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## Anglo-American Choice of Law and the Recognition of Foreign Same-Sex Marriage in Israel - On Religious Norms and Secular Reform

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**ANGLO-AMERICAN CHOICE OF LAW AND  
THE RECOGNITION OF FOREIGN SAME-  
SEX MARRIAGES IN ISRAEL—ON  
RELIGIOUS NORMS AND SECULAR  
REFORMS**

*Yuval Merin* \*

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## INTRODUCTION

Since the repeal of Israel's sodomy law more than two decades ago, Israeli gay men and lesbians, as well as same-sex couples and their families, have gained wide protection and recognition in various legal fields. However, while a growing number of countries are in the process of lifting the ban on same-sex marriage, there is no legal option to even consider such a reform in the state of Israel.

Unlike other Western nations, which began regarding and regulating marriage as a secular civil right as early as the eighteenth and nineteenth centuries,<sup>1</sup> Israel is the only democratic country whose laws of marriage and divorce are still governed exclusively by religious law. Notwithstanding the otherwise liberal and secular Israeli legal system, matters of marriage and divorce of the members of each of the recognized religious communities in Israel<sup>2</sup> are adjudicated by their respective religious tribunals and are subject to substantive religious laws.<sup>3</sup> For Jewish Israelis,

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1. The transition from religious law to the regulation of marriage as a secular civil right had begun in the 18th and 19th centuries with the end of the Church's monopolistic jurisdiction and the introduction of civil marriage. See Amnon Rubinstein, *The Right to Marriage*, 3 IYUNEI MISHPAT 433, 433 (1973) (Isr.).

2. Today, besides the Jewish community, there are thirteen Recognized Religious Communities in Israel: the Muslim, Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Greek Catholic-Melkite, Maronite, Syrian Orthodox, Druze (since 1962), Episcopal-Evangelical (since 1970) and Baha'i (since 1971) communities. The last two do not have their own religious tribunals. For a list of the Recognized Religious Communities, see Palestine (Amendment) Order in Council, 1939, in *THE PALESTINE GAZETTE* 459, 465 (1939) (adding the Second Schedule to the Palestine Order in Council, 1922-1947).

3. Israel inherited the exclusive application of religious laws in matters of marriage and divorce from the Ottoman Empire's *millet* (religious community) system. See Ariel Rosen-Zvi, *Family and Inheritance Law*, in *INTRODUCTION TO THE LAW OF ISRAEL* 75, 75 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995); see also Amnon Rubinstein, *Law and Religion in Israel*, 2 *ISR. L. REV.* 380, 384 (1967). Under Ottoman rule, the recognized religious communities were granted autonomy in matters of personal status. Rubinstein, *supra* note 3. This system was largely preserved by the British Mandate rule and later adopted by the Israeli legislature with certain amendments. *Id.* at 385; Rosen-Zvi, *supra* note 3. Israel's preservation of the status quo in the field of personal status is usually explained as having been intended to avoid conflict between the secular political parties and the religious ones. See Rosen-Zvi, *supra* note 3. Accordingly, Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 provides that: "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law." Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 *LSI* 139, § 2 (1952-1953) (Isr.). Regarding the application of religious law to members of other religious communities in Israel, see Palestine Order in Council, 1922, arts. 52, 54 & 64, in 2 *LAWS OF PALESTINE* 420, 432-34 (Moses Doukhan ed., 1934). Since the Ottoman rule and up to the present day, the exclusive authority to conduct marriages and noti-

the law that governs in matters of personal status is the Jewish law as interpreted by Orthodox Judaism. According to Orthodox Jewish law, same-sex relationships are “completely forbidden” and are regarded “as a sin and an abomination.”<sup>4</sup> In keeping with this view, same-sex marriage is not even considered as a forbidden category under Israeli law; it is simply nonexistent.<sup>5</sup> Moreover, since political religious parties have been part of every government in Israel and have always had a balancing power in any coalition, it is highly improbable that the Israeli legislature will be inclined to provide an arrangement for non-religious, civil marriage, even for opposite-sex couples.

Same-sex couples are not the only group of Israeli citizens and residents adversely affected by the lack of an option to marry in a civil ceremony and by the exclusive application of religious law in matters of marriage and divorce. Many opposite-sex couples are also excluded from the Israeli institution of marriage due to a long list of religious restrictions and impediments.<sup>6</sup> Although attempts to establish a comprehensive

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fy the authorities for the purpose of registration is granted to the priests of the various religious communities. See Marriage and Divorce (Registration) Ordinance, 1919, § 2, in 2 THE LAWS OF PALESTINE 903 (Robert Harry Drayton ed., 1934).

4. Rachel Sara Rosenthal, *Of Pearls and Fish: An Analysis of Jewish Legal Texts on Sexuality and Their Significance for Contemporary American Jewish Movements*, 15 COLUM. J. GENDER & L. 485, 530 (2006). “Orthodox Judaism regards the Hebrew Bible as the ultimate authority of Jewish law.” *Id.* The Bible characterizes sexual relations between men (alongside other prohibited sexual contacts, including bestiality and incest) as an “abomination” that justifies putting both men to death (Leviticus 18:22 and 20:13). See *id.* at 523; Steven Greenberg, WRESTLING WITH GOD AND MEN: HOMOSEXUALITY IN THE JEWISH TRADITION 74–85 (2004).

5. Jewish law, as interpreted by Orthodox Judaism, leaves no room for a more lenient approach towards same-sex unions, such as that of the Conservative or Reform movements. See Rosenthal, *supra* note 4, at 508–09, 530. Unlike Orthodox Judaism, the Conservative and the Reform movements, especially in the United States, have shown not only tolerance towards same-sex unions, but have also begun to allow for the celebration of same-sex commitment ceremonies. See, e.g., Laurie Goodstein, *Conservative Jews Allow Gay Rabbis and Unions*, N.Y. TIMES, Dec. 7, 2006, at A26. For an overview of the differing views on homosexuality and same-sex relationships among the various Jewish movements, see generally Rosenthal, *supra* note 4. A liberal religious approach towards same-sex unions is also exemplified by the recent amendment to the English Civil Partnership Act of 2004, which removed the express prohibition preventing same-sex civil partnership ceremonies from being held on religious premises. See *Church Gay Ceremonies Ban Lifted*, BBC NEWS (Mar. 3, 2010, 10:09 AM), [http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk\\_news/politics/8546827.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/8546827.stm). The amendment allows religious groups to let civil partnership ceremonies take place in their churches, mosques, synagogues and the like, if they choose to do so. See *id.*

6. See *infra* note 222 and accompanying text. For a detailed overview of the marriage impediments placed on opposite-sex couples by religious law in Israel, see Yuval

alternative system for Israelis who cannot or do not wish to undergo a religious marriage have largely been unsuccessful, opposite-sex couples ineligible for religious marriage may benefit, in the future, from a civil partnership registry, which would accord those couples most (but not all) of the rights and responsibilities associated with marriage.<sup>7</sup> This partial solution, however, would not apply to Israeli same-sex couples, who would be obliged to continue traveling outside of Israel in order to realize their basic right to marriage. Moreover, since marriage recognition is one of the most undeveloped fields of Israeli private international law, and since Israel lacks a statutory choice of law rule regarding the validity of the foreign marriages of its residents and nationals, it is unclear whether those foreign marriages would be recognized under the Israeli conflict of laws.

The Israeli Rabbinical courts interpret Jewish law as universally applicable and refuse to apply principles of private international law.<sup>8</sup> Other religious tribunals hold the same view.<sup>9</sup> Thus, the religious tribunals would flatly reject recognition of foreign civil marriages of couples who lack capacity under their respective religious law. However, the recognition of a foreign marriage may also arise—as an incidental question—in the civil family courts, which have concurrent jurisdiction over some of the incidents of marriage, such as maintenance obligations, and exclusive jurisdiction in other fields of family law, such as succession. The Israeli civil courts have always regarded the principles of private international law as having precedence over all domestic legislation, including the laws of marriage and divorce.<sup>10</sup> Therefore, unlike the religious tribunals,

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Merin, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. INT'L & COMP. L. REV. 79, 135–36 (2005) [hereinafter Merin, *The Right To Family Life*].

7. On March 15, 2010, the Israeli legislature passed a limited civil union bill, reserved only for Israeli opposite-sex couples “with no officially defined religion.” See Rebecca Anna Stoil, *Knesset Passes Civil Union Bill*, JERUSALEM POST (Mar. 16, 2010), <http://www.jpost.com/Home/Article.aspx?id=171084>. The civil union law may be expanded in the future to include other groups of Israeli opposite-sex couples who are unable to marry under religious law. See Michael Toiba & Dan Izenberg, *Civil Unions Law to be Implemented Next Week*, JERUSALEM POST (Nov. 4, 2010, 3:24 AM), <http://www.jpost.com/Israel/Article.aspx?id=193934>.

8. See CA 191/51 Skornik v. Skornik 8(1) PD 141 [1954] (Isr.) (“[Religious] law knows no bounds or limits and applies to a person from his birth until his death in all matters affecting his personal status, without any reference to the place where, or the time in which, an occurrence may have taken place.”).

9. See *id.*

10. See *id.* at 179.

the civil courts may consider the recognition of a foreign same-sex marriage on its merits.

The Israeli Supreme Court, perceiving the matter as raising intricate questions of religion-state relations, has consistently refrained from deciding the validity or recognition under Israeli law of foreign civil marriages of opposite-sex couples ineligible for marriage in Israel (let alone same-sex couples).<sup>11</sup> In 2006, the Supreme Court finally accorded full recognition to foreign civil marriages of Israeli Jewish couples who were eligible for religious marriage in Israel, but decided to undergo a civil ceremony abroad.<sup>12</sup> In doing so, the Court held that such marriages were valid by virtue of the English rules of private international law, but declined to state which rules should apply in other circumstances, leaving the matter for further consideration.<sup>13</sup> Additionally, Israeli courts are not bound to apply English rules of private international law in cases of lacunae,<sup>14</sup> and since the decision was limited to couples who qualify for religious marriage, it remains to be seen whether a same-sex marriage performed outside of Israel will be fully recognized by the Israeli courts.

The Israeli Supreme Court has, however, developed two legal mechanisms that accord some of the rights associated with marriage to those couples whose foreign civil marriages are not yet recognized in Israel. The first mechanism, which was also applied to the foreign marriages of Israeli same-sex couples,<sup>15</sup> mandates the registration of the foreign civil marriage (valid in the place of celebration) in the Israeli Population Registry, notwithstanding the couple's capacity to marry in Israel according to their personal religious laws.<sup>16</sup> The second mechanism—regarded as “partial recognition” or the “marriage incidents” approach—is the recognition of various incidents of the foreign civil marriage, while avoiding the question of validity.<sup>17</sup> Both mechanisms, however, are limited and unsatisfactory solutions, as they grant the couples very few of the rights associated with marriage, leaving them uncertain of their status and of their rights and obligations vis-à-vis one another.

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11. *See infra* Part II.

12. H CJ 2232/03 A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (2) IsrLR 245 [2006].

13. *See infra* Part III.

14. In the past, Israeli courts were instructed to defer to English common law in cases of lacunae. However, since 1980, by virtue of the Foundations Law Act, the courts are permitted to draw analogies from any foreign case law. *See infra* Part III.

15. *See* H CJ 3045/05 Ben-Ari v. Director of Population Administration [2006] (2) IsrLR 283.

16. *See* H CJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225 [1963] (Isr.).

17. *See infra* Part II.B.

The question of whether marriages of Israeli same-sex couples abroad would be fully recognized raises complex legal problems insolvable under current Israeli positive law. First, since the courts have thus far declined to decide which choice of law rules should apply in cases involving couples ineligible for religious marriage, it is unclear which of the two competing systems of private international law in the field of marriage recognition apply in such circumstances: the rule of the place of celebration (*lex loci celebrationis*), which is the principal rule in the United States, or the personal law system, practiced in England and most of Continental Europe. Second, even if Israel adopts a choice of law rule that enables the recognition of a foreign same-sex marriage, it is still unclear whether or not courts would ultimately deny recognition of such marriages as contrary to public policy.

This Article purports to answer the abovementioned questions. Part II of the Article discusses the existing alternatives to the full recognition of a foreign same-sex marriage (registration and “marriage incidents”), and examines the legal and practical distinctions between those alternatives on the one hand, and full recognition on the other hand. Drawing on comparative law, the remainder of the Article discusses the likelihood of recognition of foreign same-sex marriages under Israeli law.

Part III analyzes the developments in Israeli choice of law jurisprudence regarding the recognition of marriages celebrated outside the jurisdiction. It concludes that Israeli positive law does not regulate the matter and that the lacuna should be filled by resort to comparative law. Accordingly, Part IV discusses the various systems of private international law in the field of marriage recognition and examines which of the competing choice of law rules is most appropriate—in light of the unique social and legal situation in Israel—for determining the validity of foreign marriages conducted by Israeli same-sex couples as well as opposite-sex couples ineligible for religious marriage in Israel. This Part of the Article also examines the policy objectives of the choice of law rules in the field of marriage recognition and critically contrasts the English personal law system with the American principle of *lex loci celebrationis*.

Based on the scope and application of the public policy exception in comparative law, Part V proposes several preliminary guidelines for the appropriate scope and interpretation of Israel’s external public policy in matters of personal status. For this purpose, the article delineates the underlying rationales and objectives of the various marital impediments imposed by Israeli domestic religious law. This Part also examines whether religious norms (which are exclusively applied in matters of marriage and divorce within Israel) should also be considered in the

framing of the public policy exception. The Article concludes that courts could and should fully recognize foreign marriages of Israeli same-sex couples and that recognition of those marriages is not contrary to Israeli public policy.

## II. ALTERNATIVES TO THE RECOGNITION OF FOREIGN SAME-SEX MARRIAGES

Despite the lack of full recognition and validation of certain foreign civil marriages, the Israeli Supreme Court provides two legal mechanisms in order to accord some marital benefits to those couples: registration of foreign civil marriages in the Israeli Population Registry and recognition of various incidents of the foreign marriage. Both these mechanisms, as well as their applicability to the foreign marriages of same-sex couples, are discussed below.

### A. Registration of Foreign Civil Marriages

In the 1961 case of *Funk-Schlesinger v. Minister of Interior*, a Belgian Christian woman and an Israeli Jewish man, who were ineligible for marriage in Israel due to the prohibition on interfaith marriages, married in a civil ceremony in Cyprus.<sup>18</sup> Upon their return, and on the basis of the Cypriot marriage certificate, the wife, Mrs. Funk-Schlesinger, applied to be registered as “married” in the Israeli Population Registry.<sup>19</sup> The Minister of Interior claimed that under the applicable rules of private international law the spouses were not married, and thus refused the application.<sup>20</sup> The Supreme Court mandated the registration of the Cypriot marriage in the Israeli Population Registry, notwithstanding the couple’s ineligibility to marry in Israel.<sup>21</sup> The court reasoned that the purpose of the Registry is the collection of statistical data, and that the registration of marital status is merely an administrative procedure which does not constitute even *prima facie* evidence of its validity.<sup>22</sup>

The court further reasoned that the registration official had no judicial power and that his function was limited to collecting statistical material for the purpose of maintaining the register of residents.<sup>23</sup> Therefore, when the official is requested to register a foreign marriage, he has no authority or discretion to inquire into the couple’s capacity to marry in

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18. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225 [1963] (Isr.).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 249.

23. *Id.* at 244.

Israel or into the validity of the foreign marriage under Israeli law. “[T]he question of the validity of the ceremony that took place is a multifaceted one and examining the validity of the marriage falls outside the scope of the Population Registry.”<sup>24</sup> The court concluded that once the registration official is presented with an authenticated marriage certificate, he is obliged to register the couple as married unless he questions its authenticity.<sup>25</sup> Hence, according to the rule established in *Funk-Schlesinger*, the registration official must enter any information provided by applicants into the Population Registry, unless it is manifestly incorrect (e.g., if the official is asked to register a 20 year-old man as being 5 years of age).

Courts have followed the *Funk-Schlesinger* decision consistently over the years in a variety of circumstances. Accordingly, in the 2000 case of *Brenner-Kaddish v. Minister of Interior*, a lesbian couple requested their registration in the Population Registry as the dual mothers of the biological child of one of them (born via artificial insemination), who was adopted by the other while the couple was living in California.<sup>26</sup> The registration official refused the request, arguing that the existence of two parents of the same-sex was biologically impossible, and therefore the requested registration would be manifestly incorrect.<sup>27</sup> The Supreme Court applied the *Funk-Schlesinger* rule and mandated the registration of each of the spouses as the “mother” of the child in accordance with the foreign adoption decree.<sup>28</sup> In doing so, the Court rejected the State’s argument regarding the incorrectness of the registration and implied that the State’s position was in fact a pretext for its disapproval of adoptions in the context of a same-sex family.<sup>29</sup> Even though the Court refrained from taking a position as to the validity of the foreign adoption order under Israeli law, it held that for the purpose of registration, the foreign adoption order should be presumed valid unless declared otherwise by a competent court.<sup>30</sup> Thus, in the absence of any contention with regard to the correctness of the details presented by the applicants, and since recognition of the foreign decree is not a prerequisite for its registration, the official must register the couple as requested.<sup>31</sup>

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24. *Id.* at 252.

