today, in cases where couples require a 'surrogate' mother who will carry their embryo in her womb, the balance is achieved within the framework of the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law (hereafter — 'the Agreements Law'). The Agreements Law restricts the couple's autonomy and allows a 'surrogate' to be used only if a written agreement is made between the woman intended to carry the embryo and the prospective parents, and that agreement is approved by the Statutory Committee (section 2(1) of the Agreements Law).

A 'surrogacy' agreement is therefore not absolutely binding. An agreement made under the Agreements Law is not an ordinary contract. As long as the fertilized ovum has not been implanted in the body of the woman intended to carry the embryos, she is entitled, and the two spouses (jointly) are entitled, to be released from the agreement. Even the statutory committee may stop the fertility procedure as long as the ovum has not been implanted. Nonetheless, neither of the spouses — without the consent of the other — has the power to prevent the implantation after the ovum has been fertilized. Stopping the procedure at this stage requires approval of the statutory committee.

8. The Agreements Law, which, as aforesaid, was enacted only recently, does not apply to the case before us. The parties also did not make a formal agreement between them. But this has no significance, since, in my opinion, even according to the legal position before the Agreements Law, an agreement with regard to having children is not a contract. Couples are presumed not to be interested in applying the law of contracts to matters of this kind. This presumption has not been rebutted in our case. In any event, even were it proved that the parties had such an intention, they still did not have the power to give the agreement between them the force of a contract, since making a contract to have children is contrary to public policy. Therefore, the contract is void under sections 30 and 31 of the Contracts (General Part) Law, 5733-1973. Note that there is nothing improper in the purpose of the agreement — bringing children into the world — or the means of carrying out the agreement. The impropriety lies in the application of the law of contracts to the agreement, which is contrary to public policy. See and compare D. Freedman, N. Cohen, *Contracts*, Aviram, vol. 1, 1991, at p. 326; A. Bendor, 'The Law of Political Agreements', 3 *Mishpat Umimshal* (1995) 297, 316.

However, the fact that an agreement to have children is not a contract does not entirely negate the legal significance of the agreement or even of a representation with regard to consent. This is because, within the framework of balancing between the rights of the parties, there are reasons to take into account also the existence of an agreement between them or the existence of a representation with regard to consent. An agreement, like a representation, may lead to expectations and even reliance. These must be taken into account among the other factors affecting the balance. Cf. A. Barak, 'Protected Human Rights and Private Law', *Klinghoffer Book on Public Law* (The

Harry and Michael Sacher Institute for Research of Legislation and Comparative Law), I. Zamir ed., 1993) 163, 169.

It would seem that this principle also applies today with regard to the discretion of the committee acting under the Agreements Law to prevent implantation of a fertilized ovum in the body of a 'surrogate'. We may assume that in many cases the committee will consider the matter at the request of one of the spouses. By exercising the discretion given to it, the committee will take into account, *inter alia*, any expectation or reliance that the agreement created in the other spouse.

9. In a conflict between the right of the husband and the right of the wife, the two have equal status with regard to their relationship to the fertilized ova, which contains their joint genetic material. Moreover, I do not think that we should distinguish between a man and a woman with regard to their yearning for parenthood. The proper balance between the rights of the two is therefore unaffected by the sex of the spouse who wants the ova be implanted, or of the spouse opposing this.

One can conceive of three main ways of balancing between the rights of the spouses after the woman's ovum has been fertilized with the man's sperm and they do not agree upon its implantation in the womb of a 'surrogate' mother. These are as follows:

The first way, which was the majority opinion in the Nahmani appeal, is to prefer always the spouse who does not want to be a parent. This absolute preference is based on the principle of the autonomy of the individual, which rejects the coercion of parenthood. According to this principle, an agreement to bring children into the world should be regarded as a weak agreement, whose existence — until the implantation of the ova — is conditional on the consent of both spouses. Enforcement of such an agreement will violate a basic human right, and therefore is contrary to public policy. This position has some support in one of two judgments in the United States that considered the issue before us. In *Davis v. Davis* [47], where the judgment was given by the Supreme Court of the State of Tennessee, it was held that, as a rule, the right not to be a parent should be preferred. Nonetheless, it was held that this rule would not apply in a case where preference of the right not to be a parent would deprive the other spouse absolutely and finally of the possibility of being a parent. Justice Daughtrey wrote as follows, at p. 604:

> 'Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable

> possibility of achieving parenthood by means other than the use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered…
>
> … the rule does not contemplate the creation of an automatic veto…'.

The second way, upon which the approach of my colleague, Justice Kedmi, is based, supports a preference, in all circumstances, of the right to parenthood. This approach is based on the outlook that the point of no-return is not implantation of the ovum in the body of the 'surrogate', but fertilization of the ovum, which is what creates a new entity. This approach has support in the second American ruling that exists on the question before us, *Kass v. Kass* [51], which was given by a trial court in the State of New York. In this judgment it was held that a stipulation in an agreement made by the spouses, which said that if they did not reach agreement on how to deal with the fertilized ova they would be used for research, should not be regarded as a waiver by the woman of her right to parenthood. The court disagreed with the ruling in *Davis v. Davis*, and it held that there was no basis for distinguishing between *in-vitro* fertilization of an ovum and fertilization of the ovum in the body of the woman, and in both cases, once fertilization has occurred, the husband cannot impose a veto on the continuation of the procedure. Justice Roncallo wrote as follows:

> 'In my opinion there is no legal, ethical or logical reason why an in vitro fertilization should give rise to additional rights on the part of the husband. From a propositional standpoint it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilization is fertilization and fertilization of the ovum is the inception of the reproductive process. Biological life exists from that moment forward… To deny a husband rights while an embryo develops in the womb and grant a right to destroy while it is in a hospital freezer is to favor situs over substance.'

The third way, which my colleague Justice Tal advocates, is to balance the rights of the specific parties. In my opinion, this is the correct way, because balancing rights on an abstract level may lead to unjust results. This was discussed by Justice Holmes of the Supreme Court of the United States in *Lochner v. New York* (1905) [55], at p. 547:

> 'General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.'

Of course, even a balancing of this kind is not an *ad hoc* balancing without any guiding principles, but it is made on the basis of rules that are applied to the special circumstances of each case.

This method of balancing — according to which, in our case, the woman's right is preferable — was proposed also in three articles written as a result of the Nahmani appeal. See Marmor, 'The Frozen Embryos of the Nahmani Couple: a Response to Chaim Gans', *supra*; Barak-Erez, 'On Symmetry and Neutrality: Reflections on the Nahmani Case', *supra*; S. Davidov-Motola, 'A Feminist Judgment? A Further Aspect of the Nahmani Case', 20 *Iyunei Mishpat* (1996) 221.

10. Freedom in it fullest sense is not merely freedom from external interference of the government or others. It also includes a person's ability to direct his lifestyle, to realize his basic desires, and to choose from a variety of possibilities by exercising discretion. In human society, one of the strongest expressions of an aspiration without which many will not regard themselves as free in the fullest sense of the word is the aspiration to parenthood. We are not speaking merely of a natural-biological need. We are speaking of a freedom which, in human society, symbolizes the uniqueness of man. 'Any person who does not have children is considered as a dead person' said Rabbi Yehoshua ben Levi (Babylonian Talmud, Tractate *Nedarim*, 64b [76]). Indeed, whether man or woman, most people regard having children as an existential necessity that gives meaning to their lives.

11. Against this basic right, which constitutes a central element in the definition of humanity, we must consider the right not to be a parent. The basis of the right not to be a parent is the individual's autonomy not to suffer interference of the government in his privacy. This was discussed by Justice Brennan in *Eisenstadt v. Baird* [49], at p. 453:

> 'If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'

In the conflict of rights before us we are not speaking of relations between the individual and the government, but of relations within the framework of the family unit. Although the autonomy of the individual is also recognized

within the framework of the family, it seems to me that the right of privacy from the government is in general of greater weight than the right of privacy in the family. In the case before us, the husband does not even insist on his right for reasons of principle that oppose bringing children into the world. After all, he has a daughter from another woman, and he wanted that daughter. His argument is against a parenthood specifically with regard to an embryo created in the fertility procedure that the parties underwent. Moreover, the husband has declared that his objection to parenthood does not derive from a fear of the personal and financial burdens involved. Therefore, the interest not to be liable for personal and financial obligations towards a child born against the parent's wishes, which might be a relevant consideration when balancing the interests as a rule, is not relevant in this case.

What, then, is the importance of the freedom expressed in a person's knowing that he does not have in the world a child that he does not want? It seems to me that for both men and women this freedom is regarded as limited, conditional, and in essence secondary compared to the right to have children and to create the next generation.

In so far as a man is concerned, once a woman has been impregnated by a man, he has no power to force her to have an abortion even when he is not interested in a child. In so far as a woman is concerned, as a rule she is not entitled to have an abortion. Abortion is permitted only on the basis of a permit from a statutory committee given according to a closed list of grounds. The mere fact that the woman does not want a child is not one of the reasons on the list. A fundamental principle, which applies to both women and men, is therefore that once a woman becomes pregnant, neither she nor her spouse have a right not to be parents.

Another basic principle is that the right of a man or a woman to be a parent does not override the right of the spouses to control over their body, and it does not impose on them positive duties to participate in a procedure that may lead to parenthood.

Subject to these fundamental principles, the balance between the rights of the spouses will be made in each case by taking into account the current stage of the procedure, the representations made by the spouses, the expectations raised by the representations and any reliance on them, and the alternatives that exist for realizing the right of parenthood. I will discuss these considerations in this order.

12. *The current stage of the procedure*: The more advanced the stage of the fertilization procedure, the greater the weight of the right to be a parent. As aforesaid, the right to be a parent and the right not to be a parent are subject to a person's right over his body, and in no case can one spouse be compelled to undergo a physical act to realize the right of the other spouse. The situation is different in circumstances where the realization of the right to be a parent does not involve a violation of the other spouse over his body. In our case, it can be said that the right to be a parent has begun the journey from theory to practice, and it is not merely a yearning. On the other hand, the ovum has not yet been implanted, and there is no absolute obstacle to terminating the procedure.

13. *Representations, expectations and reliances*: Estoppel by representation prevents a party from denying a representation that he made to another party, if that party relied on the representation reasonably and in good faith and in consequence adversely changed his position. In Israeli law, the doctrine of estoppel — which we received from English law — can be regarded as a facet of the principle of good faith, which is a basic principle in our legal system. See LCA 4298/92 *Ezra v. Tel-Mond Local Council* [14]. In this regard, the following remarks were written in a review of the judgment in *Davis v. Davis*:

> '… the doctrine of reliance should be applied to resolve a dispute between the gamete providers. The consistent application of a reliance-based theory of contract law to enforce promises to reproduce through IVF will enable IVF participants to asset control over their reproductive choices by enabling them to anticipate their rights and duties, and to know with reasonable certainty that their expectations will be enforced by the courts.' (C. D. Ahmen, Comment, 'Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?' 24 *Creighton L. R.* (1990-91) 1299, 1302, 1303).

Nonetheless, in my view, the decision between the rights of the parties is not be based on estoppel alone. Representations made by one spouse to another (including their making an agreement) may be a factor in the balance between the rights of the parties, when they created reliances and sometimes even mere expectations. A similar position was adopted in another article reviewing the judgment in *Davis v. Davis* [47], where it was written:

> 'One fact is of vital importance in making this judgment: the spouse who opposes implantation wanted a child at one time and

> submitted to the IVF process with that end in mind… the greater injustice would be to deny implantation to the spouse who detrimentally relied on the other's words and conduct' (Panitch, 'The *Davis* Dilemma; How to Prevent Battles Over Frozen Preembryos', *supra*, at p. 547).

In our case, as a result of the husband's consent to the procedure, including his encouraging the wife to undergo the limited surgery and the fertilization, the wife underwent difficult fertility treatment with his sperm and did not need, for example, an anonymous sperm donation. In his article 'The Frozen Embryos of the Nahmani Couple: a Response to Chaim Gans', *supra*, Dr. Marmor discusses this, at p. 445:

> 'By agreeing to begin the fertility and surrogacy procedures, and even more by his conduct during the initial stages of the procedure, there is no doubt that Daniel Nahmani made a representation towards his wife, from which she could conclude that he had no intention of stopping them; there is also no doubt that as a result of this representation, and relying on it reasonably and in good faith, Ruth adversely changed her position, by beginning the procedures with him (and not, as aforesaid, with an anonymous sperm donation).'

Similar comments were written by Dr Barak-Erez, 'On Symmetry and Neutrality: Reflections on the Nahmani Case', *supra*, at p. 215, and Ms Davidov-Motola, 'A Feminist Judgment? A Further Aspect of the Nahmani Case', *supra*, at p. 299.

This adverse change in the wife's position is a major consideration in the balance of interests between the spouses, even if it has not been proved that the husband wanted to become the father of the wife's child even if they separate.

14. *Possible Alternatives*: A case of refusal to continue a fertility procedure when the spouse can perform it with another partner is not the same as a case where refusal will doom the other spouse to childlessness. The fewer the alternatives available to the spouse wishing to become a parent, the greater the need to protect his right to parenthood, even at the expense of trespassing on the rights of the other spouse. As stated, this was the approach of the court in *Davis v. Davis* [47]. Prof. Robertson adopted a similar approach:

> 'If the right to reproduce and the right to reproduction are in conflict, favoring reproduction is not unreasonable when there is no alternative way for one party to reproduce' (J. A. Robertson, 'Prior Agreements for Disposition Of Frozen Embryos', 51 *Ohio St. L. J.* (1990) 407, 420).

This consideration in our case has an additional weight of justice, since the spouse who is not interested in continuing the procedure — the husband — has been blessed with a daughter of his own in another family that he has established.

15. In our case, the basic principles and considerations which I have mentioned therefore lead to a preference of the wife to be a parent over the right of the husband not to be a parent. As stated, I do not believe that women and men attach different degrees of importance to having children. Therefore, were the positions reversed and were the man, in similar circumstances, to want to continue the procedure and were the woman to refuse, the result I have reached — namely, allowing the implantation of the frozen ova in the womb of a 'surrogate' mother — would not be different.

I have read the opinion of my colleague Justice Goldberg, and I agree with his remarks (except for what he says in paragraph 5 of his opinion with regard to the scope of the powers of the committee acting under the Agreements Law, a question that does not need to be decided in this case).

My opinion, therefore, is that the petition should be granted, the judgment in the Nahmani appeal should be cancelled, and the judgment of the District Court should be reinstated.

Justice E. Goldberg

1. The process of creating man was, in the past, solely governed by the forces of nature. Conception was the result of intimate acts, which were entirely in the realm of the privacy of the individual. Medical-technological advances have changed the methods of creation, and made inroads into nature's sole dominion over the secret of creation. Against this background the dispute between the Nahmani couple has arisen and come knocking at the doors of the court. This dispute does not essentially fall within the framework of an existing legal norm. It cannot be fitted into the legal frameworks of a contract or quasi-contract. It lies entirely in the realm of emotion, morality, sociology and philosophy. This explains the normative void and the inability

of accepted legal rules to provide a solution to the dispute. But since the case has arrived on the threshold of the court, it cannot avoid deciding it.

2. In the dispute before us a positive right and a negative right are opposed to one another. Ruth Nahmani (hereafter — Ruth) wishes to exercise her positive right to be a parent, whereas Daniel Nahmani (hereafter — Daniel) insists on his negative right not to be a parent. The right to be a parent is based on the autonomy of the will that respects, *inter alia*, the choice of the individual to establish a family unit. The other side of the coin, as stated, is the right not to be a parent, which is also based on the autonomy of the will that respects the desire of the individual to control the course of his life and his commitments.

Both of the aforesaid rights have their source in the right to liberty. As Thomas Hobbes said: 'A free man is he that… is not hindered to do what he has a will to' (Hobbes, *The Leviathan*, ch. 21). The scholar Isaiah Berlin discussed the positive meaning of this concept in his essay 'Two concepts of liberty':

> 'The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside' (I. Berlin, *Two Concepts of Liberty*, 1958).

Indeed, there is a strong connection between the right of liberty, and its derivative the autonomy of the will, and human dignity. This was discussed by President Barak in *Interpretation in Law*, vol. 3, *Constitutional Interpretation*, Nevo, 1994, at p. 426, where he says

> 'A central component of human dignity is the freedom of will of the individual. Human dignity is expressed in the freedom of choice of the individual and his power to develop his personality and to decide his fate.'

The right to be a parent and the right not to be a parent therefore derive their existence from the same basic values of liberty and human dignity, which are now protected in the Basic Law: Human Dignity and Liberty.

Even though the basic laws may be used to determine criteria for exercising judicial discretion, which would serve as 'a workshop for a new,

concrete law, according to the changing needs of life' (A. Barak, 'Judicial Case-law and Social Reality: The Connection with Basic Principles', *The Sussman Book*, Daf-Hen, 1984, 71, 85), this path is, in my opinion, unavailable to us in this case, where two rights of equal value and status compete with one another.

3. What are the legal tools that a court will use to make a decision in this position of 'stalemate' between the rights, when the right to be a parent and the right not to be a parent are mutually exclusive, and a clear decision is required in the dispute, in the absence of a compromise path that will bridge between them.

4. In so far as termination of a pregnancy is concerned, this involves an incursion into the woman's body, and her freedom over her body implies a duty to obtain her consent before such an incursion. It is 'the basic right of every person to protect his body from an unwanted incursion, not merely because of the physical discomfort, but mainly because of the invasion of his privacy, his unique existence and the foundation of his being' (Davidov-Motola, 'A Feminist Judgment? A Further Aspect of the Nahmani Case', *supra*, at p. 234). The need for the consent of the woman to terminate the pregnancy, which is derived, as stated, from the value of the woman's liberty over her body, gives her a 'right of veto' over the pregnancy. This conclusion, in deliberations about the termination of pregnancy, makes it unnecessary to decide whether the woman's right to be a parent overrides the man's right not to be a parent. This is not so in our case, when realizing Ruth's right to be a parent does not require an invasive incursion into Daniel's body, just as realization of his own right not to be a parent does not require an incursion into Ruth's body. It follows that there is no basis for drawing an analogy in our case from the case-law relating to the right of abortion.

5. Until recently the legislator refrained from regulating the sensitive and complex question of fertilization and surrogacy in legislation. The first direct legislation in this sensitive field has now been introduced in the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law (hereafter — the Law). It should be emphasized that the Law does not apply directly to the case of the Nahmani couple, who did not, from the outset, follow the path that it outlines. Nonetheless, we should consider whether the position adopted by the legislator can serve as a source of inspiration for solving the dispute before us.

The Law focuses mainly on the relationship between prospective parents and a surrogate mother. It stipulates several conditions for implanting a

fertilized ovum in the body of a surrogate mother, which include, as stated in section 2(1) of the Law, the need for 'a written agreement between a surrogate mother and prospective parents, which has been approved by an approvals committee pursuant to the provisions of this law'. Section 5(c) of the Law provides that:

> 'The approvals committee is entitled to reconsider an approval that it gave if a significant change has occurred in the facts, circumstances or conditions that underlay its decision, as long as the fertilized ovum has not been implanted in the surrogate mother in accordance with the surrogacy agreement.'

As can be seen from the deliberations of the Knesset's Welfare Committee (on 9 January 1996), this section was mainly intended for cases where it is discovered, after approval of the agreement, that the surrogate mother has contracted an illness that affects her ability to bring a healthy child into the world. During the deliberation it was said:

> 'With regard to the question of withdrawing from an agreement before implantation: the authority of the committee is merely to approve an agreement. The committee does not need to approve a withdrawal from, or a breach of, an agreement. An agreement is an agreement like any other agreement… [the] committee is not supposed to give approval for one side to withdraw from the agreement. What we have provided in sub-section (c) refers only to one situation: the committee gave approval and afterwards it was informed that a change occurred which could cast doubt on the approval that it gave. It can be presumed that it gave approval on the basis of the assumption that the surrogate mother was healthy, and afterwards the surrogate mother contracted AIDS or another disease that may affect her ability to bring a healthy child into the world. This is the situation in which the committee will be entitled to reconsider the matter, and, if it sees fit, to cancel the approval that it gave. If, as a result of a dispute between the parties, they decide to cancel the agreement, or one party decides that he no longer wishes it… for this the committee is not needed. It is not a court and it will not adjudicate legal disputes' (at page 17).

If a danger arises to the welfare of the unborn child, the tendency to push the 'point of no return' as far back in time as possible is obvious. On the other hand, there is an obvious fear of establishing the 'point of no return'

after the implantation of the ovum, when cancelling the approval of the agreement involves intrusive interference in the body of the surrogate mother. The proper balance between the welfare of the child and the liberty of the surrogate mother is what led to establishing the 'point of no return' at the implantation of the ovum. This point of balance does not necessarily reflect the proper point of when an internal dispute arises between the prospective parents, and the decision then, as stated, is between the right to be a parent which conflicts with the right not to be a parent. The solution to such a dispute cannot be derived from the Law, which refers even a dispute between the prospective parents and the surrogate mother to the court.

6. The possibility of 'involving' the fertilized ovum in the dispute in order to decide the matter, namely 'that one should not allow the birth of children where there is a dispute' (see the *Report of the Professional Public Commission for Examining the Issue of* In-vitro *Fertilization* (1994), at page 36) is also, in my opinion, improper.

Certainly, one cannot deny that it is preferable for a child to grow up in a warm and loving home, where the parents behave with emotional and economic responsibility towards him. But can it be said that, where the 'father' is uninterested in facing his parental responsibility, destruction of the ovum is preferable to it being allowed to develop into a child? In this regard, the rhetorical questions of Prof. Shifman with regard to the best interests of the child in an one-parent family are relevant, by way of analogy:

> '… With artificial insemination we are concerned with planning to bring an unborn child into the world in order to realize peoples' expectations of becoming parents. Can it be said categorically that such a child would be better off not being born than being born? Will the child's situation necessarily be so wretched, merely because he is born into a single-parent family, that we have a duty *ab initio* to prevent his being brought into the world?' (Shifman, *Family Law in Israel*, *supra*, vol. 2, at p. 156).

The answer to the question whether destruction is preferable to existence lies in the expanses of philosophy and the depths of morality, and the court is clearly unable to provide an answer. In this context it has been said that:

> 'Existing rules of court do not incorporate the hidden world, and we cannot find in them an answer to the existence of the right not to be born that the child claims. The abstract ethical

> approach concerning the nature of creation and life, which is determined according to the critic's outlook on life, is insufficient for the creation of a criterion for the existence of the legal right. The crux of the problem before us concerning the "nature" of non-existence lies entirely in the field of speculation about the secrets of creation and not in the field of practical law…
>
> …
>
> … Since the theory raised by the child with regard to his right to non-existence does not lie in the field of human criticism, as long as the legislator has not established such a right, even the "reasonable man" (on whom we frequently rely) will not help us, since the secrets of the universe and the mysteries of every living thing are hidden from him also. Therefore we cannot provide an answer as to the existence or non-existence of a right not to exist in rational terms of the "reasonable man", when we are concerned with a decision in a world of ethics in which the concept of "rationality" has no part' (CA 518/82 *Zaitsov v. Shaul* [15], at pp. 127-128).

7. The sub-classification of the conflicting rights in our case into rights not to be harmed (negative rights) that 'do not impose a duty on another, except for the demand to refrain from violating this freedom (or liberty)' (Barak, *Interpretation in Law*, vol. 1, *The General Theory of Interpretation*, *supra*, at p. 362) and positive rights, which 'are rights that have a corresponding duty of another (usually the State) to act to protect them…' (Barak, *ibid*., at p. 364), also does not further us in solving the dispute. The question whether the State has a duty to help an individual to realize his desire to be a parent does not arise at all in this case. But whether or not such a duty exists cannot decide the interpersonal dispute between the spouses. Defining the right of the individual as positive vis-à-vis the State cannot, in itself, be of decisive weight in the conflict between the right of that individual and the right of another individual, whereas classifying Ruth's right as positive vis-à-vis Daniel's right is impossible as long as we have not first decided the question whether the initial agreement of the spouses to begin the *in-vitro* fertilization procedure also includes the power to continue the procedure until its completion. If we say that the consent of each spouse is required for each stage, then it follows that Daniel should be regarded as enjoying a 'right of veto', and it becomes unnecessary to classify the

conflicting rights. By contrast, if Daniel's consent is not required for implantation of the ova, there is no basis for saying, as we have already explained, that his liberty takes precedence over Ruth's liberty.

8. The Nahmani couple did not think of determining expressly what would happen to the ova if their marriage broke down. In so far as Ruth's expectations are concerned, it is hard to determine that she actually ruled out the possibility that her right to be a parent would be realized within the framework of a one-parent family, if the marriage should break down. With regard to Daniel's expectations, it can be said, on the one hand, that he took part in the *in-vitro* fertilization process only in order to establish a family home together with Ruth. The threat of childlessness did not hang over his head, and he knew that he could fulfil his aspiration to be a parent even if he separated from her. But on the other hand, is it clear that this would also have been his position had the 'officious bystander' troubled him at that time to consider the question of the fate of the ova, should he become infertile for any reason and his relationship with Ruth deteriorate? Is it not more reasonable to assume that his answer would be that in such a case the procedure should continue?

