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## Changing Motherhood Paradigms: Jewish Law, Civil Law, and Society

*Avishalom Westreich\**

### INTRODUCTION

The focus of civil concepts of parenthood has moved in recent years from biological to functional parenthood. This paper reveals a similar paradigmatic change within Jewish law due to a fascinating interaction between three sides of a triangle: civil law, Jewish law, and society.

The paper analyzes the mutual interaction between civil law and Jewish law regarding parenthood (and in particular: motherhood) in cases of assisted reproductive technologies (ART) on both the conceptual and the normative levels, and the influence of the societal reality on both. The paper argues that civil law and Jewish law are dynamic. They influence one another very deeply, and both are influenced by the social reality (which itself is, of course, dynamic by nature).

The hypothesis of dynamism and mutual interaction might be quite surprising: We do expect dynamism of civil law, and we do expect dynamism of society. This is evident in every legal matter, and especially in family law, but we hardly expect dynamism in religious law. Nevertheless, the paper argues that Jewish law in this particular realm has been, and is, changing, as a living system in society and due to its interaction with civil law. Even more surprising is the argument that some

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Primary Jewish law sources are cited from the Bar-Ilan Responsa Project database or from the hebrewbooks.org database, unless otherwise specified.

Jewish law decisors are aware (again, in this particular realm) of this internal dynamism, and are willing not only to make pragmatic decisions in these family matters, but also to modify their basic concepts of the family and change their conceptual paradigms in accordance with changes in society, science, and civil law. This dynamism, awareness, and, more generally, the conceptual paradigmatic change, are the focus of this paper.

The paper focuses on the conceptual dimension, suggesting a new analysis of Jewish law concepts of parenthood. The paper argues that whereas civil law seeks functional or intentional definitions of family concepts, such as parenthood, motherhood, and fatherhood, Jewish law *prima facie* looks for biological (or formal) definitions. But one important (and surprising) outcome of the mutual interaction of these two normative systems is a conceptual interaction, on two levels: First, by accepting changes in family concepts as a result of the interaction between the systems and the reality, and second, by a paradigmatic change in the basic conceptual approach. In this respect, my close analysis of modern rabbinic writings and recent verdicts of Israeli rabbinical courts will reveal initial signs of a shift in Jewish law from biological definitions of parenthood to a functional approach, with a resulting increase in the legitimacy of interaction and mutual influence between law, religion, and society.

The paper is structured as follows. I begin with a conceptual clarification (Section One). Section Two gives necessary background on the attitude of Jewish law towards assisted reproductive technologies. It raises the basic concerns regarding the use of ART and indicates its implications on the conceptual level or how parenthood concepts are defined according to Jewish law. Section Three examines the influence of Jewish law on Israeli civil law. Section Four examines the interaction from the Jewish law point of view. This section focuses first on social and legal influences on Jewish law and their pragmatic result, which is, increasing leniency towards ART. It then examines the conceptual changes in parenthood concepts within Jewish law. It refers to recent writings, which reveal a paradigmatic, or metaconceptual, shift from a substantive approach regarding parenthood concepts to a functional one. Section Five is a summation, with a reference to the discursive character of Jewish law as a living, dynamic legal system which exists within its society.

## I. CONCEPTUAL CLARIFICATION

Before turning to the actual analysis, I would like to make a conceptual clarification, in order to elaborate the conceptual definitions which, I will use in the following discussion. The classic, traditional approach towards parenthood is based on formal, noncontingent definitions.<sup>1</sup> I would also use

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1. See, e.g., Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 468-73 (1990).

the term “substantive approach.” Well-known legal, social, and cultural transitions, as well as scientific developments, led to dramatic structural changes within the family, including the rise of multiple family types and numerous conceptualizations (and resulting definitions) of parenthood: psychological parenting, the actual practicing parents (*de facto* parenting), contract-based parenting, and so on.<sup>2</sup>

One important and widely used concept is functional parenthood. This concept is usually used for defining parenthood based on *ex post* relationships between the child and his or her parents. In this respect, it includes psychological parenthood and other related definitions, while parenthood on the basis of prenatal agreement or on the basis of the intention of the parties involved may be defined differently.<sup>3</sup> In any event, definitions are quite flexible, and not always agreed; they rather vary between scholarly writings.<sup>4</sup> In general, however, all refer to the nontraditional concepts of parenthood and nontraditional parent-child relations.

The focus of this paper is the shift within religious law from a formal-substantive definition of parenthood to a more contingent one. For this purpose, I will define the whole range of contingent factors of parenthood as a functional approach (in its broader sense).<sup>5</sup> My concept of “functional parenthood” does not merely refer to the actual parenting (that is, functioning as parents), but also to the functionality of the idea, that is, the variety of meanings of parenthood and their use in different functionalities. To be sure, choosing this definition is not due to a decisive argument in the conceptual debate (if such an argument can be made at all). Rather, I chose this definition more for instrumental purposes, for simplifying the

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2. See Polikoff, *Id.* at 483–91; Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 HARV. L. REV. 835, 842 (2000) (an approach based on “society’s actual practices and beliefs”). For additional discussion and further references, see Richard F. Storrow, Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage, 53 HASTINGS L.J. 597 (2002); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, Between Function and Form: Towards a Differentiated Model of Functional Parenthood, 20 GEO. MASON L. REV. 419, 422, 428–38 (2013). For a recent criticism of these approaches, see Scott Fitzgibbon, The Biological Basis for the Recognition of the Family, 3 INT’L J. JURISPRUDENCE FAM. 1 (2012).

3. Laufer-Ukeles & Blecher-Prigat (*id.*) accordingly see intentional parenthood as part of formal parenthood. Yehezkel Margalit defines it as “legal parenthood by agreement.” See Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. CHILD & FAM. ADV. 39, 41 (2013). I would prefer to include it in functional parenthood. See *infra*.

4. In addition to the articles cited above, see on the flexibility of “natural parenthood” Alison Diduck, *If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved’: Law, Identity and Parenthood*, 19 CHILD & FAM. L.Q. 458 (2007), and see further, the next note.

5. Richard Storrow expands the definition of functional parenthood to include intentional parenthood as well, an approach that I adopt here. See Storrow, *supra* note 2, at 602, 677–678.

discussion, as this definition (the broad meaning of functional parenthood) enables us to clarify more sharply the conceptual development in our matter, mainly by revealing the differentiation of the relatively new approach in Jewish law from the more classic formal-substantive one.

