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An International Perspective on Same-Sex Marriage Post Obergefell (and Some Thoughts on Legal Positivism as a Means of Reconciliation): The Israeli Case

Avishalom Westreich*

ABSTRACT

Obergefell v. Hodges has changed the legal status of same-sex marriage in the United States. In some other countries, the legal debate still continues. In both, legal decisions did not reduce the deep controversies that exist between groups in society regarding the general character of marriage and the status of same-sex marriage in particular.

This paper discusses the international side effects of the Obergefell decision, and asks whether these side effects necessarily include social conflict, or whether there are ways to promote societal agreement on this matter. By examining the Israeli situation as a test case, the paper argues that while in the legal realm Obergefell will strengthen the demand for recognition (and possibly even be decisive in the legal debate), in the social and cultural fields, gaps will continue to characterize the discourse on this matter. Therefore, this paper proposes a different socio-legal model, which is relevant to any divided society. Based on H. L. A. Hart’s classic positivistic legal theory, this paper argues that scholarship needs to change the way it (often) understands the law and its social objects. Instead of substantive expectations from the law (which lead to a contest over the rights and duties that are included in it), the law must be treated as an expression of social practices. In this respect, a pluralist approach to law is possible. Despite deep controversies over right and wrong, good and bad, society through its legal system should enable different practices within shared social standards.

* Ph.D., M.A. (Hermeneutic Studies); B.A. (History; Talmud); LL.B. (Law). Senior Lecturer (Associate Professor), College of Law and Business, Ramat Gan; Research Fellow, The Kogod Research Center for Contemporary Jewish Thought, Shalom Hartman Institute, Jerusalem; Visiting Research Fellow (2007-08), Agunah Research Unit, University of Manchester, U.K. I wish to thank Leon Morris and Noam Zion for our wonderful talks and their very helpful comments, and Edward Levin for his excellent linguistic editing. The paper was delivered at the symposium on “The Implications of Obergefell v. Hodges for Families, Faith and the Future,” J. Reuben Clark Law School, Brigham Young University, October 12, 2015. I am grateful to Prof. Lynn Wardle and to the other symposium organizers for the opportunity to participate in this stimulating event.

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In regards to same-sex relationships, this paper thus proposes that both contesting sides of the society will acknowledge each side's practical right to participate in defining the marital abode, possibly including marriage, as well. This acknowledgement, however, will not derive from a substantive acceptance of the other's values. The law then will become a tool of tolerance, a means for reconciliation between different worldviews, without any of them compromising on its own substantive understanding of family, partnership, and marriage.

I. INTRODUCTION

Obergefell v. Hodges has changed the legal status of same-sex marriage in the United States. In a post-Obergefell United States, following the 5 to 4 Supreme Court decision, same-sex couples are provided with full and equal rights, including the absolute legal recognition of same-sex marriage. In some countries, this was achieved by past legislation; in other countries, the legal debate still continues. In either case, legal decisions did not reduce the deep controversies that exist between groups in society regarding the general character of marriage and the status of same-sex marriage in particular. Public discourse on this issue is therefore still precisely characterized as a "controversial environment."

This opening remark hints at two related discussions that were raised following the Obergefell v. Hodges case. First, what will be the international side effects of the Obergefell decision. Second, do the side effects necessarily include social conflict, or are there ways to promote societal agreement on this matter? While the first issue focuses on international perspectives, the second (although derived from the international perspective) may be relevant to the American context, as well.

This paper will discuss these two topics, in order to build a conceptual construction for reconciliation between the contesting approaches regarding same-sex marriage. By discussing the Israeli situation as a test case, the paper argues that while in the legal realm Obergefell will strengthen the demand for recognition (and possibly even be decisive in the legal debate), in social and cultural fields, gaps will continue to characterize the discourse on this matter. Therefore, this paper proposes a different socio-legal model, which is relevant to any divided society. Based on H. L. A. Hart's positivistic legal theo-
ry, the paper argues that scholarship needs to change the way it (often) understands the law and its social objects. Instead of substantive expectations from the law (which lead to a contest over the rights and duties that are included in it), the law must be treated as an expression of social practices. In this respect, a pluralist approach to law is possible. Despite deep controversies over right and wrong, good and bad, society through its legal system should enable different practices within the shared social standards.

In regards to same-sex relationships, the paper thus proposes that both contesting sides of society will acknowledge each side’s practical right to participate in defining the marital abode, possibly including marriage, as well. This acknowledgement, however, will not derive from a substantive acceptance of the other’s values. The law then will become a tool of tolerance, a means for reconciliation between different worldviews, without any of them compromising on its own substantive understanding of family, partnership, and marriage.

