

From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?

*Menachem Mautner**

Over the last twenty years, liberal thinkers have invested a great deal of effort in adapting liberal political theory to the multicultural condition. The central question that has occupied these thinkers is how a liberal state ought to treat cultural practices of non-liberal groups living within it. One major group of thinkers insists that it is incumbent on the liberal state to make sure that autonomy, together with some other central liberal values, are made part of the lives of all the citizens living in the state. Another major group holds that it is the function of the liberal state to serve as framework for the peaceful co-existence of people who have diverse conceptions of the good life. These thinkers therefore call for "restraint" on the part of the state in its relations with non-liberal groups. This Article wishes to go beyond these two approaches. It is motivated by the conviction that the only standards that a liberal state can invoke in its relations with non-liberal groups are universal standards, i.e., standards that can be viewed, to the utmost extent possible, as transcending any particular culture, and that can be applied not only to non-liberal cultures, but to the culture of the mainstream liberal society itself. The Article puts forth a series of considerations that must be taken into account when intervention on the part of a liberal state in cultural practices of non-liberal groups is considered. It also sets forth two proposals as to the standards that need to guide the liberal state in cases in which it considers intervention in cultural practices of groups living in it:

* The Daniel Rubinstein Chair on Comparative Civil Law and Jurisprudence, the Faculty of Law, Tel Aviv University. I thank Hanoch Dagan, Talia Fisher, Assaf Likhovski and the participants at the Cegla Center conference on Legal Pluralism, Privatization of Law and Multiculturalism for their comments.

the doctrine of human rights (and the concept of human dignity that stands at its core) and the concept of humanness.

INTRODUCTION

In the past four decades, voluminous literature on multiculturalism has been written in the disciplines of the social sciences, the humanities and the law. Liberal political theory is no exception. Over the last twenty years, liberal thinkers have invested a great deal of effort in adapting liberal political theory to the multicultural condition. (Jacob T. Levy calls this "the multicultural turn in liberal theory,"¹ which may be seen as part of the "cultural turn" that has taken place in recent decades in the social sciences, the humanities and the law.)² The central question that has occupied these thinkers — undoubtedly one of the most difficult intellectual questions of our time — is how a liberal state ought to treat cultural practices of non-liberal groups living within it.

Liberal thinkers addressing this question can be divided into two major groups.

The first group is that of "autonomy liberals."³ Thinkers of this group view autonomy as the prime liberal value and as a supreme human good. They insist that it is incumbent on the liberal state to make sure that autonomy, together with some other central liberal values, are made part of the lives of

1 Jacob T. Levy, *Liberal Jacobinism*, 114 *ETHICS* 318, 322 (2004).

2 BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE (Victoria E. Bonnell & Lynn Hunt eds., 1999); CULTURE AND ECONOMY AFTER THE CULTURAL TURN (Larry Ray & Andrew Sayer eds., 1999); Annette B. Weiner, *Culture and Our Discontent*, 97 *AM. ANTHROPOLOGIST* 15 (1995).

3 Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 *ETHICS* 661 (1998) [hereinafter Okin, *Feminism and Multiculturalism*]; Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 9 (Joshua Cohen et al. eds., 1999) [hereinafter Okin, *Is Multiculturalism Bad for Women?*]; Susan Moller Okin, *Reply*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra*, at 117 [hereinafter Okin, *Reply*]; JOSEPH RAZ, *THE MORALITY OF FREEDOM* 420-24 (1986); WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989) [hereinafter KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE*]; WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995) [hereinafter KYMLICKA, *MULTICULTURAL CITIZENSHIP*]; Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. Rawls?*, 105 *ETHICS* 468 (1995) [hereinafter Macedo, *Liberal Civic Education*]; STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); *see also* BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001).

all the citizens living in the state. They therefore call for "activism" on the part of the state in its relations with non-liberal groups. However, they admit that prudential considerations can make the state abstain from imposing the value of autonomy on non-liberal cultural groups.

The second group is that of "diversity liberals."⁴ Thinkers of this group hold that the central liberal value is not autonomy, but diversity: it is the function of the liberal state to serve as framework for the peaceful co-existence of people who have diverse conceptions of the good life. These thinkers therefore call for "restraint" on the part of the state in its relations with non-liberal groups. "Autonomy liberalism" is often presented by these thinkers as the offspring of the Enlightenment, and "diversity liberalism" as the offspring of the Reformation.

Each of these two approaches is problematic.

Generally speaking, autonomy liberals focus on basic liberal values to the neglect of considerations having to do with both the cultures of non-liberal groups and the culture of the mainstream liberal society itself.

It cannot be denied that autonomy deserves to be viewed as a highly important human value. But as a policy for conducting the interaction between a liberal state and non-liberal groups living in it, autonomy is a complete non-starter. Liberalism is one particular theory about the good life.⁵ To approach non-liberal cultural groups from liberal premises, such as

4 Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992); Chandran Kukathas, *Cultural Rights Again — A Rejoinder to Kymlicka*, 20 POL. THEORY 674 (1992); Chandran Kukathas, *Liberalism and Multiculturalism — The Politics of Indifference*, 26 POL. THEORY 686 (1998); JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP (1994); Jeff Spinner-Halev, *Cultural Pluralism and Partial Citizenship*, in MULTICULTURAL QUESTIONS 65 (Christian Joppke & Steven Lukes eds., 1999); JEFF SPINNER-HALEV, SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP (2000) [hereinafter SPINNER-HALEV, SURVIVING DIVERSITY]; Jeff Spinner-Halev, *Feminism, Multiculturalism, Oppression and the State*, 112 ETHICS 84 (2001) [hereinafter Spinner-Halev, *Feminism, Multiculturalism, Oppression and the State*]; Jeff Spinner-Halev, *Autonomy, Association and Pluralism*, in MINORITIES WITHIN MINORITIES 157 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005); Jeff Spinner-Halev, *Liberalism and Religion: Against Congruence*, 9 THEORETICAL INQUIRIES L. 553 (2008); William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516 (1995); WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002); WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM (2005); Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339 (1990); Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599 (1999).

5 This point was made in strong terms by Bhikhu Parekh. BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY (2000); Bhikhu Parekh, *British Citizenship and Cultural Difference*, in

autonomy, is to evaluate their cultures by the standards of another particular culture whose only preeminence, in their eyes, is that it enjoys the advantage of the backing of the law and power apparatuses of the state.

Moreover, the culture of mainstream liberal society is afflicted by many ailments, such as poverty, violence, degradation of women to sexual objects, excessive individualism, neglect of moral education, etc. The implications of this phenomenon are twofold. First, people living in non-liberal groups would find it unacceptable that their cultures be evaluated according to standards that stand at the basis of a way of life that is so peccable. Second, if indeed mainstream liberal society is deficient to such an extent, there is the risk that in upholding liberal values, liberal thinkers may miss the blind spots of their own society. (An obvious case in point is prostitution. Many liberal thinkers, taken over by the paradigm of autonomy, tend to think of prostitution as premised on contractual transactions between consenting adults. In that, they miss many traits of this practice that the autonomy paradigm obscures.) In order to avoid this risk, liberal thinkers need to reach beyond their own accepted standards and to look for normative standards capable of checking the way of life of their own society, as well.

Diversity liberalism is problematic as well. On the one hand, it is more fitting for the multicultural condition in that it acknowledges and endorses the multicultural condition and in that it is not premised on evaluating non-liberal cultures by liberal standards. However, diversity liberalism fails to offer coherent and rigorous guidance as to the circumstances in which intervention by the liberal state in non-liberal cultural practices would be justified. Thus, diversity liberalism gives too much weight to considerations having to do with the cultures of non-liberal groups, to the neglect of basic human values.⁶

CITIZENSHIP 183 (Geoff Andrews ed., 1991); Bhikhu Parekh, *Decolonizing Liberalism*, in *THE END OF "ISMS"?* 85 (Aleksandras Shtromas ed., 1994); Bhikhu Parekh, *A Varied Moral Order*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 3, at 69; Bhikhu Parekh, *Minority Practices and Principles of Toleration*, 30 *INT'L MIGRATION REV.* 251 (1996) [hereinafter Parekh, *Minority Practices and Principles of Toleration*].

⁶ Two additional approaches need to be mentioned. The first is the suggestion made by Ayelet Shachar for a division of the jurisdiction over normative issues between the state and cultural groups. AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS* (2001) [hereinafter SHACHAR, *MULTICULTURAL JURISDICTIONS*]; Ayelet Shachar, *The Paradox of Multicultural Vulnerability*, in *MULTICULTURAL QUESTIONS* 87 (Christian Joppke & Steven Lukes eds., 1999) [hereinafter Shachar, *The Paradox of Multicultural Vulnerability*]; Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 *POL. THEORY* 64 (2000); Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 *HARV.*

This Article wishes to go beyond these two approaches. It is motivated by the conviction that the only standards that a liberal state can invoke in its relations with non-liberal groups are universal standards, i.e., standards that can be viewed, to the utmost extent possible, as transcending any particular culture; standards that can be traced, to the least extent possible, to any one particular culture; standards that can be applied not only to non-liberal cultures, but to the culture of the mainstream liberal society itself.

