# RELIGIOUS MARRIAGE IN A LIBERAL STATE

*Gidi Sapir*[*] *& Daniel Statman*[**]

CONTENTS

I. Introduction ..... 2855
II. Religious Marriage and Public Reason ..... 2857
III. Religious Marriage, Conscience, and Respect ..... 2862
IV. Religious Marriage in Israel ..... 2868
A. The Acknowledgement of Civil Marriage ..... 2873
B. The Recognition of Non-Marital Cohabitation ..... 2878

## I. INTRODUCTION

Can a liberal state enforce religious marriage? For many liberals, the answer is in the negative. They perceive such enforcement as the paradigmatic case of illegitimate religious coercion. The purpose of our paper is to examine whether this is indeed the case.

Let us start with three clarifications which will help to define the question we posed. First, there is a whole spectrum of possibilities regarding the attitude of the state towards religious marriage. At one extreme, there is complete denial of legal validity to such marriage, i.e. the view that marriage, as a public institution, is governed solely by state law, the law that applies equally to citizens of all religions under the jurisdiction of the state. According to this option, religious marriage is viewed by the state as a private matter carrying no legal force in itself. This is the legal arrangement in a few European countries, such as Germany.[1] Some of these countries, Germany and Belgium, for example, go further and prohibit religious marriage which was not preceded by a civil marriage procedure.[2] At the other extreme, there are

* Faculty of Law, Bar-Ilan University.
** Faculty of Humanities, University of Haifa.

1 *See* DIETER SCHWAB ET AL., GERMANY: FAMILY AND SUCCESSION LAW 50 (Kluwer Law Int'l 2006) ("The celebration of marriage in Germany is a civil ceremony conducted before the Registrar. No other marriage ceremony (e.g. religious) will have legal effect.").

2 For Germany, see INTRODUCTION TO GERMAN LAW 254 (Joachim Zekoll & Mathias Reimann eds., 2d ed. 2005) ("A religious ceremony may follow the official ceremony but must

states in which the only way to get married is by means of a religious marriage ceremony. On the face of it, this is the case in Israel[3] (but see section IV below). Between these two extreme positions there is a wide range of possibilities. In some countries, for instance, the state acknowledges both religious and civil marriage ceremonies without granting the former any preference.[4]

Which of the arrangements on this continuum, if any, is problematic from a liberal point of view? Our focus here will be on the last option mentioned above, namely, on the option of a religious *monopoly* over marriage. At first sight, such a monopoly indeed looks antithetical to liberalism, but we shall cast doubt on this assumption. Of course, if such a monopoly is acceptable, the less extreme attitudes are acceptable too.

The second clarification concerns the assumed basis for the incompatibility of liberalism with a religious monopoly over marriage. The view we wish to explore contends that there is something inherently problematic in such a monopoly—regardless of the specific content of the religious law or the religious ceremony. We want to exclude from our discussion other reasons for thinking that religious marriage is problematic, mainly for being non-egalitarian, or degrading to women. In the many traditions in which religious marriage has such negative features, it is indeed problematic, not because of its *religious* nature, but because of its patriarchal nature.[5] Surely religious marriage is not

not precede it, except in special cases in which both partners are foreigners (Article 13 III Introductory Act to the BGB).") (citation omitted); for Belgium see Article 21 of Belgium's Constitution ("A civil wedding should always precede nuptial benediction except in cases established by law, should this be necessary."); Rik Torfs, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Belgium*, 19 EMORY INT'L L. REV. 637, 640 (2005).

[3] *See* Eliav Shochetman, *On the Introduction of Civil Marriage in the State of Israel*, *in* JEWISH FAMILY LAW IN THE STATE OF ISRAEL 131, 132-33 (2002) ("As is well-known, civil marriage was never practised in the Land of Israel, and even prior to the creation of the State, the performance of marriage ceremonies was entrusted exclusively to the various religious communities. In this regard, nothing changed with the creation of the State, and according to s.2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, the marriage of Jews is performed in Israel only in accordance with religious law. Over the years proposals were put forward, and attempts made, to enact a law that would make civil marriage possible for Jews interested in such marriage (especially in those cases in which a couple is prevented from marrying because they are forbidden to do so from a halakhic point of view), but so far these attempts have not been successful.") (footnotes omitted).

[4] *See, e.g.*, SUSANNE STORM ET AL., DENMARK: FAMILY AND SUCCESSION LAW 65 (Kluwer Law Int'l 2005) for Denmark; M. SAVOLAINEN, FINLAND: FAMILY AND SUCCESSION LAW 58 (Kluwer Law Int'l 1998) for Finland; GUILHERME FREIRE FALCAO DE OLIVEIRA, PORTUGAL: FAMILY AND SUCCESSION LAW 22 (Kluwer Law Int'l 2005) for Portugal; MAJA KIRILOVA ERIKSSON & JOHANNA SCHIRATZKI, SWEDEN: FAMILY AND SUCCESSION LAW 53 (Kluwer Law Int'l 2008) for Sweden.

[5] *See, e.g.*, Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661, 668 (1998) ("While the powerful drive to control women . . . has been softened considerably in the more progressive, reformed versions of Judaism, Christianity, and Islam, it is

necessarily non-egalitarian or degrading: consider, for example, a marriage ceremony carried out by a reform rabbi. The question that will concern us, then, is whether religious monopoly over marriage is problematic *simply because of its religious nature*.

But what exactly is meant by saying that some marriage arrangement is religious? This brings us to the third clarification. 'Religious' might refer here to three elements: (a) the nature of the marriage ceremony. A ceremony is religious when it includes elements such as prayers, citations from scripture, religious symbols, etc. (b) The laws regulating marital status. These are religious insofar as they are derived from a religious code, such as the Jewish law (*halakha*). (c) The body in charge of administering and implementing these laws. Such a body would be religious insofar as it is composed of clergymen (or, atypically, women) who would be in charge, *ex officio*, of implementing marital law. In such cases, the law implemented would typically be the religious law, but the court might still be required to rely, at least partially, on state (secular) law and, in any case, the fact that the implementing body is religious might add a further disturbing dimension from a liberal point of view. Each of these elements raises different questions and there is no reason to assume a priori that they rise and fall together.

## II. RELIGIOUS MARRIAGE AND PUBLIC REASON

With these initial clarifications in mind, let's turn now to the question at hand regarding religious monopoly over marriage within liberal states. One reason to think that the state should not grant such a monopoly is based on the idea of state neutrality. According to this idea, a liberal state is committed to neutrality between competing conceptions of the good and is not allowed to prefer one conception over others. This seems to imply that any monopoly—religious or other—regarding marriage must be ruled out. By granting monopoly to religious marriage, the state enhances religion at the expense of other conceptions of the good and abandons its neutral position.

A full discussion of the neutrality thesis lies beyond the scope of the present paper. It is a controversial thesis even among liberals. Some still stick to it, relying on authorities such as Rawls and Dworkin,[6] while others reject it and deny that it is part of liberalism.[7]

still very much present in the more orthodox or fundamentalist versions of all three religions.").

[6] *See, e.g.*, CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 43 (1987) ("The ideal of neutrality can best be understood as a response to the variety of conceptions of the good life."); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980).

[7] *See, e.g.*, Thomas Hurka, Book Review, 109 ETHICS 187, 190 (1998) (reviewing GEORGE

Luckily, for the present discussion we don't have to decide between these conflicting views. Whatever one thinks about neutrality in general, in the present context, the neutrality argument is a non-starter because the very institution of marriage expresses a non-neutralist attitude; it expresses a preference for marital relations over other sorts of cohabitation. One cannot oppose religious monopoly over marriage on the basis of its incompatibility with the idea of neutrality while granting preference to the institution of marriage over other forms of cohabitation.