II. INTERNATIONAL IMPLICATIONS OF OBERGEFELL V. HODGES: EXPECTATIONS

The legal implications of the U.S. Supreme Court’s recent ruling in Obergefell v. Hodges will probably not stop at the borders of the United States. The U.S. Supreme Court’s decisions in past value-based conflicts have been widely cited and discussed, and have affected both academic discourse and judicial rulings all over the world. It would not be too far-reaching to assume that the impact of Obergefell will be similar. The decision might bolster the struggle of same-sex couples for legal recognition in other countries and cultures. Following the decision, it is reasonable to expect that it will reinforce the demand for legal recognition of same-sex partnerships, and thus pro-


vide same-sex couples with full and equal rights in a growing number of countries. In fact, the trend (generally speaking) is already towards full recognition and equality of same-sex couples, so the Obergefell case will soon become a natural element in any discussion or debate of same-sex marriage.3

From social, cultural, and religious perspectives, in many countries including the United States, the rights of same-sex couples, and especially the right to marry, are extremely controversial. Conservative social forces, often led by religious groups, hesitate to change (and often even vigorously oppose any change in) what traditionally was understood and believed to be marriage. The majority of the U.S. Supreme Court took a clear position in Obergefell (although the debate has not yet ended).4 In some countries legislators, rather than the courts, took a similar position.5 However, in other countries the legal process is still in earlier stages.6 Typically, the status of same-sex couples is built in a step-by-step process, including both judicial decisions and legislation, starting from specific rights, leading to full recognition. In this process, as argued above, it would not be surprising to find the new U.S. Supreme Court’s ruling as a supportive argument in favor of full recognition of same-sex marriage.

How will this occur? As a test case, I will examine the status of

3. Recent developments in the European Court of Human Rights have indeed referred to the Obergefell case. In Oliari and Others v. Italy, the court established “the positive obligation of the State to ensure recognition of a legal framework for same-sex couples in absence of marriage,” but did not (yet?) recognize a positive right to same-sex marriage. See Giuseppe Zago, A Victory for Italian Same-Sex Couples, A Victory for European Homosexuals? A Commentary on Oliari v. Italy, Articolo 29 (Aug. 21, 2015), http://ssrn.com/abstract=2689060.

4. One aspect that, in my opinion, will lead to a collision and will require the attention of the United States Supreme Court is the extent to which religious groups, institutions, and individuals that object to same-sex marriage are obliged to accept and recognize it. The current tendency is to compel those groups to recognize same-sex marriage, and Chief Justice Roberts, in his dissenting opinion, was very concerned by this issue. See Obergefell v. Hodges, 135 S. Ct. 2584, 2625-26 (2015) (Roberts, J., dissenting). In the Hobby Lobby case, on the other hand, the U.S. Supreme Court supported exceptions for some corporations based on religious beliefs. It seems, thus, that the conflict is inevitable. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).


6. See id. European countries differ in the measure of recognition that is given to same-sex couples, including the option of marriage. The European Court of Human Rights, however, ruled that there is an obligation to establish a legal framework for same-sex couples. See supra note 3.
same-sex couples in Israel and the possible influence of *Obergefell*. The present status of same-sex couples in Israel is discussed in several papers. I will therefore focus on the future, on expected and proposed developments in this area.

### III. THE ISRAELI CASE

Israel is a paradigmatic example of a society divided in its attitude towards same-sex relationships. It is a society in which the civil legal system recognizes (in principle) equal rights of same-sex couples, and tries to implement these rights in practice to the greatest extent possible. But, a strong religious establishment objects to such rights. It is also a society in which same-sex relationships are part of the normal life of some social groups, while still others (more traditional or conservative; not necessarily “religious” in the classic meaning) reject

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8. In Israel, marriage and divorce are performed according to religious law in the religious courts. See Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953 (Isr.). Civil marriages performed abroad are recognized (see HCJ 2232/03 Plonit v. The Regional Rabbinical Court Tel Aviv 61(3) PD 496 [2006] (Isr.)). The Israeli Supreme Court acknowledged the right of same-sex couples who performed marriage abroad to be registered as married, but did not (yet?) provide those couples with full recognition (HCJ 3045/05 Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior 61(3) PD 537 [2006] (Isr.)). Marriage registration, however, is a de-facto recognition, which includes also the right to divorce. Some spousal financial rights were recognized even earlier, in the *Danilovich* case (HCJ 721/94 El Al Israeli Airlines v. Danilovich 48(5) PD 749 [1994] (Isr.)). In that case, the Supreme Court obligated El Al, the Israeli national airline, to provide its employee’s same-sex spouse with benefits to which opposite sex spouses are entitled. That landmark decision acknowledged same-sex couples as cohabitants, opening the gate for providing them with the relatively wide range of rights that are given to cohabitants according to Israeli law. It goes without saying that rabbinical courts would not recognize any kind of same-sex marriage (and any rights derived from it). Rabbinical courts do recognize some aspects of civil, nonreligious marriage and define such unions as Noahide marriage. See Avishalom Westreich, *Rhetoric and Substance ‘Came Down Wrapped Together’? On Civil Marriage in Israel Following the Noahide Decision*, 543 FAM. IN L. REV. 6–7 (2013–2014) (Heb.). However, Noahide marriage would not apply to same-sex marriage, although more and more countries recognize it as marriage, and, in principle, same-sex marriage, too, could be defined as Noahide marriage. This was interestingly illustrated when a homosexual couple, Uzi Even and Amit Kama, filed a divorce suit in a rabbinical court (probably as a protest). The rabbinical court has ignored the file. See Amir Paz-Fuchs, *The Ironies of Gay Divorce in Israel*, OXFORD HUMAN RIGHTS HUB (Dec. 20, 2012), http://ohrh.law.ox.ac.uk/ the-ironies-of-gay-divorce-in-israel/.
them. It is a society in which the political system tries (without total success) to satisfy everyone and to provide same-sex couples with civil rights, but without fully recognizing their relationships as equal.