Also, this Article is written by a lawyer. This means that it is written within the practical wisdom tradition of which Anglo-American law is a contemporary manifestation. Therefore, while it admits the importance of insights borrowed from political theory, it is also premised on awareness of the great variety of normative problems that the multicultural condition gives birth to, as well as of the uniqueness and complexity of each of these problems. It therefore calls for contextualization and for close understanding of the actual realities of the problems under discussion.

This Article is composed of three Parts. In Part I I shall put forth a series of considerations that must be taken into account when intervention on the part of a liberal state in cultural practices of non-liberal groups is considered. In Parts II and III I shall set forth two proposals as to the standards that need to guide the liberal state in cases in which it considers intervention in cultural practices of groups living in it. In Part II I shall suggest that in the coming decades, the international community will apply the doctrine of human rights, and the concept of human dignity that stands at its core, for evaluating cultural practices and for determining the acceptability of practices. In Part III I shall suggest that the concept of humanness will provide the standards for determining the acceptability of cultural practices.

I. CONSIDERATIONS

In this Part I shall put forth a series of considerations that have to be taken into account when intervention on the part of a liberal state in cultural practices of non-liberal groups is considered. I shall identify four types of considerations: considerations having to do with the role played by culture in the lives of human beings; considerations having to do with the social processes through

C.R.-C.L. L. REV. 385 (2000); Ayelet Shachar, *Two Critiques of Multiculturalism*, 23 CARDOZO L. REV. 253 (2001). The second approach is that of Bhikhu Parekh, which suggests that a series of inter-group and intra-group dialogues will take place in the multicultural state over normative issues. See sources cited *supra* note 5.

which culture is created and maintained; considerations having to do with the culture of the mainstream liberal society; and considerations having to do with the means of intervention, upon determination that intervention is justified. These considerations are varied and complex. They require careful balancing.

A. The Role of Culture in the Lives of Human Beings

A fundamental question that needs to be addressed when intervention in cultural practices is considered is, what is the role played by culture in the lives of human beings? Liberal thinkers have come up with two major responses to this question: culture as a repertoire of choices and culture as constitutive of human identity.

1. Raz and Kymlicka: Culture as a Repertoire of Choices

Joseph Raz and Will Kymlicka, who view autonomy as the prime liberal value, perceive culture as the repertoire of options from which individuals choose when they exercise their autonomy.⁷ Under their approach, therefore, culture is seen as playing a secondary, instrumental role in the lives of human beings. Also, this approach deals with the role played by culture in general — *any* culture — in the lives of human beings, not with the role played by the *particular* culture in which particular human beings live. Thus, it provides an explanation as to why human beings need *a* culture, not why human beings have an interest in the continued existence of the particular culture in which they live.

Can the Raz-Kymlicka approach justify the preservation of non-liberal cultures? At first sight, the answer seems to be negative: as the departure point of this approach is that the value of culture lies in the role it plays in creating the conditions for autonomy, it cannot provide a good justification for the continued existence of cultures (e.g., religious cultures) that do not nurture this value. As I shall argue in greater detail later on, however, following Jeff Spinner-Halev,⁸ even people living in non-liberal cultures enjoy a considerable amount of autonomy in their lives. Thus, non-liberal cultures, much like liberal cultures, may serve as repertoires of choices for the

7 RAZ, *supra* note 3, ch. 15; JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, in *ETHICS IN THE PUBLIC DOMAIN* 155 (1994); KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE*, *supra* note 3; KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 3.

8 SPINNER-HALEV, *SURVIVING DIVERSITY*, *supra* note 4.

people living in them. Therefore, the Raz-Kymlicka approach is relevant to non-liberal cultures, as well.

The intervention of a liberal state in the culture of a non-liberal group would never be aimed at doing away with that culture *in its entirety*. Rather, such intervention would target one particular cultural practice or several such practices. Therefore, as the Raz-Kymlicka approach deals with the role played by culture *in general* in the lives of human beings, very little normative guidance can be found in it when the question of intervention in a given culture is considered.

2. Margalit and Halbertal: Culture as Constitutive of Identity

Avishai Margalit and Moshe Halbertal see culture as playing a primary role in the lives of human beings: for them, culture is constitutive of the "personality identity" of human beings (i.e., the mind categories with which human beings give meaning to what transpires in their lives).⁹ "[A]ll persons are supremely interested in their personality identity," write Margalit and Halbertal. "[T]he individual's right to culture stems from the fact that every person has an overriding interest in his personality identity."¹⁰ This approach provides justification, therefore, for the continued existence of *the particular culture* in which human beings live, rather than for the existence of *a culture* in their lives.

Whereas the Raz-Kymlicka approach is premised on an instrumental relation between culture and human beings, the Margalit-Halbertal approach is based on the existence of a constitutive connection between culture and the personalities (identities) of human beings. Therefore, from the perspective of a moral attitude that is concerned with human interests, the latter approach is preferable.

Moreover, the Margalit-Halbertal approach is relevant to the *typical situation* in which a liberal state considers intervention in the culture of a non-liberal group. As noted earlier, this intervention is never meant to eradicate a culture in its entirety; rather, it is meant to do away with one particular cultural practice or with several such practices. Intervention of this kind, albeit of a limited scope, may amount to fatal injury to the personalities (identities) of the people living in the cultural group. An obvious example is the attempts made several times in the course of the history of the

9 Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES. 491 (1994); see also Chaim Gans, *Individuals' Interest in the Preservation of Their Culture: Its Meaning, Justifications, and Implications*, 1 J.L. & ETHICS HUM. RTS. 6 (2007).

10 Margalit & Halbertal, *supra* note 9, at 502.

Jewish people to eradicate the Jewish practice of male circumcision. The prohibition of this practice was not meant to abolish Jewish culture in its entirety. Nonetheless, it was perceived by Jews as a fatal assault on their culture and personalities.

An important normative imperative comes out of the Margalit-Halbertal approach: if we have to treat every human being with respect, then, *prima facie*, we have to treat respectfully the cultures in which human beings live, e.g., by not intervening in their contents.¹¹ Yet I hasten to add that this is only a primary normative imperative, and a fairly weak one. Other relevant considerations (see below) may lead to the conclusion that state intervention is imperative.¹²

B. The Social Processes of Culture

1. Culture and Power

The contents of every culture are not determined at the tribunal of reason; they are the product of competitive social processes in which social groups struggle over the shaping of the cultural contents prevalent in their group. (However, the social processes through which culture is created, distributed and preserved are not governed merely by power. Reason plays a role in these processes, as well. Hans-Georg Gadamer was right in noting that "tradition . . . needs to be affirmed, embraced, cultivated But preservation is an act of reason, though an inconspicuous one.")¹³ Thus, the cultural contents a group adopts reflect the worldviews and serve the interests of those having access to power in the group. A striking example is the way cultures structure the social relations of men and women: almost all cultures we are familiar with create a hierarchy between men and women that discriminates against women and that often enables men to control women.¹⁴

What follows is that when the liberal state considers intervention in the

11 ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 225-26 (2000); GAD BARZILAI, *COMMUNITIES AND LAW* ch. 1 (2003). Chaim Gans has made a third suggestion as to the justification for the preservation of cultures: people wish their actions to have an impact on the world, but this cannot occur outside of a culture that gives meaning to these actions. CHAIM GANS, *THE LIMITS OF NATIONALISM* (2003).

12 For a similar approach, see Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM AND "THE POLITICS OF RECOGNITION"* 25 (Amy Gutmann ed., 1992).

13 HANS-GEORG GADAMER, *TRUTH AND METHOD* 281 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1993).

14 Okin, *Feminism and Multiculturalism*, *supra* note 3; Okin, *Is Multiculturalism Bad for Women?*, *supra* note 3; Okin, *Reply*, *supra* note 3.

cultural practices of a group, it needs to bear in mind that those who speak on behalf of the group against such intervention are usually those belonging to the social groups that traditionally enjoyed access to power and privileges in the life of the group.¹⁵ What this means is that it is most probable that those speaking against intervention in the culture of a group do not speak for the weak, "losing" sub-groups in the group.

The culture of the mainstream liberal society too is the product of such social processes. Therefore, this culture too needs to be treated with suspicion, and we need to search for normative standards that would enable us to identify the weak, "losing" social groups of this society, as well. (The obvious case in point is the poor.) The standards acceptable in the mainstream liberal society itself would not succeed at that. We therefore need to look for standards that transcend what is acceptable in this society.

2. *Cultural Contents Are Always in Dispute*

For many years, anthropologists studied the cultures of small, isolated societies. As a result, anthropologists developed a perception of culture as enjoying wide acceptance. In recent decades, anthropologists and other culture researchers have begun to view society as composed of a large number of groups that are often in disagreement as to the shaping and the interpretation of their common culture.¹⁶

What this means is that when intervention by the liberal state is resisted by some who present themselves as speaking on behalf of a cultural group, this does not necessarily imply that all those who live in the group identify with such resistance. It might be the case that some social groups within the cultural group endorse the proposed intervention (and at times, even initiate it).

