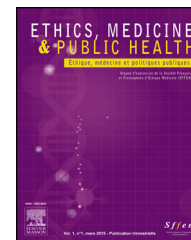




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PRACTICES AND CONCEPTS

The influence of Jewish law on Israeli regulation of sperm banks[☆]

L'influence du droit hébraïque sur la réglementation des banques de sperme en Israël

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Summary Modern fertility technologies of artificial insemination and in vitro fertilization raise several legal and religious questions on the use of donor gametes. In Israel, sperm donations remain minimally regulated and questions that are a matter of public policy, such as anonymity and determination of paternity, are regulated solely by internal government directives. Scholars including myself maintain that the current situation needs revision. Due to the potent effect of such regulation on issues of personal status, it is crucial to address questions of Jewish law that will be influenced by any proposed sperm bank regulation, since the answers will affect large sectors of the Israeli population. In particular, we will raise concerns unique to Jewish law that could jeopardize the status of offspring and their ability to marry in accordance with Jewish law, and we will examine creative arguments found within contemporary Jewish law to address those concerns. We will demonstrate that Jewish law includes a range of opinions in this area, from lenient to stringent, and propose solutions that can accommodate that range while at the same time safeguarding the best interests of children conceived through artificial insemination by donor (AID). Considering the foregoing analysis, we will evaluate regulatory schemes from a proposed 2016 Sperm Bank Law, such as: creation of a (privacy-protected) state registry of the identities of sperm donors, sperm recipients and offspring of AID that preempts incestuous marriages or cohabitation, and establishment of an identity-release track for sperm donation.

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MOTS CLÉS

Progénitures conçues
par don de gamètes ;
Loi israélienne ;
Droit hébraïque ;
Mamzer ;
Shtuki ;
Banque de sperme

Résumé Les technologies de fécondation modernes, parmi lesquelles l'insémination artificielle et la fécondation in vitro, posent de nombreuses questions légales et religieuses, concernant entre autres l'utilisation de gamètes de donneurs anonymes. À l'heure actuelle, les dons de sperme, y compris certaines questions cruciales en matière de politiques publiques, telles que l'anonymat et la détermination de la paternité, ne sont réglementées en Israël que par des directives gouvernementales internes. Cette situation doit être révisée. En raison des enjeux liés au statut personnel, il est essentiel d'analyser certaines questions de droit hébraïque sur lesquelles toute réglementation des banques de spermes pourrait avoir de graves répercussions, puisque les réponses à ces questions affecteront une grande partie de la population israélienne. Plus précisément, nous traiterons certains aspects spécifiques au droit hébraïque liés à l'anonymat du donneur, qui pourraient compromettre le statut des progénitures et leur capacité de se marier selon la loi juive. Nous examinerons les arguments novateurs avancés par certains décisionnaires contemporains afin de résoudre ces problèmes. Nous montrerons que la loi juive inclue tout un éventail d'opinions à ce sujet, des plus laxistes aux plus strictes, et soutiendrons qu'il est possible de proposer des solutions qui concilient cet éventail d'opinions tout en défendant les intérêts des enfants conçus par insémination artificielle avec don de sperme (IAD). À la lumière de cette analyse, nous évaluerons les schémas régulateurs de la proposition de loi présentée par le ministère israélien de la Santé en 2016 concernant les banques de sperme, dont : la création d'un registre national de donneurs de sperme, de receveurs de sperme et de progénitures IAD (avec protection de la vie privée) qui préviendrait les unions incestueuses, ainsi que l'instauration d'une possibilité de dons de sperme non anonyme.

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Introduction

The modern fertility technologies of artificial insemination and in vitro fertilization raise several legal [1,2]¹ and *halakhic*² questions [3], not to mention a host of moral, social, and psychological dilemmas.

The regulation of sperm donation and its impact on offsprings conceived through artificial insemination from a donor (hereinafter: AID) is the subject of debate and legal reform around the world. Issues such as donor anonymity vs. the right of children to know their origins and discover (genetic) siblings appear in legal as well as ethical discussions [4]³. Scholars as well as AID offsprings have raised concern about inadvertent consanguinity, i.e., meeting and unknowingly mating with a genetic sibling and possibly even parenting children with the genetic sibling (or close relative). This fear has given rise to suggestions ranging from limiting the number of children born from one sperm donor to instituting donor registries where offspring can check to prevent accidental consanguinity or find out information about their donor parent⁴ [5, p. 60–1].

Among secular jurists and ethicists, there is a debate as to what constitutes sufficient justification for the prohibition against incestuous relationships and what justifies the need to protect against incest and inadvertent consanguinity, as well as whether the same justifications apply to inadvertent consanguinity [5, p. 60–1] caused by conception through donor gametes⁵ [5, p. 60; 6], Jewish law, by way of contrast, has a strict system of dos and don'ts regarding forbidden sexual relations with relatives or sexual relations (for married women) outside of marriage. Children born as a result of religiously forbidden relations are termed *mamzerim* [pl. of *mamzer*] and forbidden under Jewish law from marrying within the Jewish community⁶. What is not clear is how Jewish law applies these restrictions to incestuous genetic "relationships" that do not involve sexual relations.

In this article, we will focus on the question of whether a child born from an anonymous sperm donation is able to

⁵ See also: footnotes 2–5 of [5].

⁶ A *mamzer* is often translated as a bastard, but that translation is misleading since a bastard generally means any child born out of wedlock, including a child born to a single mother. In Jewish law, a *mamzer* is a child born of relations forbidden by Torah law [7]. This means that a child born to a single woman is not forbidden per se, unless the father was a *mamzer* or a close relative, whereas a child born to any married woman via relations with any Jewish man other than her husband is considered a *mamzer*. A *mamzer* is considered a terrible stigma since he/she may not marry another Jew unless the latter is a convert, or also a *mamzer*, and tragically, the status of *mamzer* is passed on to all subsequent generations.

¹ See also: H.C. 4077/12 Plonit v. Ministry of Health (5.2.13).

² "*Halakhic*" refers to something that operates in accordance with *halakha* which is the Hebrew word for Jewish law.

³ See also: popular articles found at the following website accessed on March 27th, 2018: <https://www.donorsiblingregistry.com/content/industry-issues>.

⁴ Also see: footnotes 6–10 of [5].

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