



## **Sexual Segregation as Sex Based Discrimination: A Feminist Critique of Multiculturalism \***

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### **A. Introduction**

Israeli society is a composition of various cultural and religious groups, the largest of which is the Jewish religion. The Jewish religion like most cultures is stuffed with practices and ideologies concerning gender and gender relations. Those practices and ideologies govern the life of many of the religiously observant people especially members of the Ultra Orthodox community in Israel. One of the basic convictions in that regard is that men and women are fundamentally different in their mental dispositions and therefore many religious practices assign men and women different roles in social life. Women for instance have a distinctive role in family life. They are perceived as being more suited to the domestic sphere where they are expected to rear and bear children and to preserve the integrity of the family. Men on the other hand have a distinctive role in spiritual life. Public life is preserved mostly for them and they are expected to dedicate themselves to the study of the Torah and to the spiritual leadership of the community. In addition some religious practices are founded on certain convictions concerning the different sexual nature of men and

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women. Men are perceived to be inherently lustful while women are not. Therefore girls and women in Ultra Orthodox Judaism are held responsible for male sexual self control. Not only are they required to dress modestly from very early childhood, and to shave or clip short their hair and cover it from the time of marriage. Even their voices are considered sexual organs such that women and girls are forbidden to sing in the presence of anyone outside the immediate family.

Those beliefs generate several practices the most predominate one is the practice of sexual segregation. The Ultra Orthodox community has a segregated educational system where girls education is oriented toward the ends of domesticity and boys education is oriented toward being a Torah scholar. In a similar manner during religious services in the synagogue men and women are forbidden from sitting together. Men sit in the front while women are excluded to the rear where their sexual presence is less observed and not as disturbing. Furthermore the distancing of women from the center of the ritual activity does not interfere in any manner with the public practice of religion since women are not expected and are actually prevented from having any dominant role in that regard. Women are excluded from positions of authority and leadership and even from the study of canonical texts such as the Talmud.

In recent years the practice of sexual segregation in Israel has expanded to public transportation as well. Following the demand of the community, several bus companies in Israel started to operate in the Ultra-Orthodox neighborhoods buses with separate seating for men and women. In those buses just like the synagogue men sit in the front and women in the rear. In sum, women's domestic nature together with values of sexual morality provide the main rationale for practices of sexual segregation within the Ultra Orthodox community.

How should the liberal state treat those practices of gender segregation? On its face it seems that those practices clash with the norm of gender equality that is, at least formally, endorsed by liberal states. So, should religious sexual segregation be declared gender discriminatory or should the state respect those practices as being a legitimate exercise of religion?

Israel has confronted this question not a while ago when enacting a new anti discrimination law.

In 2000 the statute prohibiting discriminatory provision of goods and services was enacted in Israel. This law continues the existing trend in Israeli law to enforce the principle of equality beyond public law and to apply it to relations governed by private law. Section 1 of this law (specifying the goals of the law) states that:

“This law is aimed at promoting equality and preventing discrimination in entrance to public places and in the provision of goods and services.”

In other words the goal of this law is to make sure that private providers of public services such as owners of restaurants, sports clubs or amusement parks will be obliged to deliver their services on an equal basis without discrimination on the basis of sex, race national origin etc. Yet Israeli legislatures were concerned that its legislation might infringe upon the practice of sexual segregation as exercised by the Ultra Orthodox community in Israel. Consequently an exception was specified in the law. The exception – section 3(d)(3)(h) – states that this law does not prohibit:

“the existence of separate facilities for men and women, when integration of the sexes would prevent part of the public the provision of the good or the public service, the entrance to the public place, or the provision of the service to the public place, as long as the separation is justified given among others

the nature of the good, the nature of the public service or the public place, its importance, the existence of reasonable alternatives, and the needs of the public which may be affected by the separation."

Thus, today Israeli law legitimizes and protects religious practices of sexual segregation and they cannot be attacked under the general principle of gender equality. This outcome, it is important to note, is endorsed not only by members of the Ultra Orthodox community but also by many in the legal community who claim to defend those practices on liberal grounds. Commonly there are three justifications that are being raised in favor of this legislative scheme. I will refer to them as the cultural argument, the internal perspective argument and the women perspective argument.