To summarize this point, functional parenthood in my discussion includes psychological parenthood, *de facto* parenthood, contractual parenthood, and every other contingent factor, either *ex ante* or *ex post*, which is beyond the definition of parenthood on the basis of the biological process of reproduction and birth. An agreement between the parties, for example, is a factor external to the process of fertilization and birth, but one that still can influence the legal definition of parenthood, and therefore is defined here as part of a functional approach, rather than a formal one. No less important, the functional definition of parenthood is contingent on the specific legal question. That is, defining parenthood varies from one legal area to the other; for one legal purpose, the parent may be individual X, and for another, Y. In short, this is a functional approach.

## II. ASSISTED REPRODUCTIVE TECHNOLOGIES (ART) IN JEWISH LAW: PROBLEMS AND SOLUTIONS

It was not easy for Jewish law to accept Assisted Reproductive Technologies, and in fact, this is not absolutely accepted even today.<sup>6</sup> The first significant steps in ART were made at the end of the nineteenth century and the beginning of the twentieth century. At that time, it was only the more moderate technology of artificial insemination which was discussed by that time's Jewish law decisors.<sup>7</sup> Despite the fact that artificial insemination, when using the husband's sperm, is very close to the natural process of reproduction, it still faced objections, or at least hesitations, from the decisors.

The first two prominent decisors who discussed the use of artificial insemination in practice have reached quite opposite conclusions. The first, Rabbi Shalom Mordecai Shvadron (1835-1911), permitted (in specific circumstances); the second, Rabbi Malkiel Zvi Tenenbaum (1847-1910) was strict and prohibited the practice. Both, however, raised very similar

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6. See Daniel Sinclair, *Assisted Reproduction in Jewish Law*, 30 *FORDHAM URB. L.J.* 71 (2002); *idem*, *JEWISH BIOMEDICAL LAW: LEGAL & EXTRA-LEGAL DIMENSIONS* 68-120 (2003) (hereinafter: SINCLAIR, *JEWISH BIOMEDICAL*).

7. The first reported case of artificial insemination in humans was in 1799, but its wide use started only in the first decades of the twentieth century. See Allen D. Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 *A.B.A. J.* 1089, 1089-90 (1957). Jewish law decisors already raised the option of artificial insemination in the medieval period, but only theoretically. See, e.g., *RESPONSA TASHBETZ*, 3:263; Simcha Emanuel, *Pregnancy Without Sexual Relations in Medieval Thought*, 62 *J.J.S.* 105 (2011). Its practical use was discussed at the end of the nineteenth century or at the beginning of the twentieth century (the exact dates are missing), quite close to the beginning of its wider use in the world; see below.

concerns from a Jewish law perspective, concerns that charted the way for discussions on ART to the present.<sup>8</sup>

A few problems were raised regarding artificial insemination. I will mention two of them. First, regarding the positive Biblical commandment to be fruitful and multiply:<sup>9</sup> Does the couple comply with this Biblical commandment when being fertilized artificially, or only when the conception is done naturally? The commandment to be fruitful and multiply is undoubtedly one of the main cultural catalysts of ART from a Jewish perspective<sup>10</sup> (in addition to other historical and cultural factors, such as in the post-World War II period — the restoration of the Jewish people after the Holocaust).<sup>11</sup> But is the commandment fulfilled in those ways? The question of parenthood, or more precisely: who is defined as a father, is obviously crucial here: If the genetic father is not deemed the child's father, he then does not comply with this commandment. Second, regarding a negative commandment: Jewish law objects to masturbation (and other ways of “destruction of seed” not in sexual relationships), and sperm extraction is considered forbidden, as well. Some may expand this prohibition even if the act is performed for artificial insemination. The way of defining parenthood concepts (and fatherhood, in this case, in particular) is crucial here, since it influences the question of whether it is considered masturbation or not.

More developed and sophisticated technologies raise more complex problems.<sup>12</sup> In the case of surrogacy and an egg donation, who is defined as the mother of the child? This is not only a theoretical question, it also has important practical implications. For example, if a married surrogate mother is legally (or halakhically, i.e., from a Jewish law perspective) considered to be the child's mother, the child might be considered as an illegitimate child that was born out of adultery (a *mamzer*; often translated

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8. See RESPONSA MAHARSHAM, 3:268 (1962); RESPONSA DIVREI MALKI'EL, 4:107-8 (2001).

9. *Genesis* 1:28. This is considered to be the first commandment that God gave to humans. According to Jewish law, it is fulfilled when the couple has two children: one boy and one girl. See Maimonides, MISHNEH TORAH, *Ishut* (Marital Relations) 15:4.

10. On the religious status and importance of the commandment to be fruitful and multiply as a basis for the discussion on procreation (including artificial procreation) from a feminist view, see RONIT IRSHAI, FERTILITY AND JEWISH LAW 25–52 (Joel A. Linsider, trans., 2012). For further references, see the next note.

11. These factors are responsible for Israel being one of the leading countries in the use of ART. No doubt, this is due to the influence (even on nonreligious people) of the religious obligation to be fruitful and multiply, in addition to the other cultural, political, and historical reasons. See Carmel Shalev & Sigal Gooldin, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 NASHIM 151 (2006); Yehezkel Margalit, *Scarce Medical Resources – Parenthood at Every Age, In Every Case and Subsidized By the State?*, 9 NETANYA ACAD. C. L. REV. 191 (2014) (Heb.) (Isr.). For a short English version, see Yehezkel Margalit, *Scarce Medical Resources? Procreation Rights in a Jewish and Democratic State* (2011), <http://ssrn.com/abstract=1807908> (unpublished manuscript).

12. Sinclair, *supra* note 6, at 102–109.

as bastard). According to Jewish law, if a married woman gives birth to a child whose father is not her husband, the child is deemed a *mamzer* and may suffer legal sanctions, mainly the prohibition to wed according to Jewish law.<sup>13</sup> So, is the child born to a married surrogate mother considered her child, and does this result in declaring him a *mamzer*?

This point takes us back to artificial insemination. Similar to the discussion regarding a married surrogate mother, in the case of artificial insemination from a donor to a married woman, if the sperm donor is considered as the child's father, is the child (whose father is not the husband of the child's mother) considered to be a *mamzer*?

The discussion does not end with the legal-formal considerations of positive or negative commandments. It also entails metalegal, metaphysical, and religious considerations, such as the legitimacy of human intervention in the Creation and the fear of a "slippery slope" in the use of artificial technologies for that purpose. These types of considerations appear in the discussions by twentieth century Jewish law decisors.<sup>14</sup> My impression, however, is that the metaphysical considerations are of lesser importance than the formal legal arguments or the "slippery slope" considerations, which are more frequently raised in this context.<sup>15</sup>

There is a wide range of opinions within Jewish law regarding the attitude towards ART. There is also a broad spectrum of views in the conceptual discussion of the definitions of parenthood, motherhood, and fatherhood. As noted above, the positive discussion of what is permitted or prohibited from a Jewish law perspective is strongly connected to the conceptual discussion of parenthood. More precisely, there are bilateral relationships, that is: the conceptual discussion both influences and is influenced by the positive discussion of what is permitted and what is prohibited. The different views were presented and discussed in quite a few scholarly works.<sup>16</sup> Here, we will focus on process: that of paradigmatic change;<sup>17</sup> the process of thought development; and the process of mutual influence and complex interaction between the participants in the discussion of ART: civil law, religious law, and society.