25. *Id.*

26. HCJ 1779/99 Brenner-Kaddish v. Minister of Interior 54(2) PD 368 [2000] (Isr.).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 376–77. The State had requested a further hearing of the case arguing that unlike marriage, which is a mere administrative act, a foreign adoption order—being a

In 2006, in the case of *Ben-Ari v. Director of Population Administration*, the Israeli Supreme Court was faced, for the first time, with the question of whether the *Funk-Schlesinger* rule should also apply to the foreign marriages of Israeli same-sex couples. The case involved five same-sex couples, citizens and residents of Israel, who had undergone civil marriage ceremonies in Toronto, in accordance with Canadian law.<sup>32</sup> Upon their return to Israel, the couples applied for registration as “married” at the Population Registry.<sup>33</sup> The registration official refused the applications, stating that ““marriages of this kind are not legally recognized in the State of Israel, and therefore it is not possible to register them in the [Registry].””<sup>34</sup> The couples thus petitioned the Supreme Court, arguing that the refusal to register their marriages was unlawful.<sup>35</sup>

The petitioners argued that the *Funk-Schlesinger* precedent, which until that time had been applied only to the foreign civil marriages of opposite-sex couples, should also apply to the marriages of same-sex couples.<sup>36</sup> In response, the State argued that a distinction should be drawn between registration of a foreign marriage—withstanding its validity—that satisfies the existing, basic “legal framework” of marriage in Israel, and registration of a marriage that is inconsistent with this legal framework.<sup>37</sup> According to the State, since the legal framework of marriage in Israel relates only to a marriage between a man and a woman, and since there is no recognized legal framework of marriage between two persons of the same sex, the *Funk-Schlesinger* rule should be limited to the registration of the marriages of opposite-sex couples.<sup>38</sup>

The Supreme Court rejected the State’s arguments and ordered the registration official to enter the foreign same-sex marriages in the popula-

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judicial decision—could be registered only if it was previously recognized by a competent court. *See id.* However, since the Supreme Court has subsequently allowed for same-sex second parent adoptions *within* the State of Israel, see CA 10280/01 Yaros-Hakak v. Attorney-General 59(5) PD 64 [2005] (Isr.), the further hearing of the *Brenner-Kaddish* case became moot.

32. HCJ 3045/05 *Ben-Ari v. Director of Population Administration* (2) IsrLR 283 [2006].

33. *Id.* ¶ 1.

34. *Id.*

35. *Id.* ¶ 1–2. Since the Supreme Court had consistently refused to rule on the validity of foreign civil marriages of Israeli couples ineligible for marriage in Israel, the petitioners in *Ben-Ari* sufficed with requiring the registration of their foreign marriages and did not apply for those marriages to be given validity in Israel.

36. *Id.* ¶ 2.

37. *Id.* ¶ 3.

38. *Id.*

tion registry.<sup>39</sup> The Court held that for the limited purpose of registration, no distinction should be drawn between the foreign marriages of opposite-sex couples and those of same-sex couples:

The population registry was not intended to decide the question of the existence or absence of legal frameworks; the registration official is not competent to determine whether there is a recognized 'legal framework' or merely a 'social framework with a certain legal significance'; the register provides statistical data with regard to personal events (such as birth, death, marriage and divorce), not legal constructions that have passed the discerning scrutiny of the registration official. It is not right that the legal struggle concerning personal status should take place in the field of registration.<sup>40</sup>

The Court stressed that under *Funk-Schlesinger*, the registration of a couple as "married" in the Population Registry is merely an administrative act that has no bearing on the legal validity of the marriage in Israel, and again, that registration of the personal status does not constitute even *prima facie* evidence of its correctness.<sup>41</sup>

Since the *Ben-Ari* ruling, Israeli same-sex couples who marry abroad are routinely registered in the Population Registry. Despite the Registry's limited legal force, the Israeli authorities, in practice, rely on the registration for the purpose of granting various spousal benefits, without inquiring into the validity of the marriage in Israel.<sup>42</sup> Thus, Israeli couples who marry abroad and register as "married" upon their return—including same-sex couples—may benefit from a few of the rights that flow from the institution, such as social security, taxation, and the like. However, the registration of the foreign marriage is a partial and inadequate solution.

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39. See *id.* ¶ 23.

40. *Id.* ¶ 17.

41. See *id.* ¶ 7. Section 2 of the Population Registry Law sets out the items of information concerning Israeli residents that should be registered in the Population Registry (including family name, date of birth, etc.). See Population Registry Law, 5725–1965, 19 LSI 288 (1964–1965) (Isr.). Section 2(7) provides that the Registry should also include the personal status of the resident. *Id.* § 2(7). Section 3 provides that "The registration at the Registry, any copy or extract thereof and also any certificate that was given under this law shall constitute *prima facie* evidence of the correctness of the registration items set out in paragraphs (1) to (4) and (9) to (13) of section 2." *Id.* § 3. Note that paragraph (7) is not among those items for which registration constitutes *prima facie* evidence of correctness.

42. See Menashe Shava, *Civil Marriages Celebrated Abroad: Validity in Israel*, 9 TEL AVIV UNIVERSITY STUDIES IN LAW [TEL AVIV U. STUD. L.] 311, 321–22 (1989) [hereinafter Shava, *Civil Marriages Celebrated Abroad*].

First, given that registration does not constitute even *prima facie* evidence of a marriage's validity, the authorities may decide, at any given time, to change their policy and cease relying on the registration or make exceptions for various circumstances. Second, registration has limited practical implications in that it only entails the de facto recognition of the marriage by third parties. However, registration has no legal bearing on the other two aspects of the legal regulation of marriage: the rights and obligations between the spouses during the marriage, and the dissolution of the marriage. As far as these aspects of marriage are concerned, registration does not entail any personal status, even de facto, and thus affords no control over that status. Therefore, same-sex Israeli couples of the same religion who marry in Canada and return to Israel less than a year later cannot divorce each other either in Israel<sup>43</sup> or in Canada<sup>44</sup> nor can they change their registration from "married" in the Ministry of Interior.<sup>45</sup> Only full recognition of these marriages for the purpose of divorce could resolve the paradoxical obstacle faced by same-sex couples who wish to dissolve their foreign marriages.

Thus, although the registration of marriage bears a few practical advantages as mentioned above, there are significant differences between the administrative act of registering a personal status and the judicial act of recognizing the validity of the foreign marriage. In light of these differences, it is clear that the registration of marriages does not replace the need for judicial ruling regarding their essential validity.

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43. Same-sex couples belonging to the same recognized religion certainly cannot initiate divorce proceedings in the religious tribunals in Israel, which have exclusive jurisdiction over the matter. Nonetheless, there is no apparent reason why the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law should not apply to the annulment of same-sex marriages (where both are residents and citizens of Israel) where the couple is of different religions or without religious affiliation. The authority to dissolve a marriage of that sort rests with the Family Court, which is authorized to annul marriages in accordance with the law of the place of celebration (Sec. 5 of the same law). See Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729–1969, 23 LSI 274 § 5 (1968–1969) (Isr.); see also Talia Einhorn, *Same-Sex Family Unions in Israeli Law*, 4 UTRECHT L. REV. 222, 233–34 (2008).

44. Although foreign residents and citizens are allowed to marry in Canada, in order for a Canadian court to obtain jurisdiction over divorce proceedings, Canadian law requires a minimum of one year of residency in Canada prior to the initiation of the proceeding. See Divorce Act, R.S.C. 1985, c. 3, §3(1) (Can.).

45. Section 19(C) of the Population Registry Law provides that a change in the registration of an item shall be recorded in accordance with a "public certificate" that testifies to the change. Population Registry Law, 5725–1965, 19 LSI 288 §19(C) (1964–1965) (Isr.). The relevant "public certificate" in cases of divorce is a domestic or a foreign divorce decree. Since same-sex Israeli residents cannot obtain such a decree, see *supra* note 43, they are unable to change their registration.

The Court in *Ben-Ari* repeatedly stressed that the case involved only the question of the registration official's authority, and not the question of the validity of the marriage.<sup>46</sup> In this respect, the Court noted that when the question of "recogniz[ing] a marriage between two persons of the same sex that took place outside Israel . . . arises, it will be examined in accordance with [the] accepted rules of private international law."<sup>47</sup> Before turning to consider the applicable rules of private international law in such circumstances, however, it is useful to first examine another mechanism employed by the Supreme Court in cases concerning the legal implications of civil marriages conducted abroad—the "marriage incidents" approach. This solution constitutes a middle-ground between the mere registration of the foreign marriage and the full recognition of its validity.

#### *B. The "Marriage Incidents" Approach*

For nearly forty years, the Israeli Supreme Court compelled the Ministry of Interior to register the foreign marriages of Israeli citizens and residents, but refrained from ruling on the question of their full or partial validity. During the last decade, the Supreme Court developed an additional mechanism, the "marriage incidents" approach, which allows certain couples married in civil ceremonies abroad to obtain various rights associated with marriage.

This approach stems from the distinction between marriage as a status and the incidents of marriage.<sup>48</sup> It is employed by judicial recognition of certain rights flowing from the foreign marriage without conferring the full status of marriage.<sup>49</sup> Except for instances in which the validity of the

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46. HCJ 3045/05 *Ben-Ari v. Director of Population Administration* (2) IsrLR 283 [2006]. As the Court stated: "[T]he question before us is not whether a marriage between persons of the same sex, which took place outside Israel, is valid in Israel. . . . The question before us is whether the registration official—whose authority is prescribed in the Population Registry Law . . . —acted within the scope of his authority when he refused to register the marriage of the two men in the register." *Id.* at 286–87.

47. *Id.* ¶ 22.

48. "'Incidents of marriage' refer to each of the specific benefits, rights, or responsibilities flowing to a married couple based on their marital status," such as government benefits, property rights and the like. Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 718–19 (2004).

49. On this approach in the United States context, see *In re Estate of Shippy*, 678 P.2d 848, 850 (Wash. Ct. App. 1984). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 11, intro. note (1971) ("In law, a status can be viewed from two standpoints. It can be viewed as a relationship which continues as the parties move from state to state, or it can

marriage as such is the principal question (e.g., a suit for a declaratory judgment to directly recognize the marriage), the majority of legal proceedings concerning marriages performed outside the jurisdiction seek to obtain one of the rights deriving from marriage, such as spousal support, inheritance or division of property.<sup>50</sup> In the latter cases, the question of the marriage's validity arises only as an incidental question in determining the remedy to be granted.<sup>51</sup>

In such cases, the court may first decide the incidental question of the marriage's validity and then, upon finding a valid marriage, grant the remedy. Alternatively, it may decide whether to grant the remedy as an independent matter, without ruling on the validity of the marriage. Courts in the United States and England traditionally viewed the question of marital status as a prerequisite to a ruling on the various rights flowing from such status.<sup>52</sup> Accordingly, courts customarily ruled first and foremost on the question of the marriage's validity, and based on that ruling, rendered their decision on the remedy sought.<sup>53</sup> This approach was based on the viewpoint that the incidents of marriage are inseparable from the status itself, and thus the entire set of rights and obligations entailed in the status are dependent upon its recognition.<sup>54</sup>

However, this concept of recognition as controlling all the incidents flowing from marital status could lead to an "all-or-nothing" approach to the recognition of foreign marriages that are inconsistent with accepted views of marriage in a given forum.<sup>55</sup> For this reason, courts in the United States have begun to adopt an interim approach which allows the court to grant remedial relief.<sup>56</sup> Even when a marriage (valid under the foreign law of the country of celebration) would not be recognized under the forum's choice of law rules or due to its public policy, the court may still "recognize" the marriage as valid for the particular purpose of grant-

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be viewed from the standpoint of the incidents that arise from it."); PETER HAY, *CONFLICT OF LAWS* 123 (4th ed. 2003).

50. See Willis L. M. Reese, *Marriage in American Conflict of Laws*, 26 *INT'L & COMP. L.Q.* 952, 953 (1977).

51. For a thorough analysis of the incidental question in the conflict of laws, see generally A. E. Gottlieb, *The Incidental Question Revisited—Theory and Practice in the Conflict of Laws*, 26 *INT'L & COMP. L.Q.* 734 (1977).

52. See EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 546 (3d ed. 2000).

53. See *id.*

54. *Id.*

55. *Id.* at 567–68.

56. See LENNART PÅLSSON, *MARRIAGE IN COMPARATIVE CONFLICT OF LAWS: SUBSTANTIVE CONDITIONS* 38, 41 (1981) [hereinafter PÅLSSON, *MARRIAGE IN COMPARATIVE CONFLICT OF LAWS*].

ing a remedy.<sup>57</sup> In accordance with this approach, United States courts have granted certain rights associated with the status of marriage in many cases of polygamous and incestuous marriages, which are otherwise considered contrary to public policy.<sup>58</sup>

According to Israeli law, a recognized marriage is not a necessary precondition for granting various rights traditionally considered to derive from marital status, and unmarried Israeli couples may acquire some of those rights via cohabitation.<sup>59</sup> The rights accorded to cohabitant partners do not derive from the status of marriage, nor are they dependent upon it. Applying the same approach to foreign civil marriages, the Israeli Supreme Court has more than once treated the availability of the remedy sought as independent from the question of the marriage's general validity.

This approach was first implemented in the *Jane Doe* affair,<sup>60</sup> which concerned an opposite-sex Jewish Israeli couple who married in a civil ceremony in Paraguay, in accordance with Paraguayan laws.<sup>61</sup> The spouses were consequently registered as married in the Israeli Population Registry, and when their relationship broke down, the wife petitioned the family court for spousal support.<sup>62</sup> The family court held that Israeli law does not recognize such marriages and thus rejected the petition.<sup>63</sup>

On appeal to the Supreme Court, the wife claimed that she was entitled to spousal support since the marriage should be recognized under Israeli private international law.<sup>64</sup> In keeping with its long-standing and consistent position of refraining from deciding whether foreign civil marriages can be recognized in Israel, the Supreme Court chose not to rule on the

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57. *See id.*

58. In these matters courts consider the nature of the remedy sought and the case-specific circumstances, and typically examine whether granting the remedy would run counter to the rationale that prevents the marriage from being recognized by the forum. For instance, awarding inheritance rights in cases of incestuous marriages is not considered to contradict the aims of the prohibition on recognizing these marriages, as the prohibition is seen as intended, among other things, to prevent the couple from engaging in acts of sexual intimacy. *See id.*

59. Non-marital cohabitation has long been recognized by the Israeli legislature for various purposes (mainly in the field of social rights). *See* Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU J. PUB. L. 359, 362 (2008). Over the years, the Supreme Court has expanded the institution to include additional rights associated with marriage. *See id.* at 362–63.

60. CA 8256/99 Doe v. Doe 58(2) PD 213 [2003] (Isr.).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 221.

validity of the marriage.<sup>65</sup> Instead, the Court held that appellant's entitlement to spousal support could be based on the contractual approach employed in the field of cohabitation.<sup>66</sup> The Court held that the existence of civil contractual obligations between the parties did not depend upon recognition of their marriage in Israel.<sup>67</sup>

[T]he explicit non-recognition of the marital status [indeed] negates the civil benefits deriving from it, and which do not exist without it. That said, non-recognition of a marriage as status does not serve to negate the civil benefits which are not derived from the status or depend upon it, and which have an independent existence by virtue of the civil law.<sup>68</sup>

In implementing the contractual approach, the Court held that couples married in a civil ceremony abroad should be considered as cohabitant partners who had entered an implied contract to live together as married—a contract which includes, *inter alia*, “civil” spousal support obligations, whose duration and amount are determined according to the principle of good faith.<sup>69</sup> The Court emphasized that its ruling was limited to factually similar circumstances.<sup>70</sup> In such cases, contract law may be applied to determine the spouses' mutual obligations. The content of those obligations will be dependent upon the existence of a contract.<sup>71</sup> In the absence of a contract, the court will determine the rights and obligations of the parties according to the principle of good faith.<sup>72</sup>

The Supreme Court implemented the “marriage incidents” mechanism in a number of additional cases. For instance, in 2006 the court held that a woman who had been married in a civil ceremony in Romania was entitled to inherit half of her deceased husband's estate even absent full recognition of the validity of their foreign marriage.<sup>73</sup> Similar to the case of *Jane Doe*, the court confined its discussion to the validity of the marriage for the sole purpose of the issue of inheritance, signaling the understanding that the claim for a right deriving from a foreign marriage could be regarded as an independent question from that of the full validity of the marriage itself.<sup>74</sup> The Court held that the term “spouse,” as conceived in Inheritance Law, is not limited to those who marry according to reli-

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65. *Id.*

66. *Id.*

67. *Id.* at 224.

68. *Id.* (author's translation from the Hebrew).

69. *Id.* at 231–32.