The couple's silence should be interpreted as a repression of the possibility that the marriage would break down. This pessimistic scenario is contrary to the spirit of union implied by the very decision to travel together along the hazardous road of the *in-vitro* fertilization procedure. In my opinion, at that time the couple's horizon extended only as far as the possibility of joint parenthood. They did not consider the possibility of continuing the procedure and the single parenthood of one of them, should they separate from one other. Attempting to fill this lacuna will not, in my opinion, be successful. It cannot be established that when the ova were fertilized, the couple *mutually* discounted the possibility of single parenthood, just as it cannot be established that their consent to fertilization of the ovum incorporated consent of both of them to single parenthood.

9. Application of the rule that prohibits harming someone without his consent is also not without its difficulties. The answer to the question whether a *status quo* has been adversely affected requires a determination as to what the *status quo* is. If we say that the *status quo* is the procedure in its entirety, then Daniel is the one seeking to change the *status quo* in that he wants to stop the procedure, thereby adversely affecting Ruth's position, in that she will lose the experience of parenthood. If we say that the procedure should be divided into stages, then it is Ruth who wishes to change the *status*

quo by trying to move on to the next stage of the procedure — the stage of implanting the ova —thereby changing the *status quo* for Daniel, who will become a father against his will. The answer to the question whether the initial consent includes agreement to the entire procedure cannot be no merely because moving from one stage to another adversely affects Daniel, when we have already established that refraining from moving from one stage to another adversely affects Ruth. This problem of the scope of the initial consent cannot be solved by an abstract analysis of rights. Such an analysis involves a circular argument, in the sense that classifying Ruth's right vis-à-vis Daniel as a 'positive' right can only be done after determining the scope of the original consent.

10. We can summarize thus far as follows: we are dealing with a normative lacuna. Resorting to the basic principles of the legal system does not provide a solution, for if we limit ourselves to a preliminary classification of the rights, then we are dealing with an internal conflict between two derivatives of the same right, the right to dignity and liberty. Because the type of basic value being harmed is identical, the scales are balanced. The sub-classification of the conflicting rights as 'negative' rights and 'positive' rights also does not help solve the conflict. Defining the right of an individual as positive vis-à-vis the State cannot, in itself, be decisive in a conflict between the right of an individual and the right of another individual. Classifying Ruth's right as positive vis-à-vis Daniel's right requires a prior determination of the question whether the initial consent to the procedure has the strength to move the process on to its conclusion. If the consent of both spouses is required for each stage of the procedure, then Daniel has a 'right of veto', and holding Ruth's right to be conditional on Daniel's consent makes it superfluous to classify the conflicting rights. If Daniel's consent to the implantation of the ova is not required, there is no basis for saying that Ruth's liberty is inferior to his.

11. In the absence of any legal norm, which is either a rule or a standard (for the difference between the two, see M. Mautner, 'Rules and Standards: Comments on the Jurisprudence of Israel's New Civil Code', 17 *Mishpatim* (1988) 321, at p. 325), the court must 'formulate its own criterion' (see G. Tedeschi, 'The Problem of Lacunae and section 46 of the Palestine Order In Council', *Research in Israeli Law*, Newman, 2nd ed., 1959, 132, at p. 180). The court must (unwillingly) carry out a legislative function that does not apply existing legal norms, but creates a norm based on the general principles of the legal system.

Note that we are not speaking of filling a lacuna in an existing legal norm, which requires the application of the Foundations of Justice Law. Indeed, in my opinion there exists no legislative arrangement that we can use to solve the dispute, and we are certainly not speaking of an incomplete arrangement that the court would be justified in filling. We are dealing with a need for creation *ex nihilo* — by filling an extra-legislative lacuna through creating a norm which is required not by a defective norm but by a total 'legislative silence'.

12. Since, in my opinion, we have no 'conventional' tools to solve the dispute, we must search for an alternative to these, which is founded on a basic value that governs our legal system. A fitting basic value is justice.

Justice is the essence of Israeli law. It is the abstract ideal to which the legal system aspires. It —

> '… expresses the ideal arrangement vis-à-vis the law as a system of interpersonal rules. It is the ethical yardstick of the law' (I. Englard, *Introduction to Jurisprudence*, Yahalom, 1991, at p. 42).

Legislation also contains many provisions in which justice has been translated from a supreme principle governing the legal system into a specific legal norm. Thus, for example, the fundamental principles clause enshrined in section 1 of the Basic Law: Human Dignity and Liberty, states that 'Basic human rights… will be honoured in the spirit of the principles in the Declaration of the Establishment of the State of Israel', according to which the State of Israel is to be founded, *inter alia*, on the principle of justice.

When deciding a dispute between the citizen and the government, the court is empowered not to grant relief to an injured party even when he has a cause of action, if it thinks it just to do so. In this spirit, section 15(c) of the Basic Law: Administration of Justice states that the Supreme Court, sitting as a high court of justice, 'shall hear matters in which it sees a need to grant equitable relief and which are not within the jurisdiction of another court or tribunal'.

The branches of private law are based on justice. In the law of contracts, justice and fairness play a major part. Section 31 of the Contracts (General Part) Law empowers the court to exempt a party to an illegal contract from the duty of restitution 'if it thinks it just to do so'. Section 14(b) of the Contracts (General Part) Law authorizes the court to void a contract in which there was a mistake unknown to the other party 'if it thinks it just to do so'.

Section 3(4) of the Contracts (Remedies for Breach of Contract) Law, 5731-1970, does not allow the remedy of enforcement when 'enforcement of the contract is unjust in the circumstances of the case'. Justice makes its mark also in the other branches of private law. In the law of torts, the contributory payments between joint tortfeasors are determined according to criteria 'of justice and equity' (section 84 of the Torts Ordinance [New Version]). Justice naturally governs the laws of unjust enrichment. Section 2 of the Unjust Enrichment Law, 5739-1979, states that the court may exempt a beneficiary from restitution if it thinks there are circumstances that 'make restitution unjust'. The principles of justice can also be found in property law. Section 132(a) of the Tenant's Protection Law [Consolidated Version], 5732-1972, provides that 'notwithstanding the existence of a ground for eviction, the court may refuse to give a judgment ordering eviction if it is persuaded that in the circumstances of the case it would be unjust to give it'. Section 10 of the Land Law, 5729-1969, and section 10 of the Immovable Property Law, 5731-1971, provide that the court may order the severance of joint ownership of a property notwithstanding that the parties contracted out of the right to sue for severance of the joint ownership, if 'it is just in the circumstances of the case'. Even in the field of family law justice has a place. Section 9 of the Family Law (Maintenance) Amendment Law, 5719-1959, provides that 'the court may, if it thinks it just and equitable to do so, exempt someone from an obligation of maintenance…'.

In the procedural sphere, the legislator instructed the judge sitting on the bench to fill a lacuna in the field of procedure in the way that seems to him just in the circumstances of the case. Section 3 of the Criminal Procedure Law [Consolidated Version], 5742-1982, states that 'in any matter of procedure where there is no provision in legislation, the court shall act in a manner it considers best for doing justice'. In the same vein, see also section 33 of the Labour Court Law, 5729-1969; section 22 of the Administrative Courts Law, 5752-1992; and regulation 524 of the Civil Procedure Regulations, 5744-1984.

In the Foundations of Justice Law, the 'principles of freedom, justice, equity and peace of Jewish heritage' were determined as supplementary legal sources where there is a lacuna.

This survey does not purport to exhaust all the cases where the aspiration for justice is reflected in Israeli legislation. It merely serves to show that there are cases where the legislator stipulated a just solution to be *a goal in itself*, wherever he saw justice as a fitting mechanism for a solution, even though

the court must then interpret the value of justice in accordance with its meaning in that piece of legislation, and in the specific context.

13. The aspiration for a just solution influences judicial discretion, and it serves as a guide for the judge searching for a way to decide a conflict. It has been said that 'the task of translating legislation into an act of justice is entrusted to the judge, and thus he is given the ultimate opportunity of doing justice between the parties' (CA 398/65 *Rimon v. Trustee in bankruptcy of Shepsals* [16], at p. 408). Indeed, this aspiration cannot bring about creation *ex nihilo*. Where the law, which dictates a certain outcome, departs from justice, the court may not assume a discretion that has not been given to it. But where the judge has been granted discretion, then 'the law and justice, whose paths often diverge, meet at the convergence of judicial discretion' (Barak, *Interpretation in Law*, *supra*, vol. 1, at p. 194). The judge on the bench committed himself to aspire to this convergence when he swore to 'judge justly'. This was well expressed by President Barak when he said:

> 'In my opinion, justice has an additional normative force that we can call a "residual" force, which is the following: assuming that in the initial balancing the scales are balanced, and the various considerations, including the considerations of justice, balance once another, then the judge faces a true dilemma. The discretion is his. The different values, including the value of justice, conflict with one another, and are equally balanced. How will the judge exercise his discretion in such a case? He is not entitled to toss a coin, even though by doing so he would realize the value of judicial neutrality and a lack of judicial bias. How shall he solve the problem that confronts him? He must exercise his discretion in a way that will provide the solution he thinks best. But what is this solution?
>
> Different judges may have a different approach in this area. In my opinion, the best solution is the just solution. Indeed, when all criteria have been exhausted and no solution has been found, the judge should aspire to the most just solution' (A. Barak, 'On Law, Judging and Justice', 27 *Mishpatim* (1996) 1, at p. 7).

14. It follows that, in the absence of another criterion for solving the dispute, the court has the power, and it is also obliged, to provide the best solution, which is the just solution, not by interpreting this value in specific legislation, but as a value in itself.

A just legal determination, based on the judge's sense of justice, is albeit not a neutral determination. But it is also not arbitrary. Although it is the judge's feeling that ultimately tips the scales, nonetheless, before the judge listens to the dictates of the sense of justice, he undergoes a process of reasoning, consciously and subconsciously, in which all the circumstances are considered, and different values are balanced.

15. When every decision in a dispute between two individuals will harm one of them, the just solution is the solution that is 'the lesser of two evils', and as has been said in this respect, 'the "balance of convenience" of which the courts speak is a balance of justice' (CA 214/89 *Avneri v. Shapira* [17], at p. 870). Therefore, it is proper to consider whether the harm to Ruth, should she be prohibited from using the ova, is greater than the harm that Daniel will suffer if he becomes a parent against his will, or *vice versa*.

When examining the harm to Ruth, it should be remembered that the biological aspect of parenthood, namely the transfer of the genetic material from one generation to another, has great importance from an emotional viewpoint. Therefore it is clear why 'Ruth insists on her right to be a mother of children who will be her children in the biological sense' (Marmor, 'The Frozen Embryos of the Nahmani couple: A Response to Haim Gans', *supra*, at pp. 448-449). The individual's aspiration to realize biological parenthood emanates from the source of human existence. The parental experience is considered the essence of life, in the sense of 'Give me children, else I die' (Genesis 30, 1 [65]). This was discussed by Professor Shifman who said:

> 'Man's desire to have children, and in this way to ensure continuity for himself after his death, no less than the hoped for satisfaction from raising children in his lifetime, is without doubt a basic psychological fact' (Shipman, *Family Law in Israel*, *supra*, vol. 2, at p. 151).

In this regard, the remarks of Daphna Barak-Erez are also relevant:

> 'Realizing the option of parenthood is not merely a possible way of life, but it is rooted in human existence. There are some who will regard it as cure for loneliness; others will use it to deal with the thought of death… It expresses a basic existential need' (Barak-Erez, 'On Symmetry and Neutrality: Reflections on the Nahmani Case', *supra*, at p. 200).

Losing the opportunity of biological parenthood is, in effect, missing out on the opportunity for self-realization in the family sphere.

We must adopt this premise — namely that the biological aspect of parenthood has great importance — also when examining the harm to Daniel. Coerced biological parenthood, like the deprivation of biological parenthood, involves emotional harm. There is no doubt that Daniel will suffer a feeling of distress from knowing of the existence of a child, whom he does not want, that carries his genetic material. It is therefore clear why Daniel 'also insists on his right not to be connected, even if only biologically, with a parenthood that he does not want' (Marmor, 'The Frozen Embryos of the Nahmani Couple: a Response to Chaim Gans', *supra*, at p. 449).

16. Indeed, Daniel will suffer more than just emotional harm. The status of parenthood involves many duties, including in the economic sphere. But the practical duties involved in the status of parenthood cannot tip the scales in Daniel's favour. Since the couple has separated, Daniel's main obligations towards the child who will be born are in the economic sphere. His economic harm resulting from the duty of maintenance that he bears can be mitigated by making the use of the ova conditional upon an undertaking on the part of Ruth to indemnify him, and the date of realizing this undertaking will be subject to the principles developed in case-law relating to divorce agreements (see FH 4/82 *Kut v. Kut* [18]). In these circumstances, the reversible nature of the economic damage that Daniel will suffer deprives it of decisive force.

17. Here we come to the hardest question of all, whether Ruth's suffering as a childless woman against her will is preferable to Daniel's suffering as a parent against his will, when the scales for weighing the force of these emotional injuries have not yet been created. On the altar of justice, we can sacrifice the expectations of whoever was not entitled to rely on the other's consent. But justice demands that we do not, retroactively, undermine the position of someone who was entitled to rely on a representation of another.

The reasonableness of Ruth's reliance on Daniel's consent to begin the procedure jointly must necessarily be considered together with the question of the existence of other possibilities available to her for realizing her desire to be a parent, other than implantation of the fertilized ova. The fact is that at the time the ova were removed, Ruth did not have any reasonable alternative. From a medical viewpoint, it is not possible to freeze an ovum that is not fertilized (see the aforementioned *Report of the Professional Public Commission for Examining the Issue of* In-vitro *Fertilization*, at p. 118), and from a legal and emotional viewpoint, Ruth was inhibited, as a married woman, from freezing an ovum fertilized with the sperm of another, especially when her husband was not infertile. The possibility of separating

from Daniel and fertilizing an ovum with the sperm of another man was also not reasonable. The callousness emanating from this possibility is contrary to the spirit of intimacy implied by the decision to walk together along the hazardous path of the *in-vitro* fertilization procedure. Moreover, when the dispute broke out and Daniel objected to the implantation of the ova, Ruth was no longer able, from a physiological viewpoint, to undergo another fertilization procedure, since her medical condition resulted in her losing her fertility and her ability to bring children into the world.

In such circumstances, Ruth's reliance on Daniel's initial consent should be regarded as reasonable. This reasonability of her reliance on the path that she and Daniel chose to pursue require, in this case, the just conclusion that there is no going back, and whoever wishes to make a change is at a disadvantage.

I would therefore grant the petition.

Justice Y. Kedmi

I have studied the illuminating opinions of my colleagues, Justice Strasberg-Cohen and Justice Tal, and I support the conclusion reached by Justice Tal. The following, in brief, are the reasons underlying my decision:

1. Indeed, it is a basic human right — for men and women — to choose whether to be a parent or not; and a mere contractual obligation must give way before this right. Nonetheless, it is not an absolute right, nor even an equal right. When a woman becomes pregnant, her spouse may no longer go back on his choice and force her to undergo an abortion, whereas the woman is entitled to terminate the pregnancy, by virtue of her 'prevailing' right to the integrity of her body.

2. The practical question that requires a decision in this case is whether, even in so far as *in-vitro* fertilization is concerned, the 'point of no return' from the decision to realize the right to parenthood is the time of fertilization (as the equivalent of the time of conception), or whether this point is pushed back over time to the moment when the fertilized ovum is implanted in the body of the surrogate mother (so that only from this stage onwards, the woman's right to the integrity of her body prevails, and the right not to be a parent yields to it).

3. (a) Were we speaking of such circumstances, of a conflict between the right to parenthood (or not to be a parent) and the right to the integrity of the

body of the 'pregnant' woman only, then the answer required under the current legal position to the aforesaid practical question would be yes. In other words, as long as the fertilized ovum has not been implanted in the body of the surrogate mother, the right not to be a parent prevails, and each of the spouses is entitled to turn the clock back and demand the destruction of the fertilized ovum.

(b) However, in my opinion, one should not, in this context, ignore the fact that 'fertilization of the ovum' is not merely one of the stages in the development of the embryo, but it is the act that 'creates' it and turns the ovum and the sperm into a new 'entity', consisting of the two entities that created it and that can no longer be separated. Just as the sperm and the ovum have been assimilated into one other and become one, so the rights of the man and his spouse — the 'owners' of the ovum and the sperm — have assimilated into one another and become a 'joint right' in so far as the fate of the fertilized ovum is concerned. This 'joint right' is identical in its nature and status to the parental right that each of its creators had, with one difference: each of the owners of the right has a right of veto over a decision by the other, so that only a 'joint decision' can be carried out and enforced.

(c) In order to remove doubt, I should clarify:

(1) Before the date of the actual fertilization, each of the spouses can change his decision to be a parent, and his basic right not to be a parent prevails over the contractual right of his partner to demand performance of the agreement made between them in this regard. This is the position only until fertilization; this is so because the fertilization changes the position, and creates new circumstances that do not allow 'going back' and returning to the original position. Until fertilization, each of the spouses can be given back what is 'his': the man can be given back his sperm and the woman can be given back her ovum. But after fertilization, restitution is impossible, as this involves an injury to the right of the other over his share.

(2) After the fertilization, the man and the woman continue to control jointly — and only jointly — the fate of the fertilized ovum, until it is implanted in the body of the surrogate mother; on implantation, the surrogate mother acquires the basic right to the integrity of her body, as if she had 'conceived' naturally, and her right takes precedence over the joint right of the couple to the fertilized ovum.

(3) Fertilization of an ovum — whether inside or outside the body of a woman — amounts to a 'fait accompli' from which there is no return, if only

for the simple reason that the original position can no longer be restored and what the man and woman concerned invested of themselves in the 'new entity' — the fertilized ovum — cannot be returned. It is true that we can turn the clock back by destroying the 'fertilized ovum'. But since it is no longer possible to separate the sperm from the ovum, the spouse wishing to withdraw and to destroy his 'contribution' to the fertilized ovum does not have a right to destroy also the 'contribution' of the other. Destruction of the fertilized ovum requires the consent of both spouses, and each of them has a right of veto over the other's decision.

In these circumstances, a spouse's right to change his mind and 'not to be a parent' is, after fertilization, opposed by the 'strengthened' right of the other spouse to complete the procedure of bringing the child into the world and 'becoming a parent'. The act of fertilization sets the 'right of changing one's mind' against the 'right to complete the procedure'; in my opinion, in view of the new situation that has been created, the 'right of changing one's mind' is of lesser force than the 'right to complete the procedure' that has just been created.

The new reality created by fertilization of the ovum therefore changes the balance of rights: the right 'not to be a parent', which was weakened by the fertilization agreement, is now opposed by the right 'to be a parent', which has been strengthened by the right 'to complete the procedure' created by the fertilization.

4. (a) This is similar (but not identical, of course) to two people who agreed to create a work of art together, which requires 'firing' in a kiln to be preserved; after the work has been completed and all that is left is to put it in the kiln, one of the two changes his mind and wants to prevent his companion from putting the work in the kiln, thereby causing it to be destroyed. According to my opinion, it is inconceivable that after the joint work has been completed, one of the partners will be entitled to destroy it against the wishes of the other partner who wants to complete the creation process. It may be that each of the partners will retain a right to change his mind as long as the work has not been completed. But when the work has been completed, each of the partners has an identical rights with regard to its 'fate'; and the right of the person wishing to preserve it overrides the right of the one who wants to destroy it.

(b) Bringing the work of art to the stage of processing in the kiln is equivalent, if we like, to the fertilization of the ovum, which is the first and decisive stage in the development of the child; just as the right of the partner

wishing to complete the 'creation' of the work of art overrides the other's right to destroy it, so too the right of the spouse wishing to complete the process of bringing the child into the world overrides the right of the one wishing to destroy the fertilized ovum.

Justice Y. Türkel

1. In this difficult case, I choose life; the life — in the metaphorical sense — of Ruth Nahmani, and the 'life' — or the potential for life — of the fertilized ova.

2. When I considered the matter, I had before me the opinions of my colleagues, Justice Goldberg, Justice Kedmi, Justice Strasberg-Cohen, Justice Tal and Justice Dorner, who considered every aspect and facet of the subject under discussion so well that no aspect was left for me to elucidate or illuminate. I would add, therefore, but a small embellishment of my own, a few of the reasons for my decision.

3. Elsewhere I have said:

> 'The enormous progress that has occurred in our times in all the fields of science and technology (and mainly the advances in medicine and the development of medical technology) have created problems that were unknown to us … and have made problems that we did know more difficult. The classic story of those two persons walking in the desert where only one of them has a flask of water — a flask capable of keeping only one of them alive — has changed from a theoretical Talmudic proposition into a very painful and pressing reality, and the question it raises has become a relevant issue demanding a solution. This progress has erased the clear boundaries and blurred the well-used paths trodden by the scientist, the doctor and the jurist, and defined areas have become unbounded and awesome expanses. Tension, and maybe even a rift, has been created between the achievements of science and medicine and the values that have been developed over the course of human history' ('Tikkun Halev', 40 *Hapraklit* (1992), 34).

In these unbounded and awesome expanses, the law has no power to set our course. Like my colleague, Justice Goldberg, I too believe that the dispute before us —

> '… does not essentially fall within the framework of an existing legal norm. It cannot be fitted into the legal frameworks of a contract or quasi-contract. It lies entirely in the realm of emotion, morality, sociology and philosophy. This explains the normative void and the inability of accepted legal rules to provide a solution to the dispute.'

The answer will be found, therefore, in the inner world of values of each of us. I would even not hesitate to say that it is permitted to be found in the wealth of emotions in the heart of each of us.

The main question to be decided in this dispute is which of the rights is preferable: the right to be a parent or the right not to be a parent, or, if you wish, as my colleague Justice Strasberg-Cohen further clarified the question: 'is it possible, because of the great importance of parenthood, to force parenthood on someone who does not want it, and to use the machinery of the legal system to achieve such coercion?'

4. The majority opinion in the appeal was, in essence, that recognizing the autonomous will of the individual requires us to prefer the right of the spouse who does not wish to be a parent. I disagree with this. In my opinion, once the act of *in-vitro* fertilization has occurred, the positive right to be a parent prevails, as a rule, over the negative right not to be a parent. I will explain my main reasons.

The modern social and legal view recognizes the autonomous will of the individual. From this are derived the *prima facie* conflicting rights of being a parent and not being a parent (see, in this regard, the interesting analyses of the issue in the articles of Gans, 'The Frozen Embryos of the Nahmani Couple', *supra*; Marmor, 'The Frozen Embryos of the Nahmani Couple: a Response to Chaim Gans', *supra*; Gans, 'The Frozen Embryos of the Nahmani Couple: a Reply to Andrei Marmor', *supra*; Barak-Erez, 'On Symmetry and Neutrality: Reflections on the Nahmani Case', *supra*; Davidov-Motola, 'A Feminist Judgment? A Further Aspect of the Nahmani Case', *supra*, cited in my colleagues' opinions). Indeed, according to the remarks of Yosef Raz, cited in the articles of Prof. Gans and Dr Marmor: 'An autonomous person is a person who writes the story of his life on his own'. However, to use this analogy, is there really symmetry between the rights of each of the spouses to write the story of his life on his own?

In my view, there is no symmetry between the rights, despite the 'external' similarity between them, and the right to be a parent should not be viewed

simply as a derivative of the autonomy of the will, a counterpart of the right not to be a parent. However, even if we view the two rights as derivatives in this way, they are not of equal value and status, as if existence and destruction were equal to each other and as if they were the symbols 1 and 0 in the binary code of a computer (I accept the remarks made by Dr Barak-Erez in this respect, in her article 'On Symmetry and Neutrality: Reflections on the Nahmani Case', *supra*, that were cited in the opinion of Justice Tal).

5. It seems to me that no one would disagree that the right to life is a basic right that has been sanctified in Jewish history and the history of mankind in general:

> 'Judaism has always exalted and glorified the enormous value of human life. Jewish law is not a philosophical system of opinions and beliefs but a law of life — *of* life and *for the sake of* life' (in the words of the honourable Justice Silberg in *Zim Israeli Shipping Co. Ltd v. Maziar* [13], at p. 1333 {132}).

This has been the case since antiquity.