Neutrality, then, is not a promising way to explain the assumed problem with religious monopoly over marriage. A different argument would be that though, in general, the state need not be neutral with regard to different conceptions of the good, religion is different, hence while the state is allowed to promote other conceptions of the good, it may not promote religion (by granting special status to its marriage ceremony). The reason is that grounding laws on religious arguments runs against the liberal ideal of autonomy. A liberal state ought to limit itself in order to guarantee the widest possible autonomy to its citizens. Rawls argues that one of these limitations is the condition of "public reason" which requires that any restriction on liberty has to rely on reasons that are universally accepted, or at least accessible to all.[8] Rawls and his followers contend that religious arguments are the paradigmatic case of arguments that cannot satisfy this condition,[9] hence reliance on them in the public sphere should not be allowed.

Whether Rawls's doctrine of public reason is convincing or not is deeply controversial. Our own view, which we defend elsewhere,[10] is that it is not, but for the sake of the present argument let us assume that it is. This seems to imply that from a liberal point of view, religious monopoly should be ruled out. We believe, however, that the answer is

SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS (1997)) ("[I]t is hard not to believe that the period of neutralist liberalism is now over.").

8 *See, e.g.*, John Rawls, *Lecture VI: The Idea of Public Reason*, *in* JOHN RAWLS, POLITICAL LIBERALISM 212 (2d ed. 2005); JOHN RAWLS, THE LAW OF PEOPLES 131-80 (1999) [hereinafter RAWLS, THE LAW OF PEOPLES] ("The Idea of Public Reason Revisited"); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 40-41 (1990) ("The moral core of [a liberal] order is a commitment to public justification: the application of power should be accompanied with reasons that all reasonable people should be able to accept."); CHARLES LARMORE, THE MORALS OF MODERNITY 125 (1996); AMY GUTMANN & DENNIS FRANK THOMPSON, DEMOCRACY AND DISAGREEMENT 50 (1996).

9 *See, e.g.*, RAWLS, THE LAW OF PEOPLES, *supra* note 8, at 220; MACEDO, *supra* note 8, at 52; GERALD F. GAUS, JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY 142, 162-63 (1996).

10 Gideon Sapir & Daniel Statman, *May a Liberal State Rely on Religious Considerations?* BAR-ILAN L. STUD. (forthcoming) (journal published in Hebrew). Our analysis owes a lot to the excellent discussion of the subject by Christopher Eberle in CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002).

much more complex. To show this, one needs to refer separately to each of the three elements mentioned above. Let's start with the easiest element, i.e. the identity of the body that implements or administers the laws of marriage. Suppose that in a given state marital law itself is not religious; could one still argue that the very fact that the bodies in charge of implementing and administering it are religious is a violation of autonomy? In our view, the answer is no. Provided that the content of the law is not religious, we see no threat to autonomy by the fact that secular citizens must face religious clerks (in court or in the City Hall). Such a monopoly on administering and implementing marital law might be problematic on other grounds, as we shall see later,[11] but not on grounds of autonomy.

Let's turn to the second element mentioned above. Assume that marital law is based on religious teachings such as those of *halakha*. The question, then, is whether this fact in itself expresses disrespect for autonomy. In other words, suppose that the content of the marital law raises no special problem from a liberal point of view and could be reached via non-religious reasoning too. Suppose that it is egalitarian, fair and efficient in advancing the social aims of marriage (whatever these are). Does the fact that it originated from a religious code imply that the law infringes the autonomy of the secular citizens?

The answer to this question depends on how one interprets the principle of public reason, namely, what kind of reliance on religious considerations violates it. Three possibilities come to mind:

(a) Reliance on religious considerations violates the principle of public reason even if explicitly combined with additional, non-religious considerations.

(b) Reliance on religious considerations violates the principle of public reason when (and only when) the relying body refers exclusively to religious considerations. The shortcomings of relying on religious considerations are not rectified by the fact that non-religious ones could have been relied upon.

(c) Reliance on religious considerations violates the principle of public reason only when there are no non-religious considerations that could support the relevant decision.

For example, assume that some minister enacts regulations for removing carrion and cemeteries from the city precincts, expressly

[11] *See infra* text accompanying notes 24-27.

relying on the *halakhic* provisions in that regard.[12] According to possibility (a), the regulations are an infringement of autonomy and hence illegitimate, even if the minister relied explicitly on non-religious, environmental considerations as well. Since religious considerations are illegitimate and must be ruled out in public discourse, the very use of them contaminates the relevant legislation. According to (b), since the involvement of religious considerations does not in itself contaminate legislation, the fate of the regulations depends on whether the minister was motivated exclusively by religious considerations or by non-religious ones as well. According to (c), the legitimacy of the regulations depends on whether or not they *could* be grounded in non-religious considerations, regardless of whether the minister was actually guided by such considerations. Since the regulations in the example under discussion could be grounded in non-religious considerations, no infringement of autonomy occurs, because secular citizens could wholly identify with these regulations.

It might help to present the differences between these three possibilities in the following table. In all rubrics, the case under discussion is one in which the decision was based on religious considerations:

| | Legitimacy of decision | | |
|---|---|---|---|
| | (a) | (b) | (c) |
| The decision could not be justified on non-religious grounds. | Illegitimate | Illegitimate | Illegitimate |
| The decision could be justified on non-religious grounds too, and indeed was. | Illegitimate | Legitimate | Legitimate |
| The decision could be justified on non-religious grounds too, but was not. | Illegitimate | Illegitimate | Legitimate |

Which of these three possibilities is the most convincing as an interpretation of the demands of public reason? In our view, it is the last one, (c). The principle of public reason requires that restrictions on liberty must be such that any citizen could, in principle, accept, or at least understand them. The requirement is fully met when there are nonreligious arguments that support the required restriction, even if they are not the arguments actually relied upon. Interpretations (a) and (b)

[12] THE MISHNA 561-62 (Jacob Neusner trans., Yale Univ. Press 1988).

pose exaggerated constraints on the use of religious arguments that do not follow from the idea of respect to autonomy embodied in the principle of public reason.

What follows with regard to the question at hand is that the reliance of state marital law on religion is not in itself problematic. Recall our assumption that in terms of its content the religious law relied upon is not problematic. This means that the state marital law could have been based on non-religious considerations too, hence it does not contradict option (c) above and should not be ruled out by the principle of public reason.

We turn now to the third element, i.e. the nature of the marriage ceremony. To recall, the question we raised was whether the fact that this ceremony includes religious symbols, prayers, etc. is problematic from a liberal point of view. Following the previous discussion on the notion of public reason, it seems that the answer to this question depends on whether one could come up with non-religious considerations to ground the religious nature of the ceremony enforced by the state. One might argue that such considerations exist and have to do with the importance of ceremonies in general. If the state wants to express the special value it ascribes to the institution of marriage, it must shape the act of marriage accordingly. Acquiring marital status must involve a significant act, and the best way to make it significant is to ground it in the reservoir of symbols and meanings inherent in any given culture, namely in a *ceremony*. Taking into consideration the long religious character of Western culture, it is only natural that marriage ceremonies in Western states would include religious components. Therefore, even if some couple deeply objects to the religious character of the marriage ceremony imposed by the state, it could fully understand the interest of the state in imposing such a ceremony and could appreciate its value. In this respect—so the argument proceeds—the marriage ceremony is no different than other ceremonies shaped by the state, such as the inauguration of presidents or of other high officials.

