

DOI: 10.53116/pgafnr.6816

# Should Liberal Democracy Respect Group Rights that Discriminate against Women and Apostates?<sup>1</sup>

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**Abstract:** The paper examines the limits of state interference in proscribing cultural norms by considering gender discrimination, right of people to leave their community free of penalties, denying women appropriate education, and forced or arranged marriages for girls and young women. The discussion opens by reflecting on the discriminatory practices of the Pueblo tribes against their women and analysing an American court case, *Santa Clara v. Martinez*. It is argued that the severity of rights violations within the minority group, the insufficient dispute-resolution-mechanisms, and the inability of individuals to leave the community if they so desire without penalty justify state intervention to uphold the dissenters' basic rights. Next, a Canadian case, *Hofër v. Hofër*, illustrates the problematics of denying reasonable exit right to members who may wish to leave their community. Subsequently, the discussion turns to the issue of arranged and forced marriages of girls and young women. While the latter is coercive the former is not. While forced marriages should be denounced as unjust, arranged marriages can be accepted. Finally, the paper considers denying education to women, arguing that such a denial is unjust and discriminatory.

**Keywords:** *Canada (AG) v. Lavell*, culture, education, forced marriages, gender discrimination, *Hofër v. Hofër*, Pueblo tribes, religion, *Santa Clara v. Martinez*

## 1. Introduction

Consider the following: A religious community within liberal democracy discriminates against women. When women complain, justification is produced that “this is how we conduct things in this community for hundreds of years. Rights of the group supersede your individual rights”. Should the liberal state intervene and come to the aid of the discriminated women? Or should it perceive this as a “private matter” to be left for the group to sort and resolve?

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<sup>1</sup> A former version of this article was published in Raphael Cohen-Almagor, *Just, Reasonable Multiculturalism: Liberalism, Culture and Coercion* (New York and Cambridge: Cambridge University Press, 2021). Permission to publish this article has been granted by Cambridge University Press.

This paper examines the limits of state interference in proscribing cultural norms by considering gender discrimination, right of people to leave their community free of penalties, denying women appropriate education, and forced or arranged marriages for girls and young women. By “appropriate” I mean education that would enable individuals comfortable integration into the wider society if they so wish. Cases in point are practices that force children to marriage at a very young age, and denial of education to vulnerable populations. Both constitute serious harms. The discussion opens by reflecting on the discriminatory practices of the Pueblo tribes against their women and analysing an American court case, *Santa Clara v. Martinez*. A Canadian case, *Hofer v. Hofer*, illustrates the problematics of denying reasonable exit right to members who may wish to leave their community. Subsequently, the discussion turns to the issue of arranged and forced marriages of girls and young women, considering the Jewish–Yemenite immigrants who came to Israel during the 1950s. As customary in Yemen, young girls were married to much older men. Finally, the paper criticised the denial of education to women, arguing that the liberal state has a role to play in protecting basic rights of vulnerable populations.

In each of these cases, the question is whether a dominant culture has a right to interfere in the business of a cultural minority, if one or more of their practices or norms cause some harm to members of that same minority culture. Groups employed internal restrictions and erected external protections to protect themselves. In the name of culture and religion, they deny women basic human rights and undermine their ability to develop themselves as autonomous beings. John Rawls has argued that the various conceptions of justice are the outgrowth of different notions of society against the background of opposing views of the natural necessities and opportunities of human life. A conception of social justice is to be regarded as providing in the first instance a standard whereby the distributive aspects of the basic structure of society are to be assessed (Rawls, 1971, p. 7). A complete conception defining principles for all the virtues of basic structure, together with their respective weights when they conflict, is a social ideal that encompasses the aims and purposes of social cooperation (Rawls, 1993, p. 60). Following Susan Moller Okin (1999), it is argued that practices and arrangements that serve to undermine women’s equal dignity and equal access to opportunities are incompatible with these two basic tenets.

The preamble to the Universal Declaration of Human Rights (UDHR), 1948 accentuates the need to protect human rights as “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”. The International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant of Economic, Social and Cultural Rights (ICESCR), 1966 are also designed to promote and protect basic human rights. Other important conventions are the 1967 International Convention for Elimination of All Forms of Discrimination against Women, the 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, and the 1990 Convention on the Rights of the Child. They all aim to safeguard the inalienable rights of women and children, perceived vulnerable and therefore in need of protection. Specifically, let me mention Article 26 of the International Covenant of Economic, Social and Cultural Rights, 1966:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## **2. Gender discrimination – The case of the Pueblo Indian communities**

It is estimated that 370 million people in 90 countries belong to indigenous people (Kedar et al., 2018, p. 160). Most of them experienced great suffering at the hands of the white men who colonialised them, took their lands and exploited them. Many indigenous people were forced to forfeit their sources of substance. The colonialising powers dispossessed and subjugated the local communities by brute force, showing little regard to the indigenous just claims on land and natural resources.