Alongside the right to life, as understood in Jewish sources, additional rights were created that were deemed equal to it, and without which human life is meaningless. This we can learn, for example, from the law of the person who kills negligently, who is condemned to flee to one of the cities of refuge 'that he may live' (Deuteronomy 4, 42; 19, 2-5 [64]), and if he is a student then 'his rabbi is exiled with him' and if he is a rabbi then 'his school is exiled with him'. The reason for this is: 'that the Bible says "and he shall live" — do for him whatever is necessary so that he may live, and the life of those who have wisdom and those who seek it without the study of the Torah is considered as death' (Babylonian Talmud, Tractate *Makkot*, 10a [77]; Maimonides, *Mishneh Torah, Hilechot Rotzeah uShemirat Nefesh* (Laws of Homicide and Preservation of Life), 7, 1 [78]). Even the right to be a parent should be regarded in this way. Alongside the right to life — which is the right to a full and meaningful life — or as a part of it, the right to be a parent is also worthy of recognition as an independent basic human right and not merely as a derivative of the autonomy of the will.

The cry of our ancestress Rachel, 'Give me children, else I die', (Genesis 30, 1 [65]), mentioned by my colleague Justice Tal in his opinion, the silent cry of Hannah 'speaking in her heart, only her lips moved, but her voice was not heard' (I Samuel 1, 13 [79]) and praying 'for this child' (I Samuel 1, 27 [79]) and countless other cases in our literature and that of other nations are a

striking expression of the force of the yearning for a child, which is unrivalled in its intensity. This yearning encompasses man's will to continue, through his descendants, the physical and spiritual existence of himself, his family and also his people. It reflects his aspiration to realize himself and even to fulfil his dreams that have not yet been realized. It contains his love for his descendants, those who have been born and those as yet unborn; a love of 'would that I had died in your stead' (II Samuel 19, 1), which overrides a person's desire for his own life, and also a yearning that holds out hope for comfort and consolation in his loneliness, old age and on his death bed. It has been said that 'When your parent dies, you have lost your past… When your child dies, you have lost your future' (Dr Elliot Luby, quoted in H. S. Shiff, *The Bereaved Parent*, 1978). The child is the future and his existence gives the lives of most people special meaning, and perhaps their main meaning.

In my view, the ethical weight of this right is immeasurably greater than the weight of the right not to be a parent, which is the right not to be burdened with the emotional, moral and economic burdens that parenthood imposes. Doing 'ethical justice' (HCJ 200/83 *Wathad v. Minister of Finance* [19], at p. 121) compels us to prefer the former right to the latter.

6. However, even if we regard the right not to be a parent as equal to the right to be a parent, there is another fact that tips the scales in favour of the latter right: the life potential of the fertilized ova. Here I would like to emphasize that I do not intend to adopt any position on the difficult philosophical questions: when does life begin? When does a person become entitled to a moral status? From what moment in his development does his life become sacred and protected as a natural right? The biological sense as contrasted with the moral sense of human existence; or to express an opinion about the different approaches on these issues, including the legal conclusions that can be derived therefrom (see in this regard the lectures of Prof. D. Hed, *Medical Ethics*, in the chapter 'Embryos as Humans', Ministry of Defence, 1990, at p. 51 *et seq.*). These and other associated questions, such as the right of abortion, in the context of this case have been discussed by Prof. Gans, 'The Frozen Embryos of the Nahmani Couple', 18 *Tel-Aviv Uni. L. Rev.*, 1994, at p. 86 and by Dr Marmor, 'The Frozen Embryos of the Nahmani Couple: a Response to Chaim Gans', 19 *Tel-Aviv Uni. L. Rev.*, 1995, at p. 437, where ultimately they reached different conclusions.

As stated, I do not intend to adopt a position on the different approaches. I also do not know whether it is at all possible to ascribe to the fertilized ova

an interest to be born, which merits moral recognition, and whether it prevails over the interest of Daniel Nahmani. However my moral sense leads me to the conclusion that the very existence of this life potential, whatever its weight, tips the scales in Ruth Nahmani's favour.

7. I intended to be brief and I fear that I have overstepped the mark. After writing my opinion, I saw the opinions of my colleagues Justices Bach, Or, Mazza and Zamir, as well as additions and corrections to the opinions written before my opinion. I will also add another small embellishment to some of their remarks.

8. Justice Zamir distinguishes between law and justice:

> 'My Maker is the law… my inclination is justice.'

He also says that 'it happens to a judge that the law and justice struggle within him, each pulling in different directions, and he cannot reconcile one with the other' (paragraph 1 of his opinion). According to him, it is possible to distinguish between the two and thereby also to find the path that should be followed:

> 'The court must seek its path in order to reach this norm… Jurisprudence guides it on its way and gives it tools in order to determine the law…
>
> … From a practical viewpoint, and maybe even from a theoretical viewpoint, it is inconceivable that the court will not find a legal norm somewhere along this path. In any case, the court is not entitled to say, before it has traversed the whole length of this path, that there is no legal norm in the matter under consideration, and therefore it is entitled to decide that matter according to justice' (paragraph 4 of his opinion).

Justice Or made similar remarks in paragraph 13 of his opinion:

> 'It [the court] must ascertain the law and decide accordingly… When I reached the conclusion that there is a legal solution to this problem, as I have sought to clarify above, this solution should apply in our case, even if its result is inconsistent with Ruth's expectations, and the situation in which she finds herself arouses sympathy.'

In my opinion, in a matter as difficult and complex as the one before us, which involves and combines moral, social, philosophical and legal questions that cannot be separated from one another and that raise strong emotions, it is

impossible to distinguish between the dictates of the 'law' and the 'justice' of the judge. The one is bound up in the other. The one stems from the other. Their existence is interconnected, like fire in a coal.

It should also be said that some believe that a decision according to the 'law' is an 'objective' decision, that should be discovered and revealed in the way outlined by jurisprudence. By contrast, a decision according to 'justice', as described by Justice Zamir, is like a decision of a person 'searching for the proper path, wandering…' — it is analogous to a subjective decision — each person according to the spirit within him. In my opinion, even a decision according to the 'law', in the case before us, is essentially a subjective-value decision, each judge according to the tune played on the harp hanging above his window (see: 'a harp was suspended above David's bed, and when midnight arrived, a north wind came and blew on it, and it played on its own', Babylonian Talmud, Tractate *Berachot*, 3b [71]). Objectivity, in a case like ours, as the historian Peter Novick said in his book *That Noble Dream: The Objectivity Question & the American Historical Profession*, Cambridge, 1993), is a myth and nothing more.

9. At the end of his decision, Justice Zamir candidly says the following:

> 'In this case, I have not tried to take a shortcut. I have followed the main road, although it was arduous, and have reached this conclusion: between Ruth and Daniel, the law is on Daniel's side. I suppose that another path could have been chosen among the paths of the law, and that perhaps a different result could have been reached by that path. However, the important point in my opinion is that the court must follow one of the paths of the law. I concede that had I seen that the path was leading me to a result of injustice, I would have stopped along the way and sought out another path, from among the abundance of legal rules, that might lead me to a just result. Moreover, even at the end of the path I am still ready and prepared to look and see whether I have reached an unjust result. For if so, I am prepared to retrace my steps and start the journey over again in an attempt to reach a more just result. But have I really, in the result that I have reached, not dispensed just law?'

In a similar vein, Justice Tal also said in the appeal that is the subject of this further hearing:

> 'But there is not always only one legal solution. Sometimes different potential solutions compete with one another. This is particularly the case with a painful human problem like the one before us. And where there is such a competition, we should, in my opinion, prefer the solution that appears to be more just.'

See also paragraphs 3 and 4 of the opinion of Justice Bach; paragraphs 11 and 12 of the opinion of Justice Goldberg; paragraph 21 of the opinion of Justice Mazza; paragraph 6 of the opinion of Justice Dorner.

After all this, I wonder what is the point in trying to weigh the competing values in the scales of the law, or in trying to follow 'one of the paths of the law', when the weight of the values changes according to the person applying the law, when it is possible to choose between several paths and when one path may even lead to different results. Even in the opinions of those of my colleagues who are of my opinion, more than one 'legal path' is presented whereby one may reach the result that they reached, which is no less 'legalistic' than the paths followed by those who disagree with them. If this is the case, what did those who followed this path achieve thereby?

10. Moreover, if there is indeed more than one 'legal path', how does one choose between the different paths and the different destinations to which each path leads? Is this choice also dictated by 'the law'? In complex issues, like the one before us, there is no legal geometry that necessitates unequivocal results. Unlike my colleagues who think this, I cannot point to *one* solution, or to a 'more correct' solution, that can be applied in the case before us. The opinions before us illustrate well how different values can be put in place of each variable in the chosen formula. Instead of the findings on which judges espousing one viewpoint rely, one can reach the opposite findings. Instead of the finding that there is no agreement between the parties, one can reach the opposite finding. Instead of the rule that contracts should be honoured, one can rely on the rule in section 30 of the Contracts (General Part) Law, according to which there are contracts that are void because they are contrary to public policy. Instead of the balance between (positive and negative) liberties, a balance can be made between (general and specific) rights. Legal geometry allows both the one and the other. There is no single solution, no single path and no single 'law' (see M. Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, Ma'agalei Da'at, 1993, at pp. 13-23; G. L. Coleman and B. Leiter, 'Determinacy, Objectivity and Authority', 18 *Iyunei Mishpat* 1994, 309; R. M. Cover, *Justice Accused*, New Haven, 1975). In such a chaotic legal world, if we may call it that, the judge

needs an external, extra-legal norm — call it what you will — in order to choose between the range of solutions that 'the law' allows. If so, it would appear that in resorting directly to 'justice' no greater 'shortcut' was made that the one taken by the minority-opinion judges in this further hearing when they chose, for example, the legal rule that 'where there is no representation, there is no argument of estoppel' (paragraph 16 of the opinion by Justice Zamir).

This is what we have been saying. When there is no legal determinism (as the scholar Cover calls it in *Justice Accused*) with regard to the case, requiring one outcome, there is, in my opinion, no reason to try to follow *ab initio* the 'path of law", which has no advantage over the 'path of justice'.

11. Furthermore, a solution that depends upon an external authority that is 'forced' on the judge (see the analysis of 'the can not argument' in Cover's book *Justice Accused*) is a tempting solution, but that is not the position here. The case before us is one of those difficult cases where the judge alone must bear, on his own shoulders, full personal responsibility for his decision, without relying on the support of another authority, because of the absence of any norm that regulates the issue (in this regard, see also R. W. Gordon, 'Critical Legal Histories', 36 *Stan. L. Rev.* (1984) 57).

I have no hesitation in saying that the result I have reached is not merely the result of legal analysis but also of intuition and internal feeling (see my article, 'Tikkun Halev', 40 *Hapraklit* (1992), 34, at p. 41). I think that in a special case like the one under discussion there is nothing wrong in this. As President A. Barak wrote in his book *Judicial Discretion*, Papyrus, 1987, at p. 197:

> 'Indeed, intuition plays a role in judicial discretion. The judge is a human creature, and intuition plays an important role in the activity of every person.'

Ultimately, in a case such as this, every path towards a solution passes through an intersection of value judgments, and it makes no difference whether we call it the path of the law, or the path of justice. In HCJ 4712/96 *Meretz Democratic Israel Party v. Jerusalem District Commissioner of Police* [20], I said, at p. 835:

> 'Not every dispute, even if it is justiciable, has a legal solution; and not every legal solution, even if there is one, is the true solution of every dispute.'

The case before us is an example of a justiciable dispute, which the court is obliged to decide, but which has no 'pure' legal solution, and it is doubtful whether it has a true solution.

12. I will permit myself to quote additional remarks that I said elsewhere:

> 'Like the prophet, the judge seeks to find a path among all these, for the public and for himself. He enters the hidden parts of the orchard, with a torch in his hand — his small torch — and all its paths are hazardous, deep abysses and tall mountains (C. N. Bialik, 'He looked and was injured').
>
> What is justice, what is equity, what is liberty, what criteria will he adopt to measure these? When will he wield the iron sword of justice and when he act gently with the full measure of compassion?… When will he apply the standard of truth? And when will he apply the standard of stability?
>
> Between all of these, as between poles of many magnets, the judge tries to find his way. In his hand he holds a measure of law, with innumerable half-measures. In every case he judges himself, in every case, consciously and unconsciously, he decides the law and the characteristics of the law, both in his image and likeness, and in the image and likeness to which he aspires…' (Y. Türkel, 'Humility, Awe and Love', 23 *The Judicial Authority — Israeli Judges Circular* (5756), 12).

We carry a heavy burden of responsibility on our shoulders. The light that guides us is neither the light of the sun nor the light of the stars, which are the property of all. It is merely the light of the small torch in the hand of each one of us, lighting up the way.

13. I began my remarks by saying that I choose life; I intended thereby to hint also at something else. According to my approach, the justice done and radiated by the court must be human justice, which is not only the result of logical analysis, but which must also flow from the depths of the heart. A decision in favour of Ruth Nahmani is, in my opinion, such a decision. Indeed, the human approach was also in the minds of those holding the majority opinion in the appeal, who did not ignore the yearning of Ruth Nahmani for motherhood, but nonetheless they reached a conclusion different from mine. These matters follow after the heart, and my heart has led me to the conclusion that I have reached. For these reasons, and for some of the

reasons of my colleagues, Justice Bach, Justice Goldberg, Justice Mazza, Justice Kedmi, Justice Tal and Justice Dorner, I will join myself with them.

In my opinion, the petition should be granted.

Justice G. Bach

1. After studying the judgment of this court in CA 5587/93,[*] the subject of this further hearing, the arguments of the parties, the opinion of my esteemed colleague, Justice Strasberg-Cohen, which supports the majority opinion in the aforementioned judgment, namely the position of the respondent, Mr Daniel Nahmani, as well as the opinions of my esteemed colleagues, Justices Tal, Kedmi, Goldberg, Dorner and Türkel, who propose that we grant the application of Mrs Ruth Nahmani to reverse the original judgment and to accept the dissenting opinion in the original judgment, I have reached the opinion that I must join with the opinions of my five colleagues and support Ruth's position with regard to the problem that we must decide.

2. This is not a conclusion that I have reached lightly. As can be seen from the opinions of my colleagues, who also had difficulty in deciding the issue under discussion, I too have experienced many serious reservations in this matter.

We have here a situation in which not only can we understand the feelings of each of the litigants, but each of them is also entitled to a large measure of sympathy.

Sympathy for the situation in which Ruth finds herself stands out in the opinion of all the judges. Even my esteemed colleague, Justice Strasberg-Cohen, emphasizes this, and she also agrees with the assessment that the emotional suffering caused to Ruth as a result of denying the right of parenthood exceeds that which will be caused to Daniel if the parenthood will nonetheless be realized.

But even the dilemma in which Daniel finds himself is deserving of understanding and empathy. It is hard to find fault with him when he is not interested in having a child jointly with a woman after their family unit has split, and he has since begun a relationship with another partner and intends to develop a family life with her and with their children only. Even if Daniel

[*] IsrSC 49(1) 485; [1995-6] IsrLR 1.

does not emphasize the economic factor in raising the child, this factor nonetheless exists. The child's right to economic support will not be prejudiced even as a result of Ruth's promise that she, for her part, will not make any financial claims. But the emphasis is placed without doubt on the emotional, psychological and family factor, and we can understand Daniel's objection to the creation of the additional dependence that is expected if a child is indeed born from these parents.

For this reason, I have difficulty in agreeing with that part of the reasoning of my esteemed colleague, Justice Kedmi, in which he compares the position of the litigants in our case to a case in which two people have agreed 'to create a work of art together, which requires "firing" in a kiln to be preserved; after the work has been completed and all that is left is to put it in the kiln, one of the two changes his mind and wants to prevent his companion from putting the work in the kiln, thereby causing it to be destroyed'. In my opinion the two cases are not similar. One cannot compare the preservation of a work of art, whatever the value and reputation involved in its ownership may be, with the change of status involved in parenthood, and with the emotional baggage and material and moral obligations that arise when a person becomes a parent.

In other words: in my opinion, I cannot decide this appeal because of a clear disapproval of the behaviour of one of the parties to the dispute.

3. I also believe that a solution will not be found to the problem that we are considering by relying on specific legislation, or the interpretation of such legislation. The Surrogacy Agreements (Approval of Agreement and Status of the Child) Law is albeit relevant to the case, but it gives no real answer to the difficulty before us. Admittedly section 5(c) of that law does stipulate that the approvals committee may reconsider an approval that it gave '… as long as the ovum has not been implanted', but I share the view that this provision refers mainly to the relationship between the prospective parents and the surrogate mother, and does not determine the period in which one of the prospective parents still has a 'right of veto' over completion of the parenthood procedure.

A study of the laws of contract also cannot help to provide a proper solution. We are not dealing here with an ordinary contract that can be enforced, or with a contract where an attempt to enforce it is doomed to failure.

But these factors are insufficient to exempt us from the duty of deciding this difficult question.

4. Here I agree with the opinion of my colleagues, who believe that in the situation before us, where there is no express statute that can guide us, we must avail ourselves of our sense of justice, and make our ruling according to what seems to us to be more just, in view of all the circumstances of the case before us. I expressed my view as to finding a just solution in the absence of legislation that dictates an express solution, in my opinion in CA 499/81 *Odeh v. Haduri* [21], at pp. 739-740. My opinion in that judgment was admittedly in the minority, but my remarks regarding the issue of considerations of justice remain unchanged. I wrote there, *inter alia*:

> 'It is clear to us all that the application of the provisions of statute to the specific facts of a particular case does not always lead to a result that satisfies our sense of justice. There are many cases — some would say too many — in which the court is compelled by statute or by case-law, established in authorities that bind it, to make decisions whose outcome in practice conflicts with the rules of logic and reasonableness and is outrageous from the viewpoint of the sense of justice that beats in the heart of the judge.
>
> This is mainly the result of the fact that even the most talented legislator does not foresee all the situations that may arise; life is more diverse than even the richest imagination of the parliamentary draftsman. And as for the judge, he is unable to depart from the clear language of the statute or from sacred case-law rules, lest he cause chaos and uncertainty with regard to the legal position on a specific issue, and thereby public crisis, which is worse even than the injustice caused to one of the parties in a particular case.
>
> But awareness of the fact that such situations cannot entirely be prevented does not need to lead us to the conclusion that we must resign ourselves to this phenomenon, and that we are exempt from making maximum efforts to minimize the cases in which such a conflict arises between application of the statute and the requirements of justice.'

And further on, at p. 740:

> ‘Lord Denning, in his book *The Road To Justice*, London, 1955, discussed the approach of many jurists, who make a clear distinction between the law and its principles and the demands of justice, and who believe that the legal system should engage in interpreting the existing law only, and not look for ways to make it more just. Lord Denning writes, on p. 2:
>
> > “Lawyers with this cast of thought draw a clear and absolute line between law and morals, or what is nearly the same thing, between law and justice. Judges and advocates are, to their minds, not concerned with the morality or justice of the law but only with the interpretation of it and its enforcement…
> >
> > This is a great mistake. It overlooks the reason why people obey the law”.’

Justice Strasberg-Cohen doubts the effectiveness of this test as a decisive factor. She points to the difficulty in determining what is the just solution and what is the unjust path. What seems just in the eyes of one observer may appear an outrageous injustice in the eyes of another.

This difficulty exists, but it is not the only one confronting the judge. When a judge must decide the question what is reasonable behaviour or reasonable care, or how the reasonable person would react in a given situation, these questions may have different and conflicting answers, and such are even given by different judges. Therefore on these issues there are majority and minority opinions, and sometimes the decisions of judges are reversed by higher courts. None of this prevents the court from deciding such questions. The judge must decide in accordance with his logic, life experience and conscience, and where there are differences of opinion, as there are in this case, the majority opinion is decisive.

As to the legitimacy of considerations of justice, let it be said that this factor constitutes an element in many statutes, which were cited in the opinion of my esteemed colleague, Justice Goldberg, such as section 31 of the Contracts (General Part) Law, which empowers the court to exempt a party to an illegal contract from the duty of restitution ‘if it thinks it just to do so’, or section 3(4) of the Contracts (Remedies for Breach of Contract) Law, which allows non-enforcement of a contract when ‘enforcement of the contract is unjust in the circumstances of the case’, or section 132(a) of the

Tenant's Protection Law [Consolidated Version], according to which, 'notwithstanding the existence of a ground for eviction, the court may refuse to give a judgment requiring eviction if it is persuaded that in the circumstances of the case it would not be just to give it'.

First and foremost in this context we should mention section 15(c) of the Basic Law: Administration of Justice, according to which the Supreme Court, when sitting as the High Court of Justice, shall 'hear cases in which it thinks it necessary to grant relief for the sake of justice…'

In each of those cases, there are differences of opinion on the questions whether justice requires or justifies the intervention of the court, and on the side of which party justice lies. But this is insufficient to prevent us from stating our position on the subject, even if the matter often involves serious reservations.

This consideration has therefore been, in this unique case, a guiding principle for me.

5. I have already said that I feel a large degree of sympathy for the two adversaries in this tragic dispute. But ultimately, when I consider the facts of this special case as a whole and I try to weigh them in the scales of justice, I feel, like my five colleagues mentioned above, that Ruth's right is weightier and will tip the scales in her favour.

I reach this conclusion on the basis of the cumulative weight of the following considerations and facts:

(a) Not only did Ruth and Daniel agree to bring a child into the world by this method of fertilizing the ova and availing themselves of a surrogate mother, but they went to the extent of realizing this plan. Daniel contributed his sperm and caused the fertilization of the ova with full consent.

(b) The procedure adopted involved serious physical suffering for Ruth. Because of her state of health, this even involved a risk to her life.

(c) Originally, Ruth could have achieved the same result with the sperm of another man, but she preferred the partnership with Daniel for obvious reasons, by relying on his full consent to the joint plan.

(d) Ruth is no longer capable of repeating this attempt, because of her age and her state of health. Consequently, this is her only and last chance for her to realize her brave aspiration of parenthood.

(e) By contrast, Daniel, who has become a parent, can experience this wonderful experience in the future.

(f) Were we to encounter the opposite situation, i.e., a situation where the man was incapable of fathering children, and his only chance to become a parent would be by implanting the ovum of his spouse, fertilized by him in her body, in a surrogate mother, then I think it would be right to reach the same conclusion, whereby the woman who provided the ovum should not be allowed to oppose the completion of the process.

(g) It should be noted that, in view of the need to consider all the relevant facts as a whole, my conclusion in this appeal might have been different, had it transpired, for example, that Daniel had found out that it was intended to implant the fertilized ovum in the body of a surrogate mother suffering from a terrible disease, or had it suddenly been discovered that because of the rare blood types of Daniel and Ruth, there existed a danger, from a genetic viewpoint, to the health or physical integrity of the foetus. But in the absence of such exceptional circumstances, the requirements of justice demand that Daniel should not be allowed to frustrate the completion of the procedure under discussion, merely for the reason that, in the meantime, there has been a change in his desire of being a father.

(h) The fact that, in certain circumstances, we recognize the right of a woman to terminate her pregnancy by means of an abortion, and that the man cannot compel her to continue the course of the pregnancy or to terminate it, makes no contribution towards solving the present problem. The decisive factor with regard to the question of abortions concerns the fact that the embryo is a part of the mother's body, and therefore the mother has control over the embryo's fate.

(i) My esteemed colleagues have extensively discussed the right and liberty of every person to achieve parenthood, and about the corresponding right and liberty of a person not to become a parent against his will.

My esteemed colleague, Justice Strasberg-Cohen, writes:

> '*Realizing the right of someone who wants parenthood by imposing an obligation on someone who does not want it conflicts with the essence of the freedom* [i.e., the freedom of someone who is not prepared to undertake parenthood] *and deals it a mortal blow*' (parentheses supplied).

This might have been the position had the intention been *to impose an obligation* on the respondent to further the realization of parenthood. But no such demand is currently being made of Daniel. The active contribution required of him in this matter has already been performed by him, of his own

free will, in the past, before there was a change in his position. Today, no-one wishes to impose on him an obligation to do anything, and he is merely denied the right to frustrate Ruth's ability to make use of her ova, which were fertilized previously by the respondent's sperm with his full consent.

Justice Strasberg-Cohen does not agree with this approach. In her opinion, Ruth is demanding of Daniel acts that are of significance. My colleague says as follows:

> 'Is it really the case that Ruth is making no demands of Daniel? I suspect that the opposite is true. She demands that his opinion should not be taken into account, that he should be removed from the picture and that his refusal should be ignored. She demands that she should be allowed use of the genetic material against his will in order to bring a child into the world. She demands that the court should give consent instead of Daniel and instruct the hospital to give her the ova so that she can continue a procedure that will lead to the birth of her and Daniel's joint child, without his consent. To this end she asks that his consent to fertilization should be interpreted as consent to bringing a child into the world against his will, even if he will not raise the child.'

In so far as these remarks indicate the serious dilemma in which Daniel Nahmani currently finds himself, I can only agree with them, and I have emphasized this in my remarks above. But this cannot obscure the practical and basic difference between imposing a duty on someone to perform an active deed to further parenthood, against his will, and not recognizing his right to do something that is intended to prevent his spouse from completing her realization of parenthood.

