

Between Individual Rights and Group Rights

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Abstract

The politicization of ethnocultural diversity and the demands posed by minority cultures for greater public recognition of their distinctive identities, and greater freedom and opportunity to retain and develop their distinctive cultural practices challenge liberal democracies. In response to these demands, new and creative mechanisms are being adopted in many countries for accommodating difference. This paper discusses some of the issues raised by these demands, focusing in particular on the difficulties that arise when the minority seeking accommodation is illiberal.

Introduction

Historically, liberal democracies have hoped that the protection of basic individual rights would be sufficient to accommodate ethno-cultural minorities. Indeed, the importance of individual civil and political rights in protecting minorities cannot be underestimated. Freedom of association, religion, speech, mobility and political organization enable individuals to form and maintain groups and associations, to adapt these groups to changing circumstances, and to promote their views and interests among the wider population.

However, it is becoming increasingly accepted that these common rights of citizenship are not sufficient to accommodate all forms of ethno-cultural diversity. In some cases, certain 'collective' or 'group-differentiated' rights are also required. And indeed there is a clear trend within liberal democracies towards greater recognition of such group-differentiated rights. Yet this trend raises theoretical and practical questions: How are these group rights related to individual rights? What should we do if group rights come into conflict with individual rights? Can a liberal democracy allow minority groups to restrict the individual rights of their members, or should it insist that all groups uphold liberal principles?

Ethnocultural relations are often full of complications that defy simple categories or easy answers. Virtually all liberal democracies contain some degree of ethnocultural diversity. They can all be described, therefore, as "multicultural". The politicization of ethnocultural diversity and the demands posed by minority cultures for greater public recognition of their distinctive identities, and greater freedom and opportunity to retain and develop their distinctive cultural practices challenge liberal democracies.

In response to these demands, new and creative mechanisms are being adopted for accommodating difference. This paper discusses some of the issues raised by these demands, focusing in particular on the difficulties that arise in North America when the minority seeking accommodation is illiberal. How should liberal societies approach illiberal, but non-violent minorities?

This paper probes group rights and the nature of liberal tolerance. I proceed by delineating the limits of state intervention. The article will draw from the philosophy of John Rawls in order to examine the limits of liberal tolerance. Then a distinction is drawn between internalized and designated coercion and, finally, the *Hofer v. Hofer* case is analyzed, illustrating the right liberal approach to face the problem of dissenters who wish to exit their religious community.

Two Types of Rights: Individual and Group

Both immigrant groups and national minorities are, in different ways, seeking legal recognition of their ethnocultural identities and practices (McBride, 2005; Patten, 2014; Kymlicka, 2015, 2017). These demands are often described in the language of “group rights”. Defenders of group rights typically describe them as *supplementing* individual rights, and hence as enriching and extending traditional liberal principles to deal with new challenges, whereas critics of group rights tend to assume that group rights involve *restricting* individual rights, and hence as threatening the underpinning liberal democratic principles, first and foremost liberty, fairness and equality.

What then is the relationship between individual rights and group rights? Different claims are involved (Glazer, 1997). First we need to distinguish between cases in which one is inflicting pain or death upon oneself, and cases in which one is inflicting damage upon others. This distinction is made in the framework of the traditional liberal dichotomy between self- and other-regarding conduct (Mill, 1948). Consider in this context the Jainas practice in relation to the dying. The practice permits a member of the community, under certain circumstances, to terminate his or her own life, or more accurately, to actively welcome impending death in a nonviolent manner. Thus persons in the late stages of their lives may decide that they want to die and undertake the vow of terminal fast (Schubring, 1962; Bilimoria, 1992: 331-355). A Jain woman monk explained:

“... for us death is full of excitement. You embrace *sallekhana* not out of despair with your old life, but to gain and attain something new. It’s just as exciting as visiting a new landscape or a new country: we feel excited at a new life, full of possibilities” (Biswas, 2015).

Sallekhana is regarded by Jains as the culmination of their lives as ascetics. It is not suicide. The monk explained:

“It is quite different. Suicide is a great sin, the result of despair. But *sallekhana* is a triumph over death, an expression of hope... With suicide, death is full of pain and suffering. But *sallekhana* is a beautiful thing. There is no distress or cruelty” (Biswas, 2015).

Societies, of course, encourage life, not death. If we all embrace Sallekhana, society will become an empty place. Should government intervene to bar this practice? In 2015 in India, the high court in Rajasthan ruled that the practice should be punishable under the law. The court ruled that no religious practice, whether essential or non-essential or voluntary can permit taking one's own life. Any form of the practice of sallekhana in Jain religion should be stopped and abolished (Biswas, 2015).