The cultural argument is the most well known argument used by liberals engaged in the multicultural debate. Will Kymlicka, the foremost contemporary defender of cultural groups rights claims that minority groups such as the Jewish Ultra Orthodox community have their own societal culture which provides its members with meaningful ways of life across the full range of human activity, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. Because societal cultures play so pervasive and fundamental role in the lives of its members and because such cultures are threatened with extinction, minority cultures should be protected. In sum, liberals who are sympathetic to the legal protection of religious practices such as sexual segregation claim that facilitating this practice is conducive to the cultural integrity and autonomy of the Ultra-Orthodox community

The internal perspective argument is usually used as a secondary argument that provides additional support to the basic multicultural position. This argument shifts the discussion to a different direction. Instead of asking whether preserving cultural practices is a value that might override other liberal values such as the concern for gender equality, the internal perspective argument suggests that the social meaning of cultural practices cannot be detached from the political and moral convictions of the community that sustains the practice. Thus the question whether religious practices of sexual segregation are discriminatory or not should be resolved based on the internal perspective of the community itself. With regard to those practices the argument is that from an internal Jewish perspective they are not discriminatory. It is true, so the argument goes, that Judaism differentiates between men and women, yet differentiation is not discrimination. Women's different social role in the household and the family is of equal worth as men's role in spiritual life, so it is actually a kind of 'separate but equal' practice in the sense that it is based on an equal respect and equal concern for both men and women. In addition the separation of the sexes in public facilities such as synagogues or buses promotes values of modesty and morality that are equally important to men and women. Hence all in all what might look discriminatory to an external secular liberal audience is actually perceived differently by internal members of the community.

The Women perspective argument takes this line of reasoning one step further and suggests that the crucial focus is women themselves. That is, when the liberal state is confronted with the question whether to sustain and support a cultural or religious practice that has gender implications the ultimate decision should be determined based on the way women who are subordinated to this practice perceive it. Ultra Orthodox women do not object to sexual segregation, so it is claimed in this context.

They perceive it as an internal element of their religious belief that promotes and protects their interests, desires and concerns.

In the following pages I wish to examine those arguments more closely and to claim that neither provides an adequate justification to state protection of religious practices of sexual segregation. I shall focus more on the last two arguments: the internal and the women perspective arguments since I find them to be more challenging in the context of religious practices such as the practice of sexual segregation. Furthermore the rebuttal of those arguments necessarily undermines the cultural argument. My final conclusion is that true commitment to the value of gender equality negates the possibility of formal legal endorsement of religious practices of sexual segregation. At the end of the day liberals will have to take a side and decide what counts more in a liberal society the cultural autonomy and integrity of religious groups or the true equality between men and women.

### **B. The Internal Perspective Argument**

As I said earlier the internal argument seeks to uncover the internal social meaning of certain cultural or religious practices. The judgment as to the discriminatory or non-discriminatory nature of a practice cannot be mechanical; it ought to take into consideration the context and the social meaning attributed to the practice. In the context of practices of sexual segregation, so it is argued, the deeper religious rationale is far more complicated than the traditional liberal judgment that is inherently suspect toward practices of segregation of protected groups. Thus, in many senses sexual segregation operates to promote values that are equally important to religious men and women such as modesty, sexual morality and the integrity of the family.

On its face this argument appears to be very appealing. Yet a closer look exposes its deficiencies. Judaism like all other monotheistic religions is inherently patriarchal in the sense that it was established, interpreted and enforced throughout the years by men. Thus the basic convictions that lay the ground for the practice of sexual segregation were established in a masculine world. It was men who determined their role in public life compared of that of women. It was men who excluded women to the domestic sphere and reserved the public sphere to themselves. It was men who excluded women to the periphery of the synagogue in order to protect themselves from women's sexual presence. Furthermore, the masculine nature of Jewish law is preserved and perpetuated until today since based on the differentiation rationale (once established by men) women are excluded even today from positions of authority and leadership within the Ultra Orthodox community. They cannot become the spiritual leaders of the community and therefore they have no influence whatsoever over the making process of new rules or on the amendment of old laws. In sum, the kind of social and religious structure created generations ago by men appears to be immune from any change since those who benefit from it most are those who also have the sole power to question it. Thus if equality is measured in terms of relative power, one can easily conclude that the present structure is inherently unequal since it keeps women in a powerless position compared to that of men. While men have the power to shape and determine the social reality they are subordinated too, women have no equivalent control over their lives.