One should add that what endows ceremonies with meaning, and enables them to fulfill their social and cultural roles, is the fact that they reflect traditions with an historical depth, traditions that are shared by the entire people or collective. In this sense, ceremonies are essentially conservative—they are grounded in the *past*. This implies an inevitable tension between the conservative aspect of ceremonies and the desire to update them to fit current trends or culture. Concessions to these trends might end by throwing out the baby with the bath water, i.e. completely losing the inspiring and uniting power of the ceremony.

This is an appealing argument, yet it is overstated. With all respect to historical depth and meaning of ceremonies and to the advantages in

keeping them, this is not an all-or-nothing choice. It is true that if too many components of traditional ceremonies are altered during too short a period, ceremonies might indeed lose their meaning and power. But if the reform is sensitive and gradual, ceremonies could retain their power without creating an unnecessary clash with the values and attitudes of contemporary citizens. What follows is that secular citizens might identify with a ceremony that includes *some* elements from the religious tradition, but not if the entire ceremony is of a religious nature. This seems to be the difference between, e.g., the president's inauguration in the US and a wedding held in a church. In the former, the ceremony in its entirety is not a religious one, although it includes some reference to religion in the words "so help me God" that conclude the presidential oath, while in the latter the ceremony is religious through and through. Hence, if by 'religious marriage ceremony' one refers to a ceremony with only minor religious components, then imposing it upon secular citizens who wish to get married would not be objectionable.[13] If, however, one refers to a ceremony of a comprehensively religious nature, then imposing it would indeed be objectionable from a liberal point of view.

## III. RELIGIOUS MARRIAGE, CONSCIENCE, AND RESPECT

In the previous section we argued that respect for autonomy does not necessarily rule out marital law that relies on religious codes, nor does it rule out the possibility of religious clergymen administering or implementing, *ex officio*, state marital law. But respect for autonomy does rule out the conditioning of marital status on participation in ceremonies replete with religious symbols and obligations. This captures one major reason why imposing such conditions is wrong from a liberal point of view, but it is not the only one. Another reason that seems to play a role here is respect for conscience. Let us explore this possibility.

The notion of conscience we use in the present context refers to deeply held normative convictions, those that constitute the personal identity of individuals. These principles might of course be false, but nonetheless they are a matter of conscience for the individuals holding them, and liberals tell us that matters of conscience merit special respect. But why respect the conscience of those who hold misguided

[13] However, some would regard *any* inclusion of religious symbols as illegitimate. A good recent illustration is the public debate about President Obama including the words "so help me God" in his presidential oath. *See, e.g.*, Lisa Miller, *God and the Oath of Office*, NEWSWEEK, Jan. 19, 2009, at 13. However, if we are right, it is unlikely that the basis for such general opposition would be the principle of public reason.

moral beliefs? The standard answer is that coercing people to act against their deep normative beliefs amounts to an attack on their integrity, an attack that involves a sense of self-alienation and loss of identity; therefore, such coercion should be avoided as much as possible. It is this sort of argument that underlies the liberal requirement to show tolerance for certain dissenters. The first example that comes to mind here is the granting of exemption from military service to pacifists. More relevant for the present discussion is the grounding of various exemptions to religious groups and individuals from laws which violate the dictates of their religion and making efforts to accommodate their needs.

If coercing believers to violate their principles is as illegitimate as it is an affront to their consciences, one might argue that the same affront would be suffered by *non*-believers if coerced to violate *their* principles, or, in other words, that freedom *of* religion entails or includes freedom *from* religion. A good illustration of this line of thought can be found in Kathleen Sullivan:

> . . . The right to free exercise of religion implies the right to free exercise of non-religion. Just as Caesar may not command one to transgress God's will, he may not command one to obey it. To do either is to run afoul of free exercise. As the Court put it in *Wallace v. Jaffree*, "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." The "conscience of the infidel or the atheist" is as protected as any Christian's.
>
> . . . [T]he affirmative right to practice a specific religion implies the negative right to practice none . . . .[14]

But exactly what principles of the non-believer might be violated by religious legislation? Surely no such principles are violated simply by the fact that some law was motivated by religious concerns. Assume, for example, that some public route is blocked to traffic on the Sabbath because it runs through an ultra-orthodox Jewish neighborhood and, as a consequence, drivers have to take a detour that lengthens their journey. While some drivers may resent this imposition, it would be strange and artificial if they presented their complaint as one against a violation of *conscience*. The reason is, of course, that there is nothing in the secular value system that is opposed to taking a circuitous drive, and therefore the additional journey cannot be seen as an attack on integrity.

On the face of it, this implies that non-believers would hardly ever have a conscience-based argument against laws based on religion. After

[14] Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

all, very few people have a *principle* not to act in ways that accord with those of religion. But this would be too hasty. It seems to us that conscience adds a separate reason against some kinds of religious legislation, in addition to the issue of public reason. To understand this, we need to distinguish between cases in which the content of the religious law is not "religious," like in the above example of traffic limitations, and cases in which the content of the law is of a clearly religious character. The latter is characteristic of religious ceremonies. In the former case, it is indeed hard to see in what sense the conscience of the secular individual might be under attack. By contrast, in the latter, such an attack seems evident. Think of a secular couple forced to get married in a religious ceremony in a church. These two people live in a world very different from that of the church. Their way of thought, their values, the symbols they find meaningful are all far from those expressed in the church ceremonies. But here they are, forced to participate in a ceremony that is foreign to them and that naturally arouses in both of them a sense of absurdity and self-alienation. They feel they have lost authenticity, that they are betraying their way of life, or their true identity, in a way that resembles the feelings sensed by the believer who feels she is forced to betray *her* way of life when required to violate the precepts of religion. Thus, contrary to what was suggested above, non-believers do have a conscience-based argument against some laws based on religion, i.e. laws enjoining participation in religious ceremonies.

But this does not put an end to the matter. We mentioned above that even the most secular people would not subscribe to a principle that prohibits them from behaving in a way that accords with the demands of religion; hence it is not against their principles to avoid driving through a religious neighborhood on the Sabbath. But this seems to imply that even participation in religious ceremonies is not against their principles. For most secular people, participation in religious rituals—reading a chapter from the Psalms, attending a church service, reciting a blessing, holding a Torah scroll—is not perceived as problematic in itself. The clear evidence is that they are willing to do any of the above religious duties if a relative or a friend asks them nicely. In this respect, there seems to be a huge difference between believers and non-believers. The observant Jewess will refuse to eat non-kosher food at her best friend's birthday party, even if asked very nicely to do so. Furthermore, the friend's very request would be considered inappropriate and offensive. Doesn't this difference cast doubt on the proposal to conceptualize the non-believer's objection to laws requiring participation in religious ceremonies as *conscientious*?

Elsewhere[15] we replied by creating a link between the affront to conscience and the importance of the ceremony to the person involved. The more central the ceremony is to a person's life, the stronger the interest in shaping it to express individual identity. Since a wedding is a major event in the life of any individual, he or she has an especially strong interest in shaping it according to his or her values and identity. If a couple is not allowed to do so, but is forced instead to express the identity and view of *others*, by participating in what they perceive as an alien ritual, the sense of self-alienation is strong and painful. This seemed to explain why secular people are willing (often happily) to take part in the religious wedding of a friend but strongly oppose being forced to get wed themselves in a religious ceremony. In line with the definition of conscience as referring to deeply held principles, we tried to argue that when non-believers are forced to participate in ceremonies that are foreign to them, they are forced to betray one of their deepest principles, namely that of authenticity—the requirement to be truthful and authentic to themselves when it comes to central events in their lives.