Alongside these controversies, the direction in the Israeli legal system is quite clear. Similar to other countries, the Israeli legal system is moving towards enhancing the rights of same-sex couples including, as I have mentioned above, a de facto right to marry and divorce. In this environment, it is reasonable to expect that the Obergefell v. Hodges case will soon become part of the agenda of the supportive opinions, and we will probably see it as an additional argument (or even evidence) in favor of full and formal recognition of same-sex marriage. I assume that this recognition will be in both the legal and the public spheres.

In the margin of my discussion, before entering the legal arena, I would like to make a few short arguments regarding the public sphere. Significant sectors of Israeli society (which are often seen as the hegemonic groups in Israel, and are—at least are viewed as being—strongly represented in Israeli media) have adopted Western liberal culture, with a particular orientation to American liberalism. Liberal groups in Israel, too, follow the recent trend towards full recognition of same-sex relationships. This trend is expressed in a growing social legitimacy for establishing same-sex marital abodes and viewing them as a manifestation of basic liberal values and human

10. These cultural differences are highlighted in the reactions to the Gay Pride Parades in Jerusalem as compared to those held in Tel Aviv. While in Tel Aviv tens of thousands participate in the parade and it becomes a municipal event, supported by the city council, in Jerusalem the parade faces strong objections. In 2015, one of those present was murdered by a radical ultra-Orthodox man. See Yonah Jeremy Bob, Gay Pride Parade Stabber Charged with Murder, JERUSALEM POST (Aug. 24, 2015, 9:13 AM), http://www.jpost.com/Israel-News/State-indicts-alleged-gay-pride-parade-stabber-Schlissel-for-murder-413072.

11. For example, the attempt to provide same-sex couples with tax benefits. While the government did not succeed in passing a law in the Knesset (the Israeli Parliament) due to internal disputes, they were finally instituted by a memo of the Tax Authority. See Moran Azulay, Tax Authority Grants Same-Sex Couples Equal Tax Benefits, Ynet (Dec. 30, 2013, 10:17 PM), http://www.ynetnews.com/articles/0,7340,L-4471395,00.html.

12. See Blecher-Prigat and Cohen, supra note 7.

13. I will limit myself to some basic statements. Further and deeper discussion obviously requires more serious sociological research, which is beyond the scope of this paper.

14. As an anecdote in regards to our topic: Yitzhak ben Horin, a reporter for Ynet, the most popular Israeli news and content website, defined the dissenting opinions in Obergefell as "opinions ... relatively dark to the 21st century." Yitzhak ben Horin, U.S. History: Same-Sex Marriage Legal, Ynet (June 26, 2015, 5:15 PM), http://www.ynet.co.il/articles/0,7340,L-4673110,00.html, (Hebrew).

rights (such as freedom and equality), but without the necessary deep discussion on the character of the family in the society that may be affected by these changes. My expectation is that the legitimacy of same-sex marriage (together with other aspects of family life, including procreation) will soon become an axiom in public discourse. This process will reinforce the demand for providing same-sex couples with full social and legal rights, even those that are not yet afforded them. Its consequences will be particularly in the legal field, to which I now turn.

As for the consequences of *Obergefell* in the legal sphere, the constitutional rulings of the Israeli Supreme Court are traditionally influenced by foreign jurisdictions, which are frequently cited by its justices. It will take some time, but in the end, *Obergefell v. Hodges* will also enter the Israeli legal discussion. Indeed, the Israeli Supreme Court today is less activist than it was two decades ago, under Chief Justice Aharon Barak. However, yet it does not refrain from making significant decisions, including judicial legislation, when it deems it necessary. Lower courts are subject to the Supreme Court's rulings, but even without a formal decision, the “spirit” of the Supreme Court spreads and is reflected in lower court decisions that often drive significant change. Thus, in recent years, lower courts have also made changes—some of which have been revolutionary—by participating in a bottom-up process. This is especially true regarding family mat-

16. I am not arguing that liberal values necessarily lead to accepting same-sex marriage. Rather, I maintain that certain social and academic groups see it in this way. The very issue of what should be the liberal position towards same-sex marriage is disputed, although (as argued above) the trend today is towards viewing this as a basic right. See, e.g., Greg Walker, *Public Reason Liberalism and Sex Neutral Marriage: A Response to Francis J. Beckwith*, 28 *RAT. JUR.* 486 (2015).

17. See Porat, *supra* note 2. In a recent example, the Israeli Supreme Court, sitting as the High Court of Justice, discussed the legitimacy of limiting the right to free speech in an Israeli anti-boycott law that defines support of the boycotting of Israel or Israeli institutions as a cause for tort suit and imposes some governmental sanctions on those who support boycotting (the Law for Prevention of Damage to the State of Israel through Boycott – 2011). The Court rejected the suit, basing itself, *inter alia*, on American precedents that discussed the limitations on free speech in the context of boycotts (for example, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). See HCJ 5239/11 The Supreme Court of Israel, Uri Avnery et. al. v. the Knesset (Apr., 15, 2015), Versa Legal Database (Isr.) available at http://versa.cardozo.yu.edu/opinions/avneri-v-knesset.