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13. See Maimonides, MISHNEH TORAH, *Ishut* 1:7; *Issurei Bi'ah* (Forbidden Sexual Relations) 15:1.

14. See, e.g., Rabbi ELI'EZER WALDENBERG, RESPONSA TSIZ ELI'EZER, 15:45 (1983).

15. For a discussion of the types of considerations in the artificial procreation debate, see Avshalom Westreich, *Flexible Formalism and Realistic Essentialism: An Analysis of the Artificial Procreation Controversy*, 31 DINE ISRAEL (forthcoming, 2016) (Heb.) (Isr.).

16. See MORDECHAI HALPERIN, MEDICINE, NATURE AND HALACHA 278–98 (2011) (Heb.); IRSHAI, *supra* note 10, at 254–64, Sinclair, *supra* note 6; YECHIEL M. BARILAN, JEWISH BIOETHICS: RABBINIC LAW & THEOLOGY IN THEIR SOCIAL & HISTORICAL CONTEXTS 123–59 (2014) and more. Some of the sources are discussed in Westreich, *supra* note 15.

17. Hinting at Kuhn's famous discussion of scientific revolutions. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (50th Anniversary Edition, 2012).

An important part of the discussion of ART from a Jewish perspective, and its relation to the law and society, is within the Israeli context, since most (but not all) decisors respond to this legal situation. We will therefore now briefly examine the Israeli legal situation, which, I argue, has an important influence on the paradigmatic shift in the Jewish law perspective. Yet, this is not to say that this discussion is merely local, for two reasons. First, from a Jewish law perspective, when Jewish law decisors discuss legal arrangements that are basically similar to the Israeli one (e.g., regarding parenthood definitions for surrogate mothers), they respond in a way similar to the situation in Israel (some references will be provided below). Second, more generally, the relationships between law, religion, and society described here may be similar (with necessary legal and cultural modifications) for other traditional systems, as well. The basic structure and the conclusions regarding changing paradigms in parenthood concepts are, therefore, far from local.

### III. ISRAELI CIVIL LAW'S CONCEPTS OF PARENTHOOD: CONSIDERATE FUNCTIONALISM

The Israeli legal system was one of the first to regulate egg donation and surrogacy, and progress has been made from time to time in modifying those regulations.<sup>18</sup> Regarding the concept of motherhood, the law adopts a nonformal approach, that is, defining motherhood according to the context of the case, its circumstances, and, mainly, the intentions of the parties, which are reflected in the agreement between them. As mentioned above, this is the core of an intentional-functional approach.<sup>19</sup>

According to this approach, a child born out of the very same medical process — for example, in vitro fertilization involving two women, a genetic mother (the egg owner) and a gestational mother — could be defined differently, according to the intent of the participants and the agreement between them. In the case of egg donation, the mother will be the gestational mother; while in a case of surrogacy, the mother will be the

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18. Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756–1996; Egg Donation Law, 5770–2010. The Embryo Carrying Agreements Law was amended in 2010. The entire issue was examined by a public commission, which proposed significant changes in the law, including, for instance, permitting altruistic surrogacy in Israel for singles or same sex couples rather than only for heterosexual couples, as it is under the current law, while keeping the option of commercial surrogacy for married heterosexual couples. See THE PUBLIC COMMISSION FOR THE EVALUATION OF FERTILITY & CHILDBIRTH (2012, Hebrew version available at: <http://www.health.gov.il/publications/files/bap2012.pdf>). Regarding surrogacy see *ibid*, at 51–65. On the committee's recommendations regarding international surrogacy, see Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & POL'Y 41, 87–89 (2015).

19. This is the current trend in the United States, as well. See *supra* text to notes 3-5.



genetic mother.<sup>20</sup> There is, however, some tendency to view the carrying mother as the child's mother, which has consequences for defining motherhood in some exceptional cases.<sup>21</sup> This inclination may be explained in several ways,<sup>22</sup> and in any event, it does not change the picture as a whole: the definition of motherhood is still very flexible, and is dependent on the reality and the legal circumstances, so that in most cases (and this is encouraged by the law), the agreements between the parties and their intentions is the definitive, or at least dominant, element in defining who is the child's mother.<sup>23</sup> Functional motherhood, thus, is the best definition of the attitude of Israeli law towards children born by assisted reproductive technologies.

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20. See Egg Donation Law, 5770–2010, section 42a; Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756–1996, section 11. It should be noted, that basing parenthood on the intention of the parties was proposed by Pinhas Shifman a few years before the enactment of these laws. See PINHAS SHIFMAN, FAMILY LAW IN ISRAEL 2, 131–33 (1989).

21. There is a (slight?) difference between surrogacy and egg donation regarding who the mother is, which may reflect some tendency towards defining the gestational mother as the child's mother. In egg donation, the gestational mother is immediately (right after birth) considered as the legal mother of the child (Egg Donation Law, *ibid*). In surrogacy, on the other hand, the egg owner's motherhood depends on a parenthood decree given by the court, and if there is a significant change in the circumstances, the surrogate mother has the option to rescind her agreement and keep the child, even against the surrogacy contract (Embryo Carrying Agreements Law, sections 11–14). For an analysis of this difference, and a proposal for an alternative relational theory for family relations, see Ruth Zafran, *The Family in the Genetic Era – Defining Parenthood in Families Created Through Assisted Reproduction Technologies as a Test Case*, 2 DIN UDVARIM 223, 265–68 (2005) (Heb.) (Isr.). This should be compared to *Johnson v. Calvert* in California, in which the Court of Appeals preferred the genetic mother, viewing her as the “natural mother” (while the Supreme Court, although affirming the lower court's decision, focused on intention). See Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 99–101.

22. The partial bias in favor of the carrying mother may be a result of one or more of the following reasons: first, the practical fact that the child is in the “hands” of the carrying mother (who gave birth of him or her), which leads to the need for an active legal and physical act of giving the child to the genetic mother; second, a (natural?) substantive tendency towards defining the carrying mother as the child's mother; third, the influence of Jewish law's dominant view (at least at the time those laws were enacted), as will be discussed below.