Another relevant conduct involves scarring parts of the body as part of initiation rites that is common in some African and Oceanian cultures. Let us assume that some immigrants bring these rituals to a liberal democracy. The liberal state has no strong case for interference. These customs of self-starvation and scarring should not be promoted and encouraged by the liberal state, but since the sub-cultures possess historical claims and strongly believe in their traditional practices and norms, they should have a right to cultural autonomy.

The case is different when it concerns other-regarding conduct. Now the issue revolves around practices such as suttee, female infanticide, female circumcision, or murder for family honour. Should a liberal state tolerate these practices?

Of course, all forms of government involve restricting the liberty of citizens (e.g., paying taxes, undertaking jury duty or military service). Even the most liberal of democracies imposes such restrictions in order to uphold individual rights and democratic institutions. But some groups seek to impose much greater restrictions, not in order to maintain liberal institutions, but rather to protect religious orthodoxy or cultural tradition. A sociological look at different societies reveal that many groups seek the right to legally restrict the freedom of their own members in the name of group solidarity or cultural purity. When one looks at rituals around the globe, it is almost always the case that women are being discriminated against: suttee, arranged marriage, female infanticide, as well as female circumcision and murder for family honour are such examples (Okin, 1998, 2002; Cohen et al, 1999; Laden and Owen, 2007).¹ Women are required to pay a high price for the norm of male dominance. Group rights are invoked by theocratic and patriarchal cultures where women are oppressed and religious orthodoxy enforced. This obviously raises the danger of individual oppression. At the same time there is also a danger that claims for groups rights might override law and order. In the name of preserving culture and protecting a sense of community a demand is raised against society not to interfere even when the most atrocious things take place (Ginat, 1987). Thus feminists and liberals have argued that respecting and promoting multiculturalism amounts to disrespecting women. Respect for difference might empower only male group members, sometimes at the expense of women in this same group. Speaking for group rights might put women at disadvantage and even at risk (Cohen-Almagor, 1995b; Okin, 1999; Shachar, 1998, 2007).

¹ For discussion about discrimination against ethnic and other minorities, see Cohen-Almagor (1995a; 2015); Kymlicka (1997: 28-32); Kymlicka and Bashir (2010).

Clearly, some things lie beyond the ability of liberal democracies to tolerate. Democracy cannot endure norms that deny respect to people and that are designed to harm others, although they might be dictated by some cultures. Some norms are considered by liberal standards to be intrinsically wrong, wrong by their very nature. Such are norms that result in physical harm to women and babies like widow burning, female infanticide, harsh forms of female circumcision (like the Pharaonic circumcision which involves the excision of the clitoris, the labia minora, and the labia majora is sewn closed while leaving a small opening at the vulva for urination and release of menstrual blood) (Boddy, 1987)², and murder for family honour (Cohen-Almagor, 1996; Maris and Saharso, 2001; Fisk, 2010).

Female circumcision, referred to also as Female Genital Mutilation (FGM), Female Genital Cutting (FGC) or Female Genital Alteration (FGA), exists primarily in Africa and among certain communities in the Middle East and Asia. More than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia. Female circumcision is associated with cultural ideals of femininity and modesty, which include the notion that girls are clean and beautiful following this practice (WHO, 2017). Immigrants to liberal western countries from areas in which FGM is practiced may bring this practice with them and may wish to have their daughters undergo this ritual (Committee on Bioethics, 2010). In its moderate form, the ritual involves a tiny scar on the labia. This ritual form is not much different from male circumcision. It should be conducted by sterilized surgical knives instead of a host of other instruments (razors, kitchen knives and even glass) (Cohen-Almagor, 1996). Members of traditional communities might not allow this conduct to be supervised by external doctors, nor would they allow it to be performed in hospitals or to perform female circumcision at a very early age. We can also assume that they might not condone practicing circumcision in a later age employing anaesthesia so as to minimize suffering, physical as well as psychological. The state should intervene only to help those girls who do not wish to go through this small operation, who feel that they are being coerced to undergo it (subjected to what I call designated coercion; see *infra*). I am not able to say that the liberal value judgment of the practice should prevail over the traditional communities' value judgment (i.e. that the liberal view that female circumcision is morally repugnant is truer than the power of tradition and the related notions that concern the woman's tidiness and her position in her community); therefore, interference in the community cultural life could potentially be more harmful than the performance of female circumcision in its minor form. One thing that the state can do is to offer to train the women and grant them official authorization as circumcisers. The training will include, *inter alia*, studies of sterilization and methods to reduce pain and handling severe bleeding in case of emergency. The government could offer to pay the trained circumcisers for