Now, however, it seems to us that the attempt to fit the case under discussion into the above model of conscience—via the idea of being forced to violate the principle of authenticity—is a bit forced. It now seems to us that what makes the requirement to take part in a religious ritual problematic is not the tension between commitment to the ideal of authenticity (in important events in the life of any individual) and participation in a religious ceremony, but the fact that such participation is *forced*. Such enforcement is problematic regardless of the importance of the event. Thus, when a non-believer is asked to recite a blessing at the wedding of her friend, she often agrees as a token of friendship and usually does not see such a request as problematic. Yet if the law *ordered* her to do so, she would most probably resent it. The explanation seems related to the idea of respect. When the state forces its citizens to participate in religious rituals, it thereby expresses deep disrespect for their secular worldview. The crucial test, then, is whether the participation is voluntary or not.

But if coercion to act against one's beliefs is wrong, then too many laws seem to be ruled out. After all, many laws clash with the beliefs and values of many citizens, yet that would not suffice to rule them out on grounds of disrespect. The answer to this question is that there is a difference between laws that are merely incompatible with the beliefs and values of many citizens and laws that demand active participation in religious ceremonies. Such participation expresses a much more

[15] Gidon Sapir & Daniel Statman, *Why Freedom of Religion Does Not Include Freedom from Religion*, 24 LAW & PHIL. 467 (2005).

profound disrespect for secular citizens than if they were merely laws that these citizens find objectionable. To force non-believers to participate in religious rituals is, in a sense, to force them to *be* religious, at least for a short time. If you wish, it is like a partial and temporary *forced conversion*.

This argument seems to rely on a fundamental intuition that underlies the principle of public reason, namely, that rules based on reasons that are inaccessible to some citizens expresses disrespect for their dignity as free and equal members of society. However, the present argument seems to add an important dimension to the above argument. Forced participation in religious ceremonies is not just another instance of doing things without accepting or understanding the grounds, but a particularly disturbing instance of disrespect because of the forced active involvement in a praxis based on grounds that seem irrational or inaccessible to secular citizens.

This is not to deny that self-alienation also plays a role here, as mentioned above. In the cases under discussion, secular citizens are forced to play a role that is alien to their identity and that constitutes a kind of attack on or threat to who they fundamentally are. That makes the disrespect for the secular individual especially disturbing. The fact that self-alienation also plays a role in the argument from conscience makes the argument from disrespect and the argument from conscience family relatives. The concern about self-alienation explains why people tend to conceptualize their opposition to forced participation in religious ceremonies in terms of attack on their conscience. If our analysis is correct, then (a) the use of conscience here is not the standard one, and (b) the idea of disrespect better captures the significance of self-alienation involved in such enforcement.

Our view regarding forced participation in religious ceremonies has important implications from a liberal point of view regarding the legitimacy of marriage ceremonies that are governed by religious law, but that are devoid of any explicit religious symbols or expressions. According to Jewish law, for instance, one way of getting married is for the groom to give the bride a document that declares some version of the formula "You are hereby my wife."[16] The document does not contain any religious content, nor does the act of handing it to the bride. No blessings need to be recited and no religious authorities need to be present. Assume, then, that the state of Israel determines that all marriages between Jews have to comply with this procedure which would be carried out—let's further assume—in the City Hall, not in the

[16] The common formula is "Behold, thou art consecrated unto me (*mequdeshet li*) [by this ring, according to the Law of Moses and of Israel]," but the Jewish law recognizes the validity of other formulae too, such as the one mentioned in the text. *See* BT KIDDUSHIN 5b and SHULKHAN ARUKH, part *Even Ha-Ezer* ch. 27, section 1.

Rabbinate. Since such a ceremony could not plausibly be described as a *religious* one, enforcing it by law (as a condition for marriage) would constitute no attack on the conscience of the participants and no disrespect for their secular worldview. This is an interesting thought experiment because the imaginary state law would be both derived from a religious code and would enforce participation in a *ceremony*. Nevertheless, since the ceremony would include no explicit religious content, it would pose no special problem in terms of respect or of conscience.

We can now connect these observations regarding disrespect to the three elements mentioned at the outset. We suggested that the expression 'religious marriage' could refer to: (a) the nature of the marriage ceremony, (b) the laws regulating marital status, and (c) the body in charge of administering and implementing these laws. Regarding (a), we suggested that a marriage ceremony expresses disrespect when forced upon secular citizens only if it includes explicitly religious content. All the more so with regard to other laws governing marital life (treated under category (b)), which constitute even a weaker form of disrespect for the secular.

What about (c)? Does the fact that the body in charge of administering or implementing marital laws is religious express disrespect towards the non-believers that are forced to use its services? One might be tempted to answer in the affirmative because the presence of the relevant clergymen (or women) colors the ceremony with a religious hue even if there is no explicit reference to religious content. If the marital court is comprised of three priests wearing their cassocks, clerical collars and other appurtenances of their role, those appearing before them might feel that they are participating in a religious ceremony even when, as a matter of fact, no religious content is explicitly referred to.

We concede that in cases like these, appearing before the relevant judicial or administrative body is dangerously close to participating in a religious ceremony and is, therefore, problematic for the reasons just mentioned. However, not all religious officials don such explicitly religious attire while executing their various roles or activities, and even those who do, often choose less distinctive apparel. Our point is that the very fact that the relevant body is comprised of religious people, *ex officio*, does not express disrespect towards those appearing before it and using its services.

Let us summarize the conclusions of our discussion so far:

(1) Religious monopoly over marriage is problematic from a liberal point of view mainly when it implies that in order to get married, citizens must undergo a ceremony of a comprehensively religious

character. Such an arrangement would violate the autonomy of secular citizens: it would force them to participate in an activity that cannot be grounded in non-religious reasons. Although participation in ceremonies with some religious components could be understood and appreciated, this is not the case in ceremonies that are comprehensively religious. Forcing secular citizens to participate in such ceremonies would also express disrespect towards them, disrespect bordering on a (temporary) forced conversion.

(2) The fact that state marital law is derived from religious beliefs and practices is not in itself problematic. Insofar as such law can be grounded in non-religious arguments, it meets the requirement of public reason and, therefore, involves no disrespect.

(3) The fact that the bodies that administer and implement the state marital law are religious is problematic only if their appearance is explicitly religious in a way that makes the proceedings too close to those of religious ceremonies.

## IV. RELIGIOUS MARRIAGE IN ISRAEL

In order to further clarify the above conclusions, it might be worthwhile to test them against some real-life examples. Illiberal states will not serve our purpose because they make no pretense of respecting the autonomy and dignity of their citizens, at least not in the way these notions are understood within the liberal tradition. Liberal states that are strongly secular are also not of interest here because they do not grant any kind of monopoly to religion over marriage. Israel is an interesting example in this respect, because on the one hand it is obviously a liberal democracy, while on the other it grants religion a special status in the domain of marital law. Historically speaking, this arrangement is a remnant from the Ottoman *millet* system that granted autonomy to each religious community over issues of marriage and divorce. The religious character of marital law in Israel is not unique to Jews. Each citizen is classified as belonging to some religion (Jewish, Muslim, Christian, Druze) and his religion dictates the marital law that applies to him.[17]

[17] Israeli law requires the registration of each citizen's religious affiliation, though in some cases citizens requested and were granted the option of being registered as having no such affiliation ("lacking religion"). *See* HCJ 58/68 Shalit v. Minister of the Interior [1970] IsrSC 23(2) 477, *translated in* SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL: SPECIAL VOLUME 35 (Asher Felix Landau & Peter Elman, eds., 1971). However, for the purpose of marital law, this registry is irrelevant because each recognized religion has authority to determine

Because of the religious character of Israeli marital law, many see this law as illiberal through and through.[18] In what follows we shall try to show that this impression is premature. In analyzing the actual legal situation in Israel, we shall be focusing on Jewish marital law rather than on the law of other denominations though the latter merit a detailed descriptive and normative analysis of their own.[19] This merely reflects the contingent fact that the authors are Jewish and more familiar with Jewish marital law.