70. *Id.*

71. *Id.*

72. *Id.*

73. CAF 9607/03 X v. Y. (2006), Takdinet Legal Database (by subscription) (Isr.).

74. *Id.* ¶ 14.

gious law, and further, foreign civil marriages that are valid in the place of celebration meet the standards set out in Inheritance Law.<sup>75</sup> As the court states: “The family unit established consequent to the civil marriage, and the interests of its members, deserve the support and protection of the legal system in general, and the laws of inheritance in particular.”<sup>76</sup>

Indeed, the application of the “marriage incidents” approach to foreign civil marriages has contributed to the legal regulation of several aspects of the mutual rights and obligations of spouses during marriage. It would appear that there is no reason to refrain from applying this solution to the foreign marriages of same-sex couples as well, thereby according them various rights associated with marriage (such as spousal support and inheritance) without recognizing the validity of their marriage for other purposes. Nevertheless, the fact-sensitive “marriage incidents” approach has engendered a lack of uniformity in the manner in which the Israeli courts resolve the disputes arising between spouses married in civil ceremonies abroad, creating a sort of internal “limping marriage” whereby the marriage may be regarded as valid for one purpose but not for another.<sup>77</sup> Furthermore, according to this approach, the spouses are required to petition the courts each and every time there is a disagreement between them, without either party having any reasonable level of certainty about their rights and obligations vis-à-vis one another. Oftentimes, the spouses are likely to discover that they are entitled to relief based on their foreign marriage in one area but not in another. Therefore, this mechanism does not provide a dependable solution to most of the problems encountered by couples who perform a civil marriage ceremony outside of Israel.

Moreover, it seems that the Supreme Court erred in choosing to refrain from ruling on the full validity of the foreign marriages in the cases discussed above and should have adopted an approach similar to that employed in the United States, where the marriage incidents solution is utilized only in cases where the marriage is found invalid according to the forum’s choice of law rules or in violation of public policy.<sup>78</sup> Israeli

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75. *Id.* ¶¶ 17–20.

76. *Id.* ¶ 19.

77. For discussion of the concept of “limping marriages,” see, e.g., Martha Bailey, *Hawaii’s Same-Sex Marriage Initiatives: Implications for Canada*, 15 CAN. J. FAM. L., no. 1, 1998, at 153, 168–69.

78. See PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56. The Israeli Supreme Court’s unwillingness to rule on the question of the validity of civil marriages between Israeli citizens and residents that are ineligible to marry in Israel was likely based on apprehension over ruling on a controversial issue that is the subject of a heated public debate, and not because these marriages are invalid under the applicable laws. In the U.S., on the other hand, the “marriage incidents” method is implemented

courts should thus first make an effort to reach a favorable resolution regarding the full validity of the foreign marriage. Only when a court fails to do so should it make a decision to permit or deny the enjoyment of a particular incident attached to marital status independently from the validity of the marriage for other purposes. Accordingly, the next Part examines the possibility of recognizing foreign civil marriages as valid under Israeli conflict of laws principles.

### III. RECOGNITION OF OPPOSITE-SEX FOREIGN CIVIL MARRIAGES UNDER ISRAELI PRIVATE INTERNATIONAL LAW

The legal solutions proposed to date—the “marriage incidents” approach and the registration of foreign civil marriages of those ineligible for marriage in Israel—are neither adequate nor satisfactory and they do not replace the need to rule on the question of full recognition of these marriages. However, the question of which choice of law rule applies to the recognition of foreign civil marriages of Israeli opposite-sex couples ineligible for marriage in Israel—not to mention same-sex couples—has yet to be answered. In the absence of original Israeli legislation or judicial precedent in the matter, some claimed that the solution could be found in Article 47 of the Palestine Order in Council over the Land of Israel of 1922, enacted during the British Mandate and later incorporated into Israeli law, where it remains in force today.<sup>79</sup> Article 47 confers jurisdiction upon the civil courts in matters of personal status in respect of “persons in Palestine” according to the “personal law” applicable to the parties.<sup>80</sup> The Supreme Court has held that the “personal law” of Israeli citizens and residents is their religious law.<sup>81</sup>

Over the years both scholars and Israeli Supreme Court justices expressed varied positions on the effect of Article 47 on the choice of law issue. The prevailing view interpreted the Article as an internal directive regarding the marriage and divorce of Israeli citizens within the borders

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only following a determination that a marriage of a certain kind (such as polygamous marriages) contradicts public policy and thus is not recognized as valid. *See id.* at 37–39.

79. *See* The Palestine Order in Council, 1922, art. 47, in 3 THE LAWS OF PALESTINE 2569, 2580 (Robert Harry Drayton ed., 1934).

80. Article 47, entitled “Jurisdiction in personal status,” states: “The Civil Courts shall further have jurisdiction . . . in matters of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any law, Ordinances or Regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable.” *Id.* However, “[s]ince 1922, no ‘law, Ordinances or Regulations’ which would provide a basis for reviewing the validity of [a civil marriage contracted abroad by Israeli citizens and residents] have been enacted in Israel.” Shava, *Civil Marriages Celebrated Abroad*, *supra* note 42, at 322.

81. CA 26/51 Kotik v. Kotik 5(1) PD 1341, 1345 [1951] (Isr.).

of Israel.<sup>82</sup> According to this view, Israel lacks a statutory choice of law rule regarding the validity of marriages of its residents and nationals contracted abroad, and the matter is thus considered a lacuna.<sup>83</sup> Others argued for the interpretation of Article 47 as a choice of law rule for marriage recognition, referring to the national law as the connecting factor.<sup>84</sup> This complex interpretive question remained unresolved for a long period of time.

Given the vague language of Article 47, it was unclear whether courts would interpret it as an internal directive or as a choice of law rule for marriage recognition. The question first arose in *Skornik v. Skornik*, where the Supreme Court considered the validity of a civil marriage between Jewish spouses who wed while residents and citizens of Poland.<sup>85</sup> Upon their immigration to Israel, both spouses lost their Polish citizenship and became stateless.<sup>86</sup> When conflict arose between them, the husband sued for the return of property, claiming that the marriage could not be recognized under Israeli law.<sup>87</sup> In response, the wife filed a defense and counter-sued her husband for spousal support, arguing that their foreign marriage was valid in Israel by virtue of the English rules of private international law which were still in effect at the time.<sup>88</sup> All three justices addressed the question of the marriage's validity as a preliminary and incidental question. The majority rejected the husband's interpretation of Article 47 as a choice of law rule and held that:

The provision in Article 47 is a provision of the municipal internal law, and does not form an exception to the rule which I have stated: that private international law takes precedence in its application over municipal internal law. The provision in Article 47 is also subject to the rules of private international law.<sup>89</sup>

Once the majority determined that Israeli law lacked a statutory choice of law rule for marriage recognition, they referred to Article 46 of the Order in Council, which directed the courts to apply English common law in the case of a lacuna.<sup>90</sup> Given that under English common law, capacity to marry was decided based on the couple's domicile at the time of the ceremony, the majority held that the foreign marriage of the *Skornik* couple

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82. See, e.g., CA 191/51 *Skornik v. Skornik* 8(1) PD 141 [1954] (Isr.).

83. See *id.*

84. See *infra* notes 95–97 and accompanying text.

85. CA 191/51 *Skornik v. Skornik* 8(1) PD 141 [1954] (Isr.).

86. *Id.* at 146.

87. *Id.*

88. *Id.*

89. *Id.* at 179.

90. *Id.*

should be recognized in Israel since it was valid in Poland.<sup>91</sup> In fact, even the dissenting justice, Justice Agranat, held that the marriage was valid, but unlike his colleagues, he based his ruling on Article 47 of the Order in Council, interpreting it as a choice of law rule for marriage recognition.<sup>92</sup> Accordingly, Justice Agranat held that the personal law that should be applied to determine the validity of marriages performed outside of Israel is the law of the couple's nationality at the time of the marriage ceremony.<sup>93</sup> Since both spouses were Polish citizens at the relevant time, and their marriage was valid according to Polish law, Justice Agranat recognized their marriage as valid in Israel.<sup>94</sup>

Relying on the dissenting opinion in the *Skornik* case, a few Israeli scholars claimed that Article 47 should be interpreted as a rule of private international law, so that the religious law of Israeli nationals would govern the formal and essential validity of their marriages.<sup>95</sup> According to these scholars, as long as Jewish religious law prescribes that a Jew can be married only in a certain manner, the provision applies to the person whether the marriage takes place within the state of Israel or beyond its borders.<sup>96</sup> This approach, although based upon the interpretation of Article 47 as a choice of law rule, is in fact a pretext for rejecting the application of private international law for the recognition of marriages performed by Israeli citizens and residents outside the jurisdiction. According to this interpretation, Israeli domestic law has universal applicability, such that the internal system of compulsory religious marriage applies also to marriages taking place abroad by Israeli residents and nationals.<sup>97</sup>

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91. *Id.* at 161.

92. *Id.* at 166.

93. *Id.*

94. *Id.* at 166–67.

95. See, e.g., Shava, *Civil Marriages Celebrated Abroad*, *supra* note 42, at 319; see also A. V. LEVONTIN, ON MARRIAGES AND DIVORCES OUT OF THE JURISDICTION 95 (1957). A similar position was expressed by Goadby: “The validity in substance of a marriage contracted by Palestinians, *whether in Palestine or abroad*, depends, it is submitted, upon the personal (religious) law of each party. . . . Thus a marriage contracted abroad though valid according to the *lex loci celebrationis* both in form and substance might be held invalid in Palestine on the ground that it was substantially unlawful by the religious law of one or both of the parties.” FREDERIC M. GOADBY, INTERNATIONAL AND INTER-RELIGIOUS PRIVATE LAW IN PALESTINE 152 (1926) (first emphasis added).

96. See LEVONTIN, *supra* note 95, at 95, 114.

97. The advantage of the position that Jewish religious law should have universal application is that it may validate religious marriages performed in countries whose laws permit only civil marriage ceremonies. This interpretation has been applied by the Israeli courts only in cases where the resort to religious law would validate the foreign marriage; however it was not implemented in cases where religious law would invalidate the foreign marriage. See CA 5016/91 Shaulian v. Shaulian 49(5) PD 387, 392 [1996] (Isr.).

This interpretive approach, which maintains that domestic law (i.e., Jewish religious law) should have extra-territorial application in all circumstances, thus denying the application of private international law, is unprecedented and was never adopted by any legal system the world over.<sup>98</sup> Indeed, the religious tribunals claim that Jewish religious law has universal, retroactive, and exclusive application, and completely reject the rules of private international law.<sup>99</sup> The Israeli civil courts, on the other hand, consider the rules of private international law to prevail over the application of religious law, and where a foreign element is involved—such as foreign nationality or place of celebration—view the rules of domestic law (including religious law) as subordinate to those of private international law.<sup>100</sup>

Still, on more than one occasion judges in Israel's lower civil courts have held that Article 47 should be interpreted as a choice of law rule so that the validity of foreign marriages of Israeli citizens were determined in accordance with the laws of their religion.<sup>101</sup> Other lower court judges, however, have applied the majority opinion in the *Skornik* case (although that case dealt with spouses who were citizens and residents of a foreign country at the time of their marriage ceremony), deferring to the English choice of law rules in order to verify the validity of marriages between spouses who were residents and citizens of Israel at the time the foreign

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98. This approach is in fact akin to the "*Lex Fori* solution," which is an alternative to private international law. According to the above solution, even where a foreign element is involved, the local law must be applied, and foreign law should never be applied. See Amos Shapira, *Comments on the Nature and Purpose of Private International Law*, 10 IYUNEI MISHPAT 275, 281–83 (1984) (Isr.) [hereinafter Shapira, *Comments*]. This approach is informed not only by the assumption of the *lex fori*'s universal application, but also by considerations of convenience and efficiency (among them the familiarity with the local law of all parties involved and the difficulty of proving the foreign law), as well as considerations of justice and reasonableness (the application of forum's public policy considerations and accepted notions of justice and reasonableness of the local society). See *id.* However it must be emphasized that no legal system in the world has adopted the *Lex Fori* solution in a systematic and comprehensive way. The actual manner in which the *Lex Fori* has been applied, in order to prevent the application of foreign law, is via the "public policy" exception.

99. See Yitzhak Englard, *The Status of Religious Law in Israeli Law*, 4 MISHPATIM L. REV. 31, 32–33 (1972) (Isr.).

100. *Id.*

101. See, e.g., CC (BS) 2400/98 Chernich v. Slotski (Jan. 14, 2001) (unpublished) (Isr.); CC (TA) 12181/01 B.B.D. v. B.M.N. (May 15, 2002) (unpublished) (Isr.); CC (TA) 713/92 Chiadri v. Chiadri (Mar. 23, 1993), Takdinet Legal Database (by subscription) (Isr.).

marriage ceremony took place.<sup>102</sup> Accordingly, for a long period of time, the controversy regarding the appropriate interpretation of Article 47 was not resolved and it remained unclear which choice of law rules should apply in cases involving the foreign marriages of Israeli citizens and residents.

Finally, in 2006, this debate came to an end in the case of *A. v. Tel-Aviv-Jaffa Regional Rabbinical Court* (“*A. v. The Rabbinical Court*”).<sup>103</sup> The case involved a petition for divorce brought by an Israeli Jewish couple, who were eligible to marry in Israel according to religious law, but decided to marry in a civil ceremony in Cyprus.<sup>104</sup> The Supreme Court was faced, yet again, with the question of the appropriate interpretation of Article 47. The Court flatly rejected the position that Article 47 should be interpreted as a choice of law rule and unequivocally adopted the position expressed by the *Skornik* majority.<sup>105</sup> Accordingly, the Court held that Article 47 is an internal directive regarding the marriage and divorce of Israeli citizens within the borders of Israel.<sup>106</sup> It thus took more than half a century for the obiter dictum of the majority Justices in *Skornik* to become a binding precedent.

The Supreme Court went on to hold, based on basic principles of private international law, that a distinction must be made between the formal validity of a marriage and the capacity of the parties to marry.<sup>107</sup> It classified the nature of the marriage ceremony—whether religious or civil—as part of the question of form, properly governed by the law of the place of celebration, the *lex loci celebrationis*.<sup>108</sup> As far as essential validity is concerned, the Court held only that foreign marriages of couples eligible to marry in Israel are recognized according to the English rules of private international law, refraining from deciding whether this rule applies to foreign marriages of couples who lack capacity under religious law.<sup>109</sup>

Given the rejection of the interpretation of Article 47 as a choice of law rule, and in light of the limited scope of the precedent set in *A. v. The Rabbinical Court*, the question of which choice of law rule applies to

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102. See, e.g., CC (Jer) 2/85 Kleidman v. Kleidman, PM 5747(b) 377 (1987) (Isr.). For an explanation of English choice of law rules in this context, see discussion *infra* Part IV.B.

103. HCJ 2232/03 *A. v. Tel-Aviv-Jaffa Regional Rabbinical Court* (2) IsrLR 245 [2006].

104. *Id.* ¶ 1.

105. *Id.* ¶ 26.

106. *Id.*

107. See *id.* ¶ 24.

108. *Id.*

109. *Id.* ¶ 26.

foreign marriages of Israeli residents and citizens prevented from marrying in Israel under religious law, including same-sex couples, became a lacuna. It is unclear whether the courts, when faced with this issue, will fill the void by resort to the English rules of private international law, or whether they will consider adopting choice of law rules practiced in other jurisdictions as well. Some of the English rules of private international law were incorporated into Israeli law in the past via Article 46, which stipulated that Israeli courts were directed to apply the English common law as the main source for filling the gaps in Israeli law.<sup>110</sup> For instance, the majority in the 1954 *Skornik* case applied Article 46 and deferred to the English rules of private international law.<sup>111</sup>

Indeed, in the past, by virtue of Article 46, courts usually filled the gap created by the absence of statutory or judge-made private international law rules in the Israeli legal system by deferring to English common law.<sup>112</sup> Nonetheless, in 1980 the legislature repealed this Article, which had been the formal channel for the absorption of English law since the initiation of Israel, through the passage of the Foundations of Law Act.<sup>113</sup> Since 1980, the Act instructs the courts to fill in lacunae by case law, analogy and “the principles of freedom, justice, equity and peace of Israel’s heritage.”<sup>114</sup> Thus, although Israeli courts are no longer *obligated* to apply English law in cases of lacunae, they are still *permitted* to draw analogies from English or, since 1980, any other foreign case law.<sup>115</sup>

The Supreme Court’s holding in *A. v. The Rabbinical Court*, recognizing the marriage under examination in accordance with the English rules of private international law, was limited to the circumstances of that case—Jewish spouses eligible for marriage under religious law who married abroad.<sup>116</sup> In that scenario, the decision of which choice of law rule to apply bore no significance to the outcome—each rule led to recognition of the foreign marriage. For this reason, the Supreme Court did not see fit to construct a new choice of law rule for marriage recognition, and

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110. Palestine Order in Council, 1922, art. 46, in 2 LAWS OF PALESTINE 431 (Moses Doukhan ed., 1934).