3. *Culture Constantly Changes*

Human beings are not passive objects of cultural constitution; they have creative powers. Human beings create cultural contents all the time. Also,

15 Shachar, *The Paradox of Multicultural Vulnerability*, *supra* note 6.

16 Robert Brightman, *Forget Culture: Replacement, Transcendence, Relexification*, 10 *CULTURAL ANTHROPOLOGY* 509 (1995); Paul DiMaggio, *Culture and Cognition*, 23 *ANN. REV. SOC.* 263 (1997); William H. Sewell Jr., *The Concept(s) of Culture*, in *BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE*, *supra* note 2, at 35; U. Hannerz, *Anthropology*, in 1 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES* 513 (2001); Chicago Cultural Studies Group, *Critical Multiculturalism*, in *MULTICULTURALISM: A CRITICAL READER* 114 (David Theo Goldberg ed., 1994).

they constantly import cultural contents from other cultures. Thus, cultures constantly change. People living in a cultural group have to admit, therefore, that the culture in which they presently live differs from the culture in which their forefathers lived and from the one in which their offspring will live. This means that the mere fact that intervention in a culture is bound to change it is not in itself a good reason to enjoin the intervention.¹⁷

However, cultures usually change at a slow pace. Therefore, from the perspective of those living in a culture, the fact that their culture changed in the past and will change in the future is irrelevant. What is relevant for them is the resistance a proposed change incites in them.¹⁸

It is sometimes the case that those resisting intervention in their culture claim that the intervention will make their culture collapse. This argument is usually highly exaggerated. Every culture is made of many thousands of categories and practices. Usually, no change — not even a radical one — in any one of these categories and practices is bound to have too far-reaching an effect on too many other categories and practices of which the culture is composed.¹⁹ It is true that some categories and practices are so central to a culture that a change in them may widely affect other categories and practices. (E.g., a change in the Jewish Ultra-Orthodox culture that will force men to share with women arenas presently reserved only for men, such as the political and judicial arenas. I discuss this below.) But even in such cases, *most* other cultural categories and practices will remain intact. (I tend to think of culture as a wall made of many thousands of bricks. Usually, pulling one brick out of the wall should not significantly affect the stability of the wall.)

4. *The Origin of the Cultural Practice: Religious or Cultural*

When intervention in a cultural practice is considered, an important consideration that needs to be taken into account is the origin of the practice: whether it is a religious commandment or merely a cultural norm. People's attitudes to religious commandments differ from their attitudes to cultural norms: Religious believers²⁰ regard religious commandments as

17 SHACHAR, *MULTICULTURAL JURISDICTIONS*, *supra* note 6, ch. 2; Christian Joppke & Steven Lukes, *Introduction: Multicultural Questions*, in *MULTICULTURAL QUESTIONS 1* (Christian Joppke & Steven Lukes eds., 1999); Yael Tamir, *Siding with the Underdogs*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 3, at 47.

18 Suzanne Last Stone, *Cultural Pluralism, Nationalism, and Universal Rights*, 21 *CARDOZO L. REV.* 1211, 1223 (2000).

19 Okin, *Reply*, *supra* note 3; Tamir, *supra* note 17; BARRY, *supra* note 3, at 256 (by the same token that moving, taking a new job or getting married do not destroy a person's identity so also changes in cultures do not destroy it).

20 The enormous variety of religions in the world and throughout history makes

having their origin in God and therefore as expressing ultimate truth and as deserving of utmost respect. Moreover, violation of a religious commandment is regarded by religious believers as bound to bring about Godly punishment.²¹ The status of a cultural norm is different. Such a norm is the product of humans and therefore it is perceived neither as expressing ultimate truth nor as a norm whose violation is bound to bring about Godly retaliation. Therefore, respect for people, as well as pragmatic considerations, dictate utmost caution in the case of a cultural practice embodying a religious commandment.²²

5. *The Inefficacy of Cultural Compulsion*

Some cultural dispositions are so deeply embedded in the minds of human beings and they attach to them such importance that attempts to eradicate or restrict the practices by law are doomed to fail, and at times are even liable to bring about reaction by way of increased prevalence of the practice.²³ In cases of this kind, the right way to cause cultural change is to instigate it from within the group, possibly with external assistance. This is particularly true in the case of the practice of a cultural group that perceives itself as oppressed by the state.²⁴

6. *Misunderstanding the Culture of a Group*

When the liberal state considers intervention in a cultural practice, it needs to caution itself that the intervention may potentially be motivated by some misunderstanding of the meaning of the practice for those who

generalizations about the traits of religions problematic. Here, and throughout this Article, I shall refer mainly to Judaism, Christianity and Islam.

21 Eric J. Mitnick, *Liberalism and Membership*, 4 U. PA. J. CONST. L. 533, 557-58 (2002) (reviewing BARRY, *supra* note 3).

22 It should be noted, however, that the classification of a certain practice as cultural or religious is often disputed. For example, it is disputed among Muslims whether the practice of wearing a headscarf by women is a cultural practice or a practice rooted in an Islamic commandment regarding women's modesty. Sebastian Poulter, *Muslim Headscarves in School: Contrasting Legal Approaches in England and France*, 17 O.J.L.S. 43 (1997); Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571 (2007).

23 The attempt of the British government in Sudan in 1946 to act against the practice of female circumcision by criminalizing it bred a wide wave of girl and infant circumcision. The same was the reaction to the British attempt to act against circumcision in Kenya in the early twentieth century. In 1989, the President of Kenya condemned the practice of female circumcision. Part of the wide protest that this statement bred was an increase in the rate of female circumcision.

24 Spinner-Halev, *Feminism, Multiculturalism, Oppression and the State*, *supra* note 4.

participate in it.²⁵ Moreover, it might be the case that the practice embodies values that are ranked high in the culture of the mainstream liberal society itself, albeit in different social contexts. Female circumcision is a case in point. A major campaign has been conducted by Western feminists in the past two decades against this practice, common in certain parts of Africa, the Middle East and Malaysia. The campaign was premised on the assumption that female circumcision is a way for men to control and suppress female sexuality. Yet, many writers insist that in many cultural groups in Africa this practice embodies values having nothing to do with sexuality — values that are cherished in Western culture (courage, perseverance, fraternity, hygiene, beauty, etc.).²⁶ This argument is reinforced by the fact that many cultural groups all over the world practice male circumcision (parallel to female circumcision or independently of it) without attaching to this practice any meaning having to do with sexuality. (Circumcisions performed on males every year greatly outnumber those performed on females.)²⁷

The case of female circumcision sheds light on two additional problems. First is the possibility of a variety of *factual versions* of the same

25 Homi K. Bhabha, *Liberalism's Sacred Cow*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 3, at 79; John Frow, *Economies of Value*, in MULTICULTURAL STATES 53 (David Bennett ed., 1998); Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, in MORAL IMPERIALISM 39 (Berta Esperanza Hernandez-Truyol ed., 2002); Martha Minow, *About Women, About Culture: About Them, About Us*, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 252 (Richard A. Shweder et al. eds., 2002).

26 FEMALE CIRCUMCISION IN AFRICA (Bettina Shell-Duncan & Ylva Hernlund eds., 2000); Richard A. Shweder, "What About Female Genital Mutilation?" and Why Understanding Culture Matters in the First Place, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES, *supra* note 25, at 216; M.C. Lam, *Multicultural Feminism: Cultural Concerns*, in 15 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, *supra* note 16, at 10163; O. Hoffe, *Human Rights in Intercultural Discourse: Cultural Concerns*, in 10 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, *supra* note 16, at 7018; Sander L. Gilman, *Barbaric Rituals?*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 3, at 53.

27 Another example is that of veiling, which is often presented by Western feminists as a means for men to control women's bodies. However, in Muslim societies, veiling allows women to take part in empowering and liberating social activities, such as the acquisition of education and participation in the work force. Also, Muslim women with political consciousness often treat veiling as a means for expressing their identification with Muslim culture and their protest against what they see as Western cultural imperialism. Nancy J. Hirschmann, *Eastern Veiling, Western Freedom?*, 59 REV. POL. 461 (1997); Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, in THIRD WORLD WOMEN AND

cultural practice. With regard to female circumcision, for instance, there are several forms of performing it, some highly intrusive and others less so. Also, the age of those on whom circumcision is performed varies across groups. (This applies to male circumcision, as well, and to other problematic practices, such as arranged marriages.)²⁸ Obviously, when a wide spectrum of practices is governed by one normative standard (as is done in many Western discussions of female circumcision), normative errors are inevitable.

The second problem is disagreement over the *implications* of a practice on those involved in it. Again, female circumcision is a case in point. There is fierce disagreement in the literature as to the implications of this practice: while some argue that it endangers the lives and health of women and that it fatally damages their sexuality, others argue that none of these negative effects are inherently associated with the practice. It might be the case that the parties involved in the debate focus on different manifestations of the practice (in terms of the cultural groups involved, the type of surgery performed, the hygiene conditions in which it is performed, etc.).