23. Interestingly, according to a 2013 family court decision (whose view seems to be accepted by the state, that did not appeal) in an international surrogacy (when the surrogate mother does not have any connection to her child, neither by her intention nor by the local law), the court can declare the (Israeli) egg owner as the child's mother based on a judicial decree, and there is no need for the formal process of a motherhood decree (see Family Court File [Tel Aviv] 21170-07-12 *Ploni and Almonit v. Attorney General*). This is a result of the fact that Israeli law regulates only local surrogacy, and (still) keeps silent regarding international surrogacy (see Margalit, *supra* note 18). Accordingly, slightly different than the bias in favor of the carrying mother described above, the status of the genetic mother in this case is stronger than that of the surrogate, but this is due to the social and legal context of the case: international, not regulated and unsupervised, surrogacy, which removes the surrogate mother from the picture. It is undoubtedly problematic, and many (including the court in that case) consistently call for legislation on this matter, as well.

Israeli civil law does not adopt a substantive view of parenthood (and in particular, in surrogacy and egg donation cases, of motherhood), that is, a view which coherently follows either the genetic connections or the physical ones. As we have seen, in a surrogacy agreement the mother will be the genetic mother, while in an egg donation the mother will be the carrying mother. But civil law's functionalist approach does not only depend on the circumstances of the case, it also takes into account legal-policy considerations, that is, the view of Jewish law in the matter discussed. From this respect, I would define civil law's approach as "considerate functionalism." We will now explore this idea.

Jewish law influences Israeli civil law. This is not an innovative statement. We see this in many aspects related to family law, and the regulation of assisted procreation is no different. In core marriage and divorce matters, religious law is the binding law in Israel.<sup>24</sup> In other matters the law is civil in its basis, but the legislation takes into account the position of religious law, to whatever extent. For example, outside of family law, Israeli law defines death as brain death (section 2 of the Brain-Respiratory Death Law, 5768–2008) by which it permits organ donation. The law was legislated after consultation with and with the agreement of several Jewish law authorities (although others dispute it) so that religious persons would be able to participate in the highly important project of organ donation.<sup>25</sup> The brain death case is a good example of how Israeli civil legal concepts are defined with a careful consideration of religious views, and how religious views influence civil concepts. To me, it is a reflection of Israel's character as a Jewish and democratic state. The exact balance between these two aspects is, however, in many cases, debated and sometimes in need of modification.<sup>26</sup>

Similarly, in our case, Jewish law is often viewed as taking a substantive approach regarding motherhood (I will challenge this view later). Within this approach, however, the decisors debate whether Jewish law follows the genetic connections, in which case the child's mother is the egg owner, or a biological-physical connection, and, consequently, the child's mother will be the carrying mother. We find various approaches on this matter: some decisors argue in favor of the first, some in favor of the second, and others (often due to their doubt regarding the identity of the mother) — argue for both, or for none.<sup>27</sup> But in any event, the arguments

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24. See Rabbinical Courts Jurisdiction Law (Marriage and Divorce), 5713–1953, sections 1-2.

25. On the definition of the moment of death and the debate around brain death, see Avraham Steinberg & Fred Rosner, *ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS*, 695–711 (2003).

26. This is so as regards marriage and divorce. See AVISHALOM WESTREICH & PINHAS SHIFMAN, *A CIVIL LEGAL FRAMEWORK FOR MARRIAGE & DIVORCE IN ISRAEL* (Ruth Gavison, ed., Kfir Levy, trans., 2013).

27. For a broad discussion and references, see HALPERIN, *supra* note 16.

are usually substantive, and if one adopts a particular view, it will be applied to all relevant legal areas and all cases. In this respect, although there is no final decision, we can identify the dominant trend among many, if not the majority, of Jewish law decisors. Rabbi Dr. Mordechai Halperin claims that in the past, most decisors have defined the carrying mother as the child's mother, while today, many of them rule in favor of the genetic one.<sup>28</sup> This is reflected, for example, in the unequivocal decision of the former Israeli Chief Rabbi, Shlomo Amar, that the genetic mother is considered the child's mother for all halakhic matters. Rabi Amar based this ruling, *inter alia*, on a decision by Rabbi Ovadiah Yosef (died 2013), who was considered the most prominent and leading Jewish law decisor at the turn of the twenty-first century.<sup>29</sup> Others, however, are still in doubt,<sup>30</sup> but in any event, all in principle adopt a substantive approach towards parenthood concepts.

Israeli civil law takes into consideration the view of Jewish law in defining motherhood. It does so by subordinating its contingent, functional approach to the view of Jewish law in relevant matters.<sup>31</sup> Thus, the law states explicitly that regarding marriage and divorce (issues that in Israel are subject to religious law),<sup>32</sup> its parenthood definitions will not affect the religious laws.<sup>33</sup> Thus, for example, in surrogacy, after a parenthood decree is issued, the genetic mother is defined as the child's mother for all legal and social purposes (including the child being her heir when the time comes), but for marriage and divorce, the surrogate mother may be defined as the child's mother (thus, this child would be prohibited from marrying

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28. Halperin, *supra* note 16, at 294–95.

29. See a response by Rabbi Shlomo Amar to Prof. Richard V. Grazi (the Director of the Division of Reproductive Endocrinology at Maimonides Medical Center, Brooklyn, N.Y.), *Laws of Pedigree When the Mother Is a Non-Jew*, 87–88 ASSIA 100, 100–102 (2010) (Heb.). An earlier response of Rabbi Amar is discussed *infra*, text to notes 41–43.

30. This was argued even regarding the view of Rabbi Ovadiah Yosef (in contrast with Rabbi Amar's claim that he decided in favor of the genetic mother); see Rabbi Aryeh Katz, *The Parentage of the Embryo from Egg Donation*, 99–100 ASSIA 101, 101–06 (2015) (Heb.) (Isr.), according to whom Rabbi Yosef somewhat shifted to preferring the genetic mother, but did not make a final decision. It should be noted that Rabbi Prof. David Bleich claims that Halperin's description of the present trend among the majority of halakhic decisors is not accurate. Bleich's own view is that either the carrying mother is the sole mother or both the carrying and the genetic ones are the child's mothers (private conversation following the presentation of the first draft of this paper at the 8th International Academy for the Study of the Jurisprudence of the Family Symposium on "The Jurisprudence of Family Relations," Ono Academic College, Israel, June 9, 2015; see also *infra* note 52).

31. Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 97–98; Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT'L L.J. 313, 333–336 (1998–1999) (arguing for unintended patriarchal consequences of the Jewish law considerations).