111. CA 191/51 *Skornik v. Skornik* 8(1) PD 141, 160–61, 180 [1954] (Isr.).

112. See Aharon Barak, *Lacuna in the Law and the Foundations of Law Act*, 20 MISHPATIM L. REV. 233, 309 (1990) (Isr.).

113. Foundations of Law, 5740–1980, 34 LSI 181, § 2 (1979–1980) (Isr.).

114. *Id.* § 1; see also Rhona Schuz, *Private International Law at the End of the Twentieth Century: Progress or Regress?*, in ISRAELI REPORTS TO THE XV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 145, 152 & n.18 (Alfredo Mordechai Rabello ed., 1999).

115. See Barak, *supra* note 112.

116. See HCJ 2232/03 *A. v. Tel-Aviv-Jaffa Regional Rabbinical Court* (2) IsrLR 245 [2006].

sufficed with referring to the rule that had applied to the issue in the past (by virtue of Article 46), declining to decide which choice of law rule should apply in other circumstances.<sup>117</sup> This case was an “easy” one, as the parties were both eligible for marriage in Israel according to Jewish religious law and since even the Rabbinical Court was willing to recognize the validity of their foreign civil marriage for certain purposes.<sup>118</sup> The question of the applicable choice of law rule for marriage recognition will arise at its full intensity once the courts are faced with a case involving spouses who are ineligible for marriage in Israel, particularly same-sex couples. When this question arises, it would be inappropriate for the Israeli courts to mechanically apply the English rules of private international law. Instead, the courts should be at liberty to select the choice of law rule most appropriate for marriage recognition in Israel. Indeed, Israeli courts increasingly tend to compare the English and American choice of law rules and adopt the more suitable rule among the two.<sup>119</sup>

#### IV. DETERMINING THE PROPER CHOICE OF LAW RULE FOR THE RECOGNITION OF FOREIGN SAME-SEX MARRIAGES

##### *A. Policy Objectives of the Choice of Law Rules for Marriage Recognition*

In investigating the most appropriate choice of law rule for ruling on the validity of civil marriages conducted abroad by Israeli citizens and residents who are ineligible for religious marriage, including same-sex couples, it is important to first examine the policy objectives which choice of law rules in the field of marriage recognition should seek to achieve. These findings enable a subsequent examination of the rules that promote the aforementioned interests in the most fitting manner.<sup>120</sup>

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117. *Id.* ¶ 26.

118. The Rabbinical Court stated that Jewish law recognizes such marriages as valid only vis-à-vis third parties, but not in terms of the mutual obligations of the parties. *See id.* ¶ 8–9.

119. Schuz, *supra* note 114, at 153 n.20 (citing CA 2705/91 Abu Jechlah v. E. Jerusalem Elec. Co. 48(3) PD 554 [1993]; CA 750/79 Klausner v. Berkovits 37(4) PD 449 [1983]).

120. In addition to the two principal systems for marriage recognition in the conflict of laws, which are the main focus of this Article (the personal law system versus the principle of *lex loci celebrationis*), there are additional, less common approaches that serve as alternatives to the prevailing choice of law rules, including the *lex fori* approach and “the proper law” approach, which allows the court to weigh up all the relevant connections instead of being bound to give precedence to a particular connection. For an overview of the various approaches, see MICHAEL KARAYANNI, THE INFLUENCE OF THE CHOICE OF

Within the context of formulating choice of law rules, modern private international law aspires to configure rules that arrive at a just result<sup>121</sup> and which attribute considerable weight to general policy considerations.<sup>122</sup> There are five principal policy objectives which choice of law rules in the field of marriage recognition should seek to advance.<sup>123</sup>

(1) The presumption in favor of the validity of marriage: The fundamental policy of private international law in the field of marriage recognition is the principle of validating foreign marriages in order to preserve family ties and to give effect to the parties' intention to create a binding marital bond.<sup>124</sup> According to this principle, preference should be given to choice of law rules that would validate the marriage over rules that would lead to non-recognition of the foreign status.<sup>125</sup>

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LAW PROCESS ON INTERNATIONAL JURISDICTION 46–58 (2002). These approaches were harshly criticized and it appears that they do not promote, in any meaningful way, the policy objectives that choice of law rules for marriage recognition should seek to promote.

121. *Id.* at 233.

122. HCJ 5666/03 Amutat Kav la-Oved v. Nat'l Labor Court in Jerusalem, ¶ 18 [Oct. 10, 2007] (Rivlin, J.) (unpublished) (Isr.).

123. The following list is based primarily on T.C. Hartley, *The Policy Basis of the English Conflict of Laws of Marriage*, 35 MOD. L. REV. 571, 571–73 (1972); see also Alan Reed, *Essential Validity of Marriage: The Application of Interest Analysis and Depeage to Anglo-American Choice of Law Rules*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 387, 388–90 (2000). Most of the policy objectives mentioned in this list also appear as factors to be considered in choice of law proceedings under Section 6 of the Restatement (Second) of Conflict of Laws (including the interest in protecting the expectations of the parties, as well as considerations of certainty and uniformity). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

124. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 402 (rev. 3d ed. 2003). The fundamental principle of private international law according to which marriages valid in the place of celebration should, wherever possible, be held valid everywhere, was also recognized in Israeli jurisprudence. See, e.g., CA 191/51 Skornik v. Skornik 8(1) PD 141, 178 [1954] (Isr.) (“If . . . we follow this course, and lay down the law in these terms, we shall also remain faithful to the principle—a widely-accepted principle in this branch of the law—that it is the duty of the judge who investigates the question of the validity of a marriage to do his best, so far as the law enables him so to do, to hold a marriage valid, and not invalid.”).

125. Hartley, *supra* note 123, at 572. Another interest that may be relevant in this context is the interest in universal recognition of vested rights. See Shapira, *Comments, supra* note 98, at 283–84. It should be noted, however, that the “vested rights theory” is quite controversial and its influence is gradually diminishing. See Kurt Siehr, *A Statute on Private International Law for Israel*, in ISRAEL AMONG THE NATIONS 353, 357–58 (Alfred E. Kellermann, Kurt Siehr & Talia Einhorn eds. 1998). That said, and despite the erosion of the “vested rights theory,” it appears that in the field of family law (as opposed to other legal fields, such as contracts and torts) the protection of vested rights is still a relevant and important consideration.

(2) The protection of the reasonable expectations of the parties: It would be unjust to breach the expectations of the parties by deferring to a law that the parties could not reasonably have contemplated—particularly so when the parties reasonably relied on the application of a certain law and conducted their lives accordingly.<sup>126</sup>

(3) Convenience, Simplicity and Efficiency: These considerations typically support the application of the forum law with which the parties involved are most familiar.<sup>127</sup>

(4) Certainty, Stability and Uniformity: “[P]arties should know [with certainty], or be able to ascertain, without the necessity of litigation, the applicable law.”<sup>128</sup> According to these considerations, choice of law principles should be clear, definite, and absent of any element of ambiguity or flexibility.<sup>129</sup> Likewise, choice of law rules should seek to promote the international uniformity of status as much as possible and thereby promote legal stability and certainty.<sup>130</sup> Consequently, it would not be fitting to apply the law of the forum where it is likely to lead to “limping” marriages.<sup>131</sup>

(5) Comity and International Cooperation: For reasons of comity and state interest in international relations,<sup>132</sup> the choice of law rules of the forum should give due regard to the interests of a foreign country and give effect to its judgments and administrative decisions.<sup>133</sup> In order to encourage international cooperation, a choice of law rule that promotes these interests is preferable.<sup>134</sup>

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126. Reed, *supra* note 123, at 388–89; Hartley, *supra* note 123, at 571–72.

127. See Hartley, *supra* note 123, at 571. The application of foreign law is liable to be complex and complicated, as foreign law is considered a “fact” that typically requires proof by experts. *Id.* The requirement of proving foreign law could thus prolong the proceedings and cause uncertainty. *Id.*

128. Reed, *supra* note 123, at 389.

129. See *id.*

130. The best way to promote the uniformity of status is to apply the choice of law rules that have earned wide international recognition. See Hartley, *supra* note 123, at 572. On the importance of the uniformity of status, see *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952); *Leszinske v. Poole*, 798 P.2d 1049, 1054 (N.M. Ct. App. 1990).

131. See Reed, *supra* note 123, at 390.

132. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court S. Dist. Iowa*, 482 U.S. 522, 543 n. 27 (1987) (“Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states”); see also *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”).

133. See Hartley, *supra* note 123, at 572–73.

134. Schuz, *supra* note 114, at 147.

In order to formulate an appropriate choice of law rule, an attempt must be made, to the extent possible, to advance all of the above goals.<sup>135</sup> It is doubtful whether it is possible to formulate a single choice of law rule that will fully promote all of the interests, though, as some of the policy considerations are likely to conflict with one another and each may lead to the adoption of a different choice of law rule. Such is the case, for instance, regarding the considerations of certainty, uniformity and international cooperation (policies 4 and 5 above), which normally would point to the application of the foreign law, whereas considerations of convenience and efficiency (policy 3 above) usually weigh in favor of domestic law.<sup>136</sup>

Choice of law rules in the field of marriage recognition can thus be designed to promote a number of goals that are not necessarily consistent with one another. The relative weight given to each of the interests and the balance between them is likely to vary from one legal system to another. Indeed, as is further elaborated below, the emphasis on different rationales and policy considerations has led to the formulation of two distinct systems for marriage recognition.

*B. The Personal Law System vs. The Principle of Lex Loci Celebrationis*

It is customary to distinguish, for purposes of marriage recognition, between the formal validity (“marriage formalities”) and the essential validity of the marriage (“marriage essentials”).<sup>137</sup> Although the nature and scope of the requirements that are considered “marriage formalities” may vary from one country to another, the term usually refers to the legal sufficiency of the ceremony itself as well as the “related procedures required for the valid celebration of a marriage,” including the need for license and witnesses, registration requirements, and the like.<sup>138</sup> All of the requirements to which the parties must adhere in terms of their legal capacity to marry each other, such as minimum age and lack of affinity, belong to the “marriage essentials” category.<sup>139</sup> As far as the form of

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135. See Reed, *supra* note 123, at 391.

136. Hartley, *supra* note 123, at 573.

137. LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 216 (2002).

138. Reed, *supra* note 123, at 392; see also P. M. NORTH & J. J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 572–86 (12th ed. 1992).

139. See PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 164. Certain countries “subdivide essentials into categories that distinguish between defects that render a marriage void *ab initio* and those which render the marriage merely voidable . . . .” Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L.Q. 497, 500 (1995) [hereinafter Wardle, *International*

marriage is concerned, the universally accepted rule of conflicts is that all aspects of formal validity are governed by the *lex loci celebrationis*.<sup>140</sup> As to the substantive conditions of marriage, there are two prevailing choice of law rules: the personal law of the parties and the law of the place of celebration.<sup>141</sup>

Until the middle of the nineteenth century, English courts drew no distinction between the formal and the essential validity of foreign marriages, holding that in both aspects the validity of a marriage depended on the *lex loci celebrationis*.<sup>142</sup> The basic concept held by the English courts up to that time was that marriages valid where celebrated are valid everywhere, subject to the requirement that the marriage did not violate the public policy of the forum.<sup>143</sup> Since some of the marital prohibitions imposed by English law during the nineteenth century were stricter than those imposed by neighboring European countries, English couples who lacked capacity to marry often attempted to evade the local prohibition by marrying on a brief trip abroad and then returning to England.<sup>144</sup> As the choice of law rule simply referred to the *lex loci celebrationis*, such marriages were routinely validated.<sup>145</sup> However, in the 1861 case of

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*Marriage*]. While “[e]ssentials are necessary for a valid marriage [and the] violation of those . . . prohibitions . . . may . . . render the marriage invalid, . . . [f]ormalities are legal requirements the violation of which may be punished, but generally will not affect the validity of the marriage.” *Id.*

140. LENNART PÅLSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS 173 (1974) [hereinafter PÅLSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS]; see also NORTH & FAWCETT, *supra* note 138, at 572 (“There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of a marriage, i.e. that an act is governed by the [law of the] place where it is done.”).

141. See PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 89. “The personal law system includes two different rules for determining personal law: [one is] *lex patriae* (the law of one’s nationality) and [the other is the] *lex domicilii* (the law of one’s domicile). *Lex patriae* . . . is the traditional choice of law rule for marriage recognition in most of Continental Europe,” while *lex domicilii* “is the choice of law rule for marriage recognition in England, in many commonwealth countries, and in some Latin American countries.” See WARDLE & NOLAN, *supra* note 137, at 216–17.

142. PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 13 & n.22; see also J. H. Beale, Jr., *The Law of Capacity in International Marriages*, 15 HARV. L. REV. 382, 385–86 (1902).

143. See J.H.C. MORRIS, DAVID McCLEAN & KISCH BEEVERS, THE CONFLICT OF LAWS 55, 200 (7th ed. 2009).

144. See *id.* at 213; Wendy A. Adams, *Same-Sex Relationships and Anglo-American Choice of Law: An Argument for Universal Validity*, 34 CAN. Y.B. INT’L L. 103, 111 (1996).

145. See Adams, *supra* note 144, at 110–11. For instance, English couples frequently evaded “the provisions of Lord Hardwicke’s Marriage Act, 1753, which required parental

*Brook v. Brook*,<sup>146</sup> the House of Lords, wishing to prevent further attempts to evade domestic prohibitions, decided to draw a distinction between capacity and form, and held that while the form is to be governed by the *lex loci celebrationis*, capacity should be governed by the law of the domicile.<sup>147</sup>

The case concerned "a man and his deceased wife's sister, both . . . domiciled in England," who attempted to evade the domestic prohibition on their marriage by performing the ceremony in Denmark, which allowed such marriages.<sup>148</sup> Based on the aforementioned distinction, since the parties lacked capacity to marry each other under English law, the House of Lords denied recognition of the marriage.<sup>149</sup> Since the *Brook* court did not specify the exact manner in which the parties' domicile should be determined, English courts developed three distinct theories to that effect: the intended matrimonial home theory (attributed to Cheshire),<sup>150</sup> the most real and substantial connection theory,<sup>151</sup> and the dual

consent for underage marriages, by marrying in Scotland where consent was not required." *Id.* at 111. Upon their return to England, their marriages were usually recognized. *Id.*; see, e.g., *Middleton v. Janverin*, (1802) 161 Eng. Rep. 797, 799; 2 Hag. Con. 437, 443–44 & 444 n. (discussing *Compton v. Bearcroft* (Ct. Del. 1769) (Eng.)); *Simonin v. Mallac*, (1860) 164 Eng. Rep. 917, 924; 2 Sw. & Tr. 67, 83 ("*Compton v. Bearcroft* is therefore an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England.").

146. *Brook v. Brook*, (1861) 11 Eng. Rep. 703; 9 H.L. Cas. 193.

147. See *id.* at 710; 9 H.L. Cas. at 207–08; see also *Sottomayor v. De Barros*, [1877] 3 P.D. 1 at 5 (Eng.) ("The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile . . .").

148. Adams, *supra* note 144, at 111–12. Marriages between relatives of such affinity were prohibited at the time in England by virtue of "Lord Lyndhurst's Marriage Act, 1835, [which] rendered void a marriage between persons within prohibited degrees of consanguinity and affinity that were stricter than those in other European countries." *Id.* at 111. Only in 1907 did England enact a special law allowing such marriages (the Deceased Wife's Sister's Marriage Act of 1907). See MORRIS, McCLEAN & BEEVERS, *supra* note 143, at 214 & n.90.

149. See *Brook*, 11 Eng. Rep. at 705; 9 H.L. Cas. at 193.

150. See Reed, *supra* note 123, at 396–400. According to this theory, "the parties' capacity to marry is determined by the law of their intended matrimonial [domicile]." *Id.* at 396. Although the intended matrimonial home test has some advantages (such as the promotion of the validity of marriages), it is "inherently uncertain," and its prospective nature renders it impractical. See *id.* at 397–98.

151. See *id.* at 400–02. This theory directs courts to the legal system "that has the most real and substantial connection with the marriage" and it "allows consideration of a multiplicity of relevant factors embracing domicile, nationality, residence, . . . and place of

domicile theory (attributed to Dicey).<sup>152</sup> This last theory is the one most commonly applied by the English courts.<sup>153</sup>

Seemingly, the main argument in support of applying the personal law (whether determined by domicile or by nationality<sup>154</sup>) in matters of capacity is that questions of status should be the concern of the country in which a person's life is centered.<sup>155</sup> According to this approach, the country holding the most significant interest in determining the substantive conditions for creating a valid marriage is the one to which the parties hold the most substantial connections.<sup>156</sup> The House of Lords in

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[celebration].” *Id.* at 400. However, it is a “vague and unpredictable test” that is difficult to apply. *Id.* at 402 (internal quotation omitted).

152. *See id.* at 393–96. According to the dual domicile theory, “[c]apacity to marry is governed by the law of the parties’ ante-nuptial domiciles: each party must have capacity [to marry], according to the law of his or her domicile at the time of the ceremony, to marry the other.” *Id.* at 393. The “primary justification [for this theory] is that it promotes certainty” and that “a person’s status is a matter of public concern to the country to which he belongs at the time of marriage . . . .” *Id.* at 394. However, as Reed points out, this approach “runs counter to the policy objective of presuming in favor of upholding the validity of a marriage” since: “The cumulative nature of the test, looking at both parties’ ante-nuptial domiciliary laws, greatly increases the likelihood of the marriage being declared invalid, than if a single determinative law were applied.” *Id.* at 395.