During the 20<sup>th</sup> century, many western countries recognised the evil that their forefathers brought on the indigenous people. In their repent, they have aimed to compensate them in various ways. The old school repressive methods have been reversed. Instead of trying to suppress indigenous cultures, liberal democracies have been acknowledging cultural value and importance. Steps were taken to accommodate cultural rights. In the United States, some Pueblo Indian communities enjoy extensive rights of self-government. They limit freedom of conscience of their own members and employ sexually discriminatory membership rules. Similarly, some immigrant groups and religious minorities use ‘multiculturalism’ as a pretext for imposing traditional patriarchal practices on women and children. Some immigrant and religious groups demand the right to stop their children (particularly girls) from receiving a proper education, so as to reduce the chances that the child will leave the community; some other communities uphold compulsory arranged marriages.

Pueblo peoples are thought to be the descendants of the prehistoric Ancestral Pueblo (Anasazi) culture. This Indian tribe has been in existence for more than 600 years. They established villages in New Mexico along the Rio Grande and in northern Arizona (Britannica s. a.). Like many traditional communities, some Pueblo Indian communities apply discriminatory practices regarding women and people who decide to abandon the tribes. They discriminate in the distribution of housing and if female members marry outside the tribe, their children are denied membership.<sup>2</sup> Should the American federal government intervene in the Pueblo affairs to protect the rights of women and children?

In 1968, the American Congress passed the Indian Civil Rights Act (ICRA) which recognises the tribes’ sovereignty and their right to self-government but stated that tribes are subject to constitutional guidelines resembling the Bill of Rights. This legislation was

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<sup>2</sup> This discriminatory rule was upheld in *Santa Clara Pueblo v. Martinez*; 436 US 49 (1978), discussed *infra*. For further discussion, see Shachar (2001); Resnik (1989).

widely opposed by Indian groups who perceived it as an unjust federal intrusion into tribal affairs, and for understandable reasons (Christofferson, 1991; Schneiderman, 1998). The assumption that all governments within a country should be subject to a single Bill of Rights, enforced by a common Supreme Court, was perceived inappropriate in the eyes of the Pueblo and other incorporated national minorities. After all, the indigenous population preceded the establishment of the United States. Most of their valuable assets were taken away from them by the colonising power.

Since the 19<sup>th</sup> century, Indian tribes were recognised by the courts to have a distinct political society. They are domestic dependent nations, capable of managing their own affairs and of governing themselves; yet they are dependent on the United States to whom the relation resembles that of a ward to a guardian (Brown, 1930). Still, many Indian leaders argued that Indian governments should be exempt from the Bill of Rights in order to maintain their coherence and unity. They fear that the United States will abuse its power to take their land, as white people did when they arrived to America, and they do not trust white judges to do a good job in protecting their rights. Pueblo communities wish to retain responsibilities for their communal affairs.<sup>3</sup>

Spinner-Halev (2001) asserted that avoiding the injustice of imposing reform on an oppressed group is often more important than avoiding the injustice of gender discrimination. The American Supreme Court legitimised the acts of colonisation and conquest, which dispossessed the Pueblo of their property and power. The Pueblo have never had any representation on the Supreme Court. Thus, the American federal constitution and courts do not enjoy obvious legitimacy in the eyes of an involuntarily-incorporated national minority. Why should the Pueblo agree to have their internal decisions reviewed by a body, which is, in effect, the courts of their conquerors?

The Pueblo have their own internal constitution and courts, which prevent the arbitrary exercise of political power. To be sure, while the Pueblo constitution is not liberal, it is a form of constitutional government. As Graham Walker (2000) notes, it is a mistake to conflate the ideas of liberalism and constitutionalism. There is a genuine category of non-liberal constitutionalism, which provides meaningful checks on political authority and preserves the basic elements of natural justice, and which thereby helps ensure that governments maintain their legitimacy in the eyes of their subjects.