In other words: were the court now to be asked to order the respondent to cooperate actively with the continuation of the fertilization procedure, by contributing sperm or by participating in any medical tests or treatments, or by making payments to a surrogate mother or to other parties for procedures that have not yet been carried out, then there would be a basis to the argument that making such an order would infringe upon a protected liberty of the respondent. But this is not the position in our case. Daniel is not currently being asked by Ruth to do anything, but he is seeking to prevent the hospital, by means of an active instruction on his part, from delivering the fertilized ova to the applicant, and he is seeking in this way to frustrate the

realization of the parenthood that was planned in the past by the two spouses jointly.

I have, in the meantime, had the opportunity of reading also the opinion of my esteemed colleague, Justice Zamir. With the intention of showing that, even after the husband consented to the fertilization of the ovum and the completion of the acts required for this end, of his own free will, the husband is still required to perform a positive act with regard to the additional steps connected with the implantation of the ova, Justice Zamir refers mainly to the Public Health (*In-vitro* Fertilization) Regulations (hereafter — the regulations). Under regulation 14 of those regulations, the husband's consent is required for any act involved in *in-vitro* fertilization of the woman, and under regulation 9 of the regulations, the consent of both the wife and the husband is required to extend the freezing of the ovum beyond five years.

These provisions are insufficient to obscure the major difference between imposing a duty on someone to carry out a positive act and a decision that merely neutralizes the opposition of that party to the act of the other party. With regard to what is stated in regulation 14 of the regulations, I am of the opinion that Daniel should be regarded as someone who not only agreed to the *in-vitro* fertilization, but even carried out all the acts required on his part to realize the fertilization. And with regard to what is stated in regulation 9 of the regulations, I will make two observations:

(1) The problem concerning an extension of the freezing of the ovum in excess of five years was created only because Daniel refused to agree to the ova being delivered to Ruth, and as a result of the protracted legal proceedings, of which the current proceeding, it is to be hoped, is the last. In these circumstances, a decision by the court, which will invalidate Daniel's objection, should not be regarded as forcing Daniel to perform a positive act against his will, thereby violating one of his basic liberties.

(2) In any case, when the court decides to accept Ruth's claim, according to the opinion formed by a majority of the judges on this panel of the court, the meaning of this is that the court is deciding, instead of the husband, to consent to implantation of the ovum, and it is instructing the hospital to deliver the fertilized ovum to Ruth in order to continue the activity required for carrying out the implantation. Again, Daniel is not required to take any tangible step as a result of this judgment. The power is now being transferred to Ruth to take, on her own, all the steps required for completion of the procedure involved in the implantation of the fertilized ovum.

(j) In these circumstances, it is my opinion that the respondent's right to carry out an act to undermine the procedure must yield before the right of the applicant to realize her right to parenthood. On this issue, my colleague Justice Strasberg-Cohen writes:

> 'The law does not require a person to have children with his spouse even if he promised to do so and changed his mind. A person who breaks a promise causes disappointment and frustration to the other. His behaviour is not "just", but the law will not require him to keep his promise in the name of "justice".'

But, in my opinion, we must distinguish between someone's spoken promise to have children with his spouse, and such a promise which, from his point of view, has already been carried out by fertilization of the wife's ova, with all the associated circumstances in the present case.

(k) In this regard, I will not repeat the citations of judgments and learned opinions that were cited by my esteemed colleagues Justices Tal and Dorner, which point to the factor of estoppel that exists in the present circumstances, at least from the moral perspective. In order to illustrate the principle which seems to me persuasive, I will merely cite once again a short passage from the aforementioned article of Panitch, 'The *Davis* Dilemma; How to Prevent Battles Over Frozen Preembryos', 41 *Case W. Res. L. Rev.* (1991) 543, at p. 574, upon which Justice Tal relies:

> 'One fact is of vital importance in making this judgment; the spouse who opposes implantation wanted a child at one time and submitted to the IVF process with that end in mind. The two spouses once agreed on this issue and initiated the IVF procedure in reliance on that mutual wish. Given this background, the greater injustice would be to deny implantation to the spouse who detrimentally relied on the other's words and conduct.
>
> Protection against this sort of injustice is recognized by the well established doctrine of estoppel…'

(l) To all of these we must add another consideration, which was also discussed by my esteemed colleague, Justice Türkel, that preferring the position of Ruth involves the possibility of granting life and bringing a living person into our world. Even were the scales of justice balanced (and this is not the case), even this thought would have tipped the scales.

6. Conclusion:

For the reasons set out above, I share the view of my five colleagues, who think that Ruth's application in this further hearing should be granted, and that it should be held that she is entitled to continue her efforts to bring about the birth of a child by implanting the fertilized ova in the body of a surrogate mother.

Justice E. Mazza

Ruth Nahmani wants to become a mother, and justice is on her side. Daniel Nahmani does not want to be a parent of joint children with Ruth, and justice is on his side too. But the justice on Ruth's side is greater than that on Daniel's side, and the law is therefore on Ruth's side.

Deciding between rights

Are the right to be a parent and the right not to be a parent two facets of the same right? This is not an easy question. But even is we assume that the answer to this question is yes — i.e., that we are dealing with 'opposing' rights — we cannot easily prefer one to the other. Possibly the intensity of the rights is equal and possibility it is not equal; deciding this question requires a value judgment (see D. Barak-Erez, 'On Symmetry and Neutrality: Reflections on the Nahmani Case', 20 *Tel-Aviv Uni. L. Rev.* (1996), 197, at pp. 198-200). Indeed, not always do the positive right and its opposing negative right have the same status. Thus, for example, the right to speak and the right to remain silent are not necessarily equal rights. When the positive and negative aspects of the same right conflict with one another, a judicial determination is required. Sometimes there is no escaping a value judgment that determines the rank of the competing rights and accords them different statuses. Thus, for example, it was held (in CA 506/88 *Shefer v. State of Israel* [22]) that the right to die is not equal to the right to live. It seems to me that in our case we are not required to make such a value judgment of this kind. A decision in favour of Ruth's right to parenthood is not contingent on a determination that the right to be a parent, in itself, is stronger than the right not to be a parent. The reason for this is that in our case there is a clear and major gap, not between the inherent weight of the conflicting rights as such, but rather in the intensity of the manifestation of each of them in the circumstances of the specific case. It follows that, while the right to be a parent is manifested here in one of its strongest forms, the right not to be a parent is manifested here in a form that is relatively weak. Indeed, a just

decision in the matter of the Nahmani couple must be based on a proper balance between their conflicting rights. But this balance cannot be based merely on a feeling of justice. It must be made with an objective criterion. The criterion required, in the absence of a recognized legal norm that regulates the issue, is the doctrine of rights. As with any decision based on a comparison between conflicting rights, our decision will also be a value judgment. But in the circumstances of the case, as I have already said, we can exempt ourselves from the value judgment between the conflicting rights as such (as in *Shefer v. State of Israel*), and it is sufficient for us to compare the relative intensity of the rights as manifested and expressed in the concrete dispute. As a premise we can therefore assume that Daniel's basic right not to be a father to Ruth's children is equal to Ruth's right to be a mother to these children. However even with a premise that assumes the existence of absolute equality in the intensity of the conflicting rights, Daniel's case is weaker.

'Fundamental' rights, 'general' rights and 'specific' rights

3. The term 'right' has different meanings. In the discussion below we will seek to recommend a distinction between the following three meanings: 'fundamental' right, 'general' right and 'specific' right. A 'fundamental' right reflects the norm and constitutes a part of the legal system. A 'general' right is the right of a specific person to have the 'fundamental right. A 'specific' right is the right of a person to a certain application of his general right. Take, for example, the freedom of speech. There is, in our legal system, a basic right of freedom of speech. This right, whose existence reflects the constitutional norm underlying it, is a *fundamental* right to the freedom of speech. The right given to the individual to express himself as he wishes is a *general* right of freedom of speech. It is 'general' in that it gives the individual the fundamental right in principle. However, the right of the individual to a particular application of his right to freedom of speech, such as his right to express a particular idea or to do so in a particular way (by publishing an article, orally, etc.) is a *specific* right. As distinct from his having the general right, which derives from the fundamental right, his right to a particular implementation of the general right constitutes a 'specific' right.

The distinction between a 'general' right and a 'specific' right focuses on two aspects of the right: the object to which the right relates, and the interest that is protected by the right. A right is general if the object of the right is the person having the right himself, and the protected interest is the very existence of the fundamental right for the person having the right. By

contrast, if the object of the right is one of those objects with regard to which it is possible to implement a particular general right, and the interest protected by the right is the implementation of the said general right vis-à-vis that object, then the right is specific. For example: someone who opposes any restriction of his freedom of movement is in practice insisting that the fundamental right of freedom of movement applies to him too; his demand is for a general right of freedom of movement. By contrast, someone seeking to be released from a restriction preventing him from entering a specific place is seeking a specific freedom of movement, and the same is also true of someone seeking permission to leave the country. Note that a specific right does not need to relate to one specific object, but may relate also to a specific group of objects, as distinct from objects not included in that group. Thus, for example, a person who demands to be given the right to leave the country is asking for himself a specific right of freedom of movement, even though exercising the right may be expressed by travelling to several countries. All foreign countries to which he may wish to travel constitute potential objects for the exercise of his specific right. Travelling to other places that are inside the country, even though these are also possible objects for exercising the right of freedom of movement, are not objects for exercising the specific right of leaving the country. On the other hand, for someone asking to be released from arrest or from another restriction imposed on his freedom of movement, so that he may travel to specific places inside the country, only the places to which he wishes to travel will constitute objects for the exercise of the specific right of freedom of movement inside the country.

A comparison with the accepted distinction between absolute rights and relative rights

4. I would like to emphasize that our distinction between a general right and a specific right is different from the accepted distinction in our legal system between an 'absolute' right and a 'relative' right. The distinction between an absolute right and a relative right focuses on the weight of the right, whereas the distinction between a general right and a specific right focuses on other questions: identification of the object to which the right relates and defining the interest which the right is intended to protect. Note that even the distinction between a general right and a specific right may influence the weight given to that right. But the weight of the right is not one of the characteristics of this distinction. The characteristics of this distinction are the identification of the object to which the right relates and defining the interest protected by it.

The distinction between an absolute right and a relative right combines a theoretical approach and a practical approach, which are like two distinctions existing alongside one another. The premise for the theoretical approach is definitional: an absolute right is a right that is protected absolutely against infringement, whereas a relative right may yield to conflicting interests and considerations. Professor Dworkin says that whoever has an opinion that a right is absolute is bound to hold that the right must always exist, and there can be no justification for restricting it (see R. M. Dworkin, *Taking Rights Seriously*, *supra*, at p. 92). The theoretical approach guiding the case-law of this court holds that the rights recognized in our legal system are never 'absolute', but are always 'relative'. This is the case with regard to the right of freedom of speech (HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [23], at page 879 {99}); the right of holding a demonstration and procession (HCJ 153/83 *Levy v. Southern District Commissioner of Police* [24], at p. 399 {115}); the right of assembly and demonstration (HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Commissioner of Police* [25], at p. 454); the right of a journalist to refuse to answer a question regarding the source of his information (MApp 298/86 *Citrin v. Tel-Aviv District Disciplinary Tribunal of Bar Association* [26], at p. 347); the freedom of occupation (CA 496/88 *Henfeld v. Ramat Hasharon Sports Association* [27], at p. 721); the right to receive information (HCJ 1601/90 *Shalit v. Peres* [28], at p. 366 {223}); the right of being heard (HCJ 4112/90 *Association of Civil Rights in Israel v. Southern Commander* [29], at p. 638); and the right of a suspect to meet with a lawyer (HCJ 3412/91 *Sufian v. IDF Commander in Gaza Strip* [30], at p. 848).

The practical approach deals with determining the weight of a particular right. According to this approach, the weight of a right is never determined by the actual recognition of the right's existence, but derives from the balance between it and the interests competing with it in a particular situation. The meaning of this is that the weight of any right cannot be expressed by indicating its place on any scale. All that can be said is that, in one or other set of specific circumstances, the right prevails over, or gives way to, a conflicting interest. In practice, the practical approach deals with relative rights, and in this way it realizes the ideological approach. It assumes a premise that we should not recognize a right as 'absolute' (i.e., as reflecting an objective value that is absolutely independent of other values). Thus it provides an independent yardstick for distinguishing between 'absolute' rights (in the primal-hypothetical sense) and 'relative' rights, which alone

have a practical legal significance. Case-law also contains reference to the distinction between absolute rights and relative rights in this sense (see, mainly: CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [31], at p. 205; CA 2266/93 *A v. B* [32], at p. 266; cf. also what is stated in HCJ 753/87 *Borstein v. Minister of Interior* [33], at p. 474, and HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [34], at p. 760 {488}. In its operation, the practical approach proves the correctness of the ideological approach, and works jointly with it: in the absence of a 'moral' possibility of determining the weight of any right in objective-absolute values, the necessary conclusion is that no right is absolute and that all rights are relative.

5. We have discussed the distinction between general rights and specific rights. If we wish to describe these rights in terms familiar to us from the field of distinguishing between absolute rights and relative rights, we will quickly discover that general rights and specific rights are both relative rights. Someone claiming a general right of freedom of speech does not claim that his right must prevail over every conflicting right. The difference between him and someone claiming a specific right of freedom of speech is merely that the first demands a right to say anything that he wants to say, whereas the second demands that he be allowed to say something specific. But both of these have only a relative right, whose weight is determined by the existence of conflicting interests. The right is relative also in the sense of the practical approach. The weight of the right of freedom of speech is not fixed and absolute in either case, but it is determined in relation to other values that conflict with it. This conclusion also passes the definition test, that an absolute right is a right that must never be harmed. At any rate, for our purposes, both a general right and a specific right will always be (in the words of Dworkin in *Taking Rights Seriously*, *supra*, at p. 92) 'less than absolute'.

A comparison with other accepted distinctions

6. Additional distinctions are recognized in jurisprudence with regard to rights. Hohfeld's distinction between a 'right in the strict sense' and a 'liberty', a 'power' and an 'immunity' is well-known. In our case, it is important to distinguish between a right in the strict sense and a liberty. Hohfeld characterizes rights according to the relationship between them *inter se* and between them and the existence of duties: the existence of a right in the strict sense, for a specific person with regard to a specific object, means the existence of a corresponding duty for someone else with regard to that

object, whereas the existence of a liberty for a specific person with regard to a specific object means the absence of a duty for that person with regard to that object (W. N. Hohfeld, *Fundamental Legal Conceptions*, 1919, at p. 1923). In the terms of this distinction, both the general right and the specific right can be either a right in the strict sense or a liberty. It is possible, therefore, to speak of the general right of freedom of movement, which is a liberty, as well as of a person's specific right to go out of his home, which also is a liberty; and by contrast, it is possible to speak of an employee's general right to receive his wages on time, which is a right in the strict sense, and of that employee's specific right to receive his wages for the month of May at the beginning of June, which is also a right in the strict sense.

7. Professor Dworkin (in *Taking Rights Seriously*, *supra*, at p. 93) distinguishes between an 'abstract' right and a 'concrete' right. According to this distinction, a concrete right is a determination concerning the real entitlement of a person to act in a certain way in a particular situation, whereas an abstract right is the actual idea according to which a certain right ought to be given preference. Thus, for example, the declaration that everyone has a right of freedom of occupation merely expresses an abstract right; but when the court determines that a specific person is entitled to establish a business that will compete with the business of his former employer, despite his contractual undertaking not to do this, the court is ruling that the person has a concrete right to realize his freedom of occupation in this specific way. If we try to characterize the general right and the specific right in terms of the distinction between the abstract right and the concrete right, we will find that both of them — both the general right and the specific right — are abstract rights. It need not be said that the general right does not determine that there is an entitlement to act in a certain way in a particular situation. However even the specific right does not do this: it too merely outlines the principles that lead to a concrete decision, but it does not, in itself, embody a decision. The decision must be made separately. In reaching it, the court must take account of the existence of the specific right, but it is likely and entitled to take into account also the existence of contradictory interests and additional considerations.

8. Of particular importance for our case is the comparison with several distinctions made by Professor Raz (see: J. Raz, 'On the Nature of Rights', 93 *Mind* (1984) 194). His first distinction is between 'core' rights and 'derivative' rights. Raz says that sometimes the justification for recognizing a right derives from another right. He calls rights, whose justification derives

from another right, 'derivative' rights, whereas he calls the rights that are not derivative 'core' rights. However, Raz emphasizes, not every right that from a logical viewpoint has its source in another right is a derivative right; for a right to be considered 'derivative', there must be a justification relationship between it and the core right. In other words, it is the core right that justifies recognition of the existence of the derivative right (*ibid*., at p. 197). In the absence of a justification relationship, there is no basis for the distinction. Consider a person who bought a house containing several apartments. His right of ownership in a particular apartment in that house derives from his right of ownership in the whole building; and since the justification for his right of ownership in the apartment derives from his right of ownership in the whole house, the right of ownership in the apartment is a derivative right. By contrast, consider a person who bought all the apartments in the house, but who did so in separate transactions: one apartment after another. He too, at the end of the process, has become the owner of the whole house. Despite this, it cannot be said that his right of ownership in a particular apartment in that building derives from his right of ownership in the whole building, since in this case the justification relationship works in the opposite direction: his ownership of the whole house derives from his ownership of each apartment in this house.

A general right always incorporates the specific right. But the relationship between a general right and a specific right does not require a justification relationship. It follows that a specific right cannot always be regarded as a derivative right, within the meaning of this term in Raz's distinction. In addition, the condition of the unidirectional derivation is unimportant here. Therefore, it is unavoidable that a general right is created as a result of the existence of several specific rights. The example of the owner of the house, who is also the owner of the apartments in the house, emphasized to us the distinction between a core right and a derivative right. But for the distinction between a general right and a specific right, we do not attribute any importance to the question which of the rights came into existence first. The general right will incorporate all the specific rights even if these came into existence, one by one, before it.

9. In his article 'On the Nature of Rights', *supra*, Raz refers to the nature of the relationship between a 'right' and a 'duty'. He disagrees with Hohfeld's assertion concerning the existence of a relationship of 'correspondence' between rights and duties. In his opinion, the relationship between rights and duties is also a relationship of 'justification', and not one

of correspondence. One person's right constitutes a basis that makes it possible to justify imposing a duty on another person, if the weight of the opposing considerations does not outweigh them (*ibid*., at p. 199). Further on, Raz distinguishes between a 'general' right and a 'particular' right. A general right means that a certain person has a right, but it does not necessarily follow from this right that another person has a duty. In every set of circumstances we must consider the fact that there is an opposing right and the considerations that conflict with the realization of the right in those circumstances. If this set of considerations leads to the conclusion that the right should be realized, then we will say that in these circumstances there is a particular right, which is accompanied by a duty of another person. The general right is the basis upon which, in appropriate circumstances, particular rights are founded (*ibid*., at p. 211).

Notwithstanding the similarity in the terms, it seems to me that there is an important difference between Raz's distinction (general right as compared with a particular right) and the distinction proposed by us: a general right as opposed to a specific right. To the best of my understanding, Raz's intention in the term 'particular right' is similar to Dworkin's intention in the term 'concrete right', namely — this is an assertion as to the existence of a *de facto* entitlement. This assertion means that the general right overrides the opposing interests, and it should be realized. This is not the case according to our distinction: a specific right — like a general right — can be denied by virtue of the greater strength of conflicting interests. The existence of a specific right is not the end of the matter, but merely one consideration in the equation which serves as the basis for the decision. Moreover, a general right (according to our definition) includes many specific rights, some of which may never be exercised in practice, because of the existence of conflicting considerations. This classification is incompatible with Raz's approach: he defines as particular rights only those specific rights that ultimately have been realized, whereas specific rights that have not been realized, in his view, are not rights at all (see *ibid.*, at p. 211).

10. Another distinction of Professor Raz is between a 'morally fundamental right' and a right that is not such. What justifies the existence of a right, according to Raz, is the interest that the right is intended to protect (see *ibid.*, at p. 195). If the interest of the person having the right is in his actually having the right, and it does not derive from any other interest, then the right is 'basic' (*ibid*., at p. 214). It follows that a right that is not basic is of two kinds: a right that derives from a basic right, and a right whose

justification derives from other or additional interests, apart from the interest of the person having the right in his actually realizing the right.

Professor Raz's definition of a basic right is similar, from the viewpoint of the structure of the definition, to our definition of a general right: as we said, a right is general, if the interest that it is intended to protect is the very existence of a fundamental right for a person who has the right. However, despite the similarity in wording, there is no similarity in meaning. First, Raz's definition refers to a person's interest in his having that right, and it can be any right. By contrast, our definition of a general right in based on a person's interest in his having the fundamental right. Second, Raz's theory is based on the concept of interest, and when he defines a right as 'basic', his intention is to distinguish between this right and other rights on the level of the interest that justifies the existence of the right. Our distinction between a general right and a specific right does not focus on the interest in the existence of the right, but in identifying the object: is the object the person having the right, or is it one of those objects vis-à-vis whom the person having the right is likely to implement his right. A person claiming a general right is making a claim with regard to himself: he is demanding for himself the fundamental right. A person claiming a specific right is making a claim with regard to objects that are extrinsic to himself: he is seeking to apply his general right to (one or more) objects from amongst the objects to which it can be applied.

Restrictions on rights

11. We have reviewed some of the better-known ways of distinguishing between rights. This review is certainly not complete, but I think that it should be sufficient to clarify somewhat the uniqueness of the method proposed by us for distinguishing between a general right and a specific right. We will seek, below, to rely on this distinction, but first let us consider briefly also the classification of restrictions on rights. This too will be required for our case, since the balance between conflicting rights is based, *inter alia*, also on the definition of the nature of the restriction that each of the rights imposes on the conflicting right.

The recognized restrictions are of several types. We will follow our method and assert that the main classification of the restrictions — like the main classification of the rights — is into 'fundamental' restrictions, 'general' restrictions and 'specific' restrictions. The first type need not trouble us: a *fundamental* restriction is a restriction imposed by law on a fundamental right, and like the right to which it applies it is part of the law,

from which the general and specific rights are derived. By its nature the restriction may be general or specific. It is general when it relates to a general right. It is specific when it relates to a specific right. That it is fundamental merely identifies the normative source of the restriction; in other words, that its application derives from the law. But balancing and deciding between conflicting rights are only required for general restrictions and specific restrictions. The normative source, from which the imposition of the restriction (whether general or specific) is derived, makes no difference: the source may be a fundamental restriction — i.e., a prohibition prescribed by the law — and it may derive from another binding norm: a court order, an agreement or another legal relationship. The classification of the restriction as general or specific derives from its content. A *general* restriction, which can relate only to a general right, deprives the person who has the right of the ability of making any use of his right; thereby it *de facto* negates the very existence of the right. A *specific* restriction may be imposed on a general right or on a specific right. Its imposition prevents the person who has the right from implementing his (general) right only with regard to some of the potential objects. It should be said that the overwhelming majority of fundamental restrictions are specific. The right of freedom of movement is limited by the road traffic laws, the criminal prohibition against trespass and laws regulating leaving and entering the country. These are specific restrictions, subject to which the (fundamental or general) right of freedom of movement is retained. Even the restrictions on the right of freedom of speech are specific, and subject to the prohibition of libel and laws whose purpose it to protect essential interests such as protecting State security and maintaining public order, the general right is retained.

12. For the purpose of our deliberation we would like also to classify two additional types of restrictions, which are derived from the main classification: a '*de facto* general' restriction and a 'quasi-general' restriction.

A '*de-facto* general' restriction is a restriction that *prima facie* can be classified as specific, or which ostensibly appears to be specific, whereas it is, *de facto*, general. Take, for example, the case of the prisoner imprisoned in his cell. Someone looking at him is liable to receive the impression that the restriction on his freedom of movement is specific, because it prevents him merely from leaving his cell, whereas all other movement is ostensibly permitted to him. But clearly presenting the nature of the restriction in this way distorts the reality. The real restriction imposed on the prisoner is not limited to a prohibition against leaving his cell, but it includes all the possible

expressions of freedom of movement outside the walls of the cell: the prisoner cannot go home, he cannot walk in the city streets, he cannot travel to another city, or leave the country. Indeed, at this moment the only restriction imposed on his freedom of movement is a specific restriction (preventing him leaving the cell) but this specific restriction places on his freedom of movement a general restriction. The restriction on the freedom of movement of that prisoner is therefore a '*de facto* general' restriction, and a restriction of this type is equivalent, as its consequences require, to a general restriction.