Why exactly is Israeli marital law perceived as deeply illiberal? The obvious answer is found in sections 1-2 of Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953, which state as follows:

> (1) Matters of marriage and divorce of Jews who are Israeli citizens or residents will be under the exclusive jurisdiction of the rabbinic courts.
>
> (2) Marriage and divorce of Jews will be carried out in Israel according to the law of the Torah.[20]

These two sections seem to entail a complete monopoly of religion over matters concerning marriage and divorce. To use the terminology mentioned above, state marital law fully adopts religious law, and the body in charge of implementing it is religious as well, namely, a rabbinical court. However, according to the analysis offered above, these implications are not necessarily troubling. The very fact that the state law is grounded in religion is not problematic if the religious law relied upon is acceptable in terms of its content. Similarly, the very fact that the implementing body is a religious court is not in itself problematic, unless religious symbols are visible in the court to the degree of making the secular discussant feel alienated.

Though the above monopoly of religion over marriage is not *necessarily* problematic, the actual situation in Israel does seem troubling from a liberal point of view. The Jewish laws of marriage and divorce run against liberalism in two ways: first, they pose significant

who belongs to it. For example, those who see themselves as belonging to no religion might be considered as Jews for the purpose of getting married, and those registered as Jews in the registry might be regarded as non-Jews by the Rabbinate. The important point for the present discussion is that a person's self-definition as non-Jewish is insufficient to evade the marital laws that apply to Jews if, according to the Rabbinate's definition, the person is Jewish (and the same applies, mutatis mutandis, to other religions).

18 *See, e.g.*, Pinhas Shifman, *Civil Marriage in Israel; The Case for Reform*, *in* JEWISH FAMILY LAW IN THE STATE OF ISRAEL 9 (2002).

19 Michael M. Karayanni, *The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 5 NW. J. INT'L HUM. RTS. 41, 42 (2006).

20 Rabbinical Court Jurisdiction (Marriage and Divorce) Law 5713-1953, SEFER HE-HUKKIM 165.

limitations on eligibility to marry, e.g. a Jew is not allowed to marry a non-Jew (actually such marriage is not valid in Jewish law). This means that according to section (2) above, a Jew and a non-Jew cannot get married in Israel, which seems to violate the universally recognized right to marry.[21] Second, Jewish law tends to be patriarchal, Hence if Israeli marital law relies on Jewish law, it would be patriarchal too, thereby violating the requirement that "[s]tates . . . shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution."[22] Regarding the monopoly of rabbinic courts over matters of marriage and divorce, the problem is that the atmosphere created in the court room is manifestly religious. A powerful illustration of this atmosphere is expressed by the regulation requiring any man appearing before the court to cover his head[23] according to religious practice.

Turning now to the third component of religious marriage, i.e. the ceremony. Given that the marriage of Jews in Israel is supposed to follow Jewish law, and given that, according to this law, marriage is carried out through a manifestly religious ceremony, section (2) of Rabbinical Courts Jurisdiction implies that all Jews seeking to get married in Israel must participate in a religious ceremony, which, as argued above, is an attack on the autonomy and dignity of non-believers. Even more troubling, regarding the attack on dignity, is the prerequisite made by the Rabbinate according to which women cannot be married unless they first immerse themselves in a ritual bath (a *miqveh*). Fully immersing herself in the water of the *miqveh* is supposed to purify the future bride from the impurity of her menstruation period, thereby making it permissible for her future husband to have sex with her. As a rule, rabbis will not perform a marriage ceremony (a *hupah*) for an impure woman (*niddah*). Needless to say, forcing a woman to immerse herself naked in such a bath, under the supervision of some orthodox woman (a *balanit*) whose task is to ensure that the ceremony is carried out in accordance with the rules of

---

[21] In some countries, the right to get married is anchored in the constitution, for example. In others, like the United States, the right has been developed by the courts. *See, e.g.*, Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L.J. 289 (1998). For the European approach, see Jacqueline Rubellin-Devichi, *Family Law: The Continuity of National Characteristics*, *in* THE EUROPEAN FAMILY 45 (Jacque Commaille & Francois de Singly eds., 1997). The right to get married is recognized in international law. *See* United Nations Universal Declaration of Human Rights art. 16, Dec. 10, 1948, *available at* http://www.un.org/Overview/rights.html, and International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 17 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[22] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 23 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 227-62 (2004).

[23] HCJ 1912/97 Rish v. Chief Rabbinate of Israel [1998] IsrSC 52(5) 650.

halakha, is a most serious violation of privacy and dignity. It is true that our main concern in this paper is in the tension between liberalism and the religious components of marriage law as such, and not in the tension between liberalism and other problematic aspects of marriage law, especially those regarding women, but when presenting the legal situation in Israel, we can't ignore this very problematic aspect.

Despite these features of Israeli law, we believe that the situation is more nuanced. When the subtleties of the situation are appreciated, the sting is removed from most of the claims about incompatibility between Israeli marital law and liberalism.

Let's start with the assumed full adoption of Jewish marital law into state marital law. Israeli marital law comprises several clauses, and though some are determined by Jewish law, others are not. We refer particularly to the vast area of property claims. In a revolutionary decision in 1994, the Supreme Court decided that in applying Jewish law to property-related marital disputes, rabbinic courts must subject it to the principle of equality between spouses.[24] Interestingly, one of the dominant rabbinical court judges expressed his view that this subjection to equality could be internalized into Jewish law by relying on its own concepts and mechanisms.[25] Nonetheless, with regard to the laws governing eligibility and the act of marriage, Jewish law still seems to enjoy unrestricted monopoly. We shall return to this point later.

We turn now to the body in charge of implementing marital law. Here, too, the picture is complex. First, all issues other than eligibility and marital status "are under the jurisdiction of the civil court, unless they are properly 'attached' to a divorce suit filed in the rabbinical court."[26] Hence it is false to say that in all marital disputes the parties are forced to come before a religious court.

Second, regarding the atmosphere in the court, one could argue that wearing a head covering when appearing before the court is not a religious act, but rather should be viewed as a token of respect towards the court authorities. Indeed, this is the interpretation suggested by the Israeli Supreme Court in the *Rish* case.[27] In this case, a declared atheist

---

[24] *See* HCJ 1000/92, Bavli v. Grand Rabbinical Court [1994] IsrSC 48(2) 6. For discussion, see HALPERIN-KADDARI, *supra* note 22, at 234; Ruth Halperin-Kaddari, *Expressions of Legal Pluralism in Israel: The Interaction Between the High Court of Justice and Rabbinical Courts in Family Matters and Beyond*, *in* JEWISH FAMILY LAW IN THE STATE OF ISRAEL 185 (Michael D. A. Freeman ed., 2002); Ruth Halperin-Kaddari, *Family Law and Jurisdiction in Israel and the Bavli Case*, JUSTICE, Summer 1994, at 37, *available at* http://www.intjewishlawyers.org/docenter/viewDocument9fa6.pdf?id=9247.