In an earlier article, Kymlicka and I (Kymlicka & Cohen-Almagor, 2000) argued that the liberal state should not intervene in indigenous affairs because they have strong claims for self-government. Balancing group rights and gender rights, they gave more weight to the former. Kymlicka (1989; 1997, pp. 72–87; 2000, pp. 35–48) has long been arguing that liberal societies should extend group rights and special arrangements to cultural communities, especially to disadvantaged national minorities and some polyethnic or immigrant groups – as a matter of liberal justice. I have changed my mind. Now I argue

<sup>3</sup> The basic attitude of the American Supreme Court towards Indian sovereignty was determined by Chief Justice John Marshall's judgement in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In this judgement, Marshall said that "Conquest gives title which the courts of the conqueror cannot deny", the validity of which "has never been questioned by our courts" (pp. 587–588). Marshall's approach continues to determine the Court's approach to Indian rights, not just in the United States, but also in other settler societies, such as Canada and Australia. On this, see Wilkins (1994, 161–168); Williams Jr. (1995, 146–202); Wilkinson (2006); Tsosie (2011, 923–950).

for state interference to redress gender injustice. Let me explain by reflecting on the landmark cases regarding the federal government's jurisdiction over Indian tribes.

### 3. Denying basic rights to women – *Santa Clara v. Martinez*

In *Santa Clara v. Martinez* 436 US 49 (1978), the Supreme Court contended with the issues of Indian autonomy and gender discrimination. Julia Martinez and one of her children, Audrey Martinez, challenged the Santa Clara Pueblo membership ordinance that disqualified Martinez's children because she had married outside the tribe. The same ordinance did not place similar restriction on men. Martinez appealed to the American justice system, seeking declaratory and injunctive relief, claiming that this ordinance discriminated against her on basis of gender, in contravention of ICRA which states that no Indian tribe in exercising powers of self-government shall "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law".<sup>4</sup> Although the Martinez children were raised on the reservation and continued to reside there as adults, they were denied basic rights. As a result of their exclusion from membership they were not eligible to vote in tribal elections or to hold secular tribal offices. They had no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands. The Pueblo successfully erected external protections to exclusively reserve land for their own community and did not wish to forfeit possession. Respondent Julia Martinez engaged with the tribe elders in an attempt to change the membership rule, but to no avail. Then she appealed to the courts, seeking justice. She was certified to represent a class consisting of all women who were members of the Santa Clara Pueblo and who had married men who were not members of the Pueblo, while Audrey Martinez was certified as the class representative of all children born to marriages between Santa Claran women and men who were not members of the Pueblo.<sup>5</sup>

The Santa Clara Pueblo argued that the 1968 ICRA did not authorise civil actions in federal court for relief against a tribe or its officials. The Supreme Court, *per* Justice Thurgood Marshall who delivered the opinion of the Court, in which Justices Burger, Brennan, Stewart, Powell, Stevens and Rehnquist joined (Justice Blackman took no part in the consideration or decision of the case) agreed, guaranteeing strong tribal autonomy except when Congress provided for federal judicial review. Marshall J. conceded that Indian tribes have been recognised as possessing common law immunity from suit traditionally enjoyed by sovereign powers (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 58). The Pueblo successfully campaigned for external protections for devolution of powers to enable them to make decisions regarding their community. The Court emphasised that the role of courts in adjusting relations between and among tribes and their members is restrained. The tribes are better suited to understand their own culture.

<sup>4</sup> The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301–1304 (ICRA).

<sup>5</sup> *Santa Clara Pueblo v. Martinez* 436 US 49 (1978), p. 53. See also Newton (1984, pp. 195–288).

Congress retains authority expressly to authorise civil actions for relief in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. “But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent”, the Court is constrained to find that ICRA “does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers”.<sup>6</sup>

Justice White disagreed. In his dissent he wrote that the Court in its majority decision had substantially undermined the goal of the ICRA, in particular its purpose to protect “individual Indians from arbitrary and unjust actions of tribal governments” (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 73). While acknowledging that Indian tribes have had special status in American law, White J. did not think that the tribe was insular from State scrutiny (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 75). He thought that in this case there was a need to interfere in the Pueblo affairs because its membership law was unjust. White J. reminded his fellow justices that the ICRA in itself was an intrusion into tribal affairs. Thus, he thought that the federal courts have jurisdiction to consider the merits of the respondents’ claims (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 83).

I side with White J. The non-liberal constitutionalism of the Pueblo is unjust from the point of view of liberal principles. The court judgment left Native American women with a general right but without recourse for remedy. The Pueblo courts were left to uphold their rules which discriminated against women (as well as Christians). Clearly, for the federal courts to overturn the decisions of the Pueblo courts and impose liberal principles is a problematic move. We need to seek a solution that would take into account the risk of denigrating the group’s own system of government and courts, the high levels of legitimacy of the governance system in the eyes of its own members as well as rights of women and children, and the liberal goal of arriving at just and reasonable formula. Reasonableness consists in equitableness whereby an individual respects other persons’ rights as well as her own (Gewirth, 1983). In this case, mutual respect is clearly lacking. The severity of rights violations within the minority group, the insufficient dispute-resolution-mechanisms, and the inability of individuals to leave the community if they so desire without penalty justify state intervention to uphold the dissenters’ basic rights.