153. M.D.A. Freeman, *Marriage and Divorce in England*, 29 FAM. L.Q. 549, 561 (1995).

154. In the Continent it is also customary to distinguish between form and capacity to marry, and to apply the law of the place of celebration in matters of form. However, unlike English law, which refers to domicile in matters of capacity, the customary choice of law rule in the Continent refers to the law of the couple’s nationality. *See* PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 89–91.

155. *See, e.g.*, Pugh v. Pugh, [1951] P. 482 at 491 (Eng.) (“It must be remembered that personal status and capacity to marry are considered to be the concern of the country of domicile.”).

156. PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 93. From this perspective it seems that the personal law system referring to the domicile of the parties is preferable to that which refers to their nationality. Indeed, the current trend in private international law is to use domicile rather than nationality (especially in immigration states). On this topic, see Michael Bogdan & Eva Ryrstedt, *Marriage in Swedish Family Law and Swedish Conflicts of Law*, 29 FAM. L.Q. 675, 679–80 (1995). The most widely used connecting factor in Israeli statutory choice of law rules is domicile, especially in the field of personal status. For example, the law of the common domicile of the parties is the primary connecting factor under both Section 5 of the Dissolution of Marriage (Jurisdiction in Special Cases) Law and Section 17(a) of the Family Law Amendment (Maintenance) Law. *See* Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729–1969, 23 LSI 274, § 5 (1968–1969) (Isr.); Family Law Amendment (Maintenance) Law, 5719–1959, 13 LSI 73, § 17(a) (1958–1959) (Isr.); *see also* Spouses (Property Relations) Law, 5733–1973, 27 LSI 313, § 15 (1972–1973) (Isr.); Capacity and Guardianship Law, 5722–1962, 16 LSI 106, § 77 (1961–1962) (Isr.).

*Brook v. Brook*<sup>157</sup> based its use of domicile as determinant of the parties' capacity on the concept that the law of the country with which the parties are most connected at the time of the ceremony should apply in all matters vital to the preservation of the fundamental features of its marriage institution, and that the parties should not be allowed to evade any prohibitions imposed by their domicile's law.<sup>158</sup> In the words of the House of Lords:

There can be no doubt of the general rule, that 'a foreign marriage, valid according to the law of a country where it is celebrated[,] is good everywhere.' But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the marriage depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.<sup>159</sup>

As indicated by the decision in *Brook*, the consideration that lies at the heart of the English choice of law system, as far as marriage recognition is concerned, is that the country of domicile bears the most significant interest in setting the essential conditions required to create a valid marriage, even when the ceremony is performed in a foreign country in accordance with that county's laws.<sup>160</sup>

The decision of the House of Lords to abandon the principle of *lex loci celebrationis* with respect to the parties' capacity to marry was harshly criticized, and rightfully so. Professor Beale, for one, called the decision "an ignorant error."<sup>161</sup> Justice Sussman of the Israeli Supreme Court concurred with Beale's critique,<sup>162</sup> and added:

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157. *Brook v. Brook*, (1861) 11 Eng. Rep. 703; 9 H.L. Cas. 193.

158. See C. M. V. Clarkson, *Marriage in England: Favouring the Lex Fori*, 10 LEGAL STUD. 80, 81 (1990).

159. *Brook*, 11 Eng. Rep. at 710; 9 H.L. Cas. at 207–08.

160. See *id.*

161. Beale, *supra* note 142, at 386. The decision to apply the law of domicile in matters of capacity was criticized by the lower courts in England as well. See, e.g., *Sottomayor v. De Barros*, [1879] 5 P.D. 94 at 100 (Eng.) ("But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which up to the

When the Israeli court decides to elect a choice of law rule [for marriage recognition], we will not necessarily adopt the English rule. Indeed, as for myself, I see no obligation to rectify an English precedent which even if born by mistake, is now accepted law in England . . . . Should the English rule meet our needs, we will accept it as law in Israel. However, it is possible that the American rule will be deemed more appropriate.<sup>163</sup>

Indeed, the English choice of law rule for marriage recognition, as formulated by the *Brook* court, is inconsistent and incoherent. The rule does not make a distinction between couples domiciled in England at the time of their foreign marriage and couples who had married while domiciled in a foreign country and later immigrated to England. Since the prevalent approach is that capacity to marry is governed by the law of the parties' domicile at the time of the ceremony (the dual domicile theory), marriages of couples who immigrate to England following their wedding ceremony are commonly recognized (subject to public policy considerations), even though the marriage would have been prohibited under English law. The rule validates these marriages even though England is the country with which the parties have the most connections during their marriage. This flaw reveals that the rule for marriage essentials was nothing more than a disguised prohibition of evasion.<sup>164</sup> The main concern of the court in *Brook* was not with the formulation of a coherent choice of law rule for marriage recognition, but rather with halting attempts to evade the English marital restrictions.<sup>165</sup> While preventing evasion "may be a valid concern," it is immaterial as an "underlying rationale" for choice of law rules.<sup>166</sup>

Moreover, the English rule was designed to promote social, cultural and moral interests that embody the forum's fundamental concept of its marriage institution, and as such, to give effect to domestic prohibitions placed on certain types of marriages, such as incestuous marriages, mar-

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present time there has been no English authority. What authority there is seems to me to be the other way.").

162. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225, 254 [1963] (Isr.).

163. *Id.*

164. See Adams, *supra* note 144, at 113.

165. As the *Brook* court stated: "It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions." *Brook*, 11 Eng. Rep. at 712; 9 H.L. Cas. at 212.

166. Adams, *supra* note 144, at 114.

riages of minors, and the like.<sup>167</sup> Without minimizing the significance of the forum's public interests (which reflect its "internal" public policy<sup>168</sup>), these considerations should not play a part in the formulation of choice of law rules for marriage recognition. Such rules should be designed according to the fundamental principles of private international law, and local public interests, including the interest in preventing evasion, should be taken into consideration only within the context of an "external" public policy exception.<sup>169</sup> The limitations imposed on the parties' capacity to marry are a clear matter of "internal" public policy, and where a foreign element is involved, it is fitting that limitations be examined within the framework of the exception expressly designed for that purpose.<sup>170</sup> By virtue of the public policy exception, the court is authorized to deny recognition of marriages that are inconsistent with the core social, cultural, and moral values of the forum. Although the public policy exception is also recognized under English law,<sup>171</sup> the court in *Brook* (as well as subsequent case law) did not even consider the option to invoke it in order to deny recognition of the marriage in question.<sup>172</sup>

In addition to the aforementioned weaknesses, the most significant disadvantage of the English rule for marriage recognition is that it completely bars—without leaving any discretion to the court—the option of recognizing a marriage that was conducted in violation of any of the requirements for marriage capacity prescribed by the law of the parties' domicile. The court is denied any discretion to consider the seriousness

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167. Based on the English case law, there are scholars who also classify moral, religious, and cultural considerations as part of policy objectives which choice of law rules in the field of marriage recognition should seek to achieve. See, e.g., Reed, *supra* note 123, at 387–90; see also Hartley, *supra* note 123, at 571–72.

168. For a discussion of the distinction in private international law between "internal" public policy and "external" public policy, see *infra* Part V.A.

169. *Id.*

170. According to Kurt Siehr: "The preference of domestic law over foreign law is a coloured one, tainted by prejudice, habit and other human frailties. In conflicts law one must get rid of them. Conflicts law does not need to defend domestic law against foreign intrusions . . . . If foreign law violates basic values of domestic law, the general clause of public policy assures that such a law will not be applied in domestic courts." Siehr, *supra* note 125, at 364.

171. NORTH & FAWCETT, *supra* note 138, at 128.

172. Had the court in *Brook* applied the law of the place of celebration to the issue of capacity (as it was applied to the formalities of the marriage), it could have invalidated the marriage as contrary to external English public policy. Once the House of Lords had elected to adopt a choice of law rule which refers to the parties' domicile in matters of capacity, see *Brook v. Brook*, (1861) 11 Eng. Rep. 703; 9 H.L. Cas. 193, the invocation of the English public policy exception became relevant only in instances where the parties were domiciled in a foreign country at the time of the marriage.

of the breach of the relevant norm under the circumstances of the case, the differences between the various restrictions laid down by the laws of the forum, the different rationales the restrictions are based on, and the degree of the necessity of each of them for the preservation of the fundamental values of the forum's marriage institution. Moreover, the personal law system does not place adequate weight on the interests of validating foreign marriages, protecting the parties' expectations, and promoting uniformity of status and international cooperation.

The view held by the legal systems that have adopted the *lex loci celebrationis* as their choice of law rule for marriage essentials, and particularly by the US legal system, is utterly different. The United States has always maintained the original English rule for marriage recognition, whereby a marriage was held to be governed in its entirety by the *lex loci celebrationis*.<sup>173</sup> Accordingly, courts in the United States (and in other countries that have adopted the same rule)<sup>174</sup> apply only one choice of law rule in terms of both form and substance.<sup>175</sup> The *lex loci celebrationis* rule normally ensures that a marriage valid where entered into will be held valid in the forum as well.<sup>176</sup>

In the United States, the rule as reflected in the Restatement (Second) of Conflict of Laws<sup>177</sup> is subject to two main exceptions: the public poli-

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173. See PÅLSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 140, at 23.

174. Other countries that follow the place of celebration rule include the Scandinavian countries, the Netherlands, Russia, South Africa, Australia, and most of the Latin American countries. See PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 4; HAGUE CONF. ON PRIVATE INT'L L., THE HAGUE MARRIAGE CONVENTION 2 (2007), available at <http://www.hcch.net/upload/outline26e.pdf>.

175. PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 4. It should be noted in this context that the American conflict law on marriage has evolved predominately on the basis of interstate, rather than international conflicts situations. *Id.* That said, the same rules that were developed in the context of interstate recognition are usually also applicable in the context of the recognition of marriages performed in foreign countries. D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY 371 (2003); PÅLSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 140, at 23.

176. See *Ferret v. Ferret*, 237 P.2d 594, 602 (N.M. 1951); *In re May's Estate*, 114 N.E.2d 4, 6 (N.Y. 1953); *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952); *Sutton v. Warren*, 51 Mass. (10 Met.) 451, 452 (1845). Various states within the United States codified this rule. See, e.g., N.M. Stat. Ann. § 40-1-4 (West 1978) (stipulating that: "All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.").

177. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

cy doctrine and evasion statutes.<sup>178</sup> These exceptions are based on the view that the state where the parties are domiciled, referred to as “the state of the most significant relationship,” is “[t]he state primarily concerned [with] the existence of the marital status.”<sup>179</sup> When these exceptions are implicated in a case, the court applies the law of the forum, which invalidates the foreign marriage. However, these exceptions have been narrowly interpreted and the interest in upholding foreign marriages usually prevails.<sup>180</sup> The most prominent feature of the United States conflict law in the field of marriage recognition is the policy of validation, thus, exceptions that prevent recognition are applied only under rare circumstances.<sup>181</sup>

It appears that the place of celebration principle for both form and capacity, which promotes the policy of validating marriages, is increasingly preferred over the personal law system in private international law.<sup>182</sup> For instance, the Hague Convention on Celebration and Recognition of the Validity of Marriages of 1978 stipulates the *lex loci celebrationis* as

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178. For a discussion of the public policy exception, see *infra* Part V. Marriage evasion statutes exist today in thirteen states in the United States. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 & n.2 (1998). According to these laws, “marriages of persons who travel elsewhere in order to avoid their home state’s marriage restrictions” are declared void. *Id.* at 923. For instance, the law in Arizona stipulates that: “Parties residing in this state may not evade the laws of this state relating to marriage by going to another state or country for solemnization of the marriage.” ARIZ. REV. STAT. ANN. § 25–112(C) (1956). However, the exception was interpreted quite narrowly, and in most cases United States courts refrained from applying evasion statutes and upheld the marriage in reliance on the *lex loci celebrationis*. PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 29. “The prevailing view [of the courts] . . . is that . . . evasion . . . is immaterial in determining the validity of the marriage and does not change the operation of the usual conflicts rule . . . . [Thus, e]ven in the minority of cases where an evasatory marriage was struck down, . . . . [the main reason for not recognizing the marriage was] that the domiciliary prohibition was based on a strong public policy, which would in itself . . . have been sufficient to compel invalidation of the marriage.” *Id.*; see also Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1074–82 (1994); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1969–70 (1997).

179. See PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 8.

180. See *id.* at 8–9.

181. *Id.* Even in personal law countries the public policy exception is usually interpreted quite narrowly. See, e.g., NORTH & FAWCETT, *supra* note 138, at 128–29.

182. SCOLES ET AL., *supra* note 52, at 548 n.2.

the choice of law rule in terms of both form and capacity.<sup>183</sup> Article 9 of that Convention states: “A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.”<sup>184</sup>

Nonetheless, the place of celebration rule is not without its disadvantages. First, the rule may allow the parties to evade various marriage impediments imposed by their personal law, which reflect the values of the community to which they belong, simply by taking a short trip to another country for the mere purpose of getting married.<sup>185</sup> Second, the place of celebration might be completely random, and the parties may lack any connection to it whatsoever. When “the parties do not intend to establish their matrimonial home in the country in which they marry, the interest of that country in their marital status is merely [temporary, whereas] . . . the interests of the country with which the parties are more permanently connected, whether by domicile or by nationality,” should bear much heavier weight.<sup>186</sup>

In sum, the main disadvantage of the *lex loci celebrationis* as a choice of law rule with respect to the parties’ capacity to marry is that it does not adequately address the interests of the country in which the spouses conduct their lives. However, this disadvantage could be adequately addressed with a public policy exception that serves to protect and sustain the vital public interests of the forum. The application of the *lex loci celebrationis* rule does not necessarily lead to the recognition of marriages

183. Convention on Celebration and Recognition of the Validity of Marriages, art. 2–3, Mar. 14, 1978, 1901 U.N.T.S. 131 [hereinafter Convention on Marriages]. Thus far six countries (Australia, Luxembourg, the Netherlands, Egypt, Finland, and Portugal) have signed the Convention, but only three of them (Australia, Luxembourg, and the Netherlands) have incorporated it into their domestic legislation. See *Status Table*, HAGUE CONF. ON PRIVATE INT’L L., [http://hcch.evision.nl/index\\_en.php?act=conventions.status&cid=88](http://hcch.evision.nl/index_en.php?act=conventions.status&cid=88) (last visited Jan. 16, 2011).

184. Convention on Marriages, *supra* note 183, art. 9. The Israeli legislature has also adopted the law of the place of celebration as the choice of law rule in a number of statutes, and has thus recognized (for limited purposes) civil marriages conducted outside of Israel and valid according to the law of the place of celebration. See Penal Law, 5737–1977, Special Volume LSI 55, § 178(1) (1977) (Isr.) (stipulating the applicable choice of law rule for establishing the crime of polygamy); see also Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729–1969, 23 LSI 274, § 5(a)(4) (1968–1969) (Isr.).

185. For a discussion of this argument as a reason to reject the place of celebration rule, see Menashe Shava, *The Nature and Scope of Jewish Law in Israel as Applied in the Civil Courts as Compared with its Application in the Rabbinical Courts*, 5 JEWISH L. ANN. 3, 19–20 (1985).

186. PÁLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 5.

that stand in contrast with the fundamental values of the forum. As discussed *infra* in Part V, by virtue of the external public policy doctrine, even legal systems that employ the *lex loci celebrationis* for marriage essentials may opt not to recognize foreign marriages valid in the place of celebration when the marriage is of residents who are ineligible to marry according to their personal law.

Moreover, the considerable advantages of the place of celebration rule clearly outweigh its weaknesses. In contrast to the personal law system, the principle of *lex loci celebrationis* properly promotes the chief policy objectives which choice of law rules in the field of marriage recognition should seek to achieve. The rule promotes, first and foremost, the focal policy of validating marriages. It is consistent with the reasonable expectations of the parties. The considerations of convenience, simplicity, and efficiency also support the adoption of the *lex loci celebrationis* principle. Since the rule does not distinguish between form and substance, it is clear and simple to apply. All aspects of the foreign marriage are governed by a single law, thereby avoiding the problematic distinctions and other difficulties involved in applying the personal law system,<sup>187</sup> such as cases in which the parties are subject to different personal laws.<sup>188</sup> The principle of *lex loci celebrationis* also promotes the interest of comity and international cooperation. As Justice Sussman stated in the *Funk-Schlesinger* case:

Any country that wishes to live in harmony with the family of nations must relinquish the implementation of some of its laws when a foreign element arises and intervenes in a legal action . . . . Just as we demand that other nations recognize Israeli law, we must not disqualify a transaction which is governed by a foreign law that is different from our

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187. Indeed, referring to the personal law of the parties with respect to the substance of marriage may also serve to promote convenience, simplicity, and efficiency in that it renders any need to examine the rules of foreign legal systems virtually unnecessary. Despite this, the personal law system may also cause various complications, particularly when the parties have different domiciles at the time of the marriage. For discussion of the difficulties involved in the implementation of each of the approaches taken under English law in order to determine the personal law of the parties, see *supra* notes 150–152. Furthermore, whether or not choice of law rules can engender convenience and efficiency, the importance of these considerations should not be overstated, particularly with respect to the determination of personal status and especially in the field of private international law, which involves, by its very nature, complex and unusual situations.