In addition it is not hard to discover that some specific religious justifications provided for practices of gender segregation derive from demeaning perceptions of women. Women are perceived in many religious texts as light minded, weak, impure, more devious and less capable for all aspects of spiritual life. Thus their exclusion to

the margins of the public sphere is not only aimed at preserving sexual morality among all member of the Ultra Orthodox community. It also reflects a deeper hierarchical notion that women have a lesser value than men. It is therefore a separate but not equal ideology that underlies religious practices of sexual segregation.

Having said that I do not mean to imply that Judaism is a monolithic set of sexist values and ideologies. I acknowledge the fact that Jewish religion in general is complicated. Some of the basic convictions it is based on are sexist and some of them are truly egalitarian. It is not uncommon to find statements praising women and imposing burdensome obligations on men to address women's concerns and needs. It is also possible to find views expressing the conviction that women's well-being is as important as that of men or that women's dignity is as valuable as that of men. Yet I believe that when examining the practice of sexual segregation one must admit that in this specific context the hierarchical discriminatory nature of those practices overrides other aspects of religion that are expressed by other rules and practices. To summarize my point, I think that the internal argument cannot provide an adequate justification to the legal protection of religious practices of sexual segregation. The internal perspective of the community does not shed a new and more egalitarian light on practices of sexual segregation. The internal perspective like the external perspective reveals discrimination. The only difference is that the internal perspective legitimates gender discrimination and the external liberal perspective does not. Yet under those circumstances the liberal state is committed to the latter stand.

### **C. The Women Perspective Argument**

This brings me to the last argument commonly raised by defenders of state protection of such religious practices: the women perspective argument. Very often

the claim is that what really counts in the context of religious practices that have gender implications is women's own will. Ultra Orthodox women, so it is argued, endorse those practices and accept them as inseparable element of their life. They don't find those practices to be demeaning, but rather just and reassuring. Those relying on this argument usually refer to the fact that Ultra orthodox women seem to be fully cooperative when its comes to the enforcement of those practices within the community.

But how do we really know that all Ultra Orthodox women actually support those practices? As a matter of fact it is highly difficult to locate and listen to women's voices in that context. Due to the patriarchal and authoritative nature of the community women don't speak in public and they are especially less likely to express public dissent to deeply entrenched social practices. Thus, the mere fact that women passively comply with particular practices does not necessarily imply their active endorsement of the practice. Yet very often we tend to conflate the two. This, I believe, what happened in the context of the legislative deliberation over the new law that eventually legitimized practices of sexual segregation. Investigating more closely the dynamics that led to the legislation of the law can provide us with a very interesting case study as to the manner by which the legal discourse over simplifies the multicultural dilemma and actively disguise many of the complexities involved. My own research as to the legislative history of this law reveals that the question whether to legalize and formally legitimize practices of sexual segregation has occupied policy makers in Israel several years before the final enactment of the new anti-discrimination law. In 1997 the Minister of Transportation has appointed a public committee to investigate ways to encourage the use of public transportation by the Ultra Orthodox communities. The committee recommended that the official policy

of the ministry of transportation should sanction voluntary arrangement of separate sitting in buses as maintained and enforced by members of the Ultra orthodox community themselves. The arrangement was to be achieved by enabling some members of the community to convince other members to abide to the community's values and beliefs. The minister of transportation adopted the recommendations and issued a formal policy endorsing voluntary arrangements of separated sitting in buses that serve the Ultra orthodox community. Interestingly enough, the committee upon whose recommendation the policy was adopted included only one woman – the legal adviser of the ministry. Representatives of the Ultra orthodox community in the committee were all men. This did not prevent the committee from announcing in a general and gender neutral language that its recommendation is based on "negotiations with representatives of the Ultra orthodox community" that were aimed to "accommodate the special needs of this community". Hence, what was actually a dialogue with religious men about their needs and interests was presented in the official report of the committee as an exchange of ideas with the Ultra orthodox community as a whole. Furthermore neither the committee nor the minister, a religious man himself, didn't question the term "voluntary" as used in reference to practices enforced by members of the Ultra Orthodox community. Avishai Margalit and Moshe Halbertal in an article dedicated to the right to culture of the Ultra Orthodox community describe this community in the following way:

"The Ultra orthodox culture is inherently illiberal. It interferes completely sometimes forcefully in all aspects of life of its members.....The community even tend to react violently toward those of its members who violate its norms and rules of behavior....In short the Ultra Orthodox way of living is strictly enforced by the community and its institutions."