While acknowledging that imposing liberal principles on self-governing national minorities is problematic, and that attempts to impose liberal principles might backfire since they are perceived as a form of aggression or paternalistic colonialism, it is unjust to accept that it is, according to the Pueblo, a matter of cultural survival to oppose women claim for upholding their natural right to equality. After the *Martinez* decision, women who were denied tribal membership lost essential benefits including federal payments, education and medical care. Julia Martinez’s daughter was denied medical treatment and later died from strokes relating to her illness (Christofferson, 1991, p. 169). In the name of culture, the Pueblo should not deny women equal individual protection that every American citizen enjoys. Reconciling multiculturalism and liberalism requires invoking

<sup>6</sup> *Santa Clara Pueblo v. Martinez*, 72. For further discussion, see Valencia-Weber (2004).

the Rawlsian Principle of Equal Liberty: Each person has an equal right to the most extensive liberties compatible with similar liberties for all. The State should provide education, minimum income and health care for all (Rawls, 1971, p. 302; Shalev, 2005).

By accentuating tribal sovereignty and narrowly interpreting the statutes in such a way that saw no urgency to interfere in the Pueblo affairs, the Court failed to appreciate Martinez's and other women's predicament. The Court accorded respect for tribal sovereignty, protected the "unique political, cultural, and economic needs of tribal governments" (*Santa Clara Pueblo v. Martinez* [1978], p. 62)<sup>7</sup> and had deliberately chosen not to extend every provision of the Bill of Rights to tribes, thereby accepting the Pueblo claims. Balancing tribal sovereignty vis-à-vis gender rights, my view – on the other hand – decidedly favours the latter. It is the duty of the liberal state to protect basic rights of vulnerable population and not to leave women at the mercy of men who employ cultural justifications to harm them and undermine their existence. Gender equality and mutual respect should be promoted as vital values. Chauvinistic group discrimination should not enjoy any form of legitimacy. Granted that liberal institutions can only work if liberal beliefs have been internalised by the members of the self-governing society; therefore, education and dialogue should be implemented rather than granting legitimacy to unjust discrimination.

Principally, as Brian Barry (2001, p. 89) noted, the Pueblo cannot run a sub-state that is religiously exclusive, certainly not in a liberal society. If the Pueblo want to retain their special political status, they should be required to observe the constraints on the use of political power that are imposed by liberal justice. They should have to accept that exercising political power cannot legitimately be used to foster religious and gender discrimination. This is in line with The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) which holds (Article 16) that men and women have the same right to enter into marriage, and that both spouses enjoy the same rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property. The Preamble of the same Convention holds that the full and complete development of a country, the welfare of the world and the cause of peace require the "maximum participation of women on equal terms with men in all fields".

Conversely, Chandran Kukathas (2003, p. 76) supports group rights and autonomy even if they trump individual rights. He argues that the good society is a free society and a free society is one that upholds freedom of association. In his extreme liberal view, there are hardly any restrictions on what communities can do to their members. Kukathas simply mistrusts the government to act prudently without exploiting its powers. He assumes that any government intervention is likely to violate individuals' freedom association and freedom of conscience and, therefore, hands-off policy is warranted.

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<sup>7</sup> For further discussion about the tensions between minority group rights and gender equality, and about conflicts over the culture defence in American criminal law, aboriginal membership rules, tribal sovereignty and polygamy, see Song (2007).

Kukathas's theory (1997; 2003) does not see "cultural integration" or what he terms "cultural engineering" as a part of the state's *raison d'être*. He rejects the idea of making the boundaries, the symbols, and the cultural character of the state matters of justice. Consequently, overarching tolerance is advocated regarding a wide array of controversial practices that include the denial of school education to children, arranged marriages, denial of medical care to members and inflicting cruel punishment on members. All of this is possible in Kukathas's (2003, p. 134) concept of toleration. Kukathas explains at length why a free society should tolerate a variety of associations and practices, including those that do not value freedom or abide by the principle of toleration, and that embrace intolerable practices. While Kukathas acknowledges the importance of individual choice, he does not think it is important to ensure that the conditions within communities exist to ensure that individuals are free to make their own choices and live by them. In accordance with Kukathas's liberal theory, illiberal communities within liberal democracy can inflict all sorts of harm – physical and non-physical, on their own members.