I am aware that attempting to classify a *de facto* general restriction as a special type of restriction is not without difficulties from a theoretical perspective. Someone will say, justifiably, that the restriction on the freedom of movement of a prisoner is, essentially, a general restriction. On the other hand, it may possibly be argued that a sentence of imprisonment for a very short period (e.g., one day) imposes only a specific restriction on the freedom of movement. These potential objections do not worry me. The classification of a *de facto* general restriction is not intended to add to the main classification of general and specific restrictions, or to subtract from the validity of either of these types. The sole purpose of this classification is to provide a diagnostic for deciding borderline cases. In other words, even when according to the basic definition we should, or can, classify a restriction on a right as a specific restriction, but its consequences are like those of a general restriction, then for the purposes of deciding a dispute, we should treat it as a general restriction. Note that the definition of a restriction as a *de facto* general one may be of use not only in cases where there the difficulty in classifying the restriction as general or specific derives from the factual circumstances of a particular situation, but also in cases that give rise to a theoretical dispute with regard to the normative classification of the restriction. Take, for example, the restriction embodied in the prohibition against incitement to racism. Some will say that we are dealing with a specific restriction on the freedom of speech, since subject to the prohibition against incitement to racism, the right is retained. Others will say that we are dealing with a general restriction, which means that the 'right' of freedom of racist speech has been utterly excluded from the fundamental right of freedom of speech. For the purposes of a practical decision, this theoretical argument may be resolved by adopting the definition according to which the restriction against racist speech is a *de facto* general one: this means that even if it is found that there is a theoretical justification for including it in the

category of specific restrictions, for the purposes of the decision it should be treated as a general restriction. In summary, since its *de facto* consequences are the same as the consequences of a general restriction, it should be treated *de facto* as a general restriction.

13. The classification of a quasi-general restriction seeks to establish an intermediate level, situated between the general restriction and the specific restriction. This classification will be appropriate in a case where the restriction imposed on the person having the right albeit leaves him potential ways of realizing his right, but from his point of view all the possibilities that the restriction leaves him are very unattractive, either because realizing them involves special risks, great inconvenience or an investment of huge resources, or because the way in which they allow him to realize the right is substantially different from the way in which the person having the right would have wanted to realize it had it not been for the restriction. From a technical-formal viewpoint, the restriction imposed on the person having the right is merely a specific restriction, since in theory he retains the possibility of realizing the right; but from a substantive-functional perspective, such a restriction is closer to a general restriction. The fact that all the possibilities of exercising his right are unattractive gives the person having the right a negative incentive to realize his right, and also very substantially reduces the chance that he will succeed in realizing it *de facto*. In such circumstances, the restriction on the right is 'quasi-general', and a quasi-general restriction should also be treated as a general restriction.

It should be noted that a quasi-general restriction is substantively different from a *de facto* general restriction. Consider the right to eat, which is one of the derivatives of the human right to preserve his physical existence. If a person is deprived of all food, the restriction on his right to eat is general. If he is deprived only of one type of food, but that type is the only food available, the restriction is *de facto* general. But if he is offered to eat rotten food, which has a bad taste and little or no nutritional value, and he is deprived of any other food, then the restriction on his right is 'quasi-general'.

The extent of the violation of the right

14. On the basis of these principles, we would like to lay down some basic premises for the extent of the anticipated violation of a person's right as a result of restrictions imposed on his right.

Our first premise is that imposing a general restriction on any right will violate that right more than imposing a specific restriction on it. The reason

for this is simple and obvious: a general restriction *ipso facto* includes all the possible specific restrictions. Thus, for example, a general restriction on someone's freedom of occupation means that he is prohibited from engaging in any occupation whatsoever. Such a restriction will violate his general right of freedom of occupation more than a specific restriction that will prohibit him from engaging in a specific profession or vocation, but will not restrict his right to engage in other professions or vocations. Note that not all specific restrictions on a particular right are of equal status. Imposing a specific restriction on a particular right may violate that right more than imposing another specific restriction on that right. But both of these will violate that right less than if a general restriction had been imposed on it. Thus, for example, an order prohibiting a resident of Haifa from entering the municipal boundaries of Tel-Aviv imposes a specific restriction on his freedom of movement. But the violation caused by such an order to the person's freedom of movement will be less than that caused by an order prohibiting him from leaving the municipal boundaries of Haifa, which also imposes a specific restriction. However, even the violation caused by an order of the latter type is still more moderate than that caused by an order which prohibits the person from leaving his home and imposes a general restriction (or at least a *de facto* general restriction) on his freedom of movement.

The second premise is that the violation of a right that derives from imposing a *de facto* general restriction on it will be, in most cases, equal to the violation caused to the person having the right as a result of imposing a general restriction. A *de facto* general restriction does not leave the person having the right with a real possibility and a *de facto* ability to realize his right. The practical result of a *de facto* general restriction classifies the violation of the right as equivalent to the violation of a general restriction. That is usually the case, but there may be exceptions, since, although the results are the same, the type of restriction may indicate a difference in attitude to the protected social value. The very imposition of a general restriction may sometimes indicate a relative decrease in the value of the protected right. Thus, for example, the prohibition against incitement to racism (assuming that it is a general restriction) indicates a negative social attitude towards the existence of the freedom of racist speech. Even imposing a *de facto* general restriction may sometimes indicate a decrease in the value of the protected right (once again, consider the prohibition against incitement to racism, against the background of the assumption that the restriction it incorporates is not general but *de facto* general). But imposing a *de facto*

general restriction (as distinct from imposing a general restriction) may derive also from circumstantial constraints, and it will not always indicate a decrease in the value of the right. Subject to this qualification, which requires caution in special cases, it can be established that a *de facto* general restriction violates the right to the same extent as the violation deriving from imposing a general restriction on that right.

Our third premise proposes that imposing a quasi-general restriction on a right violates that right less than imposing a general restriction or a *de facto* general restriction. The reason for this is clear: imposing a quasi-general restriction does not prevent realization of the right. By contrast, the violation to the right caused by a quasi-general restriction cannot be estimated as if it were a specific restriction. It has already been explained that a quasi-general restriction makes it difficult to realize the right to a greater extent than a specific restriction. It follows from this that even its violation of the right on which the restriction is imposed is greater than that caused as a result of imposing a specific restriction.

Classification of the competing rights in the Nahmani case

15. Ruth Nahmani wants to be a mother. Her right to realize her desire derives from the fundamental right, and it follows that her right is a general right. But Ruth is also claiming a specific right. Ruth is focusing her struggle on the ova fertilized with her husband's sperm. She claims that she has no other ways in which to realize her desire to be a mother. The fertilized ova — her and Daniel's joint genetic material — are the object vis-à-vis which Ruth wishes to realize her specific right. Daniel Nahmani does not deny Ruth's general right to be a mother. Notwithstanding, he wishes to prevent her from realizing this right by using ova fertilized with his sperm. The restriction that he wishes to impose on Ruth's right to parenthood is, *prima facie*, a specific restriction. According to him, Ruth may realize her right to parenthood in any way she sees fit, provided that she does not make use of those ova. But is this restriction, which Daniel wishes to impose on Ruth's right, really — as it seems — only a specific restriction? In order to answer this question, we must consider the two other methods, apart from using the fertilized ova, that it is argued against Ruth are still available to her for realizing her aspiration and her right to be a mother: another *in-vitro* fertilization, and adoption. Consideration of the circumstances leads to the conclusion that neither of these two methods is an available alternative that reduces the extent of the anticipated violation from the restriction that Daniel wishes to impose on Ruth's right.

The possibility of another *in-vitro* fertilization is vague. First, it is not at all clear whether, from a medical perspective, this option indeed exists. It may be that the chance of this attempt succeeding is negligible, or will involve an unreasonable risk to Ruth's health. Second, as long as Ruth is bound to Daniel by marriage, fertilization with the sperm of another man may make the children bastards.[*] Third, in order to carry out the additional *in-vitro* fertilization, Ruth will again have to undergo great physical and emotional suffering. It follows that even if the option of *in-vitro* fertilization exists, it is clearly an unattractive option. Even the option of adopting a child, or children, does not offer a solution that Ruth can accept. First, it is questionable whether, according to the accepted order of precedence, Ruth is entitled to adopt a child. In this regard, we must not ignore Ruth's age and her stated intention of raising her children alone (and we do not express here any opinion as to the correctness or justification of the order of priorities accepted by the competent authorities). Second — and this is the main point — adoption does not fulfil Ruth's desire and right to be a biological parent. It follows that this option also is clearly unattractive.

It transpires that of the three methods available to Ruth for realizing her general right to be a mother — using the fertilized ova, resorting to a new *in-vitro* fertilization procedure and submitting an adoption application — only the first method gives Ruth a possibility that can be regarded as a real one, whereas the other two methods are clearly unattractive. It follows that the restriction that Daniel wants us to impose on Ruth's right, even though *prima facie* it is only a specific restriction, is in fact a *quasi-general* limitation.

16. Daniel Nahmani does not insist on his general right not to be a father. Had this been his position, we would have had to decide which of the restrictions on the rights of the spouses is more severe: the quasi-general restriction on Ruth's right to be a mother, or the general restriction on Daniel's right not to be a father. But Daniel does not base his case on his general right not to be a father. On the contrary, Daniel has already willingly become a father, together with his new partner. The implication is that he does not object to the very idea of being a father, but he wishes not to be the father of the specific children that may develop from the fertilized ova which are the subject of the dispute. The right not to be a parent, for which he is

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[*] Editor's note: the Hebrew term is *mamzerim*. The significance of this status under Jewish law is that a *mamzer* is not permitted to marry within the Jewish community: see Deuteronomy 23, 3.

fighting, is expressed here in a specific right: the right not to be a parent of these specific children. The restriction that Ruth wishes to impose on Daniel's right, not to be a parent against his will to her children, is also a *specific* limitation.

Deciding between the rights

17. Deciding between Daniel's right and Ruth's right is not simple. A decision in Ruth's favour restricts Daniel's right not to be a father, since this decision forces him to be a father of children whom he does not want to father. A decision in Daniel's favour restricts Ruth's right to be a mother, since after such a decision all the options that remain to her for realizing her right to become a mother are, from her viewpoint, slight or very unattractive. Both restrictions are serious, but they are not equal. A decision in favour of Ruth imposes on Daniel's right not to be father a specific restriction, whereas a decision in favour of Daniel imposes on Ruth's right to be a mother a quasi-general restriction.

We have already explained that, as a rule, imposing a quasi-general restriction on any right violates that right more than imposing a specific restriction. In other words, a quasi-general restriction is more serious than a specific restriction. Admittedly, it does not necessarily follow from this that in every case where the court is faced with conflicting rights (whether they are opposing rights or whether they are different rights), it is sufficient for it to base the findings that must be balanced on this premise. When the rights are not equivalent, the premise may be false. Thus, for instance, in a situation where there is a difference between the inherent weight of the conflicting rights, it is possible that a balance between them will require a determination that a violation caused by imposing a quasi-general restriction on an insignificant right of one person is less serious than the violation involved in imposing a specific restriction on an important right of another person. It follows that a classification of the restricting causing the violation — as general, *de facto* general, quasi-general or specific — is merely one of the factors affecting the determination of the extent of the violation; when determining the extent of the violation — as required for making the balancing — we must take account not only of the classification of each of the restrictions violating the rights, but also of the 'absolute' inherent weight of each of the violated rights. However, it is not always necessary to define exactly the absolute inherent weight of the conflicting rights in order to determine whether imposing a specific restriction on one of them is preferable to imposing a quasi-general restriction on the other, or *vice versa*.

In many cases we will be able to adopt the balancing formula outlined in our premise, even without a determination as to the strength of each of the conflicting rights. This is the case, for example, when it is clear that the inherent weight of the two rights is equal, or almost equal. In such a case, it is correct to adopt the premise that imposing a quasi-general restriction on one of the rights will harm the person who has that right more severely than the harm caused to the person who has the opposing right as a result of imposing a specific restriction on his right. But this rule is valid and logical not only for deciding between equivalent rights. This rule will also apply when the rights are not of equal weight, but it is clear that the right which is subject to the more severe restriction — even if not preferable to the opposing right — is certainly not inferior to it.

18. These rules lead me to a decision in the case of the Nahmani couple. I accept that a person has a right not to be a parent against his will. This right is not stronger that a person's right to be a parent. It may be equal to it, or the latter may be stronger; but I have no doubt that the former right is not stronger. In the present case, the restriction that Daniel wishes to impose on Ruth's right to be a mother is a quasi-general restriction. The restriction that Ruth wishes to impose on Daniel's right not to be a father against his will is a specific restriction. Since we are required to make a decision, we must prefer imposing a specific restriction on Daniel's right not to be a father against his will, to imposing a quasi-general restriction on Ruth's right to be a mother. The violation caused by the first restriction to Daniel's right is, necessarily, less than the violation caused by the second restriction to Ruth's right. In circumstances where all other factors are equal, justice requires us to prefer the lesser violation to the greater violation. This is my reason for preferring the justice of Ruth's case to the justice of Daniel's case.

19. I would like to emphasize that the decision that I have reached is based on the distinction between the different intensity of a quasi-general restriction as opposed to a specific restriction imposed on conflicting rights which are (in the case that is more favourable from Daniel's point of view) of equal weight. My determination that the restriction on Ruth's right is quasi-general is based on the proven premise that apart from her possibility of using the fertilized ova, Ruth has no alternative method (apart from possibilities that are clearly unattractive from her perspective) to realize her right to motherhood. Let it not be understood from this that had I not accepted this premise, my conclusion would have been different. It is possible that even then I would have found a justification for accepting

Ruth's position, on the basis of a different reason, but I see no need to expand on this point.

A decision where there is no norm and no fault

20. In the legal dispute between Ruth and Daniel Nahmani, two elements, which both exist in the overwhelming majority of legal disputes, are absent. One element is a recognized legal norm that regulates the subject of the dispute. The absence of a legal norm has made our decision difficult and provided ample opportunity for different opinions and reasonings. The second element whose absence is felt in this case is the existence of fault on the part of one of the parties. At first I feared that the absence of fault, together with the absence of a binding norm, would make it difficult for us to decide the dispute. But ultimately I am satisfied that the absence of the element of fault was a blessing. Thus we have been able to rule on the dispute itself instead of dealing with the persons in dispute.

21. The absence of a legal norm — or at least the lack of consensus among the judges as to the existence of such a norm — is a rare phenomenon. Nonetheless, it is not an impossible phenomenon. Even when the court is called upon to decide a dispute of novel character, for which there is no established legal norm, it is not exempt from making a decision. Where there is a right, there is also a valid right to be granted relief. In such circumstances, the court faces the necessity of creating the legal norm on the basis of which it will decide the dispute. Usually it does not do this by means of creation *ex nihilo*. There are cases where existing arrangements that relate to a similar field may provide a norm that, *mutatis mutandis*, can be adapted to decide also the concrete dispute. Thus for instance, when the court was required to classify computer software, for the purpose of deciding whether its owner had a protected copyright, it held that software was equivalent to a literary creation (CC (TA) 3021/84 *Apple Computer Inc. v. New-Cube Technologies Ltd* [45]). Thus the court applied to a modern invention a legal norm based on legislation from the beginning of the century. In our case, too, technological development has preceded development of the law. But for deciding the matter before us, we did not find any recognized norm upon which we could build, even taking account of any necessary modifications. In such circumstances, there was no alternative to a decision based on a balancing between the conflicting rights. I personally believed that relying on a sense of justice alone is uncertain and therefore undesirable. In searching for a normative source, I resorted to the doctrine of rights. Indeed, had there existed a legal norm dealing with the matter in dispute we would have had to

decide the case accordingly, and the value analysis that we set out above would have been inapplicable. But in the absence of such a norm, I believe that the objective criterion that we created in our analysis establishes a proper basis for a just decision in the painful dispute between the spouses.

22. The second element that is absent in our case is the element of fault. I do not believe that any blame can be levelled at Daniel Nahmani. At no stage were his actions tainted by bad faith. Admittedly he reversed his decision to bring children into the world together with his wife, but in the circumstances in which this was done, his withdrawal of his consent did not involve any improper behaviour. His refusal to cooperate with Ruth in continuing the procedure that they began together also did not derive from bad faith. When considering the matter from Daniel's viewpoint, the obvious conclusion is that justice is on his side. But justice is not on his side only. Justice is also on Ruth's side; and the justice on her side is greater. Indeed, Daniel cannot expect Ruth to give up her just desire to exercise her right merely because he is justified in having a right that conflicts with her right. But there was also no reason to expect that Daniel would regard the justice of Ruth's case as superior to his. There is also no fault on Ruth's side. She did not begin the fertilization procedure without Daniel's consent or against his will. On the contrary, at the beginning of the procedure Daniel gave her his blessing. She received his full cooperation, which derived from his consent and his desire to bring children into the world together with her. But the absence of fault in our case, unlike the absence of a norm, make the decision easier, rather than harder. I suppose that had I found that one of the parties had acted improperly towards the other, I would have tended to give this weight also in reaching my decision. Fortunately I am not required to take such considerations into account. Thus I can be more certain and confident that my conclusion, namely that the law is on Ruth's side in this dispute, is based solely on the objective balancing between their conflicting rights, as expressed in the circumstances of the concrete case.

Qualification of the decision

23. My decision in the dispute between the Nahmani couple is based on a balance between Ruth's desire and right to be a mother and Daniel's desire and right not to be the father of the children that will develop from the fertilized ova. But the work of properly balancing between the spouses is not yet complete. Filling the lacuna justifies imposing a qualification on the implications of our decision.

Two assumptions underlie the balancing upon which the decision is based: first, that Ruth's genuine desire is to be a mother, and no more. Second, that both parties are acting in good faith. Both these assumptions will be proved wrong if and when Ruth turns to Daniel with financial demands. Had Ruth declared to us her intention to file such a claim, this might have been sufficient to lead to a contrary decision. But if she files such a claim, after giving birth to the child or the children, it will not be possible to turn the clock back and decide the dispute in Daniel's favour. As a solution to this dilemma, I agree with the proposal made by my colleague, Justice Goldberg, in paragraph 16 of his opinion, that we should make Ruth's use of the ova conditional upon her giving an undertaking not to demand any amount whatsoever from Daniel, for the children or for herself, and to indemnify Daniel for any payment that he shall be made liable to pay her, or to her children, as a result of an action filed against him notwithstanding the undertaking.

24. My opinion, therefore, is that we should grant the petition, reverse the appeal judgment and reinstate the judgment of the District Court, together with the condition stated in paragraph 23 *supra*.

Justice T. Or

1. Daniel and Ruth Nahmani were married in 1984. They had no children. Because of a hysterectomy she underwent, Ruth could not herself become pregnant. Against this background, the couple turned to the path of *in-vitro* fertilization under the Public Health (*In-vitro* Fertilization) Regulations (hereafter: the *In-vitro* Fertilization Regulations). The aim of the procedure was to fertilize Ruth's ova with Daniel's sperm, and to implant the fertilized ova in the womb of another woman ('a surrogate mother'). Ova were removed from Ruth's body. Eleven of these were fertilized with Daniel's sperm. The fertilized ova were frozen. They were stored in this state at Assuta hospital. The couple entered into a financial agreement with an institution in the United States, which assists in making an agreement with a surrogate mother and carrying out the various aspects of the implantation procedure and the pregnancy of the surrogate mother. No agreement was made with a surrogate mother. A surrogate mother had not yet been found. Before a surrogate was found and implantation took place, a dispute broke out between the couple. Daniel left the home. He established a new family. He and his new partner had a daughter. Ruth approached the hospital with a

request to receive the ova. Her request was refused. Therefore she began proceedings in the District Court.

The District Court granted her request. It ordered the hospital to allow Ruth use of the fertilized ova, in order to continue the implantation procedure in a surrogate mother. It ordered Daniel to refrain from interfering with the continuation of the procedure.

Daniel's appeal against the judgment (CA 5587/93[*]) was allowed, and the judgment was reversed. In this further hearing, we must decide whether to uphold the appeal judgment, or whether, as Ruth argues, we should change the result and reinstate the judgment of the District Court.

2. This opinion is being written after most of the justices on the extended panel considering this case have expressed their opinions. Their opinions are before me. My basic position on this case has been expressed in the comprehensive, illuminating and profound opinions of my colleague Justice Strasberg-Cohen, both in the aforementioned appeal (CA 5587/93[†]) and in this further hearing. I agree with large parts of these opinions. I agree with the analysis of the constitutional rights made in these opinions. I also agree with the main points of the opinion of my colleague, Justice Zamir. Like my two colleagues, I believe that the law in this case is on Daniel's side. Like my two colleagues — and this is the main point in my opinion — I do not think that in the circumstances of this case the court is faced with a normative vacuum and that it must create law *ex nihilo* in order to solve the dispute between the parties. I also believe that the decision in this dispute should be based on a general norm, which is based on the unique nature of the issue under discussion. Like my two colleagues, I do not believe that this dispute should be decided on the basis of deciding the question which of the two litigants — Daniel or Ruth — will suffer greater anguish or harm depending on the results of this litigation. Like them, I also believe that before comparing the harm that each party is liable to suffer, and deciding accordingly whose case is more just, we must first consider whether Ruth has a cause of action in law against Daniel. My conclusion, like theirs, is that the answer to this is no. Notwithstanding this, my method is different, in certain ways, from the method of my colleagues. I will set out below the main points of my outlook on this matter.

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[*] IsrSC 49(1) 485; [1995-6] IsrLR 1.

[†] *Ibid*.

3. Several years ago, Daniel and Ruth started out on the path of *in-vitro* fertilization. This step was carried out by mutual consent. In my opinion, the key to solving the dispute before us will be found by considering the scope and content of the agreement between Daniel and Ruth. This agreement was not put in writing. It did not go into the fine details. It was based on the fabric of Daniel's and Ruth's life together. The couple did not need to translate it into a legal document. They did not express it as a defined set of mutual obligations and rights. They did not provide an arrangement for possible future events. As a married couple, life partners, it can be assumed that they saw no need for this.

Against this background the question arises whether the agreement between Daniel and Ruth is a binding agreement from the legal viewpoint. Justice Scott discusses the difficulty that arises in such situations in *Layton v. Martin* (1986) [57], in remarks cited in M. Parry's book, *The Law Relating To Cohabitation*, London, 1993, at page 234:

> 'In family or quasi-family situations there is always the question whether the parties intended to create a legally binding contract between them. The more general and less precise the language of the so-called contract, the more difficult it will be to infer that intention.'

Notwithstanding these remarks, I believe that Ruth and Daniel intended to create a legally valid agreement. The consent between them did not remain a private one between them. It formed the basis for the contract made by Daniel and Ruth with third parties, such as the hospital that performed the fertilization, and the surrogacy institute in the United States. Moreover, vis-à-vis these parties this consent even received formal expression. Thus, for example, this consent was expressed in the forms that the couple signed at Assuta Hospital, where the fertilization was performed. It received similar expression in the Retainer Agreement that the couple signed with the Surrogacy Institute in the United States.

Despite this, in my opinion this consent is not a regular contractual consent. I agree with the position of my colleagues, Justices Strasberg-Cohen and Zamir, that we are dealing with a special type of consent. This conclusion is implied, in my opinion, by the context and the circumstances in which the consent was made. It derives from the special and emotional nature of the relationship between the parties as a married couple. This relationship, which I will discuss later, constitutes the basis of the consent and its purpose. In any case, and this is the main point, there is no doubt that the procedure that the

couple agreed to begin was based on this consent. Therefore, I base my opinion in this case on the content of the consent that was reached, without needing to define and classify, from the viewpoint of the legal classification, the special legal character of this consent.

4. What, therefore, is the content of the consent? No direct evidence was brought as to the content of the consent. As stated, the consent was not put in writing. In such a situation, the court must try to derive the content of the consent from the circumstances of the case. This act of construction will be governed by the basic principles that apply to the construction of contracts (see section 61(b) of the Contracts (General Part) Law).

In trying to establish the intentions of the spouses, we must try to identify their intentions as reasonable people. In this way, we can identify the joint purpose of the consent, and deduce from it the content of the consent. Justice Barak discussed this in CA 154/80 *Borchard Lines Limited, London v. Hydrobaton Ltd* [36], when he said, at p. 223:

> '… We must take account of the intentions that can be attributed to the parties, acting as reasonable people. The reason for this is that it can be assumed that, as long as the contrary is not proved, the intentions of the parties to the contract are the intentions that they would have had, had they acted as reasonable people in the circumstances of the case.'

See also CA 554/83 *Atta Textile Company Ltd v. Estate of Yitzhak Zolotolov* [36], at p. 305; CA 275/83 *Netanya Municipality v. Sahaf, Israeli Development Works Co. Ltd* [37], at pp. 241-243.