32. See *supra* note 24.

33. See Embryo Carrying Agreements Law, section 12(b); Egg Donation Law, section 42(b). Both laws state that they will not affect the religious laws of marriage and divorce. The Egg Donation Law also adds that it will not affect the authority of the religious courts (in matters of marriage and divorce): "This law shall not harm the instructions of the laws governing marriage and divorce, or the authority of the religious courts."

the surrogate mother's direct relatives), if that would be the decision of the relevant rabbinical court. The opposite case is also possible: In an egg donation case, the child will be legally and socially considered as the couple's child for any parents-child rights and duties. But when the child wishes to get married, the law (which in this case is subject to Jewish law) may view him or her as the egg donor's child, if that would be the dominant view among Jewish law decisors (as some claim that it is today). As is clear from these examples, this is not only a matter of definition; there are several practical consequences of halakhically defining the genetic mother as the mother, mainly, prohibiting the child from marrying his or her mother's direct relatives (although in this case, due to genetic ties, such a marriage would not be recommended, on both societal and medical grounds).

It should be noted that the interaction between civil law and Jewish law regarding artificial procreation is not limited to conceptual definitions and their halakhic implications. Another aspect of the influence of Jewish law on Israeli civil law are the restrictions due to religious considerations that are imposed on couples and singles who desire assisted procreation. These restrictions limit the available options for assisted procreation. This is most clearly evident in the preference, and sometimes demand, that a surrogate mother or an egg donor will belong to the same religion as that of the intended parents.<sup>34</sup> In this respect I would even say that Israeli civil law is not only influenced by, but also deferential (perhaps out of fear, if we were to use more critical terminology), to Jewish law.

In my opinion, however, the considerate functionalism of civil law regarding parenthood concepts should be encouraged in order to reconcile these two legal systems. The practical limitations, however, should be discouraged. Those are matters of personal choice (mainly, whether to involve a partner from another religion in the process of procreation), and, therefore, should be left to the sole discretion of the parties.

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34. See Embryo Carrying Agreements Law, section 2(5); Egg Donation Law, section 13(e)(3)(a) and 13(e)(4). In surrogacy, the demand that the surrogate mother and the intended parents will belong to the same religion is stricter than in egg donation. This might be a reflection of the inclination towards viewing the carrying mother (i.e., the surrogate mother) as the child's mother (see *supra* notes 21-22), therefore the law ensures that the child given to his or her parents will belong to their religion. Since, however, this is a matter of religious law, if Jewish law were to change and define the genetic mother as the child's mother (as seems to be the case, see above), this would need to be amended. If Jewish law follows the genetic ties, surrogacy would not create any problem (the intended, genetic, parents and their child will belong to the same religion). The problem now would arise in egg donation, since the child would be considered as belonging to his or her genetic mother's religion, which is different from his or her intended, carrying mother's religion. Anyway, the views among Jewish law decisors vary, and in practice many will insist upon the child's conversion, if either the genetic mother or the carrying mother are not Jewish, in order to circumvent any possible halakhic problem or dispute relating to the child's religious identity. See Katz, *supra* note 30.

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Jewish law does not solely influence civil law, rather, there is in fact a mutual interaction, which also works in the other direction, and influences Jewish law's parenthood concepts. This influence is not merely a conceptual change of parenthood definitions, it, rather, is a deeper paradigmatic shift. Now, to explore this argument.

#### IV. WHAT INFLUENCES JEWISH LAW?

What about Jewish law itself? Is it in any way influenced by or changed according to its social and legal contexts? In order to answer this question, we must distinguish between the two: between societal influence and legal interaction. The first will be mainly in the practical plane, that is, what is permitted or prohibited by Jewish law. The second will be in the conceptual plane, that is, in what way, if at all, civil law shapes the concepts of parenthood in Jewish law. We have seen above the opposite interaction, namely, how civil law takes into account the position of religious law when it comes to defining motherhood in surrogacy and egg donation. But does the same hold true in the other direction, that is, does Jewish law define parenthood concepts with some consideration of civil law?

As I will show in the following discussion, there are fascinating interactions between Jewish law and society, and between Jewish law and civil law. In the former — Jewish law and society — the religious law responds to societal pressure, which makes the use of ART more and more legitimate. In the latter — Jewish law and civil law — we see the initial signs of a far-reaching interaction, which goes to the very heart of the concepts of parenthood. We will now explore these two directions.

##### A. SOCIETAL PRESSURE AND JEWISH LAW

At the turn of the twentieth century the very moderate ART procedure of artificial insemination encountered resistance by some (but not all) Jewish law decisors (for example, Rabbi Malkiel Tenenbaum, died 1910). Some did approve, but with limitations (for example, Rabbi Shalom M. Shvadron, died 1911). All were concerned by various problems, including legal and metalegal issues, and questions of halakhic policy.<sup>35</sup>

These hesitations continue to the present, but it seems that on the issue of artificial procreation, practice triumphs over theory (certainly regarding artificial insemination, but also regarding more developed technologies, such as IVF, and even regarding surrogacy and egg donation). Assisted procreation is very common today, even among religious and ultra-Orthodox communities.<sup>36</sup> As a result of this pressure, as we will show,

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35. *See, supra* text to notes 9-15.

36. This is probably due to the religious, cultural, and historical causes discussed above. *See, supra* text accompanying notes 10-11.

most Jewish law decisors approve ART in practice, and even its strongest opponents may *de facto* accept ART, at least by not explicitly rejecting it.

For example, Rabbi Moshe Sternbuch, an ultra-Orthodox leader and the head of a well-known (private) rabbinical court, the *Edah Haredit* court, was throughout the years a strict opponent of ART. Nevertheless, regarding artificial insemination or IVF he admits:

I could discuss this further but [...] here I shall stop writing and the chooser will choose [...] since I and those who are like me are not eligible to decide. And I think that if someone is lenient [and permits ART] he has what to base [his leniency] on, and we should not protest against him.<sup>37</sup>

Rabbi Sternbuch prefers a silent acceptance of IVF and artificial insemination, although he himself (as is clear from this passage) opposes these techniques. He does so by not answering those who ask him whether the act is permitted, and thereby hints that if the questioners follow the permissive opinions, he would not object.

In my opinion, the fact that IVF and artificial insemination have become common even among religious communities led R. Sternbuch to a pragmatic decision, which silently approves of the practice. In several responses, he indicates the problematic aspects of ART (including artificial insemination),<sup>38</sup> but nevertheless accepts (and in my reading, possibly also encourages) those who follow the lenient views. Social practice, however, does not always win out in Sternbuch's writings. When it crosses some borders (for example, in surrogacy, or when artificial insemination involves the participation of both Jews and non-Jews, due to the Orthodox sensitivity regarding interfaith family ties), he objects, even in the face of societal pressure, despite the fact that "it has become common even within the ultra-Orthodox communities."<sup>39</sup>

The vast majority of the prominent Jewish law decisors, however, do accept the wider ART practices, even in those cases that seem to cross more basic halakhic or metahalakhic borders (such as involving a married woman as a surrogate mother while using the sperm of the intended father, who is not her husband).<sup>40</sup> They would not *a priori* recommend this, but when they recognize the specific need of the couple, they would approve various ART procedures, even the more complex and problematic (from a Jewish law perspective) among them.