This description reveals the fact that the process in which members of the community are "convinced" to conform to its norms and practices is not always voluntary. Hence, the officials who endorsed the right of some members of the community to "convince" others to comply with the practice of separation in buses could have reasonably assumed that compliance will not always be voluntary. Yet those kind of doubts have no reference in the official report. The report is not only gender neutral it is also phrased in traditional liberal terms such as autonomy and free choice that seem to be totally irrelevant to the kind of cultural structure it is aimed to support. Furthermore reality itself casts more doubts on the presumption of free choice based on which the committee issued its recommendations. Just a few months earlier a group of Ultra Orthodox men in a town near Jerusalem have decided to organize the community into separate sittings in the bus going to Jerusalem. They printed pamphlets and started to enforce the new arrangement. Some members of this local community objected. Some couples didn't want to be separated during the ride to Jerusalem; Some pregnant women didn't want to sit in the rear part of the bus where they felt sick. In an unusual manner this group of people organized. They drafted a petition of protest and contacted the Association for Civil Rights in Israel to whom they complained about violence and threats that were inseparable part of the effort to enforce the new sitting order in the bus. Most of the people complaining preferred to remain anonymous. The Association for Civil Rights complained to the Ministry of Transportation demanding a quick action to protect the freedom of all passengers in the bus. Months later the ministry sent somebody to investigate the complaints. The investigator reported that he found no signs of protest in the segregated bus. Men sat in the front, women in the rear, and nobody was challenging anymore the new order. Based on this investigation the authorities concluded that the

practice of separate sitting is not only voluntary, but it is also endorsed by the entire community. I would hesitate more as to the final conclusion. It is just as possible that voices of dissent have been silenced. Unfortunately policy makers did not even consider this option.

Soon after the Ministry of Transportation adopted the recommendations of the public committee with regard to the enforcement of separate sitting in public buses serving the Ultra orthodox community, a women rights organization (The Women Network) petitioned the high court of justice, claiming that such public endorsement of practices of sexual segregation clearly violates the principle of gender equality. The State in response claimed that the whole initiative came from the Ultra Orthodox community, that it is voluntarily enforced, that the passengers are satisfied and that no complaints have been heard. Based on this official response the court concluded that there is no cause of action here and therefore the judges "convinced" the Women Network to withdraw its petition. Those events set the background for the legislation of the new law. When the Parliament was considering the new law, it was already established that practices of sexual segregation are highly undesirable by all members of the community. The Ultra Orthodox community, it must be noted, was represented in the legislative process since it has delegates in the Israeli Parliament. Unfortunately all of them are men since as I already mentioned earlier Orthodox Judaism views politics and leadership roles as exclusively male. Hence, it was men again who introduced the position of the community and contributed to its adoption and acceptance by the law.

Two important conclusions should be drawn from this particular case study. First, we should be very cautious as to our basic tendency to treat cultural groups as

monoliths. All our attention in the multicultural debate is paid to differences between groups and not to differences within them. More specifically we give hardly no recognition to the fact that many minority cultural groups are sexist with substantial differences of power between men and women and even among women. The question whether all women actually endorse a particular cultural practice cannot be resolved based on general presumptions regarding the community as a whole.

Second we should be more sensitive to the role of law in disguising the complexity of the multicultural debate. The law has to be sensitive to all aspects of reality so that the legal regulation of social order is just. The case study discussed above reveals how in this context lawmakers were not only blind to the reality of inequality, they actively contributed to a process by which this reality was re-portrayed and elements of power and subordination concealed.