This joint contractual purpose derives, *inter alia*, from the nature of the issue that is the subject of the consent, the character of the consent and its characteristics. As held in HCJ 846/93 *Barak v. National Labour Court* [38]:

> 'Similarly the purpose of the contract is comprised of an objective purpose, which reflects the aims and goals that the parties to the contract, as reasonable people, can be presumed to have wanted to realize. This is "the goal or purpose, which it is reasonable to assume that the parties, as reasonable persons, would have adopted in the circumstances of the case". This purpose is naturally determined according to the substance of the matter regulated, the nature of the arrangement and its characteristics.'

We can also learn of the content of the consent from the parties' behaviour after the consent was reached. 'Such behaviour can indicate their intentions at the time of signing the agreement' (HCJ 932/91 *Central Pension Fund of Federation Employees Ltd v. National Labour Court* [39], at p. 437). Moreover, in the case before us, the consent is based mainly on the behaviour of the parties. In these circumstances, the court must 'interpret the behaviour of the parties and give meaning to it' (CA 4956/90 *Paz-Gas Marketing Co. Ltd v. Gazit Hadarom Ltd* [40], at p. 42).

5. Where do these rules lead to in this case? It seems to me that, from the circumstances of this case, it transpires that the intentions of the parties, as reasonable parties, was consent to cooperate towards realization of an *in-vitro* fertilization procedure. This consent is a framework consent. It is founded on the basic assumption that the marital relationship between the parties would continue. But, in my opinion, this consent does not include consent, *ab initio*, to all the stages and aspects of the fertilization procedure. This is a consent that is based on the knowledge and understanding that at each future stage of the *in-vitro* fertilization procedure, the joint consent and cooperation of both spouses would be required. In other words, according to this consent, each of the spouses knows and accepts that the continuation of the procedure is dependent on the ongoing consent of the couple to continue the procedure with all its stages.

This conclusion is based on the nature of the *in-vitro* fertilization procedure and the framework in which the parties acted and in which the agreement between them was made and implemented.

First, we are dealing with a lengthy procedure. The procedure is comprised of several stages: providing the sperm and ovum, fertilization of the ovum, locating and choosing the surrogate mother, carrying out the implantation (see regulation 2 of the *In-vitro* Fertilization Regulations). When the parties begin the procedure, there is more uncertainty than certainty. Many things remain open and uncertain. Thus, the parties do not know whether the *in-vitro* fertilization stage will succeed. Even in optimal conditions, the success rate at this stage is between 60% and 75% (see Appendix 'B' of the *Report of the Professional Public Commission for Examining the Issue of* In-vitro *Fertilization*, *supra* (hereafter: 'the report of the Aloni Commission'), at p. 114). They do not know if additional medical procedures will be required to facilitate such fertilization. Moreover, they do not know who will be the surrogate mother. They do not know how long the procedure of finding and choosing the surrogate mother will take. They also

do not know how many attempts will be required to achieve a pregnancy in the surrogate mother. What they should know is that the chances of pregnancy and having a child at this stage are far from certain. The rate of pregnancies per cycle of *in-vitro* fertilization treatment is only 15%. The rate of childbirth is only 12% (*ibid*., at p. 114). The rate of miscarriages for *in-vitro* fertilization is almost double that in a normal pregnancy (22%-26% as opposed to 12%-15%, *ibid*.). Even in optimal conditions — in which 3-4 embryos are implanted in the womb — the chance of a pregnancy for *in-vitro* fertilization is approximately one third (34%) (*ibid*., at p. 116).

Indeed, the surrogacy institute with which Ruth and Daniel made a contract retained for itself (through a doctor on its behalf) the power to rescind the surrogacy agreement, after it was signed, if the procedure did not succeed within a reasonable time. Clause 9 of the surrogacy agreement stipulated as follows:

> 'In the event that, in the opinion of the center's physician, the contemplated pregnancy has not occurred within a reasonable time, this agreement shall terminate by any party or the center's physician giving notice to all parties.'

Therefore there exists, at the outset, great uncertainty with regard both to the success of the various stages of the procedure and the amount of time the procedure will take.

The *in-vitro* fertilization procedure is not only a lengthy procedure, but it is also a complex procedure. It is an expensive procedure from a financial perspective. The cost of surrogacy services is high, and may reach tens of thousands of dollars. In order to achieve success, in all respects, cooperation between the spouses is essential. Each of the spouses is dependent on the other for this purpose. The spouses need each other for the actual *in-vitro* fertilization. This is a biological dependence. They are dependent on one another in order to realize the procedure legally. The consent of each of them is required for the different stages of the procedure. Thus, for example, the consent of each of the spouses is required to enter into an agreement with the surrogate mother and the surrogacy institute. The spouses are dependent on one another for the technical realization of the procedure. They need to pool their joint resources in order to meet the financial burden needed. At each of the stages and critical junctures the consent of each of the spouses is required, and it is possible that they will have differences of opinion or disagree as to one matter or another that requires the consent of both of them. Therefore it is certain that the consent between them to undergo *in-vitro* fertilization was

accompanied by the knowledge and understanding of both of them that the *in-vitro* fertilization procedure could only reach its desired conclusion with the ongoing consent of both spouses, consent for each of the critical junctures along the long journey. Both spouses are dependent on one another in order to traverse this difficult procedure successfully.

This is compounded by another important matter. The consensual purpose is a joint purpose. At the heart of the consent we do not find the yearning of one of the spouses for children. The consent focuses on a joint aspiration of both spouses to realize the complete family unit that they wish to create. This unit is the essence of the consent. It is its backbone. The consent is based on this. From this it draws its existence.

All of these characteristics show, in my opinion, that in the absence of an express agreement to the contrary, the intentions of the parties at the beginning of the *in-vitro* fertilization procedure cannot be regarded as including consent *ab initio* to all its stages and elements. Such a consent is unsuited to the complexity of the procedure. It is unsuited to the uncertainty that surrounds it. It is also unsuited to the natural sensitivity and fragility of the relationship between the spouses, which constitutes the foundation of the consent between them. It is unsuited to the timetable anticipated by the agreement. Consequently, I do not believe that the intentions of the parties as reasonable people include such a consent. In my opinion, all we can find is the desire and consent of the spouses to cooperate in achieving their common goal. This agreement is a framework consent. It requires the cooperation of the parties at each stage of the procedure for its success, and it is dependent on it. It also requires the consent of each of the spouses for each stage of the procedure, consent which is not guaranteed in advance. It requires, in my opinion, the continued existence of the basic conditions for realizing the consent — the continued existence of their relationship as a couple.

6. This conclusion as to the content of the consent that can be attributed to the parties as reasonable people, is not only based merely on the nature of the *in-vitro* fertilization procedure, and its substance as a procedure whereby the couple wish to extend the family unit. It also relies on the specific contexts in which Daniel and Ruth acted, contexts that were anticipated and known to them since the beginning of the procedure.

One aspect concerns the normative framework to which the parties subjected themselves when they began the *in-vitro* fertilization procedure. Daniel and Ruth knew that these procedures were governed by the *In-vitro* Fertilization Regulations. They acted in accordance with these regulations at

the beginning of the procedure. It can be assumed that the parties were aware of their content. *Inter alia*, these regulations require informed consent — of both spouses — for each stage of performing the *in-vitro* fertilization procedure (see regulation 14 of the *In-vitro* Fertilization Regulations). Within this framework, the regulations also require consent to the implantation stage, and I agree in this respect with the remarks of my colleague, Justice Zamir, in paragraph 8 of his opinion. This normative arrangement provides a strong indication of the content of the agreement reached by Ruth and Daniel. It indicates that it should not be said that the initial consent encompassed all the stages of the procedure, with all its obstacles. Upon their initial consent, knowing the requirements of the Regulations, they knew that also in the future the consent of each of them would be required, and they were prepared to begin the procedure in the knowledge that its continuation was dependent on the additional 'informed' consents of both of them.

Another aspect concerns the manner in which the *in-vitro* fertilization procedure is realized by implanting the fertilized ova in the body of the surrogate mother. In order to carry out the procedure, Ruth and Daniel entered into an agreement with a surrogacy institute in the United States. This agreement covered the financial aspects of their contract with the institute. The consent under this agreement is joint. The consent of each of the spouses is required for the proceeding. Thus, one of the paragraphs in the preamble of the agreement provides that:

> '… The center is engaged in the practice of arranging surrogate agreements and administration of agreements *for couples* who are unable to bear their own children…' (emphasis supplied).

According to this, the two natural parents — Ruth and Daniel — are a party to this agreement. It calls them, jointly, the prospective parents. It is therefore natural that they are also the ones who are supposed — jointly — to choose the surrogate mother (clause 5):

> 'Prospective parents shall meet with and have the final decision as to the selection of any potential surrogate…'.

This is also the case with regard to the agreement with the surrogate mother. As stated, no such agreement has yet been signed. No surrogate mother has yet been located. Notwithstanding, Ruth and Daniel were shown a draft of such an agreement by the surrogacy institute in the United States. They knew the contents of this agreement. This agreement clearly shows the need for the consent of each of the spouses to the implantation: both Ruth

and Daniel are parties to it, and to all its obligations. It indicates the basic requirement of the existence of a genuine relationship when consenting to the implantation. This can be seen from the preamble to the agreement:

> '… are a married couple, *living together*… and are desirous of entering into the following agreement…' (emphasis supplied).

Although Ruth and Daniel were aware of the contents of this agreement, no claim has been heard that either of them had reservations about this content. Moreover, this agreement requires a high degree of involvement from each of them. The agreement imposes obligations on each of them. They both undertake to take upon themselves the legal and parental obligations with regard to the child that will be born (clause 3). They both undertake to undergo physical and psychological examinations for the purposes of the procedure (clauses 5 and 6). The both undertake to provide any assistance that may be needed for the procedure (clause 7). They both undertake to indemnify the surrogate mother for her losses and expenses (clause 18). Moreover, a breach by one of them makes the other liable (clause 27).

It seems to me that this mechanism, by means of which the parties wanted to carry out the fertilization procedure, can also help in determining the contents of their consent. It indicates that the parties knew that the consent of each of them would be required also at the implantation stage. It shows that they regarded the *in-vitro* fertilization procedure as a joint procedure, and that they knew that at the implantation stage the consent of each of them to all the conditions and details relating to this stage would be required.

The details of the agreement, as stated, and the need to determine a mechanism for the implantation with the consent of each spouse, also show that there is no basis for the finding that at the stage when the dispute broke out between the parties, Daniel is no longer in the picture, so to speak, and is no longer required to perform any further act (see, for example, the opinion of Justice Tal, at paragraph 4; the opinion of Justice Bach, at paragraph 5(e)). His consent is needed not only for the actual use of the fertilized ova, as required by the hospital where they are held, but also for choosing the surrogate mother and for determining the terms of the contract with her, and for determining the details relating to the agreement with the surrogacy institute.

I can add, in parenthesis, that in view of the importance ascribed by surrogacy institutions in the United States to the joint consent and liability of

parents entering into a surrogacy agreement, I doubt whether, in view of Daniel's opposition to the continuation of the *in-vitro* fertilization procedure, the institution with which Daniel and Ruth entered into a contract, or any other institution, will sign a surrogacy agreement with Ruth alone.

7. Note that, as can be seen from the above description, this requirement for the consent of both spouses at each of the stages of the procedure is not a formal requirement. This is not an arbitrary conclusion, divorced from the reality of the *in-vitro* fertilization procedure. This requirement reflects the nature of the *in-vitro* fertilization procedure. It derives from the importance of the decisions that the parties must make along the way. The same is true of the fertilization. The couple must choose a medical institution where the fertilization will be performed. This choice may have implications for the outcome of the fertilization. It may affect its chances of success. It involves an important choice for carrying out the fertilization procedure. Is it conceivable that a decision of this kind will be made without the consent of one of them?

The situation is similar, and maybe even more complex, when we are dealing with the implantation stage. At this stage, the parties must make a series of important decisions. They must decide where to carry out the implantation. As with the fertilization, this is a decision that is important for the successful performance of the *in-vitro* fertilization procedure. They must make financial and economic decisions. As stated, entering into a surrogacy contract is an expensive matter. This is clear from the retainer agreement signed with the surrogacy institute. This agreement stated (in clause 16) that:

> 'The Center has advised prospective parents that surrogate parenting is a very expensive procedure and has many unknown implications.'

We are speaking of large amounts, in tens of thousands of dollars. Even more important, we have seen that the couple must choose a surrogate mother who will carry their future children. This choice has many aspects that are not simple. The surrogate's age may be important. Her medical background may be of importance. So, too, may her social psychological background. We are speaking of a choice whose importance cannot be exaggerated. It may determine the fate of the whole procedure. We need only glance at the serious disputes that have arisen between prospective parents and surrogate mothers in order to understand just how important the correct choice is at this stage (see *In re Baby M* (1987) [56]). Can we ascribe to the parties, in the absence of an express and clear consent on this issue, *ab initio* consent on this issue? I

believe that the answer is no. The parties left this important matter completely open. They knew and understood that an additional special consent of both of them would be required for it.

8. I reached this conclusion on the basis of the intentions of the parties as a reasonable couple, as it arises from the circumstances of the case and from the behaviour of the parties. I would point out that my conclusion is consistent with the law that governs this issue, in Israel and abroad. Thus the arrangement prescribed in the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law (hereafter — the Agreements Law) requires, as my colleague, Justice Zamir, says (in paragraph 10 of his opinion), the informed consent of the couple to the implantation. Indeed, this provision does not apply directly to the dispute before us. But it shows that there are strong grounds for the conclusion that the consent of both spouses is necessary also for the implantation stage.

The result whereby cooperation and consent of both spouses is required for each of the stages is also supported by another provision of the Agreements Law. The Law revolves around the surrogacy agreement. The agreements is between the prospective parents and the surrogate mother. The prospective parents are the couple who are entering into a contract with the surrogate mother. The agreement requires the approval of a statutory committee. Under section 5(c) of the law, this committee —

> 'may reconsider an approval that was given if the facts, circumstances or conditions that served as a basis for its decision have undergone a substantive change, as long as the *fertilized ova have not been implanted* in the surrogate mother…'.

In my opinion, even this provision shows the legislator's policy with regard to the issue before us. It clarifies that the status of a consent — even one that is incorporated in an agreement that received the approval of a special statutory body — is not absolute until the implantation stage. That is the decisive stage. Until this stage, a change in circumstances may lead to a termination of the procedure. In my opinion, the breakdown of the relationship between the two spouses constitutes a significant change in the circumstances for this purpose. The relationship between the two spouses is a fundamental element of the surrogacy agreement. The prospective parents must be 'a man and a woman who are spouses' (section 1 of the law). The pregnancy of the surrogate mother is done for the 'prospective parents' (*ibid*.). The statutory arrangement assumes, therefore, a relationship between the spouses. The breakdown of the relationship before implantation of the

ovum in the surrogate mother constitutes a change of the circumstances or the facts that formed the basis for the decision of the approvals committee. It may, therefore, lead to a revocation of the approval of the surrogacy agreement and termination of the procedure.

9. The law in other countries also supports this result. As set out extensively in the opinion of my colleague, Justice Strasberg-Cohen, in tha appeal (CA 5587/93)[*], in other countries the effective consent of the spouse is required also for the implantation stage. Until this stage, he has the right to change his mind. In other countries, this is the solution that is proposed by official commissions that were appointed to consider this issue. Incidentally, this is also the approach contained in the report of the Aloni Commission that was appointed by the Minister of Health and the Minister of Justice in June 1991 to consider the issue. The Commission expressed the opinion, on page 36, that:

> '… Fatherhood or motherhood should not be forced on a man or woman against their wishes, even if they gave their initial consent thereto.'

10. Up to this point, I have discussed my fundamental approach. To summarize, it is my opinion that the *in-vitro* fertilization procedure is a joint procedure. The intention of the spouses is to bring into the world a child of both of them, so that both of them will be able to raise him within the framework of the family unit. The procedure of *in-vitro* fertilization is a long one, there are many difficulties along the way, and the couple will in the future be required to make decisions on matters of the utmost importance. Only when both spouses want to carry out the procedure, with the understanding that this joint desire and consent will continue to exist, and only subject to the joint consent of both of them at all stages of the procedure is it possible to realize their ultimate expectations. At the start of the procedure, the spouses presume that they will both continue to have this desire and consent. This assumption was at the basis of the consent that they reached. But it also reflects an assumption that may prove false, and then one of the spouses will not be able to continue the procedure alone. Indeed, each of them expected that they would continue to cooperate with one another throughout the whole procedure. But each of them also understood and agreed, that only if there would be continuing cooperation and consent on the part of his spouse would the procedure continue and reach its conclusion.

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[*] IsrSC 49(1) 485; [1995-6] IsrLR 1.

When one of the spouses changes his mind before the implantation, there may, possibly, be grounds for the other to feel disappointed and aggrieved, but he does not have a cause of action in law to compel the other spouse to continue the procedure, in view of the contents of the consent between the spouses as aforesaid.

This view leads me to the result that Ruth needs Daniel's consent to carry out the implantation. Therefore, she cannot receive the fertilized ova into her possession for the purpose of the implantation that is opposed by Daniel. My conclusion is that, in the circumstances of the case and according to the consent of the parties themselves, Daniel was entitled not to give his consent to the continuation of the procedure. I believe that this result also reflects the proper law. This result gives proper expression to the character of the *in-vitro* fertilization procedure. It expresses in the proper degree the joint framework of this procedure.

For this reason, Daniel's unwillingness to continue the *in-vitro* fertilization procedure also is not tainted by bad faith. Since the entire procedure is based on the spousal relationship between Daniel and Ruth, when their spousal relationship is no longer intact, and in practice no longer exists, Daniel's unwillingness to continue the procedure is self-evident, because of the nature of the consent between the two, as explained above. In any case, bad faith should not be imputed to Daniel in carrying out the consent between him and Ruth, because he refuses to give his consent to the continuation of the procedure.

11. I have not been persuaded that there is anything that justifies, in the circumstances of this case, a deviation from this result. I have not been persuaded that the parties agreed that the procedure would continue even if Ruth and Daniel ceased to be a couple. I have not been persuaded that Daniel made any representation that he agreed to the continuation of the procedure even if the relationship between the two would collapse. In any event, I have not been persuaded that there was any reliance, or reasonable reliance, by Ruth on such a representation. The procedure is a joint one. As such it requires, as explained above, the consent of each of the spouses at each of the stages.

12. Indeed, Ruth's case arouses sympathy. Her distress is sincere and genuine. But this is insufficient to reverse the consent between the parties. It is insufficient to justify a retrospective change of the rules of the game which, in my opinion, the parties took upon themselves when they started out. It is also insufficient to give Ruth a constitutional right, which requires the

granting of relief against third parties for its realization. In this regard, I agree with the analysis in the decision of my colleague, Justice Strasberg-Cohen. I therefore do not agree with the result reached by the majority opinion in this proceeding. In my opinion, Ruth does not have any cause of action that requires the ova to be delivered to her for the purpose of continuing the procedure.

13. Before concluding, I would like to make an additional remark. This case raises a difficulty. In cases of this sort, there is a temptation to try and adapt the result to the special set of circumstances under discussion, in order not to cause an injustice according to one viewpoint or another. I believe that the court has a duty to resist this temptation. It must ascertain the law and decide accordingly. Therefore, I have tried to ascertain what is the legal result required in all those cases where the couple agreed on a procedure of *in-vitro* fertilization without making any express stipulation as to the result if one of them is not prepared to continue the procedure. When I reached the conclusion that there is a legal solution to this problem, as I have sought to clarify above, this solution should apply in our case, even if its result is inconsistent with Ruth's expectations, and the situation in which she finds herself arouses sympathy.

In my opinion, the correct way of dealing with this kind of problem is not to create a special law intended to solve the particular distress of a specific litigant, even if it is sincere and genuine. This was discussed by Justice Netanyahu in CA 248/86 *Estate of Lily Hananshwili v. Rotem Insurance Co. Ltd* [41] at p. 558:

> 'A legal norm must be built on a correct logical legal analysis, while exercising legal policy considerations that will achieve the desired result in most cases. It cannot be determined according to its results in a particular case. Such a norm gives rise to the well-known saying that hard cases make bad law.'

In a similar vein, see the remarks of Justice Witkon in CA 840/75 *Jewish National Fund v. Tevel* [42], at page 549; and also the remarks of Justice Y. Cohen in CA 555/71 *Amsterdramer v. Moskovitz* [43], at pp. 799-800.

I agree with these remarks.

Consequently, were my opinion accepted, the petition for a further hearing would be denied, and the judgment of the court in CA 5587/93[*] would be upheld.

Justice I. Zamir

On just law

1. 'Alas for me because of my Maker and alas for me because of my inclination.' 'My Maker' is the law, for the court was only established, and only exists, by virtue of the law, and it knows no allegiance other than to the law. 'My inclination' is justice, for the court wants, with all its soul and might, to do justice. Woe to the judge who administers law without justice, and woe to him if he administers justice without the law. Happy is the judge who administers the law with justice. Indeed, usually the law leads the judge to justice, but if the law and justice do not go hand in hand, the judge may bend the law in the direction of justice, in so far as possible, until they meet.

It happens to a judge that the law and justice struggle within him, each pulling in different directions, and he cannot reconcile one with the other. In such a case, no matter how difficult it is for him, he must not allow his 'inclination' to override his 'Maker'. This is the case because the oath of the judge, before it commands him to dispense just law, requires him to keep faith with the laws of the State. See the Basic Law: Administration of Justice, in section 6. Moreover, without law, ultimately there is no true justice.

Therefore, a judge should never jump from the facts to justice, as if there were no law between them. Justice has its place. But it must be based on a foundation of law.

2. Indeed, there are matters that it is better to decide according to justice, or emotion, or values outside the law, and not according to the law. These often include family matters, such as the relationship between husband and wife, or matters of religious or other faith, and even political matters, such as agreements between parties. It would be best if these matters never came before the court, but were decided within the family, or between a person and his Rabbi, or at the ballot box on election day.

But even these matters may find their way to the court. If such a matter comes before the court, it has two options, according to the nature of the

[*] IsrSC 49(1) 485; [1995-6] IsrLR 1.

case: first, to dismiss the matter *in limine*, without considering the matter on its merits; second, to consider and decide the matter on its merits.

The court is likely to dismiss the matter *in limine* if it is unsuited or unlikely to be resolved by the law. Such a case is the famous example of an invitation, for reasons of friendship, to dinner. The same is true of various intimate matters that are resolved between spouses by means of an understanding or consent that has no legal status. In such a case, the court will dismiss the plaintiff from the court, even if justice is clearly on his side, because he has no cause of action in law or because the matter is not justiciable.

But this is not necessarily the case. Even complex and emotional matters, in the personal sphere or in any other sphere, including the most intimate matters, may adopt a legal form. Then the court must consider the matter and decide it on the merits: a breach of promise of marriage, custody, education or adoption of children, etc.. When the court considers and decides such a matter, obviously it does not decide it as if it were a marriage counsellor, a religious teacher or a political leader. If it is compelled to decide such a matter, it must decide it as a court, i.e., by dispensing just law. First of all, there is law.

3. This is also the position in the Nahmani case. There is no doubt that this case arouses problems and difficulties in the spheres of emotion, morality, philosophy, and other spheres outside the law. There is also no doubt that it would have been preferable if this case had been resolved by agreement between Daniel and Ruth, and even if they did not reach an agreement on the merits of the case, if they agreed to settle the dispute in another way, out of court. But this was not how matters developed, and the case came before the court.

Once the case reached the court, it was obliged to decide first if it was prepared to consider it on its merits. The fact that the matter is loaded with emotion and involves important and difficult questions that are outside the law is insufficient for dismissing it. The court is used to cases such as these. The crucial question is, whether the relationship between Ruth and Daniel is a legal relationship.

In principle, it is possible that a couple will agree to bring a child into the world, naturally or by another means, but the consent will not amount to an agreement in law. In such a case, should one of the spouses file an action in court against the other, claiming that he is not upholding the agreement, the

court will have to rule that the plaintiff has no cause of action in law or that the matter is not justiciable. The action is dismissed, even though it is possible that the plaintiff suffers an injustice, and it is possible that he may also have no redress out of court. But the court is not supposed, nor even is it able, to cure all ills.

But the court did not think this way in the Nahmani case. It agreed to consider the claim and to decide it on the merits. This implies that it thought that the matter is justiciable. If so, the court must decide it in accordance with a legal norm. It cannot say in the same breath that the matter is justiciable and that there is no legal norm for adjudicating it, and therefore it is possible, in the absence of any other choice, to resort to justice. This case must be decided, like every other justiciable case, according to the law, and justice must be done within the framework of the law.

If so, what is the law that applies in this case?

4. It may be that there is no law, statute or precedent, which gives an express answer to the matter being considered by the court. But even in such a situation, the court does not stare blankly into a normative vacuum. The courtroom is full of legal norms. Even if there is no express norm that applies to the case under consideration, there is certainly an implied norm. The court must seek its path in order to reach this norm, and, if necessary, to adapt it or develop it as required. Jurisprudence guides it on its way and gives it tools in order to determine the law, and even to develop the law from within the law.