Kukathas's theory celebrates tolerance. Indeed, the idea of tolerance embodies a normative stance geared to promote equal respect and self-determination when the latter results in allocation of resources and involves some form of legal coercion (Cohen-Almagor, 2006a). Respecting our fellow citizens entails that we should see them, in Kantian terms, as ends rather than means, appreciate diversity and differences, and not be quick to judge the others as "strange" or "peculiar" only because they adhere to a different way of life, or to a different conception of the good. In a democracy, government is said to tolerate people, providing others with scope to develop themselves and their respective ways of life. However, the important proviso is to tolerate as long as the subject of tolerance does not harm others. Tolerance should not be exploited to enable gross abuse of human rights. As Karl Popper (1962, p. 265) said, it is absurd to assume that we should tolerate the intolerant with little or no regard to consequences. The delicate task is to maintain a balance between tolerance and intolerance, between group rights and the preservation of basic human rights, otherwise the very foundation of tolerance might provide the intolerant the tools for continued abuse.

Kukathas (2003, p. 188) does not trust liberal justice because this concept of justice would lead to state interference and compulsion. Liberal justice cannot condone deep cultural diversity. He acknowledges that clitoridectomy, the denial of blood transfusions and religious coercion are all oppressive. Yet Kukathas (2003, pp. 135–136) maintains that if the concern is oppression, "there is just as much reason to hold (more) firmly to the principles of toleration –since the threat of oppression is as likely to come from outside the minority community as it is from within". Kukathas is more concerned with speculative future consequences of oppression than the here-and-now tangible oppression. Hypothetical fear of government abuse is more persuasive for him than present denial of basic rights. But silence and passivity will not stop abuse.

Kukathas (2003, pp. 136–137) concedes that there are cases where there is clear evidence of terrible practices. He believes that persuasion, rather than force, is the preferred, more effective and less damaging means of fostering change from the outside. Granted that government should first resort to mechanisms of deliberative democracy as the prime means to bring about change. But what if the leaders of the community are not

open to debate and persuasion? Kukathas would then say: “At least I tried”, and leave the continuation of abuse intact. Whereas I argue that there are instances where external argumentation might fall on deaf ears and then we should resort to action that is deemed necessary to end abuse and preserve basic human rights. Kukathas’s arguments might be convincing in the realm of philosophy alone, not in reality.<sup>8</sup>

While the argument regarding paternalism contains some force, it is not sufficiently powerful to override considerations that concern the very existence of human life. Fundamentally, the question is whether norms of the kind mentioned, which deny basic rights that everyone is supposed to respect, have a place in a liberal democratic society. True as it is that to ban those cultural norms is certainly to interfere with cultural norms. Yet by the same token, gender discrimination destroys the woman’s right to seek meaningful choice for herself, and it contradicts the two basic liberal norms that hold society together: gender discrimination violates the requirement of not harming others and that of *mutual* respect for others as enunciated in liberal democracy (Cohen-Almagor, 1994).

Another North American country, Canada, has also experienced similar challenges with its indigenous people. The following case is concerned with granting just and reasonable exit rights to those who wish to lead their lives independently of their community. Having an exit opportunity is vital for members who feel oppressed by their culture. Whether it is justified for the liberal state to intervene in affairs of an indigenous tribe that restricts its members’ freedom of conscience depends on how the community in question is governed; whether it is governed by a tyrannical leader who prevents members from leaving the community, or whether the tribal governance has a broad support and religious dissidents are free to leave.

#### **4. Denying reasonable exit right – *Hofer v. Hofer and Canada v. Lavell***

In Canada, the relationship between the government and the Native peoples was marred by policies of genocide, countless broken treaties, and Canada’s ongoing failure to recognise the nationhood of Aboriginal peoples (Deveaux, 2009, p. 129). *Hofer v. Hofer* (1970, p. 958) dealt with the powers of the Hutterite Church over its members. The Hutterites are spiritual descendants of the Anabaptists. They live in large agricultural communities and closely guard their religion by expelling those who abandon or renounce their religion. Members of the Hofer family who renounce their religion were expelled for apostasy but they did not wish to leave with nothing as for many years they contributed to the wealth of their community. The Hutterites refused to give them any share of the community and the offers sought relief at the Canadian courts.<sup>9</sup> The Hutterites argued that freedom of religion of the group limits individual freedom.

<sup>8</sup> For further critique of Kukathas, see Spinner-Halev (2000, pp. 81–85); Barry (2001, p. 239); Deveaux (2009, pp. 41–53).

<sup>9</sup> For further discussion, see Janzen (1990, p. 67). On exit rights, see Vitikainen (2015, pp. 127–150).

People who wished to leave the community were subjected to designated mechanisms of coercion to make their lives difficult, forcing them to reconsider their decision (Cohen-Almagor, 2021b). Is this just and reasonable?