188. Given that the place of celebration principle, as opposed to the personal law system, examines the event rather than the parties themselves, it resolves the difficulty that derives from the need to ensure that the applicable law is appropriate for both parties. See Schuz, *supra* note 114, at 156–57.

own. To the extent that choice of law jurisprudence refers us to a foreign law, Israeli law must yield.<sup>189</sup>

The principle also promotes legal certainty, stability, and predictability, and prevents limping marriages. Even if the extent of the need for certainty and stability is liable to change from one legal field to another, there is no doubt that these considerations are essential in the field of personal status.<sup>190</sup>

The policy objectives of the choice of law rules for marriage recognition are thus best advanced by the principle of the law of the place of celebration. Adoption of this rule in Israel is arguably also required in light of the unique legal and social situation. In the words of the then Chief Justice Barak in the matter of *A v. The Rabbinical Court*:

Thousands of Jews who are citizens and residents of Israel wish to marry by means of a civil marriage that takes place outside Israel. This is a social phenomenon that the law should take into account. [In the past, some Supreme Court Justices] expressed the opinion in *obiter* remarks that with regard to the validity of marriages that take place outside Israel between Israeli citizens or residents, it is sufficient that they are valid according to the law of the place where they were contracted, even if the spouses are not competent to marry under their personal law. Within the framework of the petition before us, we do not need to make a decision with regard to this position, and we need only adopt the more moderate position that the marriage is valid if the couple are competent to marry under their personal law and the marriage ceremony took place within the framework of a foreign legal system that recognizes it.<sup>191</sup>

Admittedly, the adoption of the personal law system for marriage recognition in England—as well as in other Western countries—ultimately did not seriously undermine the fundamental policy of validation. Given the small number of impediments imposed by English law on the capacity of the parties to marry, courts recognize the majority of foreign marriages between English residents.<sup>192</sup>

In contrast, the application of the personal law system in Israel—which imposes a long list of marital impediments—will severely infringe upon the right to family life of many groups in the Israeli population, particu-

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189. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225, 256 [1963] (Isr.).

190. See Shapira, *Comments, supra* note 98, at 288.

191. HCJ 2232/03 A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (2) IsrLR 245, ¶ 26 [2006] (internal citations omitted).

192. For a discussion of the restrictions that English law imposes on the capacity of the parties to marry, see *infra* Part V.

larly same-sex couples and opposite-sex couples lacking capacity to marry in Israel. Thus, it would appear that given the special situation in Israel, and in light of the constitutional status of the right to family life and marriage,<sup>193</sup> a choice of law rule that invalidates, a priori, all foreign marriages of Israeli couples who are ineligible for religious marriage, should not be adopted. Opting for the place of celebration rule in Israel will lead to the proper result of recognizing foreign civil marriages, subject to public policy considerations. Thus, the adoption of the *lex loci celebrationis* principle would also be consistent with the modern “consequentialist theory” of conflicts law, which dictates that the appropriate choice of law rule is that which leads to the just result.<sup>194</sup> Adopting this principle, however, would not entail recognition of all marriages performed outside of Israel even though valid under the *lex loci celebrationis*, since, again, this rule is subject to a public policy exception.

#### V. THE PUBLIC POLICY EXCEPTION AND THE RECOGNITION OF FOREIGN MARRIAGES

##### *A. Ordre Public Externe in the Field of Marriage Recognition— Interpretative Criteria*

The doctrine of public policy, a fundamental principle of private international law, is used as a barrier to the recognition of a foreign act that contradicts key social interests of the forum. Public policy is a flexible concept with no exhaustive definition, embodying the vital public interests and basic values of the particular society.<sup>195</sup> Accordingly, its mean-

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193. The Israeli Supreme Court has held that the right to family life—which encompasses the right of an individual to belong to a family unit, the right of a couple to marry and live together, the right to bear children, the right of parents to raise their children and care for them, and the right of children to grow up with their parents—is grounded in the constitutional rights to privacy, self-fulfillment, and dignity and liberty, as enshrined in the Basic Law: Human Dignity and Liberty. See CA 7155/96 John Doe v. Attorney General 51(1) PD 160, 175 [1997] (Isr.); see also HCJ 7052/03 Adalah v. Minister of the Interior (May 14, 2006), Takdinet Legal Database (by subscription) (Isr.).

194. See generally Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989).

195. In the words of Chief Justice Barak in the case of *Efrat v. Director of Population Registry, Ministry of Interior*: “‘Public policy’ encompasses the central and essential values, interests and principles that a given society at a given time wishes to uphold, preserve and develop . . . . Public policy is the legal tool by means of which society expresses its credo. With this it creates new normative frameworks and prevents the introduction of undesirable normative arrangements into existing frameworks.” HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* 47(1) PD 749, 779 [1993] (Isr.) (author’s translation from the Hebrew).

ing and scope may vary from one jurisdiction to another. The content of public policy in a given country is also liable to change over time as legal and social changes affect the fundamental views of society.<sup>196</sup> For the purposes of private international law, it is customary to differentiate between “internal public policy” (*ordre public interne*), which embodies local values and interests that are superseded by the rules of private international law, and “external public policy” (*ordre public externe*), which consists of basic local principles and interests on vital issues and takes precedence over the regular rules of private international law.<sup>197</sup>

External public policy, then, concerns fundamental principles and superior interests of society and the state. The scope of the doctrine in private international law is substantially narrower than in domestic law.<sup>198</sup> Differences between domestic and foreign law, alone, certainly do not justify application of the public policy doctrine.<sup>199</sup> According to both Anglo-American and Israeli private international law, the exception may be invoked only when implementation of the foreign law would yield

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196. See Amos Shapira, *Recognition and Enforcement of Foreign Judgments In Personam in Israel*, 3 TEL. AVIV U. STUD. L. 171, 189 (1977) [hereinafter Shapira, *Recognition*]. The doctrine of public policy was explicitly incorporated into a number of statutory provisions of Israeli private international law. For instance, the Foreign Judgments Enforcement Law of 1958 stipulates that “a foreign judgment shall not be declared enforceable if its enforcement is likely to prejudice the sovereignty or security of Israel” and the court may refuse to declare a foreign judgment enforceable if its content contradicts Israeli public policy. See Foreign Judgments Enforcement Law, 5718–1958, 12 LSI 82, §§ 3(3), 7 (1957–1958) (Isr.); see also Succession Law, 5725–1965, 19 LSI 58, § 143 (1964–1965) (Isr.) (stating that the applicable foreign law will be disregarded if it discriminates on the basis of race, religion, sex or ethnic origin, or contradicts Israel’s public policy).

197. See Shapira, *Recognition*, *supra* note 196, at 190. In the words of the Court in the *Funk-Schlesinger* case: “[T]here are exceptional cases in which the granting of validity to foreign law and to the result deriving from it will greatly impair the public order by which we live, and only when a foreign law stands in contrast with the sentiment of justice and morality of the Israeli public, will we deny its application.” H CJ 143/62 *Funk-Schlesinger v. Minister of Interior* 17(1) PD 225, 256 [1963] (Isr.) (author’s translation from the Hebrew).

198. CELIA WASSERSTEIN FASSBERG, *FOREIGN JUDGMENTS IN ISRAELI LAW* 21 (1996).

199. Justice Cardozo famously remarked: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 201 (N.Y. 1918); see also Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. PRIVATE INT’L L. 201, 212 (2008) (“An English court will ordinarily apply foreign law or recognize and enforce a foreign judgment even if the result is different from that which would be reached under English law, and probably even if the cause of action is unknown to English law.”).

abhorrent and intolerable results that infringe on the social and public order of the forum state.<sup>200</sup>

Since the Supreme Court of Israel has fully recognized civil marriages conducted abroad by Israeli citizens and residents eligible for marriage in Israel, it follows that the mere fact of conducting a *civil* marriage ceremony does not violate the external public policy of Israel.<sup>201</sup> The question that has yet to be answered is whether the essential recognition of foreign marriages of same-sex couples, as well as opposite-sex couples ineligible for marriage in Israel, conflicts with one of the fundamental principles reflected in Israel's external public policy, or whether the marital impediments imposed by domestic law only reflect Israel's internal public policy. In order to answer this question, this Article turns first to the solutions employed by other jurisdictions and then examines whether the unique characteristics of the regulation of marriage within Israel has implications for its external public policy.

Over the years, English and American courts have formulated a number of guiding principles regarding the interpretation of external public policy in the field of marriage recognition.<sup>202</sup> As previously discussed, the fundamental policy of private international law in the field of marriage recognition is the validation of foreign marriages.<sup>203</sup> Accordingly, courts in both the United States and England usually interpret external public policy quite narrowly.<sup>204</sup> This interpretation of the public policy exception is not only based on the principle of validation, but also on the

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200. See, e.g., *Cheni v. Cheni*, [1965] P. 85 at 98–99 (Eng.).

201. See H CJ 2232/03 A. v. Tel-Aviv-Jaffa Regional Rabbinical Court (2) IsrLR 245 [2006].

202. Despite the local nature of public policy, there has been a growing trend to expand the doctrine so that appropriate legal concepts derived from foreign private and public law are often applied in the forum. For instance, in 2000 the Court of Justice of the European Communities held in *Krombach v. Bamberski* that the examination shall be conducted according to European public policy, and that the judgments of state courts will be examined by this criterion. See Case C-7/98, *Krombach v. Bamberski*, 2000 E.C.R. I-1935. Specifically, the court noted: “Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.” *Id.* ¶ 23.

203. See Wardle, *International Marriage*, *supra* note 139, at 514 (“Clearly the predominant policy among nations today is to prefer marriage, and to impose relatively few conditions on marriage. Likewise, there appears to be a presumption in favor of recognizing foreign marriages, as a general rule. Accommodating personal autonomy seems to be a stronger part of marriage policy today than in the past.”).

204. See PÅLSSON, *MARRIAGE IN COMPARATIVE CONFLICT OF LAWS*, *supra* note 56, at 8–9, 13.

understanding that a broad interpretation of the doctrine is likely to lead to redundancy of the rules of private international law.<sup>205</sup> This approach is also evident by the language of the exception in the Restatement (Second) of Conflict of Laws:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.<sup>206</sup>

The Restatement leaves the task of defining the content and scope of public policy in the hands of the courts.

In order to determine whether the recognition of a foreign marriage violates the “strong” public policy of the state to which the parties hold the majority of connections, United States courts typically examine a number of factors.<sup>207</sup> First, the courts usually examine whether the given marriage is deemed void or merely voidable under the law of the state which is asked to recognize it, based on the view that voidable marriages are not likely to be found to violate a strong public policy.<sup>208</sup> Second, the courts usually inquire whether entry into the type of marriage under consideration violates the forum state’s penal statutes; if it does, recognition

205. See MORRIS, McCLEAN & BEEVERS, *supra* note 143, at 54.

206. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). In the absence of legislation on the question of the validity of marriages conducted outside the forum, the American courts refer to the general principles of private international law, including the Restatement. The choice of law rule stipulated in the Restatement was incorporated into the laws of about half of the states in the United States. Koppelman, *supra* note 178, at 981. The accepted definition of public policy under English law is as follows: “English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English Law.” 1 DICEY AND MORRIS ON THE CONFLICT OF LAWS 81 (Lawrence Collins et al. eds., 13th ed. 2000). For a detailed discussion of the public policy exception in England, see NORTH & FAWCETT, *supra* note 138, at 128–37.

207. BLAIR & WEINER, *supra* note 175, at 378–79.

208. Thus, for instance, most United States courts held that their relevant statutes regarding nonage only made a marriage voidable and therefore did not reflect a strong enough public policy to invalidate a foreign marriage contracted by local domiciliaries. See PÁLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 71. Accordingly, in the majority of cases such marriages (valid under the *lex loci celebrationis*) were upheld even when the parties conducted their marriage in a foreign country with the clear intention of evading the prohibition in their home state, and even where the home state had a marriage evasion statute for foreign marriages of local domiciliaries. See, e.g., State v. Graves, 307 S.W.2d 545 (Ark. 1957); see also PÁLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 70–71.

may be found to violate a strong public policy.<sup>209</sup> Third, the courts may undertake a comparative examination of the manner in which other countries view marriages of the kind at issue, verifying whether the prohibition is deemed contrary to public policy in the majority of states or only in a few of them.<sup>210</sup> An additional factor frequently considered is the specific "purpose for which the determination regarding the validity of the marriage is being made."<sup>211</sup>

However, a careful examination of the relevant case law shows that none of the aforementioned factors has alone been regarded as decisive in determining the validity of foreign marriages.<sup>212</sup> On the whole, the policy of validation usually prevails, and even the accumulation of a number of factors does not necessarily lead to the invalidation of the foreign marriage by virtue of the public policy exception. For instance, the mere fact that the marriage is void under the law of the forum has rarely served, on its own, as a basis for finding a violation of strong public policy.<sup>213</sup> The rare cases in which US courts applied the exception were those where, in addition to the marriage being void under the laws of the forum, it contravened a criminal sanction considered odious by the common consent of nations, such as bigamy or incest.<sup>214</sup> Even in cases of this sort, the courts have occasionally been reluctant to invalidate the foreign marriage.<sup>215</sup> English case law reveals a similar approach.<sup>216</sup>

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209. BLAIR & WEINER, *supra* note 175, at 378.

210. *Id.*

211. *Id.*; *see, e.g., In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Dist. Ct. App. 1948). In the case of *In re Dalip Singh Bir's Estate*, a California appellate court recognized a polygamous marriage, holding "that it would not violate public policy to recognize both marriages and divide a decedent's estate between his two surviving wives, whom he had legally married in India and who still both resided there, particularly where both wives agreed to equal division and there were no other interested parties." BLAIR & WEINER, *supra* note 175, at 378.

212. *See* BLAIR & WEINER, *supra* note 175, at 378-79.

213. PÁLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 22.

214. *See, e.g., People v. Ezeonu*, 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992) (non-recognition of a polygamous marriage).

215. PÁLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 21-22, 76; *see also Leszinske v. Poole*, 798 P.2d 1049 (N.M. Ct. App. 1990) (mother's marriage to her uncle, valid in the place of celebration, did not preclude award of custody to mother, despite state penal statute indicating that incestuous marriages were contrary to public policy).

216. *See, e.g., Cheni v. Cheni*, [1965] P. 85 (Eng.). As the *Cheni* case demonstrates, recognition of marriages performed outside of England (and valid under the personal laws of the parties) between relatives whose degree of affinity does not constitute the criminal offense of incest (as defined in English law) does not violate English public policy, despite the prohibition on the performance of such marriages in England itself. *Id.*; *cf. Mohamed v. Knott*, [1969] 1 Q.B. 1 (Eng.) (recognition of a marriage performed

These Anglo-American criteria for interpreting the scope of external public policy in the field of marriage recognition developed through case law and mostly relate to the three limitations on the right to marriage shared by all Western nations—nonage, polygamy, and incest—and on the various policy considerations underlying each of them.<sup>217</sup> Notwithstanding the prohibition on same-sex marriage, which is gradually eroding,<sup>218</sup> the three aforementioned impediments are the only restrictions on the capacity to marry that remain as absolute prohibitions in both England and the United States (as in most other Western nations).<sup>219</sup> Although Israeli law imposes a host of additional restrictions on capacity, deriving from the exclusive application of religious law to matters of marriage and divorce,<sup>220</sup> the criteria formulated in Anglo-American case law can also be of assistance in identifying and formulating the boundaries of Israel's external public policy. The above criteria embody the view that the application of the exception may be justified only in extreme and exceptional cases, where recognition of the marriage would adversely affect the overall societal interest in that it would violate fundamental principles and widely accepted vital moral values. This insight should also guide the Israeli courts in the application of the public policy exception.

#### *B. Israel's Public Policy and the Tension Between Secular Law and Religious Norms*

The unique question that arises under Israeli law is whether the exclusive application of religious law in matters of marriage and divorce should impact the content of Israel's external public policy. In order to answer this question, it is useful to classify the capacity restrictions imposed by Israeli religious law into three main categories. The first includes restrictions that could be justified by secular-democratic rationales, including nonage, polygamy, and incest.<sup>221</sup> The second category

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in Nigeria between an adult and a 13 year-old girl, despite this type of marriage being prohibited in England); MORRIS, MCCLEAN & BEEVERS, *supra* note 143, at 213–17.

217. As stated by the House of Lords in the matter *Radwan v. Radwan*: “[I]t is an oversimplification of the common law to assume that the same test . . . applies to every kind of incapacity—non age, affinity, prohibition of monogamous contract by virtue of an existing spouse, and capacity for polygamy. Different public and social factors are relevant to each of these types of incapacity . . . .” *Radwan v. Radwan*, [1973] Fam. 35 at 51.