C. The Culture of Liberal Society

1. *The Ailments of Liberal Society*

The culture of mainstream liberal society is afflicted with many ailments, such as poverty, violence, degradation of women to sexual objects, excessive individualism, neglect of moral education, violent sports (e.g., boxing), etc. In order to be able to identify these and many other ailments, standards need to be found that transcend what is acceptable in the mainstream liberal society itself, and that may be applied for examining dubious cultural practices that are prevalent in it.

2. *Is the Liberal Way of Life Superior to the Religious Way of Life?*

Liberal thinkers often assume that non-liberal cultures are inferior to the liberal culture.²⁹ These thinkers sometime wonder whether it would not have been better for the people living in non-liberal groups, or at least for the weak sub-groups living in such groups (i.e., women and children), if their group

THE POLITICS OF FEMINISM 51 (Chandra Talpade Mohanty ed., 1991); Alon Harel, *Regulating Modesty-Related Practices*, 1 J.L. & ETHICS HUM. RTS. 212 (2007).

28 ANDREW MASON, COMMUNITY, SOLIDARITY AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE 93 (2000).

29 See, e.g., RAZ, *supra* note 3, at 423-24; Okin, *Feminism and Multiculturalism*, *supra* note 3, at 672; Macedo, *Liberal Civic Education*, *supra* note 3, at 496.

were assimilated into the mainstream liberal society,³⁰ or in the alternative if their group adopted central liberal values.³¹ However, for prudential reasons, these thinkers recommend toleration on the part of the liberal state toward such groups.³² At times, they object to financial support of such groups on the part of the state.³³

This line of thinking needs to be questioned.

It is true that the basic premise that underlies the lives of religious groups stands in stark contrast to the central liberal value of autonomy. The lives of religious people are guided by the assumption that there is *one* worthy way of life, the way of life embedded in the Godly commandments and in their interpretation by the religious leaders of the group, which comprise the group's tradition. (However, in any religious group, there is a wide variety of interpretations of what the religious commandments mean and imply.) Thus, for religious people, the notion of leading an autonomous life is meaningless; they are motivated by the belief that there is only one way of life that is morally worthy, and they see themselves as called upon to materialize this way of life throughout their lives.

However, as persuasively argued by Jeff Spinner-Halev,³⁴ in fact, people living in religious groups enjoy a considerable degree of autonomy, albeit not to the extent enjoyed by people living in mainstream liberal society. As there is a great variety of religious groups, there is a great variety in the degree of autonomy exercised by people living in religious groups. In some cases, such as that of some sectors of Israel's Jewish Religious Zionist group, the autonomy enjoyed by religious people is almost equal to that of people living in the mainstream liberal society. The degree of autonomy enjoyed by people living in the Jewish Ultra-Orthodox group is smaller. To this, one may add that the autonomy of many people living in the mainstream liberal society is severely constrained, for reasons having to do with poverty, lack of education, etc. Thus, looked at from the perspective of the ideal of autonomy, the difference between the lives of people living in non-liberal groups and the lives of people living in liberal societies is *a matter of degree* only (if at all).

Moreover, when it comes to Judaism, an important, continuous current in Jewish theology sees both the on-going development of the Jewish

30 RAZ, *supra* note 3; Macedo, *Liberal Civic Education*, *supra* note 3, at 470.

31 Okin, *Feminism and Multiculturalism*, *supra* note 3, at 680; Macedo, *Liberal Civic Education*, *supra* note 3, at 485, 490-91.

32 RAZ, *supra* note 3, at 423-24.

33 Okin, *Feminism and Multiculturalism*, *supra* note 3, at 672.

34 SPINNER-HALEV, *SURVIVING DIVERSITY*, *supra* note 4. For a similar approach, see KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* ch. 2 (2006).

normative corpus, and the actual moral life of every Jewish individual, as a partnership between God and man, namely as an on-going enterprise in which the moral corpus of the Jewish people and its actual realization in the world are jointly determined by God, by the religious leaders of the Jewish people, and by every single Jewish individual.³⁵ Needless to say, this theology of partnership expects of every Jewish person the continuous exercise of a considerable amount of autonomy in the course of his or her life.

If these arguments about the status of autonomy in the lives of religious people are correct, then one may cast doubt on the assumption of liberal thinkers that the liberal way of life is superior to the religious one. Also, for most people, leading an autonomous life is not a process of inner reflection and authenticity. People make decisions about their lives by choosing from the repertoire of options made available to them by the cultures in which they live.³⁶ When it comes to religious groups, there is one class of people that enjoys access to power over all other members of the group, in determining the contents of the culture of the group: the *religious leaders* of the group — people who devote their lives to reflection on the good life and to educating themselves and other people in the quest for the realization of the ideal of the good life. There is no parallel to this class of people in the secular, liberal society, and in that respect the cultures of religious groups enjoy a clear advantage over the culture of the secular, liberal society.³⁷

Moreover, and not of the least importance, one needs to bear in mind that people living in religious groups devote much intellectual and emotional energy, throughout their lives, to examining the normative appropriateness of their daily conduct, so that it can be said of them that they live, throughout their lives, in "an on-going seminar" of moral education.³⁸ In contrast, in

35 BETWEEN AUTHORITY AND AUTONOMY IN JEWISH TRADITION (Avi Sagi & Zeev Safrai eds., 1997) (Hebrew); AVI SAGI, JUDAISM: BETWEEN RELIGION AND MORALITY (1998) (Hebrew).

36 KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE, *supra* note 3.

37 It could be argued that when it comes to capitalist liberal societies, it is *marketing and advertisement people* who enjoy access to power in determining the contents of the culture — people who are motivated, first and foremost, by the goal of making money (a very dubious ideal in itself) for themselves and for those who employ them. It is only as a secondary, derivative by-product of their main activities that they also play the role of cultural creators and propagators.

38 Eugene Rostow wrote that the justices of the Supreme Court "are inevitably teachers in a vital national seminar." Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). Indeed, in a secular state, it is the law of the state that attempts to (partially) fill the void in the moral education of the citizens resulting from the processes of secularization.

liberal societies, a major by-product of the massive secularization that has taken place in the West in recent centuries (mainly in Europe, and certainly in Israel and the Jewish people in general, but to a much lesser extent, if at all, in the United States), coupled with the utilitarian-professional ethics of capitalism (people are valued to the extent that they can be useful to other people), the issue of the moral education of the individual has almost withered away.

D. The Means of Intervention

An important consideration that needs to be taken into account when considering intervention by the liberal state in the cultural practices of non-liberal groups relates to the means of intervention. A spectrum of means may be identified. The most severe one is prohibition of activities and criminal prosecution of those involved in them. Means less severe are denial of financial support to people and organizations involved in problematic practices; denial of legal recognition to problematic acts (e.g., marriages of minors and forced marriages); initiation of change through formal education; initiation of change through various civil society organizations active in the group. (For the long run, this last method is probably the most effective.) Of course, some or all of these means may be undertaken in tandem.

E. Conclusion

I have identified a series of considerations that need to be taken into account when intervention on the part of a liberal state in the practices of a non-liberal cultural group is considered. These considerations are varied and complex.

There are two major considerations that mitigate toward non-intervention:

- a. There is an overlap between the contents of cultures and the personal identities (i.e., mind categories) of people living in cultures. Therefore, respect for people dictates respect for the contents of the cultures within which people live, as well as for the cultural practices in which they are involved.
- b. The state may misinterpret the meaning given to a cultural practice by those taking part in it. Also, a cultural practice may embody values that are cherished in the liberal society, albeit in social contexts other than those in which a problematic practice takes place.

A third consideration that mitigates toward non-intervention in cultural practices is the following pragmatic consideration:

- c. Attempts to uproot a cultural practice by law may cause an increase in the prevalence of the practice. This consideration should be given special weight when the practice is religious.

However, these three considerations need to be weighted against the following two considerations that pull toward intervention in cultural practices:

- a. Those who speak on behalf of a cultural group in support of the continued existence of a practice are always those who have power in the group, who wish to protect their worldviews and their interests. One cannot satisfy oneself with the way a culture is presented by those enjoying access to power by it.
- b. The contents of any culture are always in dispute. In many cases, important sub-groups living in the group object to what is presented as the content of the culture of a group.

To these considerations one needs to add the following one: As the culture of mainstream liberal society is afflicted with many ailments, standards need to be identified that transcend what is acceptable in this society itself, in order to examine cultural practices that are prevalent in this society, as well.

Also, when intervention in a practice is considered, appropriate means need to be selected, given the nature of the practice and the consequences that the intervention may bring about (e.g., violent reaction on the part of the group or increased prevalence of the practice).

What emerges from this discussion is that the liberal state need not shy away from intervention in cultural practices, but the standards for such intervention can be taken neither from liberal political theory itself nor from the culture of the mainstream liberal society. Rather, these standards need to be, to the utmost extent possible, universal standards. In the next two Parts of this Article I shall inquire whether such universal standards exist.