For example, in 2006 Rabbi Shlomo Amar, the former Israeli Chief Rabbi, permitted a couple childless after thirteen years of marriage to enter

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37. Rabbi MOSHE STERNBUCH, TESHUVOT VE-HANHAGOT 4:285 (1992).

38. *E.g.*, *id.* 2:689.

39. *Id.* 5:318, 319.

40. *See, supra* text accompanying notes 12-13, regarding the fear of declaring the child a *mamzer*.

into a surrogacy agreement with a married surrogate mother.<sup>41</sup> This decision is highly innovative, first, because of the explicit permission to use surrogacy, and second, more importantly, because of overcoming the traditional fear of involving a third-party married wife in other family relationships, which might lead to declaring the child a *mamzer* according to Jewish law.<sup>42</sup> Rabbi Amar, after consultation with Rabbi Ovadiah Yosef, ruled that the genetic mother is considered — without doubt — the child's mother. Therefore, a married surrogate mother can participate in the process. He emphasized, however, that it is permitted only when other options were not possible, as in this specific case. In recent years, however, probably because of at least some influence of that decision, the use of a married surrogate mother has become more common.<sup>43</sup> The somewhat limiting scope of the remark by Rabbi Amar provides us with an interesting insight regarding law and society: It reveals how personal needs and societal pressure lead Jewish law scholars to make lenient decisions regarding ART, and how these decisions affect society by making the practice more widespread and accepted by Jewish law.

Leniency in Rabbi Amar's case ensues from a clear decision on the conceptual debate over motherhood, that is, that the genetic mother is the child's mother (and the only mother of the child). The conjunction between the two aspects (the practical and the conceptual) is not coincidental. Although a married surrogate mother could possibly be approved even if the child would be considered hers, it is much simpler to permit this if the surrogate mother is not considered the child's mother. In the first option, some may fear that the child (born to a married woman from a person other than her husband) is a *mamzer*. Although this fear will probably be rejected, it will still lead to some hesitations regarding approval of surrogacy.<sup>44</sup> In the second option, on the other hand, no such claim could be raised. Therefore, I assume that Rabbi Amar's conceptual decision was

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41. The case and the Chief Rabbi's approval aroused great interest. It was widely reported in the media (*see e.g.*, Haim Levinson, *Chief Rabbi: Married Woman Can Be Surrogate* (June 11, 2006, 2:49 PM), <http://www.ynetnews.com/articles/0,7340,L-3261249,00.html>), and discussed in the Knesset Labor, Welfare and Health Committee (Aug. 18, 2006, <http://www.knesset.gov.il/protocols/data/rf/avoda/2006-08-15-01.rtf>) (Heb.). Following the discussion, the committee called upon the Ministry of Health Board for Approval of Surrogacy Agreements to permit (in exceptional cases) surrogacy agreements with a married surrogate mother.

42. *See supra* text accompanying notes 12-13.

43. This is attested by one of the committee members, Rabbi Yuval Cherlow. *See* Rabbi Elyashiv Knohl, *Halakhic Positions on Surrogacy* (December 2016) <http://www.tzohar.org.il/?p=7352> (Heb.).

44. The fear will probably be rejected, since according to many halakhic decisors, one is declared a *mamzer* only when the child was born as a result of a forbidden sexual relationship. This is not the case in surrogacy, since the child was born without the commission of adultery (i.e., without a sexual relationship between the surrogate mother and the father). *See* RESPONSA MAHARSHAM, 3:268 (1962); Rabbi MOSHE FEINSTEIN, IGGROT MOSHE, *Even Ha-'ezer* 1:10 (1959).

important in order to facilitate permitting surrogacy with the involvement of a married woman.

This subsection began with the practical influence of societal pressure on Jewish law decisors, and it ended with a more far-reaching conclusion: That societal pressure also influences the conceptual approach of Jewish law decisors on the definition of parenthood. The process of conceptual change in Jewish law, however, is much more powerful. This change results from societal pressure, coupled with an internal Jewish law discussion, and reciprocally influences the practical plane, by widening the possible options of artificial procreation. We will now turn to its analysis.

#### B. CHANGING CONCEPTUAL PARADIGMS

We saw above the interaction between Jewish law and civil law in one direction: Jewish law's influence on Israeli civil law. Accordingly, some civil elements in the Israeli legal system are based on Jewish law principles; some legal concepts are defined with consideration of, or in accordance with, Jewish law; and in general, civil law tries to avoid decisions that contradict Jewish law.<sup>45</sup> But is this a mutual interaction, that is, can we find influence in the opposite direction, that of civil law on Jewish law? In what follows, I will seek to reveal a unique conceptual interaction between the two systems: not only a (local) conceptual change, but also what may be seen as the initial signs of a deep paradigmatic change.

In order to support my argument, we will return to the definition of motherhood. Israeli civil law, as argued above, adopts a functional approach regarding motherhood. Therefore, it does not make any clear decision about the identity of the child's mother, whether the genetic mother or the gestational one. Rather, the civil law rulings are flexible and dependent on the circumstances.<sup>46</sup> Jewish law, on the other hand, seeks a substantive definition of motherhood. Therefore, Jewish law decisors attempt to make a conceptual determination of parenthood between the two possible mothers: the genetic one and the carrying one, as well as between them and two other complex options: both or none. About three decades ago, most authorities supported the definition of the carrying mother as the halakhic mother. But — as Rabbi Dr. Mordechai Halperin argues — this trend has changed, and today many, if not most, argue in favor of the genetic mother.<sup>47</sup> In Amar's case discussed above, I pointed out the societal need that influenced the move towards the genetic mother. I assume, however, that there is a more general reason that also influences

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45. See discussion *supra* Section III, note 45.

46. See *supra* text accompanying notes 18-23. As argued above, there is some inclination to viewing the carrying mother as the child's mother, but all options are open, and the circumstances (mainly the agreement between the parties) are a crucial element in deciding who are the parents.

47. See *supra* text accompanying notes 27-30.



this trend. The move towards the genetic mother might be a result of the development of scientific genetic knowledge and its influence on human nature, which became established and widespread knowledge among the general public, as well. Genetics, thus, could not be ignored, and its legal weight from the point of view of halakhic decisors became more and more significant.

Having made this observation, I admit that no decisive ruling has been issued. Even those who came to lean toward the genetic mother, including Rabbis Ovadiah Yosef and Yosef S. Elyashiv,<sup>48</sup> did not make a decisive conclusion (at least according to some of their close disciples).<sup>49</sup> Not deciding is important here. It opens the gates for accepting various definitions of motherhood within Jewish law itself, and from here — the way is open for a functional definition of motherhood, at least in practice, despite the usual quest for substantive definitions.