The main path is outlined in the Foundations of Justice Law. This path, according to section 1 of this law, is as follows:

> 'If the court identifies a question of law that requires a decision, and it does not find an answer to it in statute, case-law or by way of an analogy, it shall decide it in the light of the principles of liberty, justice, equity and peace of Jewish heritage.'

The court is required to take this path, from legislation to precedent, and if it does not find an answer in either of these, it must go on to analogy, and if there too no answer is found, it must go on to the principles of liberty, justice, equity and peace of Jewish heritage. From a practical viewpoint, and maybe even from a theoretical viewpoint, it is inconceivable that the court will not find a legal norm somewhere along this path. In any case, the court is not entitled to say, before it has traversed the whole length of this path, that there is no legal norm in the matter under consideration, and therefore it is entitled to decide that matter according to justice.

It would not have been necessary to say this, since it is well-known, were it not to appear that it has almost been forgotten by some of the judges in the Nahmani case.

5. In the Nahmani case, had the court followed the main path outlined in the Foundations of Justice Law, it could not have jumped straight to justice before it enquired properly and determined that there is no answer either in legislation or in precedent, or in analogy, or even in the principles of liberty, justice, equity and peace of Jewish heritage. But some of the judges did not take this path, nor did they stop at any of these points along the way, not even the last, which is Jewish heritage. Admittedly there were judges who mentioned some words of Jewish law, pointing in one direction or the other. All of these are the words of the living God. But they were not mentioned as legal principles that determine the case, but merely in order to derive inspiration, as if they were a scholarly opinion.

Is the conclusion that all along this path there is no legal norm that provides an answer to the Nahmani case, so that it is necessary to make a jump straight to justice? No. There is even no need to go as far along the path, in searching for a legal norm, as Jewish heritage, nor even as far as analogy. The Nahmani case abounds in legal norms from the first step; regulations on one side and an agreement on the other; the right to be a parent against the right not to be a parent; reliance and estoppel; and more. This is the raw material that the court regularly uses to solve disputes and to construct its judgments. It should be used also in this case. This is the path and obligation of the court, before it reaches the question whether the solution that arises from the law also does justice.

Justice Strasberg-Cohen followed this path when she wrote the majority opinion at the appeal stage of the Nahmani case. I therefore agreed with her path, and together with her I reached the conclusion that the law — first of all, the law — sides with Daniel Nahmani.

I have now read the opinions in the further hearing, which have changed the majority opinion in the appeal into the minority opinion in this hearing. I have not been persuaded. First and foremost, I have not found in them any answers to the legal problems that arise in this case, and at any rate I have not found in them answers that are better than the answers given by Justice Strasberg-Cohen. I have also not been persuaded that justice tips the scales, notwithstanding the law, in favour of Ruth Nahmani. Therefore I remain on the path that I took and I stand by the result that I reached.

My path is close, but not identical, to the path of Justice Strasberg-Cohen. I will present it briefly: first — the law; afterwards — justice.

On the law

6. The legal path in this case is long and arduous. In order to facilitate our progress, I will first present the general direction of the path. Afterwards, I will present it in detail, stage by stage.

The fertilization procedure involving Ruth and Daniel was carried out by the hospital under the Public Health (*in-vitro* Fertilization) Regulations (hereafter — the Fertilization Regulations). Ruth asked to receive the fertilized ova from the hospital in order to continue the procedure and to implant them in a surrogate mother. But under the Regulations, the husband's consent to the fertilization is insufficient; his consent is also required for the implantation. Daniel notified the hospital that he is opposed to the implantation. Therefore the hospital refused to give the ova to Ruth. For lack of any other option, Ruth sued Daniel in court. The central question in the suit was whether Daniel originally agreed also that implantation would be carried out even if Daniel and Ruth were to separate from each other. The answer, in my opinion, is no. Another question is whether Daniel, even though he opposes the implantation, is estopped from arguing this. In my opinion, the answer to this question is also no. The result is that Ruth has no cause of action to force Daniel in court to give his consent to the implantation or to refrain from opposing the implantation. If so, under the law the court must dismiss Ruth's action against Daniel, and the hospital is not entitled to give Ruth the fertilized ova, unless and until Daniel agrees to this.

Now I will go into detail.

7. The first step on the legal path leads to legislation. *In-vitro* fertilization is now regulated, in part, by the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law. But this law, which regulates *in-vitro* fertilization vis-à-vis a surrogate mother, did not yet exist when the dispute between Ruth and Daniel began, nor even when the matter came before the court that tried the dispute between them, whether in the District Court or in the appeal before this court. Nonetheless, this law is relevant also to the dispute between Ruth and Daniel, and the court should not ignore it. But everything has its proper place, and I should not begin at the end.

8. About five years ago, when Ruth and Daniel began the fertility procedure, *in-vitro* fertilization was governed by the Fertilization Regulations. These regulations do not regulate the relationship between

spouses wishing to carry out *in-vitro* fertilization in a hospital, but the role of the hospital in carrying out such a fertilization, including the relationship between the hospital and the couple. Under regulation 2(a) of these regulations, *in-vitro* fertilization may be carried out 'only in a recognized ward and pursuant to the provisions of these regulations'. There is no dispute that the fertilization of Ruth's ova with Daniel's sperm was carried out by Assuta Hospital under the Fertilization Regulations.

Incidentally, it should be said that the Fertilization Regulations, in their original version, stated (in regulation 11) that a fertilized ovum may only be implanted in the woman who will be the child's mother. In other words, these regulations prohibited implantation of an ovum in a surrogate mother. But this court held that this provision was void. See HCJ 5087/94 [44]. This means that the Fertilization Regulations regulate *in-vitro* fertilization also for implantation in a surrogate mother.

Under the Fertilization Regulations, Ruth and Daniel could not have begun the fertilization procedure at the hospital without their joint consent. The consent was duly given. But it is questionable whether under these regulations the consent is required only at the first stage of the procedure, which is the fertilization stage, or whether it is also required at the second stage, which is the implantation stage. This question is of critical importance in the Nahmani case, for it is clear that Daniel gave his consent to the fertilization, whereas he now opposes the implantation.

The question arose before the District Court that considered the Nahmani case. Daniel argued that under the regulations, his consent is required also for the implantation of the fertilized ova. The Attorney-General, who was summoned by the court to join the action as the party representing the public interest, supported Daniel's argument. But the District Court (Justice Ariel) held that both Daniel and the Attorney-General were mistaken: in its opinion, the regulations provide that for a married woman the husband's consent is only required for fertilization of the ovum, and no further consent of the husband is needed for implantation of the ovum. See OM (Hf) 599/92.[*]

I do not agree. Admittedly, under regulation 3 of the Fertilization Regulations, removal of the ovum may be done solely for the purpose of *in-vitro* fertilization and implantation after the fertilization. From this it is possible to deduce that anyone who gave his consent to fertilization also agreed to implantation. Notwithstanding, the regulations do not merely

[*] IsrDC 5754(1) 142, 153.

require consent to the fertilization itself at the start of the procedure. The procedure of having a child by *in-vitro* fertilization is so complex and sensitive that the regulations insist upon requiring informed and express consent of the husband at each stage of this procedure, including consent to implantation. Regulation 14 of the regulations states as follows:

> '(a) Every act involved in *in-vitro* fertilization as stated in regulation 2 shall be performed only after the doctor in charge has explained to each of those involved the significance and the consequences that may follow from it, and has received informed consent of each of them separately.
>
> (b) Every act involved in *in-vitro* fertilization of a married woman shall be performed only after receiving the consent of her husband.
>
> (c) Consent under these regulations —
>
> (1) shall not be given for a specific person or for a specific matter;
>
> (2) shall be given in writing and in the presence of a doctor, provided that the consent of a married couple shall be given on one document.'

It follows that under the regulations 'every act' involving *in-vitro* fertilization 'as stated in regulation 2' requires 'informed consent' of the husband 'on one document'. And what is an act involving *in-vitro* fertilization as stated in regulation 2? Regulation 2(a) gives the following answer:

> 'A person may remove an ovum from a woman's body, fertilize it, freeze or implant a fertilized ovum in a woman's body only in a recognized ward and pursuant to the provisions of these regulations.'

It follows then that *in-vitro* fertilization comprises several actions, including implantation, and each of these actions requires the husband's consent.

9. If so, how did the District Court hold that the consent of the husband to the actual fertilization is sufficient, and there is no further need for his consent to the implantation? The District Court relied on clause 8(b)(3) of the regulations, which states:

> 'If the woman in whom the ovum is supposed to be implanted is divorced, and the ovum were fertilized with the sperm of her husband before her divorce — the ovum shall only be implanted in her after receiving the consent of her former husband.'

The District Court made a negative inference from the positive one. It is only with regard to a divorced woman that regulation 8(b)(3) makes the express condition that the consent of the former husband is required. It follows, according to the District Court, that no such consent is required for a married woman. And this is the important point in this case: although Ruth and Daniel live separately, they are still married to one another.

But this is wrong. Regulation 14 requires the husband's consent for every act throughout the procedure. This is clear and simple. Nonetheless, it was still necessary to add regulation 8, which deals with the procedure for unmarried women: an unmarried woman (regulation 8(b)(1)), a widow (regulation 8(b)(2) and a divorcee (regulation 8(c)(3)). For a divorcee it was necessary to add regulation 8(b(3), and regulation 14 was insufficient, since regulation 14 requires the consent of the husband, whereas clause 8(b)(3) is intended to add the consent of the former husband.

The District Court presents the husband as if he disappears from the picture after fertilization: the husband has done his job; the husband is free to go. What business is it of his to interfere at the implantation stage and to try to prevent the continuation of the procedure? Not only this. The District Court also says that —

> 'There is a danger in the position that requires additional consent of the husband in cases of a dispute between them (including a dispute before divorce), as this would give preference to the husband and may lead to major discrimination against the wife…
>
> The consent is required once, and cannot be changed according to this or that passing whim.'

But under the regulations, the husband stays in the picture. This can be seen not only from regulation 14, which requires the husband's consent for every act, but also from regulation 9. This regulation states as follows:

> '(a) An ovum, including a fertilized ovum, may be frozen for a period not exceeding five years.

> (b) If a written request is received to extend the freezing period, signed by the woman from whose body it was taken and her husband, and approved by the signature of the doctor in charge, the hospital may extend the freezing period by another five years.'

It is therefore clear that under the regulations, the husband's consent (under regulation 14(c) — written consent in the presence of a doctor) is required, for the purpose of continuing the procedure, five years after the ovum was frozen. It is required even for continuing the freezing. Is it reasonable to say that it is not needed for the implantation? It is required also when the couple is living together harmoniously. Is it reasonable to say that it is not needed when the couple are living apart and there is no peace between them? Just imagine: for five years after the freezing, the husband supposedly does not exist, is like a ghost, and the wife is entitled to take the ova from the hospital unilaterally in order to implant them in another woman at her choice. Time passes, and suddenly the husband is once again important, and it is even impossible to extend the freezing period without his consent! There is no logic in this. Indeed, in my opinion, the husband should not be said to have done his job when he gave his sperm for fertilizing the ovum, and now he is free to go. Such a statement is inconsistent with the Regulations, does not befit the idea of partnership in having children, and is unfair to the husband.

10. The question whether the husband must give his consent to implantation was also answered, recently, in the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law. This law regulates the implantation of fertilized ova in a surrogate mother. In this respect the law concerns the case before us, because the fertilization of Ruth's ova with Daniel's sperm was done for the purpose of implanting the ova in a surrogate mother. The law was enacted only after the fertilization, and it cannot be applied retroactively to the fertilization that was carried out in this case. Nonetheless, the law now allows, for the first time, the implantation of fertilized ova in Israel. This is apparently a possibility from Ruth's perspective for various reasons, *inter alia* because the institute in the United States, with which Ruth and Daniel originally entered into a contract, requires the consent of both of them for an implantation. But the implantation in Israel, under this law, can only be performed (under section 7), *inter alia*, in accordance with a surrogacy agreement made and approved under this law. The law stipulates various requirements for such an agreement before it is approved. *Inter alia*, a 'written agreement' must be made (under section 2)

between the surrogate mother and the prospective parents. In other words, the signature of the husband is required on the agreement, before the special approvals committee, of his own free will and after understanding the significance and the consequences of the consent (under section 5).

I am not making these remarks to say that, from a practical viewpoint, Ruth cannot carry out the implantation in Israel under this law without Daniel's consent, but to show the policy of the statute, which is now the policy of the principal legislator and not merely of the subordinate legislator. According to this policy, the express and informed consent of the husband is required for the implantation, including the identity of the surrogate mother. It is inconsistent with the policy of the statute that Ruth can receive the fertilized ova and deliver them for implantation in a surrogate mother without Daniel's consent.

The court strives to create harmony in the legal system. This is a guiding principle in the interpretation of legislation. Interpretation tries to prevent a conflict between two statutes or between a statute and regulations. Therefore, if the new statute requires the husband's consent for implantation, it is not desirable to interpret the regulations (or to develop the law) in a way that makes the husband's consent unnecessary.

Incidentally, I would also like to raise the question whether, under the Surrogacy (Approval of Agreement and Status of the Child) Law, a woman may carry out *in-vitro* fertilization in Israel and then perform the implantation of the fertilized ova in a surrogate mother outside Israel, other than under the terms of the statute. Section 7 of the Law states that '*In-vitro* fertilization and implantation of a fertilized ovum shall be carried out only in a recognized ward and on the basis of a surrogacy agreement that was approved as stated'. According to the language of the law, it appears that even the first stage of *in-vitro* fertilization should be performed only on the basis of an agreement under the law. And the law, as stated, provides various requirements for such an agreement: consent of the husband to performance of the implantation in a specific woman who is of the same faith as the prospective mother, provided that the agreement does not contain terms that harm the rights of the child that will be born, etc.. This leads to the question: is the prospective mother entitled to carry out *in-vitro* fertilization in Israel and afterwards, by means of implantation outside Israel, to bypass all the terms that the statute prescribes for the purpose of implantation? But this question was not argued before us, and therefore it should be left undecided. For the purposes of the case before us, it is sufficient to say once again that the new statute does not allow

implantation to be carried out without the informed consent of the husband to implantation in a specific woman.

11. Assuta hospital was sued by Ruth to deliver to her the ova fertilized with Daniel's sperm for the purpose of implantation in a surrogate mother. However, as stated, the release of the ova from the hospital for implantation is, under the regulations, an act that required Daniel's consent. Without consent, the hospital was prohibited from delivering the ova to Ruth. Therefore it refused, and rightly so.

Moreover, the need for Daniel's consent to carry out implantation derives not only from the regulations, but also from private law. This is because the fertilized ova do not belong solely to Ruth nor solely to Daniel. After all, each of them gave of himself to the hospital to create the fertilized ova. The hospital received Ruth's ova and Daniel's sperm under an agreement between Daniel and Ruth on one side and the hospital on the other. Under this agreement, the hospital may not deliver the ova to one of them against the wishes of the other. Let us assume, for example, that Daniel pre-empted Ruth and contacted the hospital first to receive the ova for some reason, whether to transfer them for implantation unilaterally, or to destroy them, or for some other purpose. It is clear, in my opinion, that the hospital would not have been permitted, if only because of the tripartite agreement between Ruth, Daniel and the hospital, to deliver them to Daniel against Ruth's wishes.

In any case, whether under the regulations or under the agreement, Ruth is unable to receive the fertilized ova from the hospital without Daniel's consent, and Daniel objects. She has no choice: she must present to the hospital Daniel's consent or, alternatively, a judgment exempting her, or the hospital, from the need for consent. Consequently, Ruth filed the action against Daniel and against the hospital in the District Court. In practice the action is not against the hospital, since both the regulations and the agreement with the couple prevent it from delivering the ova without Daniel's consent, and therefore the hospital is in practice merely a formal defendant. For this reason, the action is not based on the Fertilization Regulations. These regulations lie in the background only as an explanation for the claim: it is they that forced Ruth to sue Daniel. The real claim is against Daniel, in order to establish that he consented, or to compel him to consent, and this action is not based on the Fertilization Regulations, but on the relationship between Ruth and Daniel: in the relationship between him and her, does Ruth have a cause of action against Daniel?

12. First, does the right of parenthood give Ruth a cause of action against Daniel? Ruth has a right to be a parent. No one disputes this. The right to be a parent is a basic right. There is no dispute on this. But this is not enough. For the right to be a parent is, by its nature, a liberty, i.e., a negative right. Therefore, the right to be a parent is insufficient to support a court action of a wife against her husband, or against another man, for him to do an act in order to convert the right from theory into practice. The court may oblige a particular man to perform an act to realize the parenthood of a particular woman only if that man has a duty towards that woman: a statutory duty, an agreement, or a duty deriving from another legal source. It follows that in order to find Daniel liable towards Ruth, it is insufficient that Ruth has a right vis-à-vis society, but she also needs to have a cause of action against Daniel.

Indeed, it is an interesting and difficult question, how important is the right to be a parent, and is it more important than the right not to be a parent. But, in my opinion, it has no significance within the framework of the Ruth's claim against Daniel. For the purpose of this case we can assume that Ruth's right to be a parent is much more important than Daniel's right not to be a parent. This is still insufficient to impose a duty on Daniel to do an act that will allow Ruth to exercise her right of parenthood.

Imagine that A sues B for money in the name of the right to life. A will not succeed in the action, although the right to life is ten times more important than B's right to the money, unless he can prove that B has a duty in law to give A money.

Consequently, for Ruth to succeed in the action she filed in court, she needs to have a cause of action against Daniel. She does not have a cause of action founded in legislation, since there is no legislation that imposes on Daniel a duty to consent to implantation. Therefore the question is whether she has a cause of action against Daniel by virtue of an agreement.

13. A preliminary question is whether an agreement between a husband and wife regarding implantation of fertilized ova in a surrogate mother is a legal agreement that can impose a legal duty on the husband. There is a view that agreements between spouses while they are living together are not legal agreements. Indeed, that may be so, but it is not necessarily so. It depends on the circumstances of each case. There is no doubt that business agreements between spouses can be contracts in all respects. And not only agreements of this sort. The law recognizes a contractual claim for breach of promise of marriage. Why, then, should it not recognize other agreements between spouses, according to the subject-matter and the circumstances of each case?

In this case, I believe that the circumstances show that the agreement made between Ruth and Daniel is a legal agreement. Regulation 14 of the Fertilization Regulations requires 'informed consent' of each of the spouses, 'after the doctor in charge has explained to each of those involved the significance and the consequences that may follow from it', and it further states that the consent 'shall be given in writing and in the presence of a doctor, provided that the consent of a married couple shall be given on one document'. This, it can be said, is a strong consent, like a contract which statute requires to be in writing. Moreover, it is like a contract that must be signed before a notary. In any case, there is no doubt that this consent has a legal consequence in the field of the relationship between the spouses and the hospital: on the basis of this consent, the hospital may perform the fertilization. In my opinion, this consent also has a legal consequence in the field of the relationship between the spouses *inter se*. The spouses agreed between themselves to cooperate in the fertilization procedure already before they signed the document in the presence of the doctor. It may be that the consent between the spouses had, at this stage, not yet crystallized into a legal agreement. But it is clear to me that, at the latest, when the consent of the spouses found expression in the signature of both of them on one document, after they received from the doctor an explanation of the significance and the consequences that might result from the consent, a legal agreement was created between them. This agreement is a contract. It may be called, as Justice Strasberg-Cohen calls it, a weak contract. It may also be called, as I prefer, a special contract. Either way, the consent of Ruth and Daniel on the document creates a contract, not only between Ruth and Daniel and the hospital, but also, in my opinion, between Ruth and Daniel *inter se*. This is a contract that was signed after serious consideration, with a genuine commitment and formality that left no doubt as to the seriousness of the occasion: on the basis of the contract, each one of the parties undertook to undergo medical treatment and both of them jointly signed a preliminary agreement with the institute in the United States for carrying out the implantation in a surrogate mother. I see no reason why the mutual consent of Ruth and Daniel should not have legal force. If Daniel had retracted his consent after the ova were removed from Ruth, but before fertilization, would Ruth not have had the right to sue him for damages for the suffering he caused her?

14. Our conclusion, therefore, is that there is no legal vacuum in the relationship between Ruth and Daniel. Therefore there is no basis for

following the path of Justice Tal, i.e., the court developing the law in order to create a legal norm in the relationship between Ruth and Daniel. The norm already exists, and it fills the vacuum: the agreement between them is the law. If so, how can the court force itself into this intimate sphere, and determine by itself legal rules that regulate the relationship between the spouses as the court sees fit, while ignoring the agreement, and maybe even contrary to the agreement between the spouses? The intimate nature of this sphere and the autonomy of the spouses require the relationship between them to be regulated, in so far as possible, in consent between them *inter se*, without the intervention of an external party, be he the legislator or the court. It is therefore preferable to give legal validity to the agreement between the spouses, than to determine for them an arrangement that ignores the agreement. Even if the agreement between the spouses lacks legal validity, this too is law, because it means that they wanted the relationship between them to be regulated outside the field of law. If so, why should the court come and impose its will on their will?

15. Because the consent between Ruth and Daniel regarding the fertilization, as expressed in the document signed by both of them, created a legally valid agreement, the question is whether Ruth has a cause of action against Daniel by virtue of the agreement.

Daniel and Ruth agreed between themselves to cooperate in a procedure of *in-vitro* fertilization. Daniel doubtless agreed to fertilization of Ruth's ovum with his sperm. But, under regulation 14 of the Fertilization Regulations, this consent is not enough. The husband's consent is required for every act involved in the fertilization, including the implantation. Thus we must ask whether Daniel agreed also to the implantation?

The question whether consent to a procedure of *in-vitro* fertilization, under the Fertilization Regulations, also includes consent to implantation depends on the circumstances of the case, including the language of the consent. In the normal case, it can be presumed that a husband's consent to *in-vitro* fertilization applies to all the acts involved in the fertilization, including the implantation, since this is the purpose of the fertilization. Indeed, this is what happened in the case before us. There is no dispute that Daniel's consent, when it was given, and in the circumstances at the time, i.e., in the circumstances where Ruth and Daniel were living together, was not limited to the fertilization stage, but referred to the whole procedure, including the implantation stage.

Nonetheless, even consent to the whole procedure can be qualified. Indeed, this is Daniel's argument against Ruth: that his consent, even though it applied to the whole procedure, was qualified. And what is the qualification? That Daniel agrees to begin the procedure, and to continue it until it ends, only on the condition that he and Ruth continue to live together as one family. If, however, matters change and the family breaks up, the consent will automatically expire.

Such a condition can be included in an agreement in an express provision. Let us assume that such a condition was expressly stated in the agreement between the couple when they signed the consent to the fertilization. In such a case, if the condition was fulfilled after fertilization, and the husband gave notice that his consent has expired, the wife would have no cause of action against the husband, and the hospital would have no consent, as required under the regulations, for fertilization.

The agreement between Daniel and Ruth does not contain any such express condition. However, such a condition need not be express. It can also be implied. In order to determine whether there is an implied condition, we must interpret the agreement. The interpretation must be done pursuant to section 25 of the Contracts (General Part) Law, in accordance with the intentions of the parties, as is evident from the contract, and to the extent that it is not evident therefrom — from the circumstances. Here Justice Strasberg-Cohen and Justice Tal differ. Justice Strasberg-Cohen relies on statements of Ruth and Daniel written in the court record in order to determine that there was no consent between them with regard to the continuation of the procedure if and when they separated from one another. By contrast, Justice Tal says that we cannot know with certainty what Ruth and Daniel thought at the start of the procedure with regard to the possibility that they might separate before the procedure was completed. Therefore, he tries to establish the presumed intention of Ruth and Daniel, and is even prepared, alternatively, to give the agreement an imputed intention. Either way, he reaches the conclusion that the intention of the parties was that even in the event of separation, Daniel would not have a right to prevent the continuation of the procedure.

I disagree with this conclusion. In my opinion, human experience and common sense say that had we asked Daniel at the start of the procedure whether he would be prepared to continue and complete the procedure of having a child in all circumstances and without any conditions, and even were he to discover new facts or were new circumstances to occur, his

response would have been no. For it is possible to imagine new circumstances in which having the child or raising the child would be very difficult, for the child or for the parents. For example, if we take an extreme example, it can be imagined that new facts might suddenly be discovered, which raise a real fear that the child who will be born will suffer from a serious genetic defect; or it is possible that one of the spouses may suddenly discover new details about the other spouse which, had they been known previously, would have prevented any relationship between them. Would the consent to fertilization, even in such cases, necessarily include, without any means of revocation, also consent to implantation? And is this so even if the consent to fertilization was obtained by fraud? But we do not need to go to extremes. Let us assume that before the procedure began, Daniel was asked as follows: if during the procedure, but before implantation of an ovum, a serious dispute will break out between you and Ruth, which will lead you to a complete separation and serious animosity, would you, even in such a situation, consent to implantation of the ovum, which would make you and Ruth joint parents of a child? In my opinion, Daniel's answer, as a reasonable person, would be no. And if he were asked before the start of the procedure as follows: assume that after you separate from Ruth, as a result of a serious dispute of this kind, you establish a new family for yourself and even have a child of your own with your new partner. Would you consent to implantation of the ovum, notwithstanding all this? Again, in my opinion, Daniel's answer would be: no and no.