II. THE HUMAN RIGHTS DOCTRINE AS A STANDARD FOR INTERVENTION

In this Part and in the next one I shall set forth two proposals as to the standards that need to guide the liberal state when it considers intervention in cultural practices of groups living within it. In the present Part I shall combine procedure with substance and argue that in the coming decades, the international community needs to further develop the doctrine of human rights, and the concept of human dignity that stands at its core, so that

a growing jurisprudence will be made available for evaluating cultural practices and for determining the acceptability of practices.³⁹ In the next Part I shall suggest that the concept of humanness will provide the standards for determining the acceptability of cultural practices.

A. Introduction

In what is probably the most important development in twentieth century international law, in the decades following World War II, the international community developed a rich doctrine of human rights. This doctrine perceives human beings in all places and at all times, no matter what their gender, race or social belonging, as having intrinsic moral value, merely because of their humanity, and therefore as bearers of a series of fundamental rights. In addition, partly as a result of the influence of the human rights doctrine of international law, the concept of human rights has been widely discussed and applied in recent decades in the constitutional law jurisprudence of many countries.⁴⁰ As a consequence, a rich doctrine of human rights, and a thick concept of human dignity, are now available to the international community. We may assume that the human rights doctrine and the concept of human dignity will enjoy further development in the coming decades.

B. The Universality of the Doctrine of Human Rights

The human rights doctrine is an offspring of four major Western intellectual movements — humanism, natural law, natural rights and liberalism. Therefore, any effort to apply the doctrine in non-Western contexts raises problems similar to those arising whenever a liberal state seeks to apply

39 For a similar approach, see W. Michael Reisman, *Autonomy, Interdependence and Responsibility*, 103 YALE L.J. 401, 416 (1993) ("I submit that the practices of all groups must be appraised in terms of the international code of human rights. Deviations from that code do not signal the termination of the group, but will lead to the insistence that the discrepant practices be adjusted to conform with international standards."). See also SEBASTIAN POULTER, *ETHNICITY, LAW AND HUMAN RIGHTS* (1998) (especially ch. 3); THE FUTURE OF MULTI-ETHNIC BRITAIN ("THE PAREKH REPORT") ch. 7 (2000).

40 Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983); Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1* (Philip Alston ed., 1999); NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW* 110-11 (2002).

its standards to cultural practices of non-liberal groups. One response to these problems is the suggestion that the human rights doctrine is inherently Western and that it embodies one particular conception of the good life — individualism.⁴¹ Some have argued that the human rights doctrine stands in stark contrast to non-Western conceptions of the good life — conceptions based on sharing, partnership, solidarity and giving, as well as on the value of harmony among people.⁴² It has therefore been argued that any presentation of the doctrine as enjoying universal acceptance in the world community amounts to cultural imperialism.⁴³

In contrast, others have claimed that the post-World War II human rights movement promotes the values of the English, American, French, Russian and Chinese revolutions, and that it takes its inspiration from all the great religions and philosophies of the world.⁴⁴ Some have argued that a concept of human dignity is found in Judaism, Christianity, Islam, Hinduism, Buddhism and all the great religions of humankind, albeit not as a distinct category such as the one recognized in the West.⁴⁵ Others have maintained that the notion of universal human rights can be traced back to the Bible and to Roman law.⁴⁶

41 For discussion, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 361-62 (2d ed. 2000); Santos, *supra* note 25; Ann-Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 *HUMAN RIGHTS Q.* 286 (1996); Carol Nagengast & Terence Turner, *Introduction: Universal Human Rights Versus Cultural Relativity*, 53 *J. ANTHROPOLOGICAL RES.* 269 (1997); Richard A. Wilson, *Human Rights, Culture and Context: An Introduction*, in *HUMAN RIGHTS, CULTURE AND CONTEXT* 1 (Richard A. Wilson ed., 1997).

42 Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 *CARDOZO L. REV.* 1095 (2000).

43 COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS* ch. 1 (2000); Gil Gott, *Imperial Humanitarianism*, in *MORAL IMPERIALISM* 19 (Berta Esperanza Hernandez-Truyol ed., 2002); STEINER & ALSTON, *supra* note 41, at 366-68; Hoffe, *supra* note 26; Preis, *supra* note 41; Nagengast & Turner, *supra* note 41.

44 MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 3 (1980).

45 Rhoda E. Howard, *Dignity, Community, and Human Rights*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* 81 (Abdullahi A. An-Na'im ed., 1992); JAYAWICKRAMA, *supra* note 40, at 7; K. Hastrup, *Human Rights, Anthropology of*, in 10 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES*, *supra* note 16, at 7007; A. de Baets, *Human Rights, History of*, in 10 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES*, *supra* note 16, at 7012; Madhavi Sunder, *Piercing the Veil*, 112 *YALE L.J.* 1399 (2003); Abdullahi A. An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights — The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES*, *supra*, at 19.

46 Stone, *supra* note 18.

In contrast to an argument made by some Asian scholars that the doctrine of human rights is inconsistent with "Asian values,"⁴⁷ other researchers have posited that respect for human rights is an integral part of the spiritual traditions of Asia,⁴⁸ so that India, for example, has managed to develop, in the past five decades, a rich jurisprudence of human rights, as part of its constitutional law.⁴⁹ It has been argued that in recent decades, the discourse of human rights has taken over the discourse of revolution and socialism in many parts of the world.⁵⁰ In attempting to determine what is required for a minimally decent human existence, some have suggested scrutinizing the choices actually made by people of power and resources in various cultures.⁵¹ Arguing that many people around the world do not wish to face the binary choice of either sticking to their cultural tradition or leaving their cultural group and enjoying the benefits of human rights, certain scholars have maintained that people wish to make human rights an integral part of the cultures in which they live. Therefore, these scholars have claimed, whereas the old, rigid conception of culture as uniform and coherent hinders the possibility of employing the human rights doctrine in non-Western cultures, the new conception of culture as complex, incoherent and hybrid allows for the application of the doctrine in many varied cultures.⁵²

What comes out of all of these arguments is that the human rights doctrine can be said to be universal not only in the sense that it perceives human beings in their pre-social and pre-cultural existence.⁵³ Rather, it can

47 See Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 565-70 (2001).

48 JAYAWICKRAMA, *supra* note 40, at 8.

49 Pratibha Jain, *Critical Aspects of Multiculturalism and Its Impact on Women's Rights in the Context of Universalism and Cultural Relativism of Human Rights* (2000) (Harvard Law Sch. Research Paper, on file with author).

50 Santos, *supra* note 25, at 39.

51 BARRY, *supra* note 3, at 285.

52 Sunder, *supra* note 45; Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 49 (2001); Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY 55 (2003); Merav Shmueli, *The Power to Define Tradition: Feminist Challenges to Religion and the Israeli Supreme Court* (2005) (unpublished Ph.D. Dissertation, University of Toronto).

53 Raimon Pannikar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982); Howard, *supra* note 45; DAVID HOFFMAN & JOHN ROWE, *HUMAN RIGHTS IN THE UK* 10 (2003); Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903 (2000); Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP.

be said that the doctrine enjoys universality in the world in the following two additional senses that are of the utmost importance to the present argument. First, the doctrine's ideals may be found in many cultures around the world. Second, the doctrine enjoys widespread acceptance in the world community: many people around the world, living in many varied societies and cultures, endorse the doctrine and wish its contents to become an important part of the political culture of their country and in their personal lives. "No other ideal seems so clearly accepted as a universal good," writes Oscar Schachter.⁵⁴ The doctrine of human rights is therefore the only source available to us for providing us with standards that may be said to transcend one particular culture, for the evaluation of cultural practices.

C. The Question of the Universality of Human Rights in Anthropological Discourse

The question of the universality of the human rights doctrine arose in the second half of the 1940s in discussions held by the American Anthropological Society (AAA). These discussions, and the continuous debate that ensued in the following decades, are of special importance because of the sensitivity of anthropologists to cultural diversity and their profound understanding of the concept of culture.

In 1947, the AAA formulated its position with regard to the proposed Universal Declaration of Human Rights — the document that laid the foundation for the development of the human rights doctrine in the post-World War II era.⁵⁵ The AAA, strongly motivated by recognition of the evils of colonialism, came out with three propositions. The first was that "[t]he individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences." The second was that "[r]espect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered." The third proposition, expressing a relativist position which was

L.Q. 102 (1976); Denise G. Reaume, *Indignities: Making Place for Dignity in Modern Legal Thought*, 28 QUEEN'S L.J. 61 (2002).

⁵⁴ Schachter, *supra* note 40, at 849.

⁵⁵ American Anthropological Association, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539 (1949); *see also* Merry, *supra* note 52; Wilson, *supra* note 41; Preis, *supra* note 41; Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947 to 1999*, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES, *supra* note 25, at 344.

in tension, if not in contrast, with the agenda of developing a universal doctrine of human rights, read that "[s]tandards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole."