18. See, e.g., in 2009 the High Court of Justice struck down a law that established a private court system, viewing it as unconstitutional. See HCJ 2605/05 The Supreme Court of Israel, Academic Center of Law and Business v. Minister of Finance (Nov. 19, 2009), Versa Legal Database (Isr.) available at http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance.
ters in general, and same-sex couples in particular.\textsuperscript{19} Hence, even without an explicit Supreme Court decision fully and formally recognizing same-sex marriages performed abroad (rather than recognition for the purpose of registration),\textsuperscript{20} and certainly without formal legislation, family courts have already acknowledged the rights of same-sex couples to marry and divorce. Divorce of same-sex couples is thus not unknown in Israeli courts, even though the country does not formally recognize any kind of civil marriage, and certainly not same-sex marriage.\textsuperscript{21} It is a reasonable expectation therefore, that we will see references to the Obergefell case in Israeli family courts very soon.

Other groups in Israel, however, live in a completely different sphere. Religious tribunals—which in Israel have authority over marriage and divorce matters\textsuperscript{22}—do not, and will not accept same-sex marriage. Both rabbinical courts, which adhere to the Orthodox Jewish view, and tribunals of other religions, which take a similar conservative approach in family matters, entirely oppose same-sex relationships because of their religious views. While they may accept same-sex relationships as a social fact, and sometimes even reveal some tolerance for this different lifestyle,\textsuperscript{23} marriage is not an op-

\begin{enumerate}
\item See, e.g., family courts have accepted suits for tort compensation that is imposed on a recalcitrant spouse who refuses to grant his or her spouse divorce (get refusal). See, e.g., Aydeet Blecher-Prigat & Benjamin Shmueli, The Interplay Between Tort Law and Religious Family Law: The Israeli Case, 26 ARIZ. J. INT'L & COMP. L. 279, 284–87 (2009). This is a common decision by family courts, and was approved recently by the Tel Aviv District Court, but has not yet reached the Supreme Court. Family courts' active contribution to the formation of law is not limited to general family law matters, it relates to same-sex rights in particular. For example, during 2013–2015 a few divorce cases of same sex couples (who married abroad) were discussed in family courts, even though same sex marriages are not formally recognized. For this phenomenon and its limitations see Daphna Hacker, What Has Changed This Year? Families' Law – Between the Chaotic and the Harmonious, 9 Din Udvarim 295, 312–313 (2015) (Heb.).
\item This was the result in the Even and Kama case. See Paz-Fuchs, supra note 9. Since then a few more divorces have been issued by family courts. See Hacker, supra note 19.
\item Religious tribunals have sole authority over marriage and divorce, which should be performed according to religious law (Rabbinical Courts Jurisdiction Marriage and Divorce Law, 5713–1953 (Isr.)). Religious tribunals have shared authority over matters related to divorce, such as maintenance and property division (id., art. 3), some of which adjudicate according to civil law (property distribution), while others follow religious law (maintenance). See HCJ 1000/92 Bavli v. The High Rabbinical Court 48(2) PD 221 [1994] (Isr.).
\item Rabbinical courts rarely discuss same-sex marriage. I have found one verdict that discusses the custody of children whose mother lived in same-sex relationships. The decision confirmed the mother's custodial rights, which it deemed to be in the best interest of the children. In my opinion, the decision represents some degree of tolerance for the lifestyle of the mother (with some differences between the rabbinical judges, as a close reading of the verdict reveals). See File No. 922153/4 Rabbinical Court (Haifa), Plony v. Plonit, (August 23, 2015), Nevo Legal Database (by subscription) (Isr.).
\end{enumerate}
tion.24 Their view is not without support. In the public sphere, more traditional or conservative approaches struggle and will continue their struggle (however, following the above discussion on the legal developments, might be a rearguard battle) to delegitimize same-sex relationships and to maintain their monopoly of heterosexual marriage.

The combination of two legal authorities, different worldviews, and past legal decisions (which tried to develop civil aspects of Israeli family law, including homosexual rights) leads to a somewhat bizarre situation. Today, civil marriages that were conducted abroad are recognized by Israeli civil law, but their dissolution is done in rabbinical courts.25 Same-sex marriages are recognized only for the purpose of registration but in practice are treated as marriage and are dissolved in civil family courts. Thus, same-sex marriages have a great advantage over opposite-sex marriages from a civil perspective (that is, dissolution in a civil court). Thus, from a civil perspective, it may even be said that same-sex marriages are more established as part of Israeli civil family law than opposite-sex marriage. This situation surely does not make any sense. My expectations are that the Obergefell case will strengthen the demand of same-sex couples for full recognition and will influence Israeli family law, but will not improve this situation.

A revision of the current legal framework regarding marriage and divorce is therefore needed, as many writers have argued in the past.26 And in this revision, the status of same-sex marriage will play a significant role. I would even say that the key for the success of this kind of revision is bridging the gap between the contested views in Israeli society regarding same-sex partnership. Is this possible?