The shift towards a functional approach can be found, in my opinion, in four gradual stages:<sup>50</sup>

Some did make a decisive ruling, without any flexibility. Rabbi Shlomo Amar, for example, views the genetic mother as the unquestionable child's mother for all halakhic matters.<sup>51</sup> Nevertheless, many still have doubts, and the very existence of doubt is meaningful: it leads to recognizing, at least in principle, the possibility of several mothers of one child.<sup>52</sup> Already in the early discussions on surrogacy, the debate among halakhic decisors led some to claim that both should be treated as the child's mothers, at least as a matter of doubt.<sup>53</sup>

Rabbi Yaakov Ariel makes the shift from doubt to double motherhood in a quite poetic way:

It is written in the book *Nishmat Avraham* [...] in the name of

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48. Both are deemed the most prominent halakhic decisors of the twenty-first century. Until their death a few years ago, they were halakhic and political leaders of large religious communities: R. Yosef of the Sephardic Orthodox and traditional community, and R. Elyashiv, of ultra-Orthodox Ashkenazic Jewry.

49. Regarding Rabbi Yosef, see *supra* note 30. On Rabbi Elyashiv's opinion, see HALPERIN, *supra* note 16 at 294 note 12.

50. These stages are not chronological. At least the first two coexist. Yet, distinguishing between them clarifies the move to a functional approach. In this respect, at least part of it can be defined as a horizontal process rather than a vertical one.

51. See, *supra* text accompanying notes 29, 41–43.

52. Rabbi Prof. David Bleich already raised this option in 1977; see J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 108 (Vol. 1, 1977). In 1998, however, he preferred the surrogate mother, and even defined her as “a natural mother, both biologically and psychologically.” See J. David Bleich, *Survey of Recent Halakhic Periodical Literature*, 32 TRADITION 146, 162–63 (1998), and similarly in J. DAVID BLEICH, BINTIVOT HA-HALAKHAH 48 (2000) (HEB.). Later, however, he set forth a more complex position. In a private conversation (*supra* note 30) Rabbi Bleich explained that, in his opinion, the carrying mother is at least *a mother*. She may be the only mother (as in the classic view), but it is possible that the genetic mother is *also* a mother, and both are defined as the child's mothers.

53. See HALPERIN, *supra* note 16 at 295 regarding the view of Rabbi S. Z. Auerbach.

Rabbi. S. Z. Auerbach, of blessed memory, that the status of a child born to a surrogate mother is doubtful, and that we are to apply to him the stringencies that apply to both mothers, his genetic mother and his birth mother. It seems that also in terms of natural feelings — both have maternal feelings toward the fetus. The halakhah, that attributes the fetus to both, also corresponds to their natural feelings.<sup>54</sup>

Ariel opens his statement with a doubt regarding the child's mother, but suddenly, based on the two existing views (although they are originally alternative views) and on his assumption of the natural feelings of the women involved in the process, he defines them both as mothers.

Referring to both women as the child's mothers is the first conceptual stage. It undermines the traditional substantive definition of motherhood that has one single mother (in addition to one single father). It also opens the way for the next conceptual stage — "motherhood forum shopping."

The very existence of various views makes the definition of motherhood quite flexible. The plurality of opinions enables a kind of forum shopping between the main decisors, in which all the definitions might possibly be valid. Although some would claim that the existence of doubt leads to stringency (at least in matters which are considered more serious, like issues of marriage and divorce), this is not always so. In exceptional cases, it might be possible to rule leniently on the basis of the case's extenuating circumstances, and to follow the view according to which the required act is permitted. For example, if a couple desires a child and must use a surrogate mother, some say that they may do so in practice, despite the objecting Jewish law views and despite the views according to which the child will not be considered the genetic mother's child.<sup>55</sup> Thus, the second conceptual stage of the shift from substantive motherhood to a functional one is the legitimization of a kind of forum shopping in the status of the mothers. This, in turn, leads to a deeper functionalism regarding motherhood, as we will now explore.

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54. Rabbi Yaacov Ariel, *Artificial Procreation and Surrogacy*, 16 *TECHUMIN* 171, 178 (1996) (HEB.) (Isr.).

55. For example, Rabbi Zalman Nehemya Goldberg (born 1932), a former judge in the Israeli High Rabbinical Court and a well-known halakhic decisor, rules that the surrogate mother is the child's mother, see Rabbi Zalman N. Goldberg, *Attribution of Motherhood in the Implanting of a Fetus in the Womb of Another Woman*, 5 *TECHUMIN* 248 (1984) (Heb.) (Isr.); Rabbi Zalman N. Goldberg, *Maternity in Fetal Implant*, 1 *CROSSROADS* 71 (1987). He nevertheless acknowledges that there is no agreement among halakhic decisors in this matter, and therefore, as a matter of doubt, both the genetic and carrying mothers should be treated as the child's mothers for matters of marriage and divorce; see Zalman N. Goldberg, *On Egg Donation, Surrogacy, Freezing the Sperm of a Single Man, and Extracting Sperm from a Corpse: Response to the Committee for the Approval of Agreements for Carrying Fetuses by Rabbi Zalman Nehemiah Goldberg*, 65–66 *ASSIA* 45 (1999) (Heb.) (Isr.). Yet, in practice, he permits a childless couple to use surrogacy (even though in his opinion the child would not be considered as the genetic mother's child); see *id.*

The third (conceptual) stage is the use of different criteria for defining the mother of a child in different legal realms, while recognizing each of these criteria as legitimate and valid. Some decisors claim that the two mothers can coexist, depending on which Jewish law question is under discussion. Thus, for instance, for matters of marriage and divorce, the mother may be the genetic mother; for matters of daily life (which are governed by certain religious commandments, such as “Honor your father and your mother” — Exodus 20:12), the mother may be the carrying mother; and for matters of religious identity, the mother might be neither (depending on the specific case).<sup>56</sup> This stage is important, since it enables the coexistence of two mothers: one mother satisfies one group of criteria for one halakhic aspect; and the other, a second group of criteria for a second legal aspect. Clearly, this makes the definition of motherhood much more flexible. It theoretically (or ideally) assumes substantive motherhood, but the fact that motherhood varies from one realm to another, even for the same child, makes it quite contingent, and close to what may be defined as a functional approach.<sup>57</sup>

What is missing for a full functional approach is motherhood being dependent not only on the *issue* discussed (i.e., on the halakhic realm — a question that still has ties to substantive motherhood) but also on its *circumstances*. The circumstances in this context may include not only realistic, social circumstances, but also the position of civil law (which, from a halakhic point of view, does not *a priori* affect the substantive halakhic arena).