218. See *infra* Part V.C.

219. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 40–58 (1989).

220. See *supra* note 6 and *infra* note 222.

221. The minimum age of marriage according to Jewish law is 13 for boys and 12.5 for girls. The Marriage Age Law of 1950 stipulates that the minimum age of marriage is 17.

includes restrictions whose rationale may be regarded as “purely religious,” including, *inter alia*, prohibitions on marriages of persons “disqualified for religious marriage” and on interfaith marriages.<sup>222</sup> The third category includes the prohibition on same-sex marriages—a prohibition that may be regarded as a “semi-religious” impediment.<sup>223</sup>

Although religious laws mandate all the marital impediments in Israel, the restrictions classified under the first category above could also be rationalized by secular-democratic considerations, and they should not be regarded as reflecting only religious norms. Alongside the religious prohibitions on nonage, polygamy, consanguinity, and affinity, Israeli secular law imposes criminal sanctions on incest, entry into bigamous marriages, and marriages of minors.<sup>224</sup> The Israeli legislature, which is reluctant to directly intervene in religious marriage laws, has limited its intervention to the imposition of criminal sanctions on the entry into marriages that it wished to prevent, without asserting a position on their validity.<sup>225</sup> Accordingly, if a marriage were valid under the personal law of the parties but violated criminal law, the criminal sanctions would be imposed without invalidating the marriage itself.

However, rendering these religious impediments as criminal offenses no doubt strengthens the secular Israeli public policy regarding those prohibitions. It would thus appear that as far as this first category of impediments is concerned, there is no tension between the religious and secular laws. The main objective of those prohibitions is to sustain fun-

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*See* Marriage Age Law, 5710–1950, 4 LSI 158, § 2 (1949–1950) (Isr.). Jewish law also prohibits polygamy and incestuous marriages. *See* 1 PINHAS SHIFMAN, FAMILY LAW IN ISRAEL 186 (1995). Although the degree of prohibited kinship may change from one legal system to another and from one religious law to another, the prohibition on consanguinity and affinity is shared by all religions and all cultures. For a discussion of the degree and extent of the prohibition under Jewish law, see *id.*

222. “Under Jewish Law, a marriage between a Jew and a non-Jew is *void ab initio*.” Merin, *The Right to Family Life*, *supra* note 6, at 135. The category of persons “disqualified for religious marriage . . . includes, *inter alia*, the prohibition against the marriage of a *Kohen* (a descendant of the ancient priestly caste) to a divorced woman, to a *chalutzah* (a widow released from a levirate marriage), or to a convert.” *Id.* at 135–36. Although such marriages are prohibited, Jewish law regards them as retroactively valid, but requires the couple to divorce one another. *See id.* at 136.

223. For further discussion of this category, see *infra* Part V.C.

224. Sections 176 and 351 of the Penal Law specify bigamy and incest, respectively, as criminal offenses. *See* Penal Law, 5737–1977, Special Volume LSI 55, 93 (1977) (Isr.). Section 2 of the Marriage Age Law specifies a criminal sanction against a man or woman who marries a girl or a boy under the age of seventeen, respectively. *See* Marriage Age Law, 5710–1950, 4 LSI 158, § 2 (1949–1950) (Isr.).

225. *See* Pinhas Shifman, *Family Law in Israel: The Struggle Between Religious and Secular Law*, 24 ISR. L. REV. 537, 539 (1990).

damental values and to protect the weaker parties, and they reflect the overall societal interest.<sup>226</sup> These three restrictions are shared by all Western nations, without exception, and they will certainly remain intact even if Israel enacts an arrangement for civil marriage. In light of the rationales behind these three prohibitions, and in reliance on the criteria formulated in Anglo-American law, the recognition of marriages entered into in violation of these prohibitions may, subject to the individual circumstances of the case, be found to violate Israel's external public policy.

Aside from the three restrictions shared by all Western countries, Israeli law imposes a long list of additional unique restrictions on the right to marry, deriving from the exclusive application of religious law to matters of marriage and divorce. Within this context, the question that arises is whether external Israeli public policy should only reflect secular norms (such as the norms underlying the prohibitions listed in the first category) or whether it should also reflect the "purely religious" norms included in the second category.

First, it should be noted that most legal systems invoke public policy specifically in order to avoid the application of foreign laws that restrict the freedom of marriage on religious grounds.<sup>227</sup> Although, unlike all

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226. The rationale behind the requirement for a minimum age of marriage "is that the free consent of the [parties] is a prerequisite for marriage, and that it is necessary to establish a minimum age in order to ensure that this consent is, in fact, given freely. Another reason [for minimum age] is the need to guarantee a stable married life and the view that such stability can only be guaranteed if the two spouses are mature enough to be fully aware of their obligations within the family context." Merin, *The Right to Family Life*, *supra* note 6, at 125. The prohibition against bigamy and polygamy is based on the principle of equality between the sexes and is designed to uproot sexist customs accepted in various traditional societies. *See id.* at 128. The prohibition against incestuous marriages on grounds of consanguinity and affinity should not be regarded as a religious norm either, since "it is accepted in all civilized societies and has rational justifications that suffice on their own . . . . [O]ne of the explanations for this prohibition is based on genetics and the fear that children born to [blood related couples] are liable to be afflicted with various genetic defects . . . . [T]he genetic [concern] does not justify prohibitions based on relations by marriage and, in this matter, it seems that the rationale stems from psychological and sociological considerations." *Id.* at 127–28.

227. PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS, *supra* note 56, at 338. This approach is reflected in the 2005 Resolution of the Institute of International Law, regarding the use of the public policy exception in the context of recognition of foreign marriages. *See* INST. OF INT'L LAW, RESOLUTION: CULTURAL DIFFERENCES AND ORDER PUBLIC IN FAMILY PRIVATE INTERNATIONAL LAW § B(1) (2005), available at [http://www.idi-iil.org/idiE/resolutionsE/2005\\_kra\\_02\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2005_kra_02_en.pdf). According to the Institute's Resolution, "States shall guarantee respect for freedom of marriage. This means that, for the purposes of private international law, States shall invoke public policy against foreign laws that restrict that freedom on racial or religious grounds, and recognize the validity of

other Western countries, the institution of marriage in Israel is regulated exclusively by religious law, it seems that civil courts in Israel have also refrained from taking religious norms into consideration in determining and formulating Israeli public policy. The Supreme Court has held more than once that it determined Israeli internal public policy according to “the accepted views of the enlightened public,”<sup>228</sup> and that “public policy in Israel must not be identified with the legal policy of religious law.”<sup>229</sup> The Supreme Court also held that public policy “is aimed at the public at large [encompassing] its diversity, various opinions, beliefs, and religions,” and that it is formed in accordance with the conventional wisdom of the “enlightened public,” in consideration of the complexity and pluralism of Israeli society.<sup>230</sup> Accordingly, the Supreme Court stated (albeit in dictum) that even if a certain type of marriage is considered forbidden or a sin under religious law, that alone will not render the marriage as violating Israeli internal public policy.<sup>231</sup>

The Supreme Court has thus made a distinction between the public policy of religious law (applied in the religious tribunals) and the public policy of Israeli law in general (applied in civil courts), never regarding itself as bound by the views of religious law even with regard to Israeli internal public policy. In accordance with this view, civil courts have applied secular public policy—that based upon the freedom of conscience and the freedom to marry—even in matters of personal status. Such was the case, for instance, when the Supreme Court recognized a private marriage ceremony in Israel of an opposite-sex couple “disqualified for religious marriage,” despite the fact that this was clearly a matter of marriage and divorce subject to Jewish law and that the Rabbinical Court does not recognize private marriage ceremonies.<sup>232</sup> It was not religious, but rather, secular considerations that guided the court in this mat-

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a marriage celebrated in violation of the religious prescriptions of the normally applicable law.” *Id.* The Resolution further states: “Public policy should be invoked against the normally applicable law only to the extent that, in the circumstances of the case, the application of that law would infringe the principles of equality, non-discrimination and freedom of religion.” *Id.* § A(3).

228. CA 461/62 Zim Israel Navigation Co. v. Maziar 17 PD 1319, 1335 [1963] (opinion of Landau, J.) (Isr.).

229. HCJ 693/91 Efrat v. Director of Population Registry, Ministry of Interior 47(1) PD 749, 781–82 [1993] (Isr.).

230. *Id.*

231. *Id.* (referring to the example of interfaith marriages).

232. See HCJ 29/71 Kedar v. The Regional Rabbinical Court of Tel Aviv-Jaffa 26(1) PD 608 [1972] (Isr.); HCJ 51/69 Rodnizki v. The Rabbinical Court 24(1) PD 707 [1969] (Isr.); HCJ 80/63 Gurfinkel v. Minister of Interior 17 PD 2048 [1963] (Isr.); CA 238/53 Cohen v. Attorney-General 8(4) PD 19 [1954] (Isr.).

ter—including the degree of legitimacy of impeding freedom of religion and the degree of protection afforded to the freedom to marry.<sup>233</sup> Moreover, in the context of the discussion regarding the private marriages of couples “disqualified for religious marriage,” the Court expressed explicit disapproval of the religious prohibition on marriages of this sort, stating that it was a “ritualistic-religious” impediment inconsistent with the fundamental values of a democratic state.<sup>234</sup>

Similarly, the Supreme Court’s approach regarding the religious prohibition on interfaith marriages is also based on secular considerations, rather than religious norms.<sup>235</sup> This is the case despite the fact that unlike the marriages of couples “disqualified for religious marriage,” which under Jewish law are prohibited beforehand but valid a posteriori, marriages between Jews and non-Jews are void ab initio.<sup>236</sup> Unlike the position taken regarding the private marriage ceremonies performed in Israel by couples “disqualified for religious marriage,” however, the Supreme Court refuses to recognize the private marriages of interfaith couples.<sup>237</sup>

Nonetheless, it seems that the Court would have reached a different conclusion had it been faced with a petition to recognize a civil marriage ceremony of an interfaith couple performed *outside* of Israel. This is because the Supreme Court is apparently of the view that the public controversy over the introduction of civil marriage within Israel (which would result in allowing interfaith marriages) cannot justify, in and of itself, the invalidation of interfaith marriages when they are conducted in a foreign country.<sup>238</sup> Indeed, this position is clearly stated in the notable dictum of Justice Sussman in the *Funk-Schlesinger* case:

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233. See sources cited *id.*

234. H CJ 80/63 Gurfinkel v. Minister of Interior 17 PD 2048, 2089 [1963] (Isr.) (“[The prohibition on marriages of a Cohen and a divorcee] is religious-ritualistic given that it is based on ancient concepts regarding the superior status of the Cohen. The imposition of a prohibition of this sort on a non-believer is difficult to reconcile with the freedom of conscience and the freedom of action that it entails.”) (author’s translation from the Hebrew).

235. See, e.g., CA 373/72 Tapper v. State of Israel 28(2) PD 7, 12–13 [1974] (Isr.).

236. Muslim law, on the other hand, allows a Muslim man to marry a non-Muslim woman. See SHIFMAN, *supra* note 221, at 188.

237. CA 373/72 Tapper v. State of Israel 28(2) PD 7 [1974] (Isr.). The case involved a petition to recognize the private marriage ceremony in Israel of an interfaith couple (a Jewish Israeli man and a Christian Swiss woman). *Id.* The couple argued that the Court should adopt the English institution of common law marriage, and thereby recognize their private ceremony. *Id.* The Court did not in any way disapprove of interfaith marriages as such. Rather, it rejected the petition because it perceived the adoption of the institution of common law marriage as standing in contrast with Israeli public policy, depicting it as “a medieval religious institution which has become obsolete.” *Id.* at 12–13.

238. CA 373/72 Tapper v. State of Israel 28(2) PD 7, 9 [1974] (Isr.).

The fact that Jewish religious law considers interfaith marriages void does not, in itself, compel the secular court to reach the same conclusion when it decides the question according to a foreign law. Only if the court reaches the conclusion that the marriage is offensive to Israeli external (international) public policy, that is if such a marriage is so offensive to public policy that it should be considered void irrespective of wherever it has been celebrated, and then the court should give it no effect.

However, religious impediments to marriage, important as they may be, should not be decisive in such cases. The Israeli public is divided into two camps—one which observes religious law or most of its commands, and another which emphasizes the difference between a state abiding by the rule of law and a state abiding by religious law [*halakha*]. The views of these two groups are entirely at odds with each other. Israeli public policy does not dictate that the judge will compel one camp to follow the views of the other. Life demands tolerance towards the other and showing consideration for differing views. Therefore, the yardstick of the judge must be the balance of *all* views prevailing in the public.<sup>239</sup>

This statement, written in 1963, reflects the position of the “enlightened Israeli public” on this issue to this day. It would thus appear that the recognition of foreign civil marriages of opposite-sex couples who are ineligible for marriage within Israel due to “purely religious” impediments is not in conflict with Israel’s external public policy. Thus, one is left with one remaining issue—whether a distinction should be drawn for the purposes of external public policy between the religious prohibitions on marriages of opposite-sex couples and the prohibition against same-sex marriages.

### *C. Same-Sex Marriage and the Public Policy Exception*

Orthodox Judaism does not perceive same-sex marriage as a forbidden category—it is simply nonexistent.<sup>240</sup> Moreover, same-sex relations are subject to harsh and extreme condemnation under Orthodox Judaism.<sup>241</sup> Therefore, the recognition of a foreign same-sex marriage is undoubtedly contrary to the public policy of religious law in Israel.<sup>242</sup> Unlike the reli-

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239. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225, 256–57 [1963] (Isr.).

240. See SHIFMAN, *supra* note 221, at 183.

241. The Conservative and the Reform movements hold a much more lenient approach toward same-sex unions. See *supra* note 5.

242. Given the separation of religion and state, United States courts have taken a very different approach. See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn.

gious prohibitions on certain types of marriages between opposite-sex couples, though, most Western countries, including Israel, do not perceive the prohibition against same-sex marriage as a “purely religious” impediment. Despite the fact that a growing number of jurisdictions have opened the institution of marriage to same-sex couples, the majority of Western countries—notwithstanding their legal definition of marriage as a civil-secular right—still prohibit such marriages.<sup>243</sup> Therefore, as opposed to the Israeli prohibitions on interfaith marriages and on the marriages of opposite-sex couples “disqualified for religious marriage,” the prohibition against same-sex marriages may very well remain intact even if Israel decides to introduce the option of civil marriage. It would seem that the common view—both in Israel and in the majority of Western countries—is that the state could justify the prohibition against same-sex marriage not only on the basis of religious convictions, but also on the basis of “secular” rationales. It is therefore fitting to classify the prohibition as a “semi-religious impediment.”

As discussed *supra* in Part V.B., in the context of the configuration of Israel’s public policy, the Israeli civil courts do not view themselves bound by religious norms and interests. The question must be posed, then, whether the recognition of same-sex marriages performed abroad by Israeli residents and citizens is contrary to Israeli secular public poli-

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2008). In *Kerrigan*, the Supreme Court of Connecticut rejected the argument that opening up of marriage to same-sex couples would infringe upon the freedom of religion, stating: “[R]eligious autonomy is not threatened by recognizing the right of same sex couples to marry civilly. Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations. Because, however, marriage is a state sanctioned and state regulated institution, religious objections to same sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex marriage.” *Id.* at 475.

243. The countries and districts that have thus far opened the institution of marriage to same-sex couples are: the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Iceland, Portugal, Argentina, Mexico City, and five states in the United States (Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire) as well as the District of Columbia. See *Timeline of Gay and Lesbian Marriage, Partnership or Unions Worldwide*, UK GAY NEWS, [www.ukgaynews.org.uk/marriage\\_timeline.htm](http://www.ukgaynews.org.uk/marriage_timeline.htm) (last updated Dec. 23, 2010). Many other countries have recognized same-sex couples through the establishment of marriage-like institutions (such as “civil unions” and “registered partnerships”), which accord those couples many of the rights associated with marriage, including: Denmark, Finland, New Zealand, Australia, Hungary, Switzerland, England, Ireland, France, Germany, Austria, the Czech Republic, Luxembourg, Slovenia, and a number of states in the United States (including New Jersey, Oregon, Washington, Hawaii, and Nevada). See *id.*

cy. Even though the prohibition against same-sex marriage is ostensibly also based on secular considerations, it is difficult to ascertain any rational liberal justifications for the prohibition. In fact, it appears that the “secular” arguments proffered by opponents of same-sex marriage—both in Israel and in the majority of the Western world—constitute a pretext for prejudice against gay men and lesbians.

The most common argument offered to justify the prohibition on same-sex marriages is a definitional-moral-traditional argument, according to which marriage, by its very nature, is and has always been limited to a union between a man and a woman.<sup>244</sup> Therefore, as the argument goes, since the institution of marriage was historically rooted in the need to foster procreation, same-sex couples do not fall within the realm of the definition of marriage, and their inclusion in the institution would be detrimental to its very stability as the fundamental organ for the existence and survival of the human race.<sup>245</sup> The main flaw of the above argument is that it disregards the considerable social and legal changes in the perception and the characteristics of marriage that have taken place over the last few decades—namely, the shift in the concept of marriage from a patriarchal property arrangement for the purpose of procreation, with specific gender roles assigned to each of the partners, to a unitive institu-

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244. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 87–104 (1996).