24. See Paz-Fuchs, supra note 9.
25. This situation is a compromise between the civil and the Jewish religious systems. Some Jewish law decision-makers view civil marriage as valid from the point of view of religious law, and it therefore needs to be dissolved in a religious court with a religious writ of divorce (a get). Civil marriages are recognized, but in order to prevent cases in which divorced couples would be considered married by a rabbinical court, the Israeli High Court of Justice decided in 2006 that its dissolution would be performed in rabbinical courts. See the HCJ 2232/03 Plonit v. Regional Rabbinical Court (Tel Aviv) 61(3) PD 496 [2006] (Isr.).
IV. BRIDGING THE GAP? OBERGEFELL AND THE FUTURE CHARACTER[S] OF CIVIL MARRIAGE IN ISRAEL

The solution to this paradoxical situation is to change the Israeli framework of marriage and divorce. When this change occurs, the legal system will have to consider the status of same-sex marriage. In a post-Obergefell world, the demand for full recognition of same-sex marriage will surely be high and unyielding. Yet, the success of the demand (whether full or partial) depends in a greater extent on the characteristics of the new legal system. The following discussion will attempt to explore this argument, focusing on proposed models of the Israeli marriage and divorce system. The relevancy of this discussion is, however, much wider than the specific Israeli context, since the legal structures that will be discussed characterize other legal systems, and my proposed construction for reconciliation (infra) can be relevant to many other divided societies.

In the last three decades or so, there have been repeated calls for a change in the marriage and divorce system in Israel. Their focus is mainly on the application of the basic right to marriage and divorce (which, in Israel, is limited due to the monopoly of the religious establishment on marriage and divorce). However, the discussion on this issue—what should be the proper marriage and divorce arrangement—has implications for same-sex marriage as well.

Proposals for restricting or terminating the religious monopoly on marriage and divorce in Israel have long been an integral, continuous part of the public agenda in Israel. Such proposals are divided into two main categories. One proposal is the retention of the religious route, but adds a civil alternative to it. Those who support this two-route system propose to establish two accessible alternatives: civil marriage and religious marriage. By this, it is argued, Israel—as a Jewish and democratic state—will preserve the unique status of religious marriage (and Jewish marriage in particular), without harming the basic human right to marry and divorce (which, by their nature, religious marriages do). Accordingly, some of those who support the two routes solution propose to define the civil alternative as civil union rather than marriage, thus bypassing the difficulty in using a symbolic term (marriage) for what previously was viewed solely as a

27. See Id.
28. See Id. at 73–78.
Another proposal is for the formation of a uniform civil legal framework for marriage and divorce in Israel, while recognizing the validity of a variety of ceremonies. According to such proposals, the various cultural and religious groups and their traditions would be fully represented through their respective ceremonies, and yet, all marriages and divorces would be covered by the same civil umbrella. To the American reader this proposal sounds familiar: American family law is civil in its nature while giving room to religious, cultural, or other kinds of ceremonies in the creation of marriage. The civil framework proposal is indeed similar, although some features of the proposed civil framework will be different, retaining the unique character of Israel as a Jewish state. Thus, for example, religious courts will continue to have some authority, both on civil legal issues (under the civil umbrella) and on religious issues (such as the authority to prevent divorce refusal on religious grounds). In addition, there may still be some restrictions on civil divorce when it is unaccompanied by religious divorce, in order to prevent an acute collision between the two worlds (religious and civil).

In 2013, Professor Pinhas Shifman and I discussed these two options. We argued in favor of the second option, with regard to both civil and religious considerations. We did not make a decisive argument on the status of same-sex marriage in both options, leaving this question to further discussion. In this respect, due to the expected cross-border influence of Obergefell v. Hodges, and in particular its effect on the Israeli legal system, the time has arrived to make more decisive claims regarding the future status of same-sex marriage in Israeli family law.

In the current legal atmosphere, same-sex marriage receives increasing recognition, but only by judicial decisions, and not by legislation (like other elements of Israeli civil family law). If, or when, one

29. See id.

30. According to Jewish law, when a (religiously) married wife gives birth, with the father other than her husband, the child is considered a mamzer (a bastard), and he or she cannot marry another Jewish spouse. In order to prevent this severe religious result, some argue (and I share their view) that even in a civil legal framework, when a couple was married in a religious ceremony and divorced only civilly, divorce will not include the right to remarry until religious divorce is granted. In this case, religious courts might have the authority to impose sanctions on the recalcitrant spouse. See WESTREICH & SHIFMAN, supra note 26, at 91–94.

31. Id. at 90–91.

32. See “III. THE ISRAELI CASE,” supra Part III.
of the above two options of civil arrangements of marriage and divorce is accepted, I have no doubt that same-sex marriage will be included. But how?

The first option, the two-route system, will create two different alternatives for marriage and divorce—religious vs. civil. According to this proposal, the current religious monopoly would be replaced by a system that enables the couple to decide which route, religious or civil, they wish to choose for themselves, and their choice would continue to accompany them throughout their married life. This proposal creates a sharp dichotomy between the civil and religious routes. The two will compete for the heart of the Israeli public, each trying to expand the numbers of its supporters and followers, or to raise the number of couples who will choose it as their marriage and divorce route. Unfortunately, in my opinion, competitive routes will result in deepening the gap between them, as each will try to emphasize its marriage and divorce system’s uniqueness. Thus, sooner or later, the civil system will adopt an ultraliberal worldview in various aspects of marriage and divorce, while any call for restricting it will be denied and given the negative tag of belonging to the religious route. I assume, for instance, that the civil route, being emptied of its religious restrictions, will adopt a divorce on demand system, without any limitation on divorce. The religious route will do the same, but move towards the other extreme. I assume that it will move to the more radical conservative approach in all conflictual matters. On the right to divorce issue, for example, it will adopt an ultraconservative view that opposes unilateral divorce even in cases of irretrievable breakdown between the spouses, when the marriage has actually ended.