[25] *See* S. Dikhovsky, *The Principle of Common Ownership—Is it the Law of the Land?* 18 TECHUMIN 18 (1998). *But see* A. Sherman, *The Principle of Common ownership in Light of Torah Law*, TECHUMIN 32 (1998).

[26] HALPERIN-KADDARI, *supra* note 22, at 233. This has created a phenomenon known as "the race for jurisdiction." *Id.*

[27] HCJ 1912/97 Rish v. Chief Rabbinate of Israel [1998] IsrSC 52(5) 650.

lawyer challenged the regulation about head coverings on freedom of conscience grounds. His argument—quite similar to the one we developed earlier against forced participation in religious ceremonies—was that a *yarmulke* is a religious symbol and therefore forcing him to wear it would be an attack against his conscience. The court rejected his argument and tried to show that the duty to wear a head covering in court is not akin to a duty to participate in a religious practice, or to identify with religious symbols. In the court's opinion, wearing a head covering is an expression of respect for the court, not respect for religion. In some cultures, people express respect by taking off their head coverings, while in Judaism respect is expressed by wearing them. The court based its decision on three premises: (a) strictly speaking, wearing a *yarmulke* is not a halakhic obligation, but rather a custom; (b) the regulation under challenge could be satisfied by wearing any kind of hat, not necessarily a *yarmulke*. In the court's view, one cannot seriously claim that putting on one's favorite baseball cap is an attack on one's conscience. (c) The regulation applies to any man appearing before the court, even to non-Jews. Since, on Jewish law, non-Jews have no duty to act according to halakha, forcing them to cover their heads can only be interpreted as an expression of respect for the court.

We do not find this argument entirely convincing. First, for the sake of the present issue, it is immaterial whether head-covering is categorized as a fully-fledged obligation or as a mere custom. What matters is how it is perceived by believers and non-believers, and the fact is that it is, by and large, perceived as a religious symbol. Second, there is no general custom in Jewish culture to express respect for human beings or institutions by covering the head that would be analogous to the custom in Christian societies to bare the head as an expression of respect. Hence the expectation from Jews who don't regularly cover their heads to do so can only be understood against a religious backdrop. When the regulation forces head coverings upon men appearing before the court, it expresses its view that by entering the court area, an individual enters a kind of religious territory such that the proceedings held there are, in a sense, religious. The fact that the regulation does not distinguish between Jews and non-Jews seems to result from an oversight due to the rarity of non-Jewish men appearing before the rabbinic court (as lawyers or as witnesses). In light of the above, the fact that one can discharge the duty imposed by wearing a baseball cap cannot completely undo the religious nature of the situation.[28]

Let's turn now to the problem involved in forcing secular citizens

[28] More needs to be said about covering the head and the notion of respecting religious sensibilities, but that would take us beyond the scope of the present inquiry. *See* Daniel Statman, *Hurting Religious Feelings*, 3 DEMOCRATIC CULTURE 199 (2000).

to participate in a religious marriage ceremony. As indicated above, the Jewish marriage ceremony does not have to include religious symbols and practices, but in the course of history it developed this way, and today the marriage ceremonies of all Jewish denominations are conspicuously religious. Similarly, all legal authorities (*poskim*) agree that if a woman is married while she is impure (a *hupat niddah*) the marriage is valid, and many think that the prohibition against conducting such a ceremony is in any case a light one[29] that could quite easily be overridden by other considerations.[30] Nonetheless the fact is that no rabbi in Israel today will omit the requirement for a pre-*hupah* ritual bathing. Whether, and to what extent, these arrangements are worrisome from a liberal point of view depends on the question of whether non-believers are indeed forced to abide by them.

On the face of it, the answer is obvious. Section 2 of Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 explicitly grants halakha ("the law of the Torah") monopoly over marriage of Jews in Israel. However, various developments in Israeli law stemming from an activist and creative Supreme Court have worked to weaken this monopoly significantly. Let's briefly describe these developments.

### A. *The Acknowledgement of Civil Marriage*

Formally speaking, the option of civil marriage does not exist in Israel, though, in a landmark decision almost fifty years ago, the Supreme Court opened the door to it. In the *Funk Shlezinger* case,[31] Ms. Funk, a Christian resident of Israel, married Mr. Shlezinger, a Jewish citizen, in a civil marriage ceremony conducted in Cyprus. Upon their return to Israel, the couple applied for marriage registration in the Population Registry. The Ministry of Interior refused their request, claiming that civil marriage is not an available option for Israeli citizens. The couple filed a petition in the High Court of Justice[32]

[29] *See, e.g.*, R. Moshe Isserlish (the Ramah), *Shulkhan Arukh, Even Ha-Ezer* 61:1, who says that the current custom is not to care too much about this (*lo ledaqdeq*), though it is desirable to notify the groom before the *hupah* that his bride is *niddah*; *see also* R. Ovadia Yosef, *Yoreh Deah* Pt. 5, *Even Ha-Ezer* 8:4, who assumes that the basis for the prohibition is the fear that the young couple will not be able to resist the temptation of having sex on the wedding night at a time when the woman is impure (*niddah*). This consideration seems irrelevant for secular couples who typically cohabit before the wedding and in any case do not keep the laws of purity and impurity.

[30] In particular, a *Hupat Niddah* is allowed if the wedding arrangements are all ready and then, at the last minute, the bride sees blood. *See* R. David Ha-Levi Segal, *Turei Zahav* [*Taz*], *Shulkhan Arukh, Even Ha-Ezer* 44:6.

[31] HCJ 143/62 Funk Shlezinger v. Minister of the Interior [1963], Isr SC 17, 225

[32] In addition to its role as an appellate court (criminal and civil, both by right and with leave), Section 15 of the Basic Law: Judicature grants the Israeli Supreme Court discretionary power as a first (and final) instance to hear petitions against the various government agencies. In

against this refusal, which, surprisingly, was accepted by the High Court. The main reason given by the court for its decision was that the registry merely collects statistical information, "which could either be true or false."[33] The records of the registry are no evidence of the veracity of the data they contain. Hence, by registering the Funk-Shlezinger couple as married, the registry does not thereby recognize the validity of their marriage.

This would have seemed to be a minor formalistic decision with no significant ramifications, but in fact it marked no less than a revolution in Israeli marital law. As a result of this decision "civilly married couples are just as eligible for all economic benefits from the state as are as those who were formally married in religious marriage in Israel, their inheritance rights are the same, and in principle the same marital property laws apply to both groups."[34]

Given this dramatic development, it is no longer true that the only way Israeli Jews can obtain the status of marriage is via a religious ceremony. Moreover, by ordering the registration of Israeli couples who went through a civil marriage ceremony abroad, the Supreme Court opened a way to sidestep the Jewish laws regarding eligibility for marriage. Any marriage document obtained from some country abroad would satisfy the registry and would grant the couple all marital benefits. Recently this principle was applied to gay and lesbian couples too. The Israeli Supreme Court ordered the registration as married of same-sex couples who obtained a marriage certificate abroad.[35]

For many years the Supreme Court kept saying that its recognition of civil marriage was merely for statistical reasons and that it carried with it no official recognition of such marriage. Recently, however, the Court took that step further after receiving support for this move from an unexpected source. We refer to another revolutionary decision, this time of the Grand Rabbinical Court, issued in Jerusalem in 2003. The Rabbinical Court discussed the case of a Jewish-Israeli couple who

these cases, the Supreme Court presides in the capacity of "The High Court of Justice." The decisions dealt with in this article belong to this category. For a description and evaluation of the work of the Supreme Court, sitting as the High Court of Justice, see Yoav Dotan, *Judicial Review and Political Accountability: The Case of the High Court of Justice in Israel*, 32 ISR. L. REV. 448 (1998); David Kretzmer, *Democracy in the Jurisprudence of the Supreme Court of Israel*, 26 ISR. YEARBOOK HUM. RTS. 267 (1996); Meir Shamgar, *Judicial Review of Knesset Decisions by the High Court of Justice*, 28 ISR. L. REV. 43 (1994).