The fourth stage, in which the definition of motherhood becomes dependent on civil law and on social circumstances, hence represents a (full) functional approach. By this stage, the incremental process of a paradigmatic shift of the halakhic discourse from a substantive understanding of motherhood to a functional one is completed. This stage is quite revolutionary from a Jewish law perspective, and is represented less in explicit fashion and more in subtext. Its appearance is not yet completed; we rather have what can be defined as the *initial signs* for that change. My expectations, however, due to the direction in which the halakhic discourse is developing, as described above, is that this approach will have a greater presence.

Is this approach really to be found? In a fascinating verdict, a regional rabbinical court seems to have made this step. The court, for certain purposes, linked the halakhic definition of motherhood with the civil

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56. See Rabbi Luz's opinion, *infra* note 60. Rabbi Yechiel M. Stern adopts a similar approach, that is, that motherhood varies from one legal issue to another, but contrary to Rabbi Luz, he prefers to define the genetic mother as a mother for matters of “Honor your father and your mother”; see Yechiel M. Stern, *Halakhic Aspect*, FIRST ANNUAL CONFERENCE FOR RABBIS AND PHYSICIANS ON GYNECOLOGY, FERTILITY, & FETUSES ACCORDING TO HALAKHAH 138, 140 (1992) (Heb.).

57. See definition of functional approach, *supra* Section I, note 57.

definitions. This occurred in the following case: according to Jewish law, if a widow has a baby, she cannot remarry until the baby is 24 months old. The object of this law is to protect the baby from being abandoned or not being fed if his or her mother will remarry.<sup>58</sup> Without getting into a detailed discussion of this law, its assumptions, and the relevancy of its underlying reason, it is still binding today, although not on a high level in the normative scale of Jewish law (that is, its authority is only that of a rabbinical law rather than Biblical).<sup>59</sup> Nevertheless, the fact that we speak here about a lower normative level is fertile ground for the development of such a significant change in the attitude towards motherhood.

This ruling was issued in a case brought to the Beer-Sheba regional rabbinical court. The judge (Rabbi Zion Luz) permitted a divorced surrogate mother to remarry, even without the 24-month waiting period from the child's birth. He based his decision on several arguments, including the following two: First, that the definition of motherhood varies from case to case, and is in fact contingent on the specific issue. It is possible that for one issue the genetic mother will be deemed the mother, and at the same time, for another issue, the surrogate mother will be so considered. Therefore, for the purpose of this specific law, the surrogate mother is not considered as the mother at all, and that requirement would not be applied to her (the third conceptual level).<sup>60</sup> Second, since according to Israeli civil law, the intended parents are the baby's parents for any civil purposes (on the basis of the surrogacy agreement between them and the surrogate mother) and after a legal parenthood decree has been issued it cannot be changed, the 24-month waiting period law is not relevant here.<sup>61</sup>

In the first argument, Rabbi Luz states that there are different criteria for defining the mother in different legal realms, thereby reflecting the third stage of developing the Halakhic functional approach regarding motherhood. The second argument, according to which the decision is influenced by the civil law parenthood decree, is challenging. Is it an independent argument (i.e., that since the law sees the intended mother as the mother, the 24-month waiting period for the surrogate mother is then irrelevant), or is it connected to the first one (i.e., that civil law also influences the halakhic definition of mother, and therefore the waiting period is immaterial)? In my opinion, the second option sounds more plausible (although I admit that the first one is also possible): halakhic

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58. See Babylonian Talmud, Yevamot 42a.

59. Therefore, there is room for leniency. See e.g., File No. 1048925/1 Rabbinical Court (Ashkelon), *Plonit*, (Dec. 3, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.), in which the rabbinical court permitted a woman whose husband died by a terror attack to remarry, even though she had a very young child.

60. See File No. 1014227/2 Rabbinical Court (Beer Sheva), *Ploni v. Plonit*, (May 25, 2015), Nevo Legal database (by subscription, in Hebrew) (Isr.).

61. *Id.* The relevant law is: Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756–1996, § 10–12, 2264 SEFER HA-HUKIM [SH] [BOOK OF LAWS, Official Gazette] (2010) (Isr.); see, *supra* text accompanying notes 18–23.

motherhood is also influenced by civil definitions. In our case, accordingly, the surrogate mother is not the child's mother, since civil law fully recognizes the intended parents as the child's parents. In my reading, the first argument is, in fact, the theoretical basis for the second one, that is, the fact that the 24-month waiting period is irrelevant for the surrogate mother (due to the surrogacy civil agreement) leads to defining her as *not a mother for this purpose*, theoretically justified by the plurality of motherhood definitions for different legal realms.

If my reading is correct, we have here a fascinating progression of the concept of functional motherhood. We already know that motherhood changes from case to case (either in a forum shopping model or by the distinction between different legal realms). Here, however, this functionality is taken a step further: for the purpose of the 24-month requirement, the concept of motherhood according to Jewish law is subject to civil definitions, which result from the agreement between the parties and its regulation by civil law. Here, since civil law defines the genetic mother as the only mother, Jewish law follows it and does not define the surrogate mother as the child's mother for this function. It therefore releases the surrogate mother from her obligation to wait before her remarriage.

## V. CONCLUSIONS

ART creates a fascinating interaction between the normative and societal spheres in which it exists. In this paper, I analyzed the dynamics of the Jewish law civil law society triangle.

As we have seen, there is a mutual interaction between the triangle's parts. Jewish law influences civil law, in the cases discussed here, by limiting Israeli law's functional approach and subjecting it in some aspects to religious law. Society influences Jewish law, by forcing its decision makers to find legal justifications for common practices. Civil law, too, influences Jewish law by shaping its legal concepts in accordance with and as a result of civil definitions.

On the conceptual level, the paper revealed a fascinating paradigmatic change within Jewish law: From a formal-substantive approach to motherhood to what I define as a functionalist approach (that is, functionality of the motherhood concept; a slightly broader sense than the usual meaning of functional motherhood, which focuses on practical functioning as parents, or mother in our context). The conceptual change is obviously connected to the practical collaboration between the triangle's parts: it enables greater flexibility in Jewish law's response to the practical needs of the society as regards the question of motherhood.

The conceptual paradigmatic change is reflected in Jewish law discourse in four gradual stages. Three of these levels are quite explicitly documented. The fourth, which makes motherhood contingent for certain

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purposes on the circumstances, the intent of the parties, and civil definitions, exists, but is still in its early stages.

The issue discussed here is an excellent example of a collaborative model — between law, society, and religion. This test case provides a constructive model for collaboration between religion and state, together with a fascinating example for the development of religious law within a given society. As reproductive science develops in the future, we will still likely assume that cooperation will continue between all three parts of the triangle.