A similar result can be expected in regards to same-sex marriage. Defining the civil route as an absolute alternative to the religious route and even labeling it as the opposite of the religious route will influence its attitude towards same-sex marriage. The civil route will adhere to the view that best expresses its values. Thus, since in today’s liberal discourse recognizing same-sex marriage is considered to


be the true and justified expression of the equal right to marriage and divorce, it will surely be fully acknowledged by this civil route. The fact that Obergefell made the recognition of same-sex marriage obligatory in all American states will anchor it even more firmly within the consensus, and will lead to its introduction in this Israeli civil route without any debate. The religious route, on the other hand, will continue to completely ignore and totally reject such marriages. There will be no recognition of same-sex marriage, and probably (as long as this will be under its judicial authority) no recognition of any rights of same-sex couples, whether married or not.

In my opinion, however, the sharp dichotomy between the religious and the civil routes, which will probably become deeper and deeper, is a great disadvantage of the two-route proposal, and a danger to Israeli society. In such a divided society (some might say, more positively, a multicultural society; see below), splitting marriage and divorce into two routes can act as a catalyst for widening the gap between societal groups. It might result in a de facto separation between these groups, while reducing, or even eliminating, the shared values and common denominators of Israeli society. Israel is an immigrant state, with populations from various background, cultures, and origins (from India in the east to America in the west, Sweden in the north to Ethiopia in the south), which has been attempting since the late nineteenth century (before the formal establishment of the state in 1948) to turn this mixture of cultures into a single society, and later, into a single state. Although in recent years the call for multiculturalism in Israel has grown stronger, there is still a basic need to preserve shared communal values. Some will see this as an important step in facing national conflicts that Israel is part of. Others will see unity as a value by itself. In any event, preventing this kind of social division is still important in this relatively young state. In this environment, formal legal separation between groups might result in deepening existing gaps instead of bridging them, and thus will be very harmful to the stability of Israeli society.35

Accordingly, establishing two routes, will lead the civil route to follow the current wide recognition of same-sex marriage, while creating a high level of conflict between the two routes on this issue. The civil recognition of same-sex marriage will be stronger in the post-Obergefell world, in Israel as well as in other Western societies,

35. For additional critics of this route, see Westreich & Shifman, supra note 26, at 75–78.
which have civil marriage and divorce law. However, it will not assist in bridging the gaps between different worldviews in each one of those cultures and societies.

At this point, I will turn to the second proposal for the Israeli marriage and divorce system: the common civil framework. After introducing this proposal, I will examine its expected attitude towards same-sex marriage, and propose a conceptual framework that may enable general acceptance of that attitude. As mentioned earlier, the proposed framework may have global application. Its relevancy is wider than the Israeli context, and it can play a role in other civil legal systems of divided societies, as well.

The common civil framework draws a completely different picture than the two-route system. Such a civil framework model would deal with all matters of marriage and divorce in Israel (that is, financial aspects, child and spouse maintenance, grounds for divorce, etc.) according to one civil law. Religious and cultural differences will find their explicit expression in the creation and dissolution of marriage. The civil legal framework will grant full legitimacy to a wide variety of religious and nonreligious marriage ceremonies, as well as a variety of divorce ceremonies and procedures.

This kind of framework is civil in its nature. Nevertheless, when constructing and designing its substance, the legal system should take into consideration the multicultural nature of the society, the variety of beliefs and traditions, and the different understandings of family and family values. It will therefore have to give some place for expression of the more traditional approaches (both Jewish and non-Jewish), making an effort to mediate as much as possible between these approaches and the civil-liberal nature of the legal system. This is surprisingly feasible, at least in the Israeli context. In many core issues of family law, there are voices within Jewish religious law that reflect approaches that adhere to modern liberal values, or at least find legal and hermeneutical ways to cooperate with the civil law that is derived from these values (other religions require further research). This is true in regards to the laws of marriage and divorce, financial matters (equal distribution of property), and

36. See Westreich, supra note 9.

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the basic principles of custody cases. Gaps do exist, tensions do arise, and political conflicts break out from time to time. But the heart of the law can be based, and in many aspects is already based, on a shared language. Thus, the common civil legal framework can express a wide range of worldviews, not only by accepting various ceremonies in order to perform marriage and divorce, but also in its substantive law.

Let us examine in greater detail one of the above examples—the grounds for divorce. At present, no-fault divorce is a widely accepted divorce regime. No-fault divorce, however, is not a single approach, but rather consists of a wide range of options. Among no-fault divorce possibilities we can find a moderate one, which does not support divorce in every case, but only when there is an irretrievable breakdown of marriage. From a religious aspect, in Jewish law, although fault divorce or divorce by mutual agreement are most common, we can find sufficient basis for moderate no-fault divorce approaches, as well, and these approaches are used in practice in quite a few rabbinical courts. Thus, a civil legal framework, which adopts a no-fault divorce regime, but restricts itself to cases of an irretrievable breakdown of marriage, can be accepted by Jewish religious courts, as well. Rabbinical courts will require a religious divorce ceremony in order to acknowledge the divorce, but there will be no substantive conflict regarding the core rationale and the application of the divorce law.