[33] HCJ 143/62 Funk Shlezinger v. Minister of the Interior [1963], Isr SC 17, 225. For a discussion of the judgment, see Asher Maoz, *Who is a Jew? Much Ado About Nothing*, *in* LAW, JUDICIAL POLICY AND JEWISH IDENTITY IN THE STATE OF ISRAEL 75, 105-10 (2000).

[34] HALPERIN-KADDARI, *supra* note 22, at 244.

[35] *See* HCJ 3045/05 Ben-Ari v. Ministry of the Interior (unpublished). While in the United States there is a very hot public debate on this matter, in Israel no such debate really exists and the matter has been settled by a quiet decision of the Supreme Court. The court introduced same-sex marriage into Israel through the side door, so to say.

obtained a civil marriage in Cyprus, following which they were registered as married in accordance with the *Funk-Shlezinger* precedent. A few years later, the husband sought a divorce. Since, according to section 1 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953, marriage and divorce of Jews are under the exclusive jurisdiction of the Rabbinic courts, the husband turned to the regional rabbinical court to sever the marital relationship. The court accepted the request and declared the termination of the marriage. Yet the court did not require the husband to go through the halakhic procedure of divorce which requires the issuance and public handing over of a divorce document (a *get*).[36] The court's declaration that the marriage was dissolved was regarded as sufficient to terminate the marriage and to enable both husband and wife to remarry.

The wife appealed to the Supreme Court against the decision of the regional rabbinical court[37] and the Supreme Court turned to the Grand Rabbinical Court for clarification. The latter issued a detailed clarification in which it justified the decision of the regional court.[38] To explain why no *get* was required, the court relied on the halakhic opinion according to which if a Jewish couple freely chooses to obtain a civil marriage, although the option of a religious one is open to it, the Jewish law of marriage does not apply to their union. One might say that they are not "Jewishly" married. In the technical words of Jewish law, they are not married "according to the religion of Moses and Israel" (*k'dat moshe v'yisrael*). But if no *get* was required because the couple had never been "Jewishly" married, why was a divorce required at all? To solve this puzzle, the court relied on the laws of halakha which refer to the behavior of non-Jews ('Noahides,' as they are technically called). Jewish law has something to say about the appropriate norms for non-Jews too, including in the area of partnership and sexuality. In particular, in Jewish law, adultery is forbidden among Noahides, which makes it necessary to define the conditions for being married and the ways to undo the marriage. The court refers to what Maimonides says on this in his great halakhic book,[39] and concludes

[36] According to Jewish law, a marriage is dissolved only when the husband delivers to his wife a bill of divorcement (and not vice versa). Jewish law goes into great detail about the rules concerning the writing and handing over of the *get*, but, as emphasized in the text, none of these rules is religious in its content.

[37] Though the rabbinic court system enjoys significant autonomy within the Israeli court system, the decision of rabbinic courts can be challenged at the Supreme Court in its role as a High Court of Justice. *See* Section 15(D)(4) of Basic Law: Judiciary, SEFER HA-HUKKIM [1984] 78. In the course of the years, the Supreme Court extended the grounds for its intervention in the decisions of the rabbinic courts. *See* Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1839-42 (2004).

[38] *See* file no. 4276/2003 from 11/11/03. For the full text of this decision, see 5 HA-DIN VE-HADAYAN 5-9 (2005) [Hebrew].

[39] *Laws of Kings*, 9, 8.

from it that Jewish law recognizes the marriage and divorce of non-Jews today provided they are carried out in a way that is accepted in civilized societies. A wife obtaining a (civil) divorce from a court in Paris or in Chicago would not violate the Noahide prohibition against adultery if she then moved in with a new partner because this civil divorce is recognized by Jewish law.

Yet how are these *Noahide* laws relevant to the marriage and divorce of *Jews*? Here comes the innovative part of the decision. The court suggested that Jews can get married in two ways: qua Jews and qua human beings, i.e. Noahides. The much preferred way is of course the former, but the latter is valid as well. This means that a Jewish couple that obtains a civil marriage is regarded by Jewish law as fully married, though not "Jewishly" so. This explains why in the case at hand the rabbinic court regarded the couple as married even though they only went through a civil procedure. It also explains why the court had to officially *undo* their marriage rather than declare that the couple had never been halakhically married in the first place.[40]

This intriguing line of argument merits further discussion that we cannot offer here.[41] Anyway, shortly after the High Rabbinical Court issued its opinion, the Israeli Supreme Court warmly embraced it, thereby upgrading the acknowledgement of marriage between Israeli Jews from formal registration to full recognition. Moreover, the Supreme Court said that because Jewish law had not developed a legal corpus regarding the monetary aspects of Noahide, i.e. civil marriage, the jurisdiction over such aspects had to be granted exclusively to the state courts.[42]

What follows is that alongside the official option of religious marriage in Israel, there is an acknowledgment of civil marriage (performed abroad) as well. If a Jewish couple chooses to get married abroad and then returns to Israel, the couple can avoid the Jewish limitations on eligibility, the religious marriage ceremony (including the pre-requisite of bathing in a *miqveh*), the Jewish laws governing the monetary aspects within marriage and the Jewish laws of divorce. The only religious aspect that such a couple would not be able to avoid is the

40 According to the High Rabbinical Court, a decision to undo a marriage can be made only when it is clear that relationship between the couple is irreparable. *Id.* at 9.

41 The High Rabbinical Court's decision accords well with the view according to which the Mosaic laws supplement the Noahide laws rather than replace them. For an elaboration of this view and the Jewish sources supporting it, see Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1161 (1991) (while the Rabbis did not view the Torah law solely as a theoretical construct, they did not consider it a fully functional legal system either, but rather required its supplementation by the Noahide Code that "served as a residual source of law for Jews, a bridge between the ideals of formal Torah law and the realistic constraints of maintaining a legal community over time.").

42 HCJ 2232/03 Plonit (anonymous) v. Tel-Aviv-Jaffa Regional Rabbinical Court (yet unpublished), section 31 of Chief Justice Barak's opinion.

appearance before a rabbinic court in case of a divorce. But recall that this situation would be religious only in the sense that the judges would be religious *ex officio* and the men required to cover their heads. In terms of content, neither the considerations applied by the court nor the procedure would be religious in any meaningful sense.

Nonetheless, this option of civil marriage seems insufficient from a liberal point of view. After all, the alternative route necessitates going abroad, which is problematic in two respects: first, in practice this route is not open to all citizens because it depends on resources and know-how which are not available to many citizens. As a result, one might argue that if these citizens wish to get married, they are coerced into participation in a religious ceremony. Second, regardless of the economic and other burdens imposed by the civil marriage route, there is something inherently troubling in making the availability of civil marriage contingent on the law of some other country. If, as argued above, forced participation in religious ceremonies is unacceptable from a liberal point of view, then a state cannot evade its responsibility to its citizens by referring them to the marriage arrangements of some other jurisdiction.[43] An example of freedom of expression might help. A state that respects this freedom cannot justify limitations imposed on speech on the basis of the claim that those whose speech is limited in their home country could express their views via channels in neighboring countries, even if, on a practical level, doing so would be no less effective or costly in terms of spreading the views of the dissenters.