The Canadian Supreme Court in a six to one decision accepted this Hutterite claim, holding that the “principle of freedom of religion is not violated by an individual who agrees that if he abandons membership in a specified church he shall give up any claim to certain assets” (*Hofer et al. v. Hofer et al.* [1970], p. 963). Yet again I side with the minority opinion. Justice Louis-Philippe Pigeon’s dissent represents a just, liberal approach. Pigeon J. established that the Colony was a commercial undertaking, not a Church. The land was used essentially for growing crops and raising livestock. Its major part was sold to customers (*Hofer et al. v. Hofer et al.* [1970], p. 982). Therefore, the case should not be decided by the application of rules of law governing churches. Justice Pigeon acknowledged that the Hofer conduct was obviously of concern to the Hutterites and that the dispute was real and painful. The way to decide the dispute was through deciphering the principle of freedom of religion. Justice Pigeon noted that the usual liberal notion of freedom of religion “includes the right of each individual to change his religion at will” (*Hofer et al. v. Hofer et al.* [1970], p. 984). Hence churches “cannot make rules having the effect of depriving their members of this fundamental freedom” (*Hofer et al. v. Hofer et al.* [1970], p. 984). Pigeon J. thought that it was as nearly impossible as can be for people in a Hutterite community to reject irreligious teachings, due to the high cost of changing their religion, and so were effectively deprived of freedom of religion (*Hofer et al. v. Hofer et al.* [1970], p. 985).<sup>10</sup>

The Hutterite Church enforced unjust coercion. Canada, like other liberal societies, commonly reach just and reasonable solutions via the mechanisms of compromise and deliberative democracy. The essence of democratic legitimacy lies in people’s ability to collectively engage in authentic deliberation about their conduct. Deliberative democracy presents an ideal of political autonomy based on the practical reasoning expressed in an open and accountable discourse, leading to an agreed judgment on substantive policy issues concerning the common good. Jürgen Habermas (1996) notes that the success of deliberative democracy depends on the institutionalisation of the corresponding procedures and conditions of communication and on the interplay of deliberative processes and informed public opinions (Habermas, 1990).<sup>11</sup> Deliberative democracy enables an understanding of cultures as continually creating, re-creating, and renegotiating the imagined boundaries between “us” and “them” (Benhabib, 2002). Securing and promoting human rights are desired goals, especially of vulnerable populations. Incentives can be provided, in a non-coercive way, for liberal reforms that promote gender equality in a deliberative, consensual way, by explaining the merits of just distribution of resources, mutual respect and reasonable accommodations that value tradition and the inherent dignity of all members of the community, notwithstanding gender.

<sup>10</sup> For general discussion, see Katz & Lehr (2012).

<sup>11</sup> See also Habermas (1990); Bächtiger et al. (2018); Dryzek (2002; 2012); O’Flynn (2021).

## 5. Arranged and forced marriages for girls

We need to distinguish between *arranged marriage* in which families take a leading role, but the parties have the free will and choice to accept or decline the arrangement, and *forced marriage* where one or both people do not (or in cases of people with learning disabilities cannot) consent to the marriage and where pressure or abuse is used. While the latter is coercive the former is not. While forced marriages should be denounced as unjust, arranged marriages can be accepted. In England and Wales, arranged marriage is permitted while forced marriage is illegal. Forced marriage includes taking someone overseas to force her to marry (whether or not the forced marriage takes place) or marrying someone who lacks the mental capacity to consent to the marriage.<sup>12</sup> It is estimated that 10% of the arranged marriages are forced (Deveaux, 2009, p. 164).

Arranged marriages for girls with adults under the age of sixteen or eighteen years old might constitute serious mischief to these girls. We can assume that such unequal marriage will result in subordination, discrimination, coercion and abuse. Commonly, such a marriage is between a grown-up man and a young female (I never heard of a cultural phenomenon in which female adults marry young males).<sup>13</sup> In such a marriage, the young female will have great difficulties in developing relationships that are built around values of equality, mutual respect and self-determination. Such inegalitarian arranged marriages are unreasonable in liberal terms. They gravely undermine children/adolescent's ability to enjoy long-term basic human goods and relationships as they are hampered by a commitment decided for them by their families without their consent. The question is whether the state can and should intervene to prohibit them.

Consider the following: Saadi (42-year-old) and Tohar (15-year-old), another Yemenite married couple, immigrate to a liberal society. They have been living together for six years. Should liberal democracy recognise the marriage?

This is a hard case. It is harder if the couple have children. The line of reasoning I wish to pursue has principled as well as consequentialist dimensions. We need to examine whether the culture has historical claims, whether or not it coerces others to follow its norm, and whether children and their families have protected exit right if they do not wish to follow the cultural norm. We need to weigh the rights of the child, the harms of separation, the pros and cons of state interference to the child and to the family at large. The liberal state should certainly reflect and consider, aiming to reach a solution through means of deliberation that would be just and reasonable. Let me demonstrate the relevant considerations by considering the behaviour of the Israeli establishment towards the Jewish–Yemenite immigrants during the 1950s.