Same-sex marriage is different. The Israeli rabbinical court system is dominated by the Jewish Orthodox view (sometimes even by its strict ultra-Orthodox branches), which vigorously object to same-sex relationships. Although there are voices within Orthodox Jewry that, to different degrees, do support recognizing same-sex relation-

39. The best interest of the child is the common principle shared by civil and religious courts (both Jewish and non-Jewish). See, e.g., the decision of the Rabbinical District Court of Haifa, supra, note 23. The recent shift toward children’s rights is not yet reflected in the religious courts, but, in my opinion, there is no reason not to adopt a moderate version of a children’s rights doctrine.

40. See Amihai Radzyner, Problematic Halakhic ‘Creativity’ in Israeli Rabbinical Court Rulings, 20 JEWISH L. ANN. 103 (2013).


42. See Westreich, supra note. As in civil law, Jewish law does not provide a strict definition of irretrievable breakdown. Thus, it is possible to define irretrievable breakdown after twelve months of divorce proceedings (Rabbenu Jeroham) or after eighteen months of conflict between the spouses (Rabbi Hayyim Palache).
ships, these voices are still rare, and even among them, I doubt if marriage is included. Some of those relatively new approaches try, for example, to reinterpret the biblical prohibition on same-sex relationships as excluding current same-sex relationships, which are based on sincere partnership, but this is a marginal view within Orthodoxy. Even according to the more open approaches, it is still very hard, even impossible, to take their view a step further and to expand their recognition to defining marriage, from a religious point of view, as including same-sex couples. And even if we do find this kind of approach, basically, as stated, same-sex relationships are rejected by the mainstream of Jewish Orthodoxy and deemed as severely prohibited according to formal Jewish law.

Same-sex marriage is therefore one of the greatest challenges (if not the greatest) to the civil legal system, if it indeed wishes to give expression to the worldviews of wider parts of society. In my opinion, it is not a question whether it can do it or not, but a task: the civil legal framework has to find ways to bridge the gap, separating all elements of the society. It cannot base itself solely on one worldview; it must rather also consider the feelings and beliefs of other (more traditional and religious) groups. In many countries, it is the present task. In Israel, it is a future challenge, if (or when) a civil legal framework will be adopted. In this respect, I expect an intensive discussion regarding the status of same-sex marriage: is it legitimate to include it in a uniform civil framework?

The gap seems unbridgeable. In the current legal atmosphere, especially after the Obergefell v. Hodges decision, the demand for full recognition to same-sex marriage is very strong, and it will be difficult to establish any new civil framework without including same-sex marriage. This will raise a great challenge in Israel, as well as in similarly divided societies. Will these legal reforms necessarily exacerbate intrasocietal, cultural, religious, and political strife? Is it possible to enhance reconciliation between the conflicting sectors of such a society, while advancing the rights of same-sex couples? In my opinion, the answer is yes, but one must choose the appropriate strategy to do so. The following theoretical framework intends to propose such a


strategy.

V. THE DISTINCTION BETWEEN MARRIAGE AS SUBSTANCE AND MARRIAGE AS A SOCIAL PRACTICE: THE KEY TO SOCIETAL AGREEMENT

I mentioned above several aspects in which, despite the apparent differences between civil law and religious law, it is possible to find common ground. In those aspects, the civil and religious legal systems can, and do, find common denominators upon which they agree, and thus civil law can create a law that is basically accepted (or at least tolerated) by both.

Nevertheless, same-sex marriage, as I have argued above, is different. Thus, as opposed to the other family matters, such as divorce and property matters, same-sex marriage will continue to be substantively contested, and it will not be possible to attain mutual recognition of shared values on this matter. If we wish to create a legal and societal framework in which some acceptance will be reached, it will have to be done in a different way, by a new theoretical construction. In what follows I would like to propose such a theoretical framework. My main argument will be based on the concept of "law as social practice," which, in my opinion, can be the means for bridging the gap between different parts of such a divided society. How is this to be done?

The two worldviews differ profoundly. They reflect contradictory understandings of basic rights and values (e.g., equality, the right to marry, and the very concept of family), and mediating between them on the basis of common values is difficult, and almost impossible. The solution thus needs to be found in a different direction. Using H. L. A. Hart’s classic model of legal positivism, I suggest that a more modest expectation from the legal system of a divided society may assist in solving the problem.

Common legal discourse is substantive by its nature. It is based on questions of morality, and deals intensively with rights and values. From a legal theory perspective, it is a classic non-positivist discourse, and sometimes is even based on natural law arguments. The same obviously holds true for our issue, which deals with basic rights such as equality and individual autonomy. This kind of a discourse

cannot reach an agreement between these two contesting approaches, and it indeed leads to a dead end.

The positivist discourse, on the other hand, is more modest. Its definitions of law derive from society rather than from substance. But whereas classic positivism focuses on external aspects of the law, that is, the coercive power of the society and its obedience by the people, Hart focuses on the internal aspects of the law, that is, its basis consists of its acceptance by the society. Here precisely lies the solution to our conflict.

According to Hart’s legal positivism, the legal system is based on social rules, which treat certain types of behavior as social standards. These shared social standards are based on their mutual acceptance by society and on the mutual understanding of their importance to the life of society, but not necessarily with common substantive recognition of them as absolute rights and values. As Hart writes, “it is not even true that those who do accept the system voluntarily must conceive of themselves as morally bound to do so.”

