Looking Beyond Binary and Exclusive Parenthood: Multiple and Functional Parenthood in Jewish and Israeli Law

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Modern law still largely treats parenthood as a binary and exclusive status, reflecting a natural conception of parenthood, despite the reality in which biological parenthood is often different than intended or legally recognized parenthood and may include more than two biological parents. However, in various contexts, progress is being made to recognize non-biological, functional, and intended parenthood in light of practical changes in the way children are conceived and families are formed. Such changes, however, are met with resistance due to the strong grounding of parental rights in constitutional law.

Jewish law imbues natural, biological parenthood with religious, spiritual meaning that has various implications for Israeli law. Thus, for instance if a man is recognized as a legal father, he has support obligations that cannot be waived. Moreover, differences of opinion between Rabbinic authorities create complications and stringencies. For instance, because Rabbis do not agree on whether a gestational carrier or egg donor is the natural legal mother of a child, it is held that both must be deemed legal mothers for purposes of conversion and laws of marriage, further restraining citizens’ freedoms due to religious concerns. Israeli law is impacted by these religious stringencies resulting in a legal parenthood status that is both rigid and immutable, carrying with it many rights and obligations.

Despite such a seemingly inflexible and rigid religious perspective on parenthood, in this article I will demonstrate how Jewish law can be used to craft a system of multiple, functional parenthood appropriate for the Israeli legal system. Indeed, religious perspectives on parenthood, focused more on obligations than rights, can be used to circumvent rigid perceptions of parental rights that make recognizing more than two parents difficult. While Jewish law imbues biological parents with a sanctified status, functional parenting is about finances, caregiving, decision-making and responsibility. Regardless of who are the legal parents under religious law, these actions must be carried out for the sake of the child. These functions of parenthood can be undertaken by legal parents, kin or strangers. Jewish law embraces these guardian figures (appotropsim) treating these functional parents as equivalent to parents, recognizing their status and even placing obligations upon them. While not called “parents,” these “guardians” are recognized and supported in Jewish law, leaving space for such a recognition in Israeli law as well. Similarly, in the context of surrogate motherhood, Jewish law has already recognized the relevance and legal status of two mothers in practical impact, further clearing the way for recognizing multiple, functional parenthood.

Separating the religious, spiritual and functional aspects of parenthood is important for the sake of furthering children’s rights and interests. In an ideal world, those who are spiritually recognized as parents would also provide all children’s needed care. But, in the real world, these forces do not always align. When parents neglect their duties or underperform, looking to third-parties, kin, stepfathers or adoptive parents to provide care has even been viewed as a violation(!) of parental rights, and even of religious law in modern caselaw. Children demand that legal thinkers do better. Parenthood can still be its own spiritual legal category while simultaneously allowing other adults to obtain rights, obligations, and access to children. Dividing parenthood into its components – as opposed to building it as one spiritual category – can functionally allow other adults to be awarded status as caregivers and functional parents or guardians, whom the law can support. In practice, Israeli law has started down this path, but only in times of crisis. A clearer ex ante framework that allows and facilitates non-“natural” parents in their provision of care and support
would do much more to support children. After exploring the dichotomy between nature and function, and reviewing current Israeli legal treatment of parenthood, I will outline how Israeli law can better allow the recognition of complex multiple “parenthood” families, that function as parental webs, without violating religious understandings of the parent and parenthood.