<sup>12</sup> Forced marriage, <https://www.gov.uk/stop-forced-marriage>. In the United Kingdom, the Forced Marriage Unit (FMU) is a joint Foreign and Commonwealth Office and Home Office unit which leads on government policy, outreach and casework. Its jurisdiction includes the UK where support is provided to any individual and overseas where consular assistance is given to British nationals. The FMU operates a helpline to provide advice and support to forced marriage victims as well as to professionals. The assistance includes safety advice and helping 'reluctant sponsors'. In extreme circumstances the FMU assists with rescues of victims held against their will. See Forced marriage, <https://www.gov.uk/guidance/forced-marriage>

<sup>13</sup> There are, of course, individual cases where older women marry younger men but this has nothing to do with group rites.

For these immigrants, who were Jewish observant, arrival in Israel presented a cherished opportunity to practice religion even more strongly in the sanctity of the Holy Land. They did not wish to break with tradition, their old customs or cultural heritage. They wished to maintain their traditional way of life, folkways and norms. They expected that the place of men and women, their status and honour will be as it was in Yemen. At that time, testimonials were brought before the two Chief Rabbis of Israel, Rabbi Herzog and Rabbi Uziel, that young women were encouraged to leave their older husbands. This action was made upon the assumption that teenage girls were forced to marry older people in Yemen.<sup>14</sup> In 1950, the Marriage Age Law 5710-1950 was passed, setting the minimum age at 17.<sup>15</sup> The motivation was well-intended. Israeli decision-makers wished to “save” women from their “locked” situation. The problem was that in many instances no action was taken to verify whether or not girls preferred to live with their husbands. Social workers and advisors took the liberty of interfering in this delicate issue of marital matters without checking other factors besides the age of the woman. The age factor, in their view, was the only significant consideration that justified intervention, aiming to break the marriage. This behaviour was a reflection of the then prevailing governmental attitude toward immigrants from Asia and Africa (Cohen-Almagor, 1995, pp. 461–484; Margalit-Stern, 2006, pp. 115–144; Menelson-Maoz, 2014; Frantzman, 2016; Altman, 2018). The absorbing elite believed that the best of the people and the best of the nation required paternalism; that they had to show “the light” to the Yemenite immigrants, and that in due course these immigrants would thank them for this involvement. This was not the case. The immigrants perceived this paternalistic measure as an arrogant interference in their affairs, displaying ethnocentrism and misunderstanding of their norms. With due appreciation of the sincere motives on the part of the establishment, it was done in a crude way that disrespected the feelings of the people concerned, and probably resulted on many occasions in more harm than good. Instead of opening channels of communication with the community, identifying desirable ends and seeking accommodation that would benefit first and foremost the women in question, the state behaved more as a bull in a china store, dictating instead of deliberating, using its coercive authority rather than seeking constructive compromise. Women, of course, young and old, should have the opportunity of opting out and asking for divorce. But their opinion should be sought and be taken into account.

Another pertinent issue was polygamy. In the Yemenite culture, polygamy was accepted and the State of Israel could not have it. Freedom of choice is important provided it is not discriminatory. It is just to prohibit polygamy because it discriminates against women.<sup>16</sup> But if both men and women would be free to marry as many partners as they wish, meaning that both polygyny and polyandry were to be allowed in a certain community, then we may honour freedom of choice. Marriage between two individuals is

<sup>14</sup> Archives of the State of Israel, G5543/3631, file 607 (II). See also G5543/3631, file 607 (III).

<sup>15</sup> In 2013, the minimum age for marriage was raised to 18.

<sup>16</sup> Polygamy has been documented in 80% of societies across the globe often to the detriment of women. In times of war, when many men are away and possibly not return home, some women would rather share a man than have no man. See Hassounch-Phillips (2001, pp. 735–748); Elbedour et al. (2002); House of Commons (2018).

normative, and norms may change. Indeed, norms have been changing. In this age of time, marriage between people of the same gender is becoming more acceptable. This idea was perceived as an aberration in previous centuries (Noble, 2015). Today, most countries that permit polygamy are countries with a Muslim majority or with a sizeable Muslim minority. In India, polygamy is legal only for Muslims. In Russia and South Africa, polygamy is illegal but not criminalised (Burton, 2018). Legal and social contexts, informed by gender, race, sexuality and class, shape the experiences of social relationships (Heath, 2023).