The important point is that in the 1990s, the AAA adopted the opposite position. In 1992, the AAA established a Committee for Human Rights. In 1995, the Executive Board of the AAA adopted detailed guidelines for action in the cause of human rights. In its "Human Rights Guidelines" document the Board pronounced unequivocally the AAA's commitment to the promotion of human rights in the world and to the expansion of the concept of human rights beyond its current scope. Indeed, in the past two decades one can find many writings by anthropologists advocating the promotion of human rights in the world and discussing the means for this.⁵⁶

D. Application and Development of the Human Rights Doctrine

Anybody familiar with the human rights doctrine knows that its contents are phrased in highly abstract terms, as general and vague ideals.⁵⁷ (Indeed, it can be argued that this way of phrasing is an important reason for the cross-cultural, wide acceptance of the doctrine.) The question is whether a doctrine phrased in such abstract and general terms may provide any guidance for the normative evaluation of concrete cultural practices.

The current abstract and general layer of the human rights doctrine is the first layer of the doctrine, yet it is continuously supplemented by an additional layer embodying the decisions of international and national tribunals in cases that come before them. This second layer contains, therefore, rulings as to the acceptability of cultural practices according to the standards of the human rights doctrine. These rulings continuously accumulate, and it is in them that the potential lies for the human rights doctrine to serve as a standard

⁵⁶ See Am. Anthropological Ass'n, Committee for Human Rights Guidelines, <http://www.aaanet.org/committees/> (last visited Nov. 1, 2007); see also Engle, *supra* note 54; Nigel Rapaport, *Post-Cultural Anthropology — The Ironization of Values in a World of Movement*, in REALIZING COMMUNITY 146 (Vered Amit ed., 2002); Terence Turner, *Human Rights, Human Difference: Anthropology's Contribution to an Emancipatory Cultural Politics*, 53 J. ANTHROPOLOGICAL RES. 273 (1997); J.W. Fernandez, *Cultural Relativism*, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, *supra* note 16, at 3110.

⁵⁷ Yoram Dinstein, *Human Rights: The Quest for Concretization*, 1 ISR. Y.B. HUM. RTS. 13, 14-15 (1971).

for evaluating cultural practices. The thicker this layer becomes, the more an accumulated body of normative determinations as to particular cultural practices will be available to the international community. The thicker this layer becomes, the more it will serve as a source for further development of the jurisprudence dealing with the normative acceptability of particular cultural practices. Thus, it may be assumed that five or six decades down the road, the international community will have at its disposal a well-developed jurisprudence containing particular rulings, as well as principles supporting these rulings that lie at the mid-level between the current abstract layer of the doctrine and the rulings embodying particular applications of the doctrine. (This process is well-known to anybody familiar with the development of the Anglo-American common law or with the way codes jurisprudence grew in the Civil Law countries.)

E. A Worldwide Cross-Cultural Dialogue

The approach suggested here assumes that an ongoing dialogue will take place in the international community for the elaboration of a jurisprudence having to do with problematic cultural practices. This dialogue will take place in several contexts. It will first take place in the various countries whose courts will be called upon to evaluate such practices and who will conduct this evaluation by applying the standards of the human rights doctrine. The dialogue will also take place between states when courts consult the jurisprudence developed by courts located in other countries in addressing this issue. Finally, the dialogue will take place in international arenas in which the jurisprudence developed in various parts of the world will be studied, discussed and even codified. In all these dialogues, various points of view about human values and human ways of life will be voiced, clarified, examined and criticized. In all these dialogues, the partiality of every culture will be made clear,⁵⁸ and sensitivity to the unique traits of other cultures will be cultivated.⁵⁹ (In these respects, the approach suggested

58 "No society can include within itself all forms of life . . . [T]here is no social world without loss: that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental values." JOHN RAWLS, *POLITICAL LIBERALISM* 197 (1993). Indeed, no culture can encompass all human values. Every culture gives considerable weight to some human values and ranks others as less important. Even the liberal culture, which allows for the utmost realization of human values, cannot overcome the problem of partiality. For a classic statement of this point, see CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3 (1973).

59 "The international human rights system is not concerned with securing a

here resembles the cross-cultural dialogue approach put forward by Bhikhu Parekh⁶⁰ and Boaventura de Sousa Santos.)⁶¹ How superior is this strategy for dealing with problem of multiculturalism to that of applying the liberal standard of autonomy!

Moreover, in one of the more important contemporary developments of liberal political theory, John Rawls put forward the idea of "political liberalism."⁶² Political liberalism is meant to provide a framework for running the "center" of the state in circumstances in which major social groups bitterly contest each other's visions as to how the constitution of a state ought to be interpreted and as to how the law of the state ought to solve fundamental normative questions. Rawls' move is based on making people internalize the idea that in conditions of such disagreement, the full realization of their comprehensive theories about the good life may only take place in sub-statist communities, while the central institutions of the state are run according to an "overlapping consensus" — a free-standing, independent political theory that can be endorsed by most major social and cultural groups living in the state. The upshot of this line of thought is that it is not necessarily liberal political theory that will serve as the normative framework for running the central institutions of a multicultural state, but rather an independent theory that may be endorsed and supported by liberal and by non-liberal groups alike.

The proposition I am making here takes Rawls' suggestion and *applies it to the other major context* in which pressing questions arise in multicultural states. Much like Rawls, what I mean to suggest is that in evaluating the practices of non-liberal groups living in a liberal state (as well as the practices of the mainstream liberal society itself), it is not liberal theory that should provide the normative criteria, but rather a free-standing, independent theory that embodies an overlapping normative consensus supportable by liberals and by non-liberals alike, namely the doctrine of human rights. By the same token that Rawls understands that in a multicultural state the center of the state ought to be run by an overlapping consensus that does not necessarily embody the comprehensive, substantive vision of liberal political theory, so also in a multicultural state the relations between the state's center and its

homogenized uniformity of inner worlds . . . Rather, it is concerned with protecting, for those who wish to maintain them, the integrity of the unique visions of these inner worlds, from appraisal and policing in terms of the cultural values of others." W. Michael Reisman, *The Sacred and the Profane*, 9 ST. THOMAS L. REV. 25, 26 (1996).

60 Parekh, *Minority Practices and Principles of Toleration*, *supra* note 5.

61 Santos, *supra* note 25.

62 RAWLS, *supra* note 58.

cultural peripheries ought to be governed not by the center's comprehensive liberal theory, but by a normative consensus with which both the center and the peripheries may identify. In the world in which we live, it is only the doctrine of human rights that may be said to command such cross-cultural support.

F. A Return to Dignity in the Age of Difference

I wish to present the proposition suggested here from a different perspective.

In a classic article, Charles Taylor presents the rise of the discourses of identity and multiculturalism as a sort of "retreat" to an early historical era.⁶³ In the pre-modern era, writes Taylor, the fate of an individual was determined by his or her location on the social ladder of the society in which he or she lived. Therefore, it was seen as part of the natural order of things that different people had different fates in life, and were treated differently by others in the course of their lives. In this historical era, therefore, the notion of difference was at the core of social organization, of the self-image of people, and of the way people treated other people. Taylor calls this era the era of "honor." Modernity is presented by Taylor as a new era, organized around the notion of human dignity, the essence of which is that because of their humanity, all human beings are entitled to a hard core of rights that are supposed to assure them a certain equal life-fate and a certain equal treatment in the course of their lives. Thus, in this era, it is the notion of equality that lies at the basis of social organization and at the core of the human psyche. The rise of the discourses of identity and multiculturalism is presented by Taylor as a kind of re-introduction of elements of inequality and difference into our thinking about society and people. The two discourses emphasize the particular, unshared dimensions in the existence and identities of human beings, and they are meant to promote differential treatment of groups and of people belonging to groups.⁶⁴

By insisting on the importance of the elements of equality and similarity, taken from the era of modernity, the move I am suggesting here seeks to balance the move that has taken place with the rise of the discourses of identity and multiculturalism. The two discourses focus on identity and

63 Taylor, *supra* note 12.

64 The politics of identity is conducted by people sharing a certain identity trait. In that, it is based on emphasizing dissimilarities. But the deep logic of the politics of identity is egalitarian: it is aimed at annulling hierarchies that a culture creates between pairs of cultural categories and social groups (men/women, white/black, heterosexual/homosexual, etc.).

cultural traits that differentiate between people and that emphasize the dissimilarity among people. The proposition I am making here is meant as a reminder that we have to think of human beings first and foremost, and prior to anything else, as beings whose shared humanity establishes the claim that they will enjoy human dignity and that they will be treated as bearers of certain fundamental rights that cannot be compromised.

III. THE CONCEPT OF HUMANNESS

In this Part I shall develop a second suggestion as to the method for evaluating cultural practices. This theory is premised on the notion of humanness. It is based on a proposition that is close to the one made in the previous Part: emphasizing the traits shared by all human beings, and insisting that because of their shared human traits all human beings must enjoy a distinct kind of treatment.

A. Humanness and Personality

I want to distinguish between two concepts: the concept of "humanness" and the concept of the "person."