Moreover, even if there remained a doubt about Daniel's answer, this is not enough to fulfil the requirement for consent, neither under the regulations nor even under the agreement. Under the agreement, consent is required for the implantation, even in the event that the spouses have separated, and possible consent does not constitute consent. According to the regulations, 'informed consent' is required for every act involved in the fertilization, including for the act of implantation, after the doctor in charge has explained to each of those concerned 'the significance and consequences that might follow from it'. A doubt is insufficient: informed consent is required. On the evidence, there is no basis for saying that Daniel gave 'informed consent' at the start of the procedure for the act of implantation, after an explanation as required, with an understanding of the significance and the consequences that might follow from the consent, even in a situation of a separation between the spouses.

As such, there is no need even to consider what were Ruth's intentions at the start of the procedure with regard to the continuation of the procedure in the event of separation. Let us assume that she thought and she wanted the procedure to continue even in the event of separation. Let us go further and assume that she would not have agreed to begin the procedure had she thought that the procedure would be stopped in the event of separation. This does not change anything. This is so because the consent of one spouse is insufficient; the consent of the other spouse is also needed. This is the case under the Fertilization Regulations: the hospital may not carry out any act with the ova at the wife's request unless it also has the consent of the husband for that act. The same is true also for the purpose of the litigation in the court: for Ruth to succeed in her action against Daniel, the consent of both parties is required, as in any contract. In the absence of Daniel's consent to implantation, and as stated no such consent has been proven, not even according to the intentions of the parties, Ruth has no cause of action against Daniel. Without a cause of action, the action collapses. Therefore, under the law the court must dismiss Ruth's action against Daniel in so far as it relies on the agreement between them.

16. From a legal viewpoint, Ruth is left with only one claim against Daniel: that he is estopped from arguing that he does not consent to the implantation. Admittedly, estoppel is usually used by the defendant and not by the plaintiff; it is a shield and not a sword. But estoppel has developed in several countries, so that it can be used, albeit rarely, also as a cause of action, and this may also be the case in Israel. If so, and at least for the purposes of the case, Ruth should not be denied the possibility of raising estoppel as a cause of action against Daniel, i.e., to claim that Daniel is liable, by virtue of estoppel, to give his consent to implantation notwithstanding the separation.

The claim of estoppel was examined both by Justice Strasberg-Cohen and Justice Tal. I agree with the opinion of Justice Strasbourg-Cohen rather than that of Justice Tal, and I will explain in brief.

The claim of estoppel is based on a representation. Someone who claims estoppel must prove that another person made a representation, that he reasonably relied on the representation, that he did an act on the basis of that representation, and as a result adversely changed his position. Did the elements of estoppel exist in the case before us? Ruth must prove that Daniel made a representation to her that the fertilization procedure, including the implantation, would continue even if they separated from each other. Has it

been proved that Daniel made such a representation? In my opinion, the circumstances and factors that lead to the conclusion that Daniel did not consent to the continuation of the procedure in the event of separation, also lead to the conclusion that no such representation existed. Indeed, Justice Strasberg-Cohen says, on the basis of her examination of the evidence, that no factual basis was laid before the court from which one could conclude that Daniel did or said something from which Ruth could have understood that separation would not affect the procedure. Moreover, there is not even a factual basis from which one could conclude that Ruth did what she did in reliance on a representation by Daniel, and that had she been aware of the possibility that separation would stop the fertilization procedure, she would not have begun the procedure at all. Indeed, it is most likely that Ruth and Daniel did not consider the question of the continuation of the procedure in the event of separation or, at least, did not consider it as a real possibility. If so, there was in fact no representation on one side nor any reliance on the other. In any event, the representation and the reliance were not properly proved, not even as a defence argument, and certainly not as a cause of action. The conclusion is, in my opinion, that estoppel, in the circumstances of this case, cannot replace the consent required under the law.

In conclusion, no matter how important Ruth's right to parenthood is, and no matter how much distress she will suffer, under the law Ruth has no cause of action against Daniel.

And what about justice?

On justice

17. Greek mythology described justice as a goddess, standing on a pedestal, with her eyes covered. This description, even if it was relevant in those days, is not suitable in the present. I imagine justice as a person searching for the proper path, wandering around with open eyes. He stands before a thick forest of innumerable legal rules, through which there is a main road, but from which side roads, paths and narrow tracks branch off. He must pass through the forest in order to reach his destination: just law. In order to reach it, he is prepared to leave the main road, to seek another path and follow also narrow tracks. But he cannot take a shortcut straight to his destination, without passing through the forest.

In this case, I have not tried to take a shortcut. I have followed the main road, although it was arduous, and have reached this conclusion: between Ruth and Daniel, the law is on Daniel's side. I suppose that another path

could have been chosen among the paths of the law, and that perhaps a different result could have been reached by that path. However, the important point in my opinion is that the court must follow one of the paths of the law. I concede that had I seen that the path was leading me to a result of injustice, I would have stopped along the way and sought out another path, from among the abundance of legal rules, that might lead me to a just result. Moreover, even at the end of the path I am still ready and prepared to look and see whether I have reached an unjust result. For if so, I am prepared to retrace my steps and start the journey over again in an attempt to reach a more just result. But have I really, in the result that I have reached, not dispensed just law?

No-one has a monopoly on justice. It has been said that justice to one person is injustice to another. Justice Strasberg-Cohen shows how many forms and shades of justice there are. No less than the paths of the law. In law, at least, there are pre-established rules, and even if they are sometimes obscure and flexible, they contain a large degree of objectivity. Justice, on the other hand, is an open field, in which everyone can go in whichever direction he sees fit, with a subjective viewpoint, without road markings and without signs. The direction that seems right to me is different from the direction that seems right to my colleagues. Does this mean that they are correct?

About five hundred years ago, the Lord Chancellor of England wished to free himself of the inflexibility of the common law, which not infrequently resulted in injustice, and he chose a new approach: equity. He took it upon himself to decide each case according to his sense of justice. And what did they say of him? That justice depends on the length of the Chancellor's foot. Each foot is a different length. What judge is prepared to declare that his foot, and only his foot, has the right length?

Naturally, this does not mean that for this reason the court may ignore justice. On the contrary: the court must consider justice in every case. But it must weigh justice, as it were, in the scales of law. Only in this way can just law be carried out.

18. Even when the court considers justice, in itself, it must place it on the scales, since justice itself contains various elements and even conflicting directions, and the question is what has greater weight, as a rule or in a particular case.

First, we must distinguish between general justice and individual justice. General justice states that the interpretation or application of a particular

legal rule in a specific way will not lead to a just result in a class of cases, and therefore a different interpretation or application should be preferred. Individual justice states that the interpretation or application of a legal rule in a particular way will cause injustice in the special circumstances of a specific case, and therefore another path should be chosen. But general justice and individual justice do not necessarily lead in the same direction. It is possible that the path leading to general justice will cause injustice in the individual case, and *vice versa*. In such a case, the question is which prevails, general justice or individual justice?

In my opinion, it is not proper for the court to do justice in the concrete case before it, before examining and determining what general justice demands in that case. It is only after this that the court can and should consider individual justice, which is the justice of that person whose case the court is required to decide, as opposed to general justice, which is the justice of many others who may be affected by the decision of the court. In general, when there is a conflict between the individual and the public that cannot be reconciled, the public prevails. One should follow the majority. It is not just to do justice in one case if as a result an injustice will be done in many cases. Naturally, this rule also has exceptions, according to the circumstances and considerations in each case. Notwithstanding, no matter what case it is, it is not proper, in my opinion, to decide in favour of individual justice without first ascertaining what general justice says.

19. What does general justice say? When trying to arrive at general justice, we must take into account the values of society, including values outside the law. Justice is one of the values, and harmony is required between all the values. Among the values, we should mention, in this context, the principle that having children is a matter for the autonomy of the individual, or, to be more precise, of the couple. They, and no others, must act in this sphere with consent and with equality. This is a reason for preventing the forcing of the will of one spouse on the other spouse, or preferring the will of one over the will of the other, by means of a State authority. If matters have gone wrong and there is no longer any consent between the spouses, there is no longer any basis for continuing the process. That is also what has happened here: the relationship has come undone. The common will has split: his will against her will. Should the court intervene and say that her will takes precedence over his will? The court usually avoids intervening in intimate matters, and it leaves them to the couple to sort out on their own, for better or

for worse. This is the accepted policy. This is also the proper policy. Has the court now decided to depart from this policy?

It is for this and additional considerations that a widespread opinion has developed amongst bodies that have examined this topic throughout the world, whereby *in-vitro* fertilization should not be performed, and this includes implantation, without existing and continuing consent of the two spouses. As Justice Strasberg-Cohen says —

> 'In most enlightened countries there can be seen an unambiguous approach that requires the *informed consent* of the two spouses to performing the fertilization procedure at each stage. Because *in-vitro* fertilization is a complex procedure that is carried out in stages which may extend over a period of time, if the relationship between the spouses is disrupted and they quarrel about the fate of the fertilized ova, the general tendency is to demand the consent of both parties for the continuation of the procedure.'[*]

Have these countries chosen the path of injustice? The same has happened also in Israel. The Minister of Health and the Minister Justice appointed (in July 1991) a public-professional commission to examine the topic of *in-vitro* fertilization. The members of the commission were diverse and very distinguished: it was chaired by (ret.) Justice Shaul Aloni, and among its members were Rabbi Yisrael Lau, who at the time held the office of Chief Rabbi of Tel-Aviv, and the top specialists in the fields of medicine, philosophy, sociology, etc.. In the *Report of the Professional Public Commission for Examining the Issue of* In-vitro *Fertilization* (July 1994) the commission unanimously said, on p. 36:

> 'The Commission was of the opinion that giving permission for fertilization should not be regarded as consent to implantation, and there must be consent of both spouses to the implantation, for two reasons. First, having children when there is a dispute should not be encouraged. Second, the involvement of the father in making the decision should be encouraged.
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> The Commission considered another option, that in the absence of joint consent the matter would be referred to a multi-disciplinary statutory committee, which would be authorized to

[*] IsrSC 49(1) 485, at p. 503; [1995-6] IsrLR 1, at p. 20.

> approve exceptions to the fundamental requirement of ongoing consent. Notwithstanding, the Commission had difficulty in conceiving of considerations that would justify departing from the aforesaid principle. The Commission considered the possibility that the genetic mother or the genetic father would have no other way of realizing genetic parenthood. But giving permission to have a child in such a situation, without joint consent, means forcing fatherhood or motherhood, both from the legal viewpoint and from the emotional viewpoint, in that there will be a child who is born without their consent. The commission was of the opinion that a man or woman should not be forced to be a father or mother against their will, even if they initially consented to this… Therefore the commission recommends that in the absence of joint and continuing consent, no use should be made of the fertilized ova that were frozen until the end of the freezing period agreed by the spouses, but consent that was given at the beginning of the treatment shall be deemed to continue as long as neither of the spouses revokes it in writing'.

Did this Commission also choose the path of injustice? And it was not only the Commission. The legislator chose this path. The Fertilization Regulations require the informed consent of the husband to every act involved in the fertilization, including the implantation. And now we have statute, namely the Surrogacy Agreements (Approval of Agreement and Status of the Child) Law, which says that there shall be no implantation without the informed consent of both spouses. Moreover, the Attorney-General, who was summoned by the court to submit arguments on behalf of the public, also expressed the opinion that implantation should not be performed without the consent of the prospective father. Are all of these perverting justice?

In my opinion, all those who require ongoing consent of both spouses as a condition for implantation, whether legislators or experts, are expressing the public interest, and therefore they reflect and serve general justice.

In summary, the legal result, whereby the law is on Daniel's side, is consistent with general justice.

20. My fellow justices, who reached the opposite result, believe that this result is required by individual justice, i.e., by the special circumstances of the Nahmani case. But in my opinion, just as one can only arrive at justice by

way of the law, so too one can only arrive at individual justice by way of general justice. Individual justice does not exist in a vacuum. It must be considered against the law on one side, and general justice on the other. It is certainly possible that in a particular case, even if individual justice tends in one direction, the pan of the scales containing the law and general justice will tend in the opposite direction. In fact this is an everyday occurrence in every court.

In this case, I do not know for certain what individual justice in itself demands. But I do know this: individual justice for Ruth is not individual justice for Daniel. But am I able to weigh reliably one against the other and determine which weighs more? Indeed, there is no doubt that the medical treatment which Ruth underwent was much more difficult than the medical treatment that Daniel underwent. However, is the medical treatment that was carried out in the past the criterion that should decide the case, as opposed to, for example, the suffering of each party on an aggregate over time? But which of the parties will, on aggregate, suffer more? To this question I have no answer. At most, I can guess how I would feel and how much I would suffer were I in Daniel's position or in Ruth's position. But in doing so, I would not be doing individual justice, because I am not Daniel and I cannot know what he feels, and I am not Ruth and cannot know what she feels. In order to do individual justice, in a way that will compensate for personal suffering, I would need to enter into the hidden recesses of their personalities and the secrets of their souls. But I can not examine feelings and thoughts. Therefore I have no authoritative answer to the question which of them is more justified on the individual level.

In any event, even if I assume that individual justice tends more in Ruth's favour, I do not feel that the difference between Ruth's individual justice and Daniel's individual justice is so great that it should weigh the scales in favour of a result that is inconsistent with the law and even with general justice.

In principle, one should not depart from the main path of the law except in a case where it is clear that justice, in a proper balance between general justice and individual justice, requires us to follow a different path. This is not such a case.

Alas for me because of my Maker and alas for me because of my inclination? Not in this case. My Maker and my inclination do no conflict. I do not think that I am dispensing law whereas my colleagues, who have reached another result, are dispensing justice. I feel that I, according to my

approach, am dispensing just law. Therefore I agree wholeheartedly with the opinion of Justice Strasberg-Cohen that Ruth's petition should be denied.

President A. Barak

1. I agree with the opinions of my colleagues, Justices Strasberg-Cohen, Zamir and Or. Like them, I too think that all decisions concerning the fertilized ova — as long as they are outside a woman's body — must be made with the joint consent of the spouses. In the absence of joint consent, there is no possibility at all of continuing the stages of the *in-vitro* fertilization procedure. This conclusion of mine reflects existing law. It is consistent with the requirements of justice. Law and justice go hand in hand. Underlying my opinion concerning law and justice there is a simple and basic proposition: parenthood is a singular and special status. It involves human existence. It involves duties and rights. It is built on a partnership. It is based on going hand in hand. It relies on love and mutual respect. When the partnership dissolves, when separation occurs, when the love and mutual respect disappear, the one and only basis that allows decisions with regard to the fertilized ova disappears. Without consent, there is no possibility of beginning the fertilization procedure. Without consent there is no possibility of continuing it. Indeed, there is no possibility of separating between the beginning of the procedure and its continuation. Each of its stages — in so far as it is done outside the woman's body — must have the consent of both parties. A unilateral action that continues the procedure of having children is not possible. There is no possibility of separating between one of the parties becoming a parent and the other party automatically becoming a parent. Indeed, we must remember: Ruth Nahmani is not merely asking to be a mother. Ruth Nahmani is asking to be the mother of the child of Daniel Nahmani. For this, the consent of Daniel Nahmani is needed. This consent is needed for the fertilization stage. This consent is needed — as long as the fertilized ovum is not in a woman's body — for every stage thereafter, because the parenthood of each of the parties — and the special status that it involves — ensues from the completion of all the stages.

2. The conclusion that I have reached reflects, in my opinion, existing law. It is required from every possible legal perspective. From the constitutional viewpoint, of course, we recognize the constitutional liberty to be a parent or not to be a parent. This liberty derives from human dignity and the right to privacy. Therefore we recognize Ruth Nahmani's constitutional liberty to be a mother, just as we recognize Daniel Nahmani's constitutional liberty not to be a father. But Ruth Nahmani's constitutional liberty to be a mother does not lead to a constitutional right to be a mother to the child of

Daniel Nahmani. Therefore we do not have before us any conflict of the liberty to be a parent and the liberty not to be a parent. Just as it is inconceivable that — in the name of Ruth Nahmani's constitutional right to parenthood — we should impose a duty on Daniel Nahmani to deliver his sperm for the purposes of fertilization, so too it is inconceivable — in the name of Ruth Nahmani's constitutional right to parenthood — to impose a duty on Daniel Nahmani to deliver the fertilized ovum to a surrogate mother. Daniel's constitutional status with regard to his sperm is identical to Ruth's constitutional status with regard to the ovum. As long as the fertilized ovum is outside a woman's body, both of them have an identical constitutional status that requires the continuing consent of each of them. Consent in the past to one of the stages — such as fertilization of the ovum — cannot replace continuing consent, since the whole procedure is a continuing one, and it requires consent at every stage. Indeed, both from the biological viewpoint and from the constitutional viewpoint, there is no possibility of separating the various stages in the procedure of having children. They all require cooperation and consent. This conclusion is required also from the perspective of private law. Underlying the consent between the parties — whether we regard it as a contract, or whether we regard it as a non-contractual agreement, or whether we regard it as joint property or whether we regard it as a 'legal phenomenon' of an unique kind — there is a basic premise of a joint life. When this basis is removed, the basis on which the relationship between the parties is removed. Had Daniel Nahmani been asked before beginning the fertilization procedure whether he would be prepared to continue it after separating from Ruth Nahmani, his reply would certainly have been no. This too, we may assume, would have been the reply of Ruth Nahmani. Admittedly, they did not consider this question, but the essence of the agreement (or the understanding) between them — an agreement to have a joint child — is based on this premise. This is the legitimate expectation of Ruth and Daniel Nahmani. This is the basis for any act with regard to the fertilized ova. This is the basis for their whole existence. This is the foundation of their parenthood. This is not a 'one-family' parenthood. The sperm donor is not anonymous. This is joint parenthood in every respect. Indeed, in my opinion, should one of the parties waive *ab initio* the need for his consent at every stage of the procedure, this waiver would be contrary to public policy. Public policy requires that the procedure — which is an unique and intimate procedure, whose final outcome is the joint child of the parties — should be born only as a result of joint consent 'throughout the whole procedure'.

3. The need for the consent of each of the spouses at every stage is derived from the requirement of justice. Justice, in the context before us, means the realization of joint parenthood. There is no justice in forcing someone to be a parent against his will. Just as justice does not require one of the parties to a relationship to donate his genetic material in order to realize the desire of the other party for parenthood, so too justice does not demand that the only one of the parties should have control over the fertilized ovum. Justice demands equality in the power to make decisions concerning joint parenthood. This is the just decision in the circumstances of the case. Would justice be different if Ruth Nahmani had children of her own (from a previous marriage) and Daniel Nahmani had no children at all? Would *justice be different* if *it transpires* — as may very well be the case — that Ruth Nahmani has ova that can be fertilized by another male? Would justice be different if it transpired — and this is merely a hypothetical assumption — that additional ova were removed from Ruth Nahmani that have not yet been fertilized and they may be fertilized by another donor? And would justice be different if it transpired that Daniel Nahmani were seriously ill and the news that he would have a child and the need to care for it might cause him very serious harm? In my opinion, the answer to all these questions, and to many others, is that all these details do not affect the just solution. Justice is equality, and equality is giving a joint power of making decisions to the two parties. Let us assume, for example, that the roles were reversed, and that Daniel Nahmani was the one wanting to continue the fertilization procedure, and Ruth Nahmani was the one refusing to be the mother of their joint child. I suspect that were this the case that we were deciding, then Daniel Nahmani's application would be denied. We would say that motherhood should not be forced on a woman who does not want it; that motherhood is a relationship so intimate and natural that it should not be forced on a woman against her will; that just as a woman is entitled to make a decision with regard to the abortion of her child without her husband's consent, she is entitled to oppose the continuation of the fertilization procedure being carried out outside her body; that the cry of Ruth Nahmani — like the cry of our ancestress Rachel — 'Give me children, else I die' (Genesis 30, 1 [8]) is no stronger than the cry of a woman 'I cannot be the mother of Daniel's child, and if I will be, I will die'; if we would indeed decide this way, this would indicate that in our deepest feelings we are not treating Daniel and Ruth equally and that justice is compromised. Indeed, I believe that it is not considerations of justice that support Ruth Nahmani's suit, but considerations of compassion. I accept that compassion and consideration of suffering are

important values that should be taken into account. But justice lies not in giving the power of making decisions to one spouse, but in recognizing the joint power of the spouses to decide the fate of the fertilized ovum. Having children is a matter too important, too experiential, too existential, to leave it, at any stage, to one party only. If we do not act accordingly, we will encounter situations that we will be unable to deal with normatively. What will we do, for example, if there is no consent as to the identity of the surrogate mother? What will we do if it transpires that there is a genetic defect — whether serious or not — and there is a recommendation not to continue the procedure of having the child for this reason? What will we do if it transpires that one of the spouses — say, Ruth Nahmani — is very ill to the extent that she cannot care for the child that will be born? What is the normative compass that will guide us? When will we consider the welfare of the child? Will we continue — and if so, to what stage — to give weight to Ruth Nahmani's expectations and the great suffering she has undergone in the past? I do not argue that these questions may not have proper answers. I am arguing that the just normative arrangement should be that the answer to all these questions lies in the joint will of the parties. This is the only will that started the procedure. This is the only will that can support its continuation. Without this will, and without a continuing partnership of the parties in the fateful decision that they made, there is no basis — from the viewpoint of justice — for continuing the procedure. Fertilization and creation *ex nihilo* is a procedure so existential, so natural, so great and powerful that only the continuing and day-to-day will of the parties can serve as a basis for it.

4. I have discussed how, according to the law — the just law — continuing consent of each of the parties is required for continuing the fertilization. Non-consent of one of the parties prevents the continuation of the procedure. Notwithstanding, non-consent — like every legal act — requires good faith. The court may determine that consent was given exists where the non-consent is not in good faith. Thus, for example, had it been proven to us that one of the parties — in this case Daniel Nahmani — wished to extort financial benefits as a condition for giving his consent, I would think that this could be regarded as bad faith. But in the case before us, is the non-consent of Daniel Nahmani not in good faith? In my opinion, the answer is — and so the trial court held — that Daniel Nahmani is acting in good faith. Good faith is an ethical objective concept. It is examined according to the conflicting values in the circumstances of the case. Daniel's non-consent should be examined in its context. We are dealing with an intimate

relationship between the spouses. We are concerned with a relationship in which love, companionship, mutual respect, partnership and affection are an inseparable part. We are dealing with a relationship based on a continuing emotional bond. In these circumstances, the cooling of relations and severance of the emotional bond are part of the realities of life. Love and friendship cannot be attained by force. Mutual respect, cooperation and affection are emotional matters, which frequently are not governed by logic. Such is our life. This is the destiny that rules us. These are the risks of life. Every couple that marries, at every stage of their marriage, is aware of this possibility. The law provides various tools for solving such difficulties. A separation between spouses because of a rift between them is not a crime. The possibility of a rift occurring is an integral part of intimacy itself. Not giving consent because the feeling of love, companionship, mutual respect, partnership and affection has disappeared is not, in itself, bad faith. This is something that is done without any intention of harming the other party; this is something which is done without the aim of extorting something from the other party; this is something that happens between people who live together. This is the price of partnership in life. I am sorry for Ruth Nahmani, but just as Daniel Nahmani cannot be prevented from ending the relationship with her, and just as it cannot be said that for this reason alone he is acting in bad faith, he cannot be prevented — as part of ending the relationship — from refusing to give his consent to the continuation of the fertilization procedure, and it cannot be said that because of this he is not acting in good faith. Ending a relationship, the dying of love, are part of life itself, just like the creation of the relationship and igniting the spark of love.

5. Before I conclude, I wish to point out that I have assumed that the fertilized ovum is not an 'embryo'; that it is at the 'pre-embryonic' stage. As my colleague Justice Strasberg-Cohen, said, 'We are not speaking of preserving life that has been created, but with the creation of life *ex nihilo*'. We have therefore not considered at all the constitutional status of the embryo, and we have not considered the constitutional aspects from this perspective. The dilemma of life or no-life was not put before us. The only question that we have examined is the relationship between Ruth Nahmani's desire to be a mother of Daniel Nahmani's child, and Daniel Nahmani's opposition to this.

For these reasons, my opinion is that the petition should be denied.

Petition granted by majority opinion, President A. Barak and Justices T. Strasburg-Cohen, T. Or and I. Zamir dissenting.

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12 September 1996.