## 6. Denying education to women and children

In Israel, while secular women are not equal to men in the job market, they are not denied education. Indeed, more than 50% of the students in institutions of high education are women (Report of The Committee for the Advancement and Representation of Women in Institutions of High Education, 2015). 58% of women in Israel in the young adult group (25–34-year-old) have a college education, compared to 38% of men (Gertel, 2019). The picture is very different where ultra-religious (*haredi*) women are concerned. In 2018–2019, the *haredi* population was just over one million and of them 8,400 *haredi* women attended Israeli institutions of higher education (Malach & Kahaner, 2018; Zaken, 2019). *Haredi* women tend to marry young and have large families. While there is a notable improvement in their education, forced by the fact that their husbands prefer to study in *yeshivot* (religious institutions where they study only Judaism) and have 7 children on average,<sup>17</sup> they lack educational opportunities that are opened for secular women. Ultra-Orthodox women are expected to first fulfil family roles in optimal manner. The family comes first, and *haredi* women prefer to work in their community and not in the larger secular job market (Malhi & Abramovsky, 2015). The ideal of being “the Queen of the House” is central to the traditional education rooted in the ultra-Orthodox community. Women have to juggle between their various demanding duties – taking care of their husbands, children and the home, and at the same time be the breadwinners of their large families.

The Global Gender Gap Report, published by the World Economic Forum (WEF), ranks countries according to participation by women in the workforce, their access to education and health, and opportunities for representation and promotion in politics. In 2020, Israel was ranked 64 out of the 153 countries rated. This ranking is explained by lack of representation and power for women in politics, reflected in the low number of parliamentarian women, their weak representation in government service, the substantial salary gap between women and men, and low women participation in the labour force (Global Gender Gap Report, 2020; Uni, 2019).

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<sup>17</sup> In 2015–2017, the average fertility rate of ultra-Orthodox women was 7.1 children per woman. Malach and Kahaner (2018).

## 7. Conclusion

The theory of just, reasonable multiculturalism is about inclusion as well as exclusion, about freedom of religion and freedom from religion, about providing circumstances for people to promote their way of life as well as deserting it at will and having the ability to adopt another (Cohen-Almagor, 2021a). A fair and reasonable balance needs to be maintained between individual rights and group rights (Cohen-Almagor, 2022).

In both the Hutterite and the Pueblo cases, the courts supported the claims of illiberal groups, in the name of freedom of religion. The courts were reluctant to interfere in tribal affairs, viewing interference as an imposition of their own values on distinct minorities. The judges failed to realise that clinging to the principle of neutrality contradicts two other important liberal principles, those of gender equality and freedom. Hence, it seems that their judgments do not settle the disputes between liberal values and illiberal minorities. Tolerating tribal conduct had resulted in intolerant behaviour towards some tribe members. Since liberal tolerance is individual freedom-based, not group-based, it cannot justify internal restrictions that limit individual freedom of conscience. People should be free to move in and out of their cultural communities without penalties. They should not be coerced to stay in order to serve group interests.

Israel is an economically developed democracy that strives to maintain a particular Jewish tradition and religious identity in a heterogeneous society. As a result of its distinct preference to Jewish orthodoxy, Israel has failed to adopt national standards for women that would bring Israeli law into compliance with international human rights. The constant challenge for Israeli democracy is to secure basic human rights for all. Improvement in women's status is possible if there will be a growing egalitarian consciousness to counteract the coercive nature of Jewish orthodoxy supported by continued advancement of socio-economic conditions (Israel Ministry of Foreign Affairs, 2013; Halperin-Kaddari & Yadgar, 2010, pp. 905–920; Halperin-Kaddari, 2004; Cohen-Almagor & Maroshek-Klarman, 2023).

Finally, I argued that the State should come to the aid of women who are denied education. It is incumbent on the liberal state to help women when men use their authority to deny the right of education to women, just because they can. Women should enjoy equal opportunities to develop themselves and become the persons they perceive in their dreams. Education is a key to self-development and to reaching interesting and fulfilling positions in society. These positions should be open to all, not just men. Cultural claims should not enable discrimination and coercion.

The principles of respecting others, and not harming others, require the State to intervene when basic human rights are violated. We should recognise the inner spark that women possess. Dignity as liability requires the State to ensure that all people are accorded equal treatment from birth (Kant, 1969; Bird, 2006). Women have a right to develop themselves as autonomous human beings exactly as men do. *Dignity as liability* requires us all to respect persons *qua* persons (McCrudden, 2014). People deserve to be accorded a certain treatment from birth. We are endowed with dignity and have the right to be treated with dignity. While people cannot expect genuine *concern* from fellow humans, we can expect *respect* from others. Gender should not constitute grounds for discrimination.

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