#### **D. The Cultural Argument**

I now return to the cultural argument. In addressing the cultural position I wish to focus only on those scholars who claim to defend group rights on liberal grounds and therefore remain committed at least on the formal level to the value of gender equality and autonomy. Some multiculturalists like Will Kymlicka confine their argument of group rights to groups who are internally liberal. In his own words "group rights are permissible if they help promote justice between ethnocultural groups, but are impermissible if they create or exacerbate gender inequalities within the group." Kymlicka therefore distinguishes between two kinds of group rights: "internal restrictions" and "external protections". In the first category he refers to situations where ethnocultural groups claim rights against its own members- in particular the right to restrict individual choice in the name of cultural "tradition" or cultural

"integrity". Kymlicka objects those kind of group rights and supports only the latter category of "external protections" that refers to rights that are claimed by a minority group against the larger society in order to reduce its vulnerability to the economic or political power of the larger society. More specifically he refers here to language rights, guaranteed political representation, land claims etc. On its face it is therefore difficult to rely on Kymlicka's position in defending legal endorsement of religious practices of sexual segregation. The Ultra Orthodox community is inherently illiberal and formal enforcement of practices of sexual segregation seems to restrict individual choice within the community. Furthermore I think that Kymlicka's own categorization is very problematic. In reality and when dealing with cultural demands of minority groups it is very difficult if not impossible always to distinguish between "internal restrictions" and "external protections". Many group rights embody both aspects. Lets take for example the right to funding of educational system or the right to political representation. Those two rights are both designed to reduce the religious group's vulnerability to the power of the larger society. Yet at the same time they restrict individual choice within the community. The separate educational system of the Ultra Orthodox community restricts both men and women choices and prepare them for their pre-decided role in society. In a similar manner, awarding political representation to the community enables men to take over the political process and to exclude women from any political involvement. Thus, if you are truly committed to the endorsement of only liberal cultural practices it is hard to see how many ethnocultural groups if at all will be able to claim group rights under this condition.

Other multicultural positions seem more relevant to the Ultra Orthodox dilemma. Moshe Halbertal and Avishay Margalit for instance claim that sometimes the liberal state should protect the rights of illiberal cultures. They argue that "human beings

have the right to culture – not just to any culture but their own" and that this right may justify "an obligation to support cultures that flout the rights of [their individual members] in a liberal society". Yet trying to confine their argument to liberal grounds they add that group rights granted to minority cultures should be balanced and measured against the limitations they impose on others. So their final position is that cultural rights should not be granted if they infringe unreasonably upon the liberty of others. Unfortunately they apply the term "others" only to members of the secular society. Their discussion of the Ultra Orthodox community does not consider the possibility of rights conflicts within the community. It only refers to such possible conflicts between minority and majority groups. Thus, just like my previous discussion of the women perspective argument, the problem here seems to be the monolith treatment of the Ultra Orthodox community that is not sensitive enough to power hierarchies within the community and their possible implications for liberal rights discourse.

A similar problem can be detected in the writings of Chandran Kukathas. Kukathas does not argue, as in the preceding example, that minority cultural groups per se should have any special support or privileges, since he thinks the rights of their individual members suffice to protect them from the power of the larger society. But he does argue that such groups - even illiberal ones - within a liberal society have the right to be "let alone". Thus they have the right to treat their own members illiberally in certain respects – for example requiring them to conform to religious or other practices of the group. One can argue that Kukathas's version of multiculturalism resembles the Israeli legislative structure that enables the Ultra Orthodox community to enforce practices of separation without interference. Yet Kukathas suggests that we should assess the legitimacy of a culture or a way of life by asking "whether the

individuals taking part in it are prepared to acquiesce in it." As I demonstrated before, this has not been done in the Israeli context. Furthermore if the question is raised, one may discover for instance that "acquiescence" by at least some women in the Ultra Orthodox community in religious practices of segregation stems from lack of power, or socialization into inferior roles. If this is the case, it seems that liberal reasoning cannot provide justification for either passive or active legal endorsement of such practices.

### **E. Conclusion**

My final conclusion is that adopting a feminist perspective – that is a perspective that is sensitive to gender concerns – can help us uncover the implications of the multicultural debate for women. My particular focus in this essay was religious practices of sexual segregation and I do not wish to imply that my analysis in the particular context can apply blindly to all questions relating to group rights in general. Yet I do want to suggest that a more gender sensitive approach could help the legal system resolve issues of multiculturalism in a more just and egalitarian manner.