This structure enables a pluralism of worldviews, beliefs, and perhaps even moralities, as long as there is an agreement on the common social practices, which are reflected in the law of the society. The challenge here is, therefore, less the substance than the practice: can we build our society on shared practices which preserve the agreed interests, while still respecting each other’s beliefs?


48. See Hart, supra note 47, at 79–88. For a recent critical discussion on the importance of agreement to legal positivism, see Andrew Tutt, Legal Agreement, 48 Akron L. Rev. 215 (2015).

49. Hart, supra note 47, at 198 (emphasis added).


51. A similar argument, with broad implications, which is based on a constitutional discussion, is made by John D. Inazu in his forthcoming book: Confident Pluralism: Surviving and Thriving Through Deep Difference (forthcoming, 2016), who argues, “The goal of Confident Pluralism is not to settle which views are right and which views are wrong. Rather, it proposes that the future of our democratic experiment requires finding a way to be steadfast in our personal convictions, while also making room for the cacophony that may ensue when others disagree with us. Confident Pluralism allows us to function—and even to
aware that it is not always easy to make the distinction between substance and social practice and to apply it in reality, but it is, in my opinion, a very promising framework. Success in making such a distinction can lead to a practical reconciliation between the very deep differences in society, without any group being required to forgo its values and beliefs.

How can this framework work with same-sex marriage? Marital abode is a social practice. It is shared by various groups in society despite differences in its content and in the ideology on which it is based. As a social practice it includes most, if not all, aspects of marital life: the creation of partnership between two spouses, making them a couple, the option to dissolve the partnership and become separated again, reproduction, continuous cooperation in raising the children, educating and socializing them, financial relationships between the spouses and between them and others, and so on. As a social practice, it is shared and recognized by society's groups. On the other hand, the specific character and content of the marital abode (e.g., the nature of the family, what are its objects and the roles of each part of it), as well as the very meaning of this institution (e.g., is it merely a social institution, or does it have religious dimensions; what are its main goals), is different from one cultural, social, religious, etc. group to another. Each group has its own understanding of the substantive meaning of the family and the rights and values attached to it.

The distinction between social practices and substance makes it possible for contradictory worldviews to coexist. It demands mutual recognition of shared practices, but it does not require any part of the society to change its own values and beliefs. It goes without saying that recognizing the social fact of different lifestyles is not an easy task, but it is possible. It has some price, but does not demand waiving one's entire ideology. Values, in other words, can still coexist with practical tolerance of the other.52

This is exactly the point where the law plays a role. As it seems, the great controversies on the legal status of same-sex couples mirror

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52. I have used the term tolerance here (rather than pluralism) in order to emphasize that this framework does not demand a substantial acceptance of the other's values, but rather a practice of recognition. However, it may also be defined as weak pluralism.
the substantial conflicts of which homosexuality is a part. By putting law in its proper place, that is, reflecting social standards rather than absolute truth, we can reduce the level of tension in society. The legal status of same-sex relationships will therefore reflect the fact that for a significant group of society, it is a legitimate way of expressing their common social practices.

How can this be effected? In my opinion, it is first and foremost a question of consciousness: is it possible to acknowledge that legal rights for various lifestyles merely reflect the realistic recognition of a diverse society, without contradicting one's own values and beliefs? As I have argued above, in order to reconcile between disputing parts of the divided society, the answer has to be yes.

VI. CONCLUDING REMARKS

Bridging the gaps between the various groups in a divided society is possible even in the present context, in which the very concept of marriage is seen so differently by diverse groups of society. It requires a kind of duality (a duality of social practices and communal beliefs)—bridging the gap while recognizing shared social standards, but without imposing the acceptance of substantial understanding of the rights and values of one group on another.

It is not the object of this paper to analyze or criticize the Obergefell case. Yet, one comment should be made. If we want to achieve a practical agreement on social practices, as I have proposed above, the appropriate way is through democratic legislation, as Chief Justice Roberts’s dissenting opinion argues, rather than through the courts.53 A decision made and enforced by the court sends a message of a substantial truth, with no recognition or legitimacy granted to different worldviews. Legislation could attain the same legal result (that is, equal rights for same-sex couples), but without the somehow problematic message. Following Hart’s concept of law, this legislation should be treated as practical respect for the plurality of the society, while enabling each element of the society to preserve its own values of family and family life.

My final remark is directed to the traditional, or conservative, groups. An old Jewish Midrash54 tells us that when God wanted to

create Adam, Truth (among others) came and tried to convince Him not to do so, arguing that humans are “all lies.” As a response, God threw Truth to the ground, but then raised it up from the earth, as the Biblical verse says: “Truth springs up from the earth” (Psalm 85:12). Truth, according to the midrash, therefore, had to become part of real life against its will.

It might be true from a religious perspective that same-sex marriage is wrong. This is a traditional or religious view that should be heard as well, but same-sex partnership has become part of the reality, and the more traditional views, too, have to recognize this fact. Truth then, taking the midrashic terminology, needs to rise up from the ground. It may argue for different values, trying to convince others to follow it, but it must accept, or at least tolerate, those who live differently. My proposed dual structure enables this social practice to acknowledge different types of alliances (including marriage), even if they are debatable, while each group’s beliefs can be left unscathed.