The concept of humanness relates to the universal traits all human beings share prior to their social existence. It is therefore close to the concepts of human rights and human dignity. Humanness is a more basic and primary concept than that of the "person." "Person" in Latin means masque. When the term is applied to human beings, the assumption is that first there is the human being and then comes personhood — something external to the human being that adds to it.⁶⁵ Indeed, the concept of the person relates to human beings as they are perceived by the cultural and legal systems in which they live. In the context of the cultural systems in which human beings live, personhood is the sum total of the social roles and social statuses that the culture grants an individual. Therefore, the perception of the individual

⁶⁵ Marcel Mauss, *A Category of the Human Mind: The Notion of Person; The Notion of Self*, in *THE CATEGORY OF THE PERSON 1* (Michael Carrithers et al. eds., 1985); J.S. La Fontaine, *Person and Individual: Some Anthropological Reflections*, in *THE CATEGORY OF THE PERSON*, *supra*, at 12; N.J. Allen, *The Category of the Person: A Reading of Mauss's Last Essay*, in *THE CATEGORY OF THE PERSON*, *supra*, at 26; Charles Taylor, *The Person*, in *THE CATEGORY OF THE PERSON*, *supra*, at 257; MEIR DAN-COHEN, *Responsibility and the Boundaries of the Self*, in *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF AND MORALITY* 199 (2002).

as a person usually ceases to exist when he or she dies (and thus ceases to have social relations). (There are cultures that do not perceive women and children as persons, for in these cultures women and children are not expected to fulfill any social roles. However, some of these cultures see old women as persons.)⁶⁶

B. A Hard Core of Humanness

1. *Respect for Humanness as a Standard for Intervention*

When we consider intervention in a cultural practice, the question we have to ask is: What is the ground on which a cultural group makes the claim to be left alone in governing the lives of its people? The best answer, I think, lies in the overlap between the contents of cultures and the identity of human beings living in cultures: cultures determine the identities of those living in them, constituting the intellectual, cognitive and emotional categories with which human beings give meaning to what transpires in their lives and with which human beings experience the world. If we have to treat human beings with respect, and if an overlap exists between cultures and the mind categories of human beings living in them, then *prima facie* we also need to treat with respect the cultures in which human beings live.

Now, if the duty to treat human beings with respect is the ground for abstaining from intervention in cultures, what follows is that when we find a culture that we regard as not treating those living in it with respect, the ground for non-intervention in that culture loses its grip, and the way is cleared for intervention in the culture so as to establish respect for the people living in it. For it will be a contradiction in terms if we let a group bar intervention in its practices on the ground of the duty to treat people with respect while we regard the practices of the group themselves as disrespecting human beings. (Yes, it is the "we" who check whether a group treats its people with respect, but what is important is the standard applied; as I shall claim in the following paragraphs, we have to look for a standard that is as universal as possible.)

⁶⁶ The concept of the *legal* person is an extension of the concept of the person from the social to the legal sphere. Perceiving an individual (or a legal entity) as a legal person is seeing him or her or it as a bearer of legal rights and powers and as capable of bearing responsibility under the law. Note, *What We Talk About When We Talk About Persons*, 114 HARV. L. REV. 1745 (2001); Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209 (2005); Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENTS U. L. REV. 67 (2002).

What this leads to is that we have to define a hard core of the concept of humanness that will serve as a standard for identifying cultural practices that do not show respect for humanness. Practices that violate this hard core will be viewed as practices that treat people with disrespect and therefore as practices that need to be eradicated or restricted.

I am using the term "hard core" intentionally. The broader the concept of humanness we employ, the more we shall be on the verge of filling it with the particularistic contents of the culture in which we live. The broader the concept of humanness we employ, the more we face the risk of imposing the terms of "honor" of our particular culture on another cultural group.⁶⁷ In order to avoid these risks, we have to restrict our definition of humanness to those elements of it that are pre-cultural or cross-cultural, i.e., we have to restrict the definition to the elements of humanness that are shared by all human beings wherever they are, no matter what cultures they live in and no matter what social identities they hold. This line of thought is based, therefore, on an essentialist and universalistic perception of human beings.⁶⁸

2. A Hard Core of Humanness: Three Elements

I want to suggest the following three elements as comprising the hard core of the concept of humanness:

First, *intellectual capabilities*: the ability to absorb information about the world, to understand the world, to want to make changes in the world, to plan, to be conscious of the existence of alternatives, to make decisions; the ability to distinguish between the past and the future; the ability to possess values, the ability to make normative judgments; the ability to imagine, to argue, to justify.

⁶⁷ Susan Wolf, *Martha C. Nussbaum: Human Capabilities, Female Human Beings*, in *WOMEN, CULTURE, AND DEVELOPMENT* 105 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

⁶⁸ For a similar approach, see Martha C. Nussbaum, *Human Functioning and Social Justice*, 20 *POL. THEORY* 202 (1992); Martha C. Nussbaum, *Human Capabilities, Female Human Rights*, in *WOMEN, CULTURE, AND DEVELOPMENT*, *supra* note 67, at 61; Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273 (1997); MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999); Martha C. Nussbaum, *Aristotle, Politics, and Human Capabilities: A Response to Antony, Arenson, Charlesworth, and Mulgan*, 111 *ETHICS* 102 (2000); see also Wolf, *supra* note 67; Gerald Dopley, *Liberalism and Illiberalism: Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka*, *Taylor and Nussbaum*, 12 *J. CONTEMP. LEGAL ISSUES* 661 (2002); Susan Moller Okin, *Inequalities Between the Sexes in Different Cultural Contexts*, in *WOMEN, CULTURE, AND DEVELOPMENT*, *supra* note 67, at 275.

Second, *bodily integrity*: awareness by the individual of his or her having a body that is bounded, separate and unique; awareness of the body's beginning (birth) and end (death); the body as having needs (food, drink, sexuality, sleep, shelter); the body as the locus of senses; the capability of the body to sense pleasure and pain.

Third, *emotions*: the individual as having the capability to experience offense, humiliation, sorrow, anger, disappointment, happiness, satisfaction, love, etc.

Any cultural practice subverting one of these three elements of humanness is one that may be justifiably eradicated or restricted. And the more a practice is injurious of more than one of the three elements, the more it will be justified to act against it. If this line of thinking is accepted, it will require application of the concept of humanness to particular cultural practices, and examination of whether they violate the standards of humanness.

For example, I suggest that slavery and sex trafficking should be eradicated because they impair the intellectual capabilities of human beings. Additionally, it should be examined whether any of the following practices violates the intellectual capabilities of human beings and therefore should be eradicated: prostitution,⁶⁹ forced marriages,⁷⁰ marriages of minors,⁷¹ denial of education, discriminatory education.

Likewise, any cultural practice that involves the killing of human beings that is not motivated by self-defense should be eradicated for its violation of the bodily integrity of human beings. Therefore, the practice of murdering women for the preservation of family honor should be

⁶⁹ A prostitution contract is a contract for the leasing of one human being for the sexual use of another human being. Under this contract, therefore, the prostitute is treated as an object. Indeed, in many cases, pimps treat the prostitutes they own as if they were animals whose maintenance is valuable only so as to make use of their meat. Thus, there is much closeness between prostitution and slavery. See Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 264 (1995). See also Portia's words to Brutus in complaint for his not sharing with her the secrets of the conspiracy against Caesar: "To keep with you at meals, comfort your bed, And talk to you sometimes? Dwell I but in the suburbs of your good pleasure? If it be no more, Portia is Brutus' harlot, not his wife." WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 1.

⁷⁰ The identity of one's spouse is of crucial importance to his or her fate in life and to his or her emotional and physical welfare, as well as to the future constitution of his or her mind. Spouses are highly important "significant others," to borrow from GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY (1934). Therefore, meaningful freedom of choice is required with regard to determining who will be one's spouse.

⁷¹ The same reasons that make it essential that forced marriages be prohibited also apply to marriages of minors.

eradicated. Additionally, all of the following practices should prima facie be eradicated if conducted in circumstances of inadequate freedom of choice: female circumcision, male circumcision, sati, foot tying, maiming, piercing, tattooing, cosmetic surgeries, sex transforming surgeries. This means that none of these practices should prima facie be allowed when minors are involved. As to adults, prima facie these practices may be authorized, if it can be said that meaningful freedom not to take part in them exists in a cultural group. Also, cultural norms that restrict the exercise of sexuality (e.g., by persecuting homosexuals and lesbians) should be eradicated.

Practices that restrict the freedom of certain kinds of people to marry,⁷² or that lock people into marriages,⁷³ should be eradicated for hurting the emotions of human beings.

Discussion of each of the aforementioned practices, and of many others, necessitates detailed weighing of normative considerations, as well as accumulation of high quality data (e.g., what are the implications of various types of female and male circumcision on women's and men's health and sexuality? How many of those practicing prostitution do so following meaningful free choice?) I suggest that the essentialist-universalistic concept of humanness proposed here, together with the considerations offered at the beginning of this Article, serve as a valuable framework for conducting such discussions.

72 Under Israeli law, certain categories of people are prohibited from getting married either completely or to people belonging to some other categories. It is noteworthy that in this case, it is the law of the state, and not the laws of cultural groups living in the state, that is the source of the problem: under Israeli law, the family laws of the various religious groups living in the country are the laws that govern matters of marriage and divorce in the country. The issue of same-sex marriage needs to be discussed in this context. Prohibition of gay and lesbian marriage should be viewed as a grave affront to the emotions of gay and lesbian people. The law should therefore apply the principle of freedom of marriage in this context as well.