This last consideration explains the limited advantage that might accrue if consular marriage is ever validated in Israel. By consular marriage we mean marriage of an Israeli couple conducted by a foreign consul in Israel, within the territory of the consulate, in accordance with the law of the relevant country. Currently this option is available in Israel only for couples at least one of whom is a citizen of the same country as the consul,[44] but one could imagine that in the future this limitation would be removed and foreign consulates would open their gates to any couple that seeks a civil marriage. If this were ever to happen, the burden of obtaining a civil marriage in Israel would be no heavier than that of obtaining a religious one, but the second objection mentioned above would still apply. States cannot fulfill their obligations to their citizens by relying on the goodwill of other countries. In this sense, it is immaterial whether the marriage takes

[43] This argument was made by the Supreme Court of Israel in HCJ 51/69 Rodnitsky v. High Rabbinical Court of Appeals [1970] IsrSC 24(1) 713 ("What kind of a solution is it for the Israeli legislator and the Israeli courts to send the Israeli citizens outside of the country's borders in order to solve their problems?").

[44] *See* HCJ 2888/92 Goldstein v. Minister of the Interior, [1994] IsrSC 50(5) 89.

place across the borders of the state, or in a consulate within its borders.

### B. *The Recognition of Non-Marital Cohabitation*

In the course of the years, the Supreme Court of Israel has created and developed the category of family life without marriage. We refer to couples who live together, share a household, often have children, but were never formally married. The Supreme Court has made the status of such couples equal to that of "normal," married couples.[45] As pointed out by scholars working in this field, although this is a world-wide phenomenon,[46] Israel's approach to the legal status of Non-Marital Cohabitation (NMC) is one of the most radical among liberal countries.[47] This approach has been challenged on liberal and other grounds,[48] but in what follows we do not take a side in the dispute about it. The question we seek to explore is what the existence of the above institution entails, as actually shaped by the Supreme Court, with regard to the tension between liberalism and the apparent religious monopoly over marriage.

Since couples choosing this route are not officially married, Sections 1 and 2 of Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 do not apply to them at all. This means that at no stage would the rabbinical court have any kind of jurisdiction over their joint life, nor would religious law apply to them.

Earlier we suggested that although Israel recognizes civil marriage abroad, this alternative does not fully relax the tension between Israeli marital law and liberal values. The worries we expressed in that context, however, do not seem to apply to NMC. First, the burden of obtaining this status with its privileges (and duties) is certainly no heavier than that involved in obtaining the status of being married via the Rabbinate. Hence, it cannot be claimed that one is forced—because of such an extra burden—to get married using the services of the Rabbinate. Second, NMC is a solution within the Israeli legal system

---

45 *See* HALPERIN-KADDARI, *supra* note 22, at 245-46; Ariel Rozen-Zvi, *Israel: An Impasse*, 29 J. FAM. L. 379 (1991).

46 On Europe, see Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 INT'L J.L. POL'Y & FAM. 1 (2001).

47 Another country with such a radical approach is New Zealand. *See, e.g.*, Grace Gunz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1300-01 (2001); YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 173-74 (2002).

48 For challenges on liberal grounds see, for example, SHAHAR LIFSHITZ, COHABITATION LAW IN ISRAEL 71-87, 89-120 (2005) [Hebrew]; Ruth Deech, *The Case Against Legal Recognition of Cohabitation*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES 300 (John M. Eekelaar & Sanford N. Katz eds., 1980); Homer H. Clark, Jr., *The New Marriage*, 12 WILLAMETTE L.J. 441, 452 (1976).

that does not rely on other legal systems. Given the fact that this arrangement is not religious in any of the meanings alluded to earlier, this seems a satisfactory solution to the problem arising from the religious monopoly over marriage.

Before we conclude our discussion, we must examine one last objection. One could argue that the legal recognition of NMC does not really solve the problem of religious monopoly over marriage. It is true that this recognition guarantees couples joined by this legal construction all the benefits and privileges granted by law to married couples, yet at the end of the day it does not make them equal. After all, unlike couples obtaining a civil marriage, couples joined by NMC are not *married*. They are denied the title of marriage—though they enjoy the privileges that go with this title. And why does this seem problematic? Because by denying them the title of marriage, the state is thereby expressing a clear preference towards one way of life over another—to a bond created by religion over a bond created by the non-religious institution on NMC.

Underlying this objection is the assumption that the liberal state must be neutral between competing conceptions of the good, but this assumption was rejected by us at the beginning of our discussion. Hence, if the state is allowed to prefer one conception of the good over others, it is allowed to prefer one marriage arrangement over others, religious over civil marriage or similarly, it might prefer marriage (religious *or* civil) over NMC.

This does not finally settle the worry. One may suggest, in line with the "public reason" argument, that while preferring one notion of the good over others is in principle legitimate, this is not the case when the preference is based on religious considerations. For the sake of the present discussion we shall continue to accept this argument, as we did earlier.[49] However, the argument applies only to restrictions on liberty and not to gentler ways of preferring or promoting conceptions of the good, in particular, what might be called *symbolic preference*. Presenting such a preference as a limitation on liberty, or on autonomy, would be a gross exaggeration. Insofar as the state guarantees cohabitants within NMC all the benefits granted to married couples, the former cannot seriously be said to be *forced* to choose religious marriage just because of the symbolic preference given to it by the state.

The dilemma at hand is reminiscent of that regarding the status of same-sex couples. In many states in the US, such couples enjoy the same benefits as heterosexual married couples, but are denied the title of marriage. This arrangement does not satisfy same-sex couples, who claim, *inter alia*, that when the state denies them the title of marriage it

[49] *See* text accompanying note 10.

thereby treats them with disrespect, as second-class citizens.[50] Yet in both cases, the argument based on disrespect ultimately denies the legitimacy of political perfectionism, because every time the state prefers one conception of the good over another, it would be accused of expressing disrespect to the losing party. As we said at the outset, our entire discussion was based on the rejection of neutrality and the acceptance of perfectionism. Thus, if the very preference of marriage over non-marriage cannot be ruled out as disrespectful, then, for the same reason, preference of one form of marriage over another cannot be ruled out on such grounds either.

A closely related argument in the context of same-sex marriage is that to prefer heterosexual marriage over same-sex marriage violates the requirement of equality, and a similar claim might be made in the context of religious versus secular marriage. Yet, as in many other contexts, relying on the notion of equality merely begs the question. Whether or not same-sex and heterosexual couples are equal in the relevant sense is precisely the question under discussion and it cannot be answered by saying that equality mandates treating them as equal. Similarly, whether or not couples joined via NMC should be treated in the same way as those married in a religious marriage is precisely the question under dispute and hence cannot be solved by invoking the notion of equality.

Finally, the purpose of this paper was to draw the boundaries of what might be legitimate from a liberal point of view in the area of marital law and religion. But of course drawing these boundaries entails nothing regarding the desirability of any particular option within them. Legitimacy should not be confused with desirability. The conclusion of this section is that the current legal situation regarding marriage in Israel falls within such boundaries, though only barely so. That, however, doesn't mean that we ourselves support this arrangement. We do not. We believe that the state would be better off if it officially introduced a civil route to enable couples to get ("fully") married, a route running alongside the religious path. But that is a topic for a separate paper.

[50] *See, e.g.*, MERIN, *supra* note 47, at 278-307 (Chapter 10, "Alternatives to Marriage and the Doctrine of 'Separate but Equal.'").