245. See, e.g., George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 593–97 (1999); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 268–70 (1995) (offering a critical assessment of the conservative case for discrimination against homosexuals, including the procreation argument); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 33–35 (1996) [hereinafter Wardle, *A Critical Analysis*]; James Q. Wilson, *Against Homosexual Marriage*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 137 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997). This concept has led to the adoption of the various federal and state Defense of Marriage Acts (“DoMA”), whose constitutionality has recently been challenged. See, e.g., *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d (D. Mass. 2010) (holding that DoMA’s prohibition against extending federal benefits to gay couples in Massachusetts—including filing a joint income-tax return or claiming spousal Social Security benefits—is unconstitutional, reasoning that the Act was driven solely by animus against gay people, which could not serve as a legitimate basis for government action); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998, 1002 (N.D. Cal. 2010) (striking down California’s voter-approved ban on same-sex marriage, and thereby rejecting defendant’s argument that same-sex marriage would damage traditional marriage, holding that: “Tradition alone . . . cannot form a rational basis for a law [under the Equal Protection Clause]. The ‘ancient lineage’ of a classification does not make it rational. Rather, the state must have an interest apart from the fact of the tradition itself . . . [M]oral disapproval, without any other asserted state interest, has never been a rational basis for legislation.”) (second alteration in original) (internal citations and quotation marks omitted).

tion whose regulation is primarily aimed at furthering the emotional and economic relationship between the spouses on equal terms.<sup>246</sup> The definitional argument thus ignores the fact that marriage is a changing institution whose religious, sexist, and patriarchal characteristics are fading more and more as time passes.<sup>247</sup> Moreover, modern family law clearly differentiates between the regulation of the parent-child relationship and of that between the partners themselves, and the state regulates and encourages procreation and child-rearing in contexts that have nothing to do with marriage.<sup>248</sup>

The definitional argument also ignores the transformations that have taken place in the structure of the modern family and the growing legal recognition of “post-modern” families. This is reflected, *inter alia*, in the abandonment of most distinctions that were once commonly made between parental rights of married opposite-sex couples and those of cohabiting partners (of whatever sexual orientation) as well as in the changing assumptions regarding the best interest of the child.<sup>249</sup> The “definitional”

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246. See YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 30–40 (2002).

247. See *id.*

248. See, e.g., Single Parent Families Law, 5752–1992, SH No. 147 (Isr.). The Constitutional Court of South Africa has perhaps been the most persuasive in articulating this shift away from connecting marriage and procreation:

From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

*Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs* 2000 (2) SA 1 (CC) para. 51 (S. Afr.).

249. Legal changes made to that effect in Israel include the Supreme Court's decision to repeal the restrictions placed on the access of single women (including lesbians) to artificial insemination and *in vitro* fertilization services. See HCJ 2078/96 Weiss v. Minister of Health (Feb. 11, 1997) (unpublished) (Isr.). Similarly, the Supreme Court has also allowed for same-sex second-parent adoptions. See CA 10280/01 Yaros-Hakak v. Attorney-General 59(5) PD 64 [2005] (Isr.). The argument that the sexual orientation of same-sex parents could harm their children has been refuted by an abundance of scientific research showing that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by opposite-sex parents. See, e.g., Rachel H. Farr, Stephen

argument is thus based on a conservative worldview that opposes social change of any kind and purports to maintain the traditional gender-role dichotomy and to preserve the patriarchal and heterosexist attributes of traditional marriage.

An additional common argument against allowing marriages of same-sex couples is the “slippery slope” argument, according to which the recognition of same-sex marriage would lead to, and even justify, the recognition of the marriages of minors, incestuous marriages, and polygamy.<sup>250</sup> This argument is also tenuous. In certain religious circles same-sex relationships are indeed perceived as no less abhorrent than incest.<sup>251</sup> However, under secular public policy, a clear distinction must be drawn between the prohibition against same-sex marriage on the one hand and the prohibitions against marriages of minors, incestuous marriages, and polygamous marriages, on the other hand. As previously discussed, the purpose of the latter prohibitions is the preservation of fundamental values such as the principle of gender equality and the protection of weaker parties.<sup>252</sup> These considerations are not at all applicable to same-sex partners (who are single, adult, and unrelated to one another) and cannot justify the prohibition on their marriages.<sup>253</sup> This view was clearly expressed by the New York Appellate Division in *Martinez v. County of Monroe*, in which the court held that despite the inability of same sex couples to marry within the State of New York, principles of comity compelled recognition of a marriage celebrated in Canada by a same-sex couple residing in New York.<sup>254</sup> As the court stated: “[The natural law]

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L. Forssell & Charlotte J. Patterson, *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164 (2010).

250. See, e.g., Wardle, *A Critical Analysis*, *supra* note 245, at 47.

251. Such is the view held by Orthodox Judaism in Israel. See *supra* note 4 and accompanying text.

252. See *supra* note 226 and accompanying text.

253. For a discussion of the distinctions between same-sex marriage and polygamous marriages, as well as the “slippery slope” argument, see Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down A Slippery Slope Toward The Legalization Of Polygamy*, 6 APPALACHIAN J.L. 101 (2006); James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521 (2002).

254. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008). The *Martinez* ruling established a statewide precedent for the recognition of same-sex marriages contracted in other jurisdictions, and was consequently applied by New York State trial courts in other cases involving couples who had married in Canada or Massachusetts. See, e.g., *Godfrey v. Spano*, 920 N.E.2d 328, 333 (N.Y. 2009) (affirming trial court decision that relied on *Martinez*); *Lewis v. N.Y. Dept. of Civil Servs.*, 872 N.Y.S.2d 578 (N.Y. App. Div. 2009) (affirming trial court decision that relied on *Martinez*); *Beth R. v.*

exception has generally been limited to marriages involving polygamy or incest or marriages ‘offensive to the public sense of morality to a degree regarded generally with abhorrence,’ and that cannot be said here.”<sup>255</sup>

Moreover, as opposed to the criminal sanctions imposed by Israeli law on incest and on the entry into marriages involving minors and polygamy, not only did the legislature repeal Israel’s sodomy law more than two decades ago<sup>256</sup> and provide extensive protections against discrimination on the basis of sexual orientation,<sup>257</sup> but the Israeli courts have also accorded same-sex couples wide recognition and comprehensive protection in a variety of legal fields. For instance, same-sex couples have been recognized as “cohabitant partners” for the purpose of employment law, as well as for purposes of inheritance and immigration.<sup>258</sup>

Furthermore, in the *Ben-Ari* case, in which the Supreme Court ordered the registration of the marriage in Canada of an Israeli same-sex couple, it refrained from holding that the marriage was in conflict with Israeli

Donna M., 853 N.Y.S.2d 501, 504–06 (N.Y. Sup. Ct. 2008); *Golden v. Paterson*, 877 N.Y.S.2d 822 (N.Y. Sup. Ct. 2008) (upholding an Executive Directive, issued in reliance on *Martinez*, that required agencies to afford full faith and credit to same-sex marriages performed legally in other jurisdictions); *C.M. v. C.C.*, 867 N.Y.S.2d 884, 886–87, 889 (N.Y. Sup. Ct. 2008). For a thorough analysis of the *Martinez* case and its implications, see Arthur S. Leonard, *New York Recognition of a Legal Status for Same-Sex Couples: A Rapidly Developing Story*, 54 N.Y.L. SCH. L. REV. 479, 485–91 (2010).

255. *Martinez*, 850 N.Y.S.2d at 743 (quoting *In re May’s Estate*, 114 N.E.2d 4, 7 (N.Y. 1953)). It should be noted that the legal situation in this regard is different in England, since the barrier for recognizing foreign same-sex marriages of English residents is the choice of law rule for the essential validity of the marriage (which refers to the law of the parties’ domicile) and not the public policy exception. However, the English civil partnership law of 2004, which established a pseudo-marriage institution for same-sex couples, stipulates that same-sex marriages performed in a foreign country by English residents will be recognized in England as “civil unions” (although not as marriage for all intents and purposes). See *Wilkinson v. Kitzinger*, [2006] EWHC (Fam) 2022 (Eng.); Civil Partnership Act 2004, 2004, c. 33, §§ 212–18 (UK). For an analysis of the English civil partnership law, see Kenneth McK. Norrie, *Recognition of Foreign Relationships Under the Civil Partnership Act 2004*, 2 J. PRIVATE INT’L L. 137 (2006).

256. The sodomy law was repealed in 1988, as part of a general reform of the Israeli Penal Law. See Penal Law (Amendment No. 22), 5748–1988, 42 LSI 57 (1987–1988) (Isr.).

257. See, e.g., Defamation Law, 5725–1965, 19 LSI 254, § 1 (1964–1965) (Isr.); Prevention of Sexual Harassment Law, 5758–1998, SH No. 166 § 3 (Isr.); Equality of Opportunities in Labour Law, 5748–1988, 42 LSI 31, § 2 (1987–1988) (Isr.); Patients’ Rights Law, 5756–1996, SH No. 729 § 4 (Isr.).

258. See HCJ 721/94 El-Al Isr. Airlines Ltd v. Danielowitz 48(5) IsrSC 749 [1994]; see also CA (Nz) 3245/03 A.M. v. Custodian-General (Nov. 11, 2004) (unreported) (Isr.); LabC (TA) 3816/01 Levy v. Mivtahim (June 25, 2001) (unreported) (Isr.); NLC 54/3–1712 Even v. Tel Aviv University (Mar. 5, 1995) (unreported) (Isr.); MA (TA) 369/94 Steiner v. IDF (May 12, 1996) (unreported) (Isr.).

public policy.<sup>259</sup> Indeed, in that case the Court refrained from making any ruling on the validity of same-sex marriages performed in Canada, noting: “There is no application before us to recognize a marriage between two persons of the same sex that took place outside Israel. When this question arises, it will be examined in accordance with [the] accepted rules of private international law.”<sup>260</sup> However, the Court regarded the State’s argument—according to which a foreign marriage should not be recognized unless it constitutes a “legal framework” of marriage that is recognized in Israel—as one that was really based upon public policy considerations.<sup>261</sup> Accordingly, the rejection of the “legal framework” argument in the *Ben-Ari* case suggests that when the Supreme Court is faced with a petition to fully recognize a foreign same-sex marriage, it will refrain from holding that such recognition violates Israel’s external public policy.

Given the characteristics of Israel’s external public policy in the field of marriage recognition and the criteria for its application, and considering the degree of recognition and protection afforded by Israeli law to same-sex couples and their families, the recognition of a foreign same-sex marriage should not be viewed as contrary to Israel’s external public policy. Application of the Anglo-American criteria for determining whether recognition of a foreign marriage violates the strong public policy of the forum also indicates that the prohibition on same-sex marriage within Israel does not reflect a strong enough public policy for the invalidation of such marriages when performed in a foreign country. As discussed, the mere fact that the marriage is deemed void by the law of the forum does not, in and of itself, lead to the application of the exception.<sup>262</sup> The Anglo-American public policy exception has usually been utilized only when the void marriage was also performed in violation of the forum’s penal statutes.<sup>263</sup> Even in such cases, some United States courts have been reluctant to apply the exception.<sup>264</sup>

The Israeli courts should thus adopt the approach taken by the New York Appellate Court in the *Martinez* case, which held that recognition of a marriage between two people of the same sex does not give rise to moral repugnance, and that absent an explicit statutory prohibition on the

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259. HCJ 3045/05 *Ben-Ari v. Director of Population Administration* (2) IsrLR 283 [2006]. For a detailed discussion of that case, see *supra* Part II.A.

260. *Id.* ¶ 22.

261. *Id.* ¶ 20 (suggesting that the “legal framework” argument actually disguised the state’s stance that registration of such marriages contradicts Israeli public policy).

262. See *supra* Part V.A.

263. See *id.*

264. See *id.*

recognition of same-sex marriages performed in a foreign country<sup>265</sup> (as opposed to the prohibition on same-sex marriages within the State of New York),<sup>266</sup> the recognition of such marriages does not violate the state's public policy.<sup>267</sup>

#### CONCLUSION

Israeli domestic law in the field of marriage and divorce severely infringes upon the ability of many Israeli citizens and residents to fully realize their right to family life, including same-sex couples and opposite-sex couples ineligible to marry in Israel due to restrictions imposed by religious law. The proper solution for ensuring the right of every individual to marry, free of the shackles of religious law, is the introduction of civil marriage in Israel. However, such a solution is not expected in the foreseeable future. Under the current legal regime, couples prohibited from marrying in Israel are forced to travel abroad in order to realize their fundamental rights. The lack of recognition of marriages contracted abroad between persons ineligible for marriage within Israel due to religious impediments aggravates the infringement of their basic right to family life.

The Israeli Supreme Court has utilized over the years two mechanisms in order to accord some of the rights of marriage to couples ineligible for religious marriage in Israel who performed a civil marriage ceremony abroad—the registration mechanism and the “marriage incidents” approach—but to date, the Court has refrained from ruling on the validity of those marriages. These alternative solutions are limited and insuffi-

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265. As opposed to the majority of states in the United States, New York has not enacted a law which bars the recognition of out of state same-sex marriages (a Defense of Marriage Act). See *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008); Leonard, *supra* note 254.

266. See *Hernandez v. Robles*, 855 N.E.2d 1 (2006) (holding that New York Domestic Relations Law does not authorize issuance of licenses for marriages of same-sex partners, although the statute does not, on its face, expressly forbid such marriages). However, in the *Martinez* case, the Appellate Division held that it should not be concluded from the court's holding in *Hernandez* that the recognition of same-sex marriages performed outside of New York violates public policy, as *Hernandez* is limited to the holding that the Domestic Relations Law did not violate the New York State Constitution. See *Martinez*, 850 N.Y.2d at 743. See also Kimberly N. Chehardy, Note, *Conflicting Approaches: Legalizing Same-Sex Marriage Through Conflicts of Law*, 8 CONN. PUB. INT. L.J., Spring 2009, at 131, 151–54.

267. *Martinez*, 850 N.Y.2d at 743 (“[T]he place for the expression of the public policy of New York is in the Legislature, not the courts. The Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York.”).

cient, as they accord the couple very few of the rights associated with marriage, leaving them uncertain of their status and of their rights and obligations vis-à-vis one another, as well as toward third parties. Although by virtue of the registration of the foreign marriage and the recognition of some of its incidents the couple may enjoy a few of the rights associated with marriage, their foreign marriage is largely unrecognized.

All Western legal systems accept the fundamental principle that where a foreign element is involved, the rules of private international law supersede domestic law. Based on this premise, and given the absence of a statutory choice of law rule for the recognition of marriages conducted outside of Israel, this Article attempts to propose criteria for the adoption of a choice of law rule that will correspond to the unique social and legal conditions prevalent in the State of Israel. The critical comparison between the two main choice of law systems for marriage recognition (the United States and England), as well as the examination of the different ramifications of the application of each of them in Israel, have led to the conclusion that the American choice of law rule referring to the *lex loci celebrationis* in matters of capacity is the one most appropriate for adoption in Israeli law.

The American rule is preferable, despite some of its flaws, since it best promotes the policy objectives of the choice of law rules in the field of marriage recognition, particularly in light of its emphasis on the policy of validation. The American rule serves to preserve family ties and stability and gives effect to the parties' intentions; it also promotes certainty, convenience and predictability, as well as the uniformity of status, thereby preventing "limping marriages."<sup>268</sup> The adoption of the place of celebration rule is also preferable considering the injustice caused by the exclusive application of religious law, whereby ancient rituals serve to deprive large groups of the Israeli population of the fundamental right of marriage. The English rule, on the other hand, was largely designed in order to prevent English domiciliaries from evading the prohibitions prescribed by their personal law, thereby emphasizing the moral and cultural interests of the forum rather than the general principles of private international law.<sup>269</sup> This is not to suggest that the social interests of the forum in maintaining the core aspects of its marriage institution should be disregarded; rather, those interests should be considered within the public policy exception, which was explicitly designed for that purpose.

Accordingly, should the American choice of law rule be adopted in Israel, as suggested herein, it would not follow that all foreign marriages

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268. See *supra* Part V.A.

269. See *supra* Part IV.B.

of couples ineligible for marriage in Israel would be recognized under Israeli law, even though complying with the *lex loci celebrationis*. Some of those marriages may still be deemed invalid by virtue of the public policy exception. However, this Article argues that public policy should not be invoked against marriages performed in circumvention of the forum's internal religious or semi-religious prescriptions. The public policy exception should instead be interpreted narrowly, as protecting only democratic, secular, rational, and liberal values, including the principle of equality, as well as the right to family life and freedom of conscience. Therefore, marriages of two single adults who are not related to one another, including same-sex couples, should be fully recognized under the Israeli conflict of laws.