73 The provisions of Jewish law, which are the law of the State of Israel in matters of divorce, are particularly problematic. Under Jewish law, divorce is dependent on the husband's consent. A Rabbinical Court may not compel a husband to divorce his wife. This not only enables a husband to extort his wife in the negotiations leading to the divorce; in some cases husbands' refusals to divorce their wives last for many years and thus bar them from remarrying and from having children. Once again, it is noteworthy that in this context too it is the law of the state that is the source of the problem and not the law of some minority religious group.

C. The Exclusion of Women

Non-liberal cultures often exclude women from participation in various activities. Should the liberal state intervene in such cases?

1. *The Study of Torah in the Ultra-Orthodox Group*

Susan Moller Okin has criticized the exclusion of Ultra-Orthodox women from the study of Torah.⁷⁴ Okin is right on this point. Ultra-Orthodox people usually come up with two justifications for this exclusionary practice. The first is that the supreme value for Ultra-Orthodox Jews is the study of the Torah, and women promote this value "by proxy," i.e., by creating the conditions that enable their husbands to study the Torah without disturbances. The second justification is that there are *two* central values in the lives of Ultra-Orthodox people: the study of the Torah and the cultivation of the family (first and foremost, raising children properly). According to this justification, there is a "division of labor" in the Ultra-Orthodox society: men study the Torah and women take care of running the family. Ultra-Orthodox people often add that given the importance they attach to the institution of the family and to family values, it is ludicrous to say that in entrusting their women with responsibilities over their families they treat women with disrespect.

The major reason why Okin criticized the exclusion of Ultra-Orthodox women from the study of Torah is that it undermines these women's self-esteem. But the two aforementioned justifications used by Ultra-Orthodox people show that self-esteem is not a good reason for objecting to such exclusion. Substantive arguments are required. One such argument is that the exclusion of Ultra-Orthodox women from the study of Torah leads to their subsequent exclusion from the political and judicial spheres, while, as I shall argue in the following paragraphs, such exclusion is unacceptable. A second argument is that it is unacceptable for a human being not to be given the opportunity to make use of his or her intellect in all of the spheres of activity that exist in the social group in which he or she lives. The third argument is pragmatic: From the fact that studying the Torah is a supreme value in the lives of Ultra-Orthodox people it does not follow that this activity should be reserved only for men. Women can study the Torah just as men can. And if in addition to studying the Torah cultivating a family is another central Ultra-Orthodox value, then it is not clear why men and women can't study the Torah on equal terms and shoulder the burdens of cultivating a family on equal terms. In every law school I am familiar with

⁷⁴ Okin, *Feminism and Multiculturalism*, *supra* note 3.

there are women who "study the Torah" and there are men who do their best to be equal partners to their wives in the project of cultivating their family.

2. *Three Spheres of Exclusion*

It seems to me that it is helpful to distinguish between three spheres of activity that women may be excluded from: the political and judicial sphere; the social sphere; and the sphere of religion (fulfilling religious functions and conducting religious rituals). (It is often pointed out by religious feminists that the exclusion of women from religious rituals takes place not only in excluding women from conducting such rituals, but also in the absence of religious rituals expressing basic female experiences, such as menstruation, menopause, and abortion.)⁷⁵

a. *The Political and Judicial Spheres*

Decisions undertaken in the political and judicial spheres are of great importance in determining a person's fate in life. Such decisions affect not only what happens to a person in the public sphere; they also affect, to a substantial extent, what transpires in the familial and private spheres of a person. Such decisions have significant effect on the intellectual, bodily and emotional conditions of a person.⁷⁶ Therefore, the exclusion of women from activity in the political and judicial spheres treats women as passive objects of decisions undertaken by men and denies women the opportunity to participate in determining what constitutes them intellectually and what substantially affects them bodily and emotionally. For these reasons, the exclusion of women from the political and judicial spheres is unacceptable.

In Israel, it is the practice of both the Ashkenazi Ultra-Orthodox group

⁷⁵ Shmueli, *supra* note 52, ch. 4.

⁷⁶ A dominant strand in law and society scholarship of the past two decades sees law as constitutive of culture and thus as constitutive of the minds of individuals, their self-image, the way they are perceived by others, and the nature of the social interaction in which they are involved. *See, e.g.*, Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987); LAW IN EVERYDAY LIFE 1 (Austin Sarat & Thomas R. Kearns eds., 1993); LAW IN THE DOMAINS OF CULTURE 1 (Austin Sarat & Thomas R. Kearns eds., 1998); Austin Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129 (2000); Austin Sarat & Jonathan Simon, *Beyond Legal Realism? Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001); Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 LAW & SOC. INQUIRY 145 (2001).

and the Sephardic Ultra-Orthodox group to exclude women from political activity and from adjudication.⁷⁷

Women are not active in the political parties of the Ultra-Orthodox group. Likewise, not even once in the history of the state did a woman serve as a member of the Knesset representing an Ultra-Orthodox party. This is so, even though the organization of political parties and the finance of their activities are regulated by state law,⁷⁸ and even though equality between men and women is a fundamental principle of Israeli law.

Women also do not serve as judges (*Dayanim*) in the *community* tribunals operated by the Ultra-Orthodox group. Furthermore, not even once in the history of the state did a woman serve as judge (*Dayan*) in the religious tribunals run by the *state*. (The appointment and service of religious courts' judges are governed by the Dayanim Law of 1955. Around 80% of the judges serving in the Jewish Rabbinical Courts are Ultra-Orthodox men. The rest come from the Religious Zionist sector.) This is sanctioned by an explicit provision of state law. On the one hand, the Women's Equal Rights Law of 1951 makes equality between men and women a basic principle of Israeli law. However, section 7(c) of this law explicitly provides that the principle of equality will not apply to the appointment of judges to the state's religious tribunals. Thus, in Israel, exclusion of women from the political and judicial spheres takes place not only in the context of the cultural practices of non-liberal minority groups; it takes place in the Knesset and in the state's tribunals, and it is even sanctioned by state law.

These exclusionary practices are unacceptable. The state should take the following two measures for remedying this situation. First, the state should embark on a slow and steady path of appointing women to the state's religious tribunals. Second, the state should notify the Ultra-Orthodox group that the financial support its political parties receive from the state will begin to decline, say 15 years from now, until it comes to zero support say 25 years from now, if between 15 to 25 years from now the Ultra-Orthodox parties do not involve women in their political activities, including as their representatives in the Knesset.

Undoubtedly, if such measures are taken they will effect substantial change in the culture of the Ultra-Orthodox group. First, women will fulfill roles they never fulfilled in the entire history of the Jewish people. Second, men will find themselves in the physical presence of women and will

⁷⁷ Frances Raday, *Religion, Multiculturalism and Equality: The Israeli Case*, 25 ISR. Y.B. HUM. RTS. 193 (1996).

⁷⁸ Parties Law, 5752-1992, S.H. 190.

come into contact with women in arenas hitherto reserved only for men (committees, tribunals, etc.). But needless to say, these changes will not make the Ultra-Orthodox culture collapse. The vast majority of the cultural categories and practices of this enormously rich culture will remain intact. As to the changes that will have to take place (particularly as a result of the new opportunities for contact between men and women), the Ultra-Orthodox culture is resourceful enough to deal with such changes. New rules and new practices will be designed to safeguard against unwelcome events that may take place when men and women have close contact. Also, technologies such as video conferencing and the internet may enable men and women to cooperate without being in the physical presence of each other. (It should also be noted that for many years now, Ultra-Orthodox women have been employed in secular corporations and organizations where they routinely have contact with non-Orthodox men.)

b. Civil Society and Religion

Is there a difference between the exclusion of women from the political and judicial spheres and their exclusion from activity in various spheres of civil society? It can be argued that exclusion of women from activity in *some* spheres of civil society does not preclude them from employing their intellect in *other* such spheres, so that it does not amount to complete denial of their ability to make use of their intellect.

However, if we see intellectual capabilities as a constitutive element of humanness, what follows is that each human being should be given the opportunity to make use of his or her intellect in *all* the spheres of activity that exist in the social group in which he or she lives. (This position is certainly supported by a humanistic approach; a major tenet of humanism is that each person should be provided with the maximal conditions to develop his or her intellectual potential.) Exclusion of women from any activity recognized by the group in which they live may be justified only if relevant considerations support it, such as that the activity requires certain bodily capabilities that women lack.

This does not mean, however, that the state should intervene to enforce the participation of women in the civil society spheres from which they are excluded. When women are allowed to take part in many other civil society spheres, the urgency for intervention diminishes. (The more spheres there are in which women are allowed to take part, the less is the urgency to intervene in the culture of a group.) The appropriate measure to be taken in cases of this type is the support of sub-groups that act for social change within the group. It seems that the same considerations apply to the exclusion of women from fulfilling religious functions and from conducting religious rituals.