² Cf. Jones-Bibbs (1997), Davar (1997), Gillia (1997), Stern (1997), Messito, (1997-1998); Kelson (1998), Liu (1998), Sussman (1998), Cardenas (1999), LaFrance (1999); Committee on Bioethics (2010), Arora and Jacobs (2015), Puppo (2016), WHO (2017).

each circumcision as an incentive. This solution may be adopted throughout the world wherever female circumcision is being conducted. The World Health Organization may train medical-religious functionaries to perform a sterile minor incision and then declare the young girl circumcised. Such a practice could end the tragedy of mutilation while respecting tribal traditions (Belmaker, 1994). Acceptance of de minimal procedures that generally do not carry long-term medical risks is culturally sensitive, does not discriminate on the basis of gender, and does not violate human rights (Arora and Jacobs, 2015). We should strongly object to any form of genital mutilation that involves more than a small scar on the labia but I believe accepting the minimal procedure would strike a balance between cultural rituals while protecting the health and basic rights of women.

It is necessary, however, to evoke debate within cultures that perform female circumcision, debate in which both men and women will take part, to continue research on this issue and review this tolerant suggestion from time to time in order to ensure that the recorded mild form of female circumcision is not being radicalized, and ascertaining that no significant harm, both physically and psychologically, is involved. The issue has to be put on the public agenda. Upon reaching the conclusion that the best interests of the circumcised girls justify state intervention (because, for instance, complaints about designated coercion are becoming frequent), then these interests should serve as a trump card to override tradition and cultural considerations. The lenient attitude is suggested here only because it seems that the best interests of the girls are better served by abstention from interference.

That is to say that the right of a group against its own members is not absolute. Sometime society is justified to interfere and impose restrictions on certain cultural practices. The more difficult cases, however, concern groups that are concerned with controlling internal dissent, and seek to impose internal restrictions short of inflicting physical harm on their members. Let us probe the more difficult issues that involve some restrictions on group members but which do not amount to severe physical harm.

Some tribes discriminate against women who have married outside the tribe. Under tribal personal status law, children of male Pueblos who marry outside the tribe are extended tribal membership, whereas children of female Pueblos who marry outside the tribe are excluded from membership. The right of the tribe to set its own criteria for membership within the tribe was established in the USA in *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978). The dispute arose when two members of the Santa Clara Pueblo tribe brought suit against the tribe and its governor to enjoin them from enforcing a tribal law that denied tribal membership to children born to member mothers who married outside the tribe. The same law allowed membership to children of male members who likewise married outside the tribe (Svensson, 1997; Saucedo, 2000; Shachar, 2001).

The U.S. Supreme Court ruled in favor of the tribe primarily on the basis of recognizing Indian sovereignty and ability to decide its internal matters. Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. However, the Pueblo law is patently unjust and discriminatory. Instead of ensuring some measure of fairness and protection of basic civil rights for all, notwithstanding gender, the U.S. Supreme Court failed to protect female tribal members, sacrificing individual rights in the name of group rights.

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 may 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; or the right to continue traditional customs such as compulsory arranged marriages that is common among certain immigrant cultural communities in North America and in other places around the globe. How should liberal states respond to these cases in which immigrant, cultural and national groups demand the right to protect their historical customs by limiting the basic civil liberties of their members and at the same time refrain from using violence? The next section probes the nature of liberal tolerance while availing ourselves to Rawls's theory of justice as fairness.

Rawls' Justice as Fairness

In 1971, John Rawls published *A Theory of Justice*, arguably the single most influential book in political philosophy of the past century. The book has become a classic. Rawls continued to develop his theory of justice as fairness in *Political Liberalism* (1993), *The Law of Peoples* (1999), and *Justice as Fairness* (2001). Today, certainly in the Western world but also in other parts of the world, it is difficult to speak about justice without relating to Rawls' philosophy.

Rawls asserts that justice is the first virtue of social institutions, as truth is of systems of thought. He envisages a four stage unfolding of just institutions. The first stage is the original position. Rawls explains that this is the appropriate initial *status quo*, which insures that the fundamental agreements reached in it are fair (1971: 17). He clarifies that it is a purely hypothetical situation designed to account for our moral judgments and helps to explain our having a sense of justice. It is, if you will, the basis of the justice-as-fairness theory, a theory of our moral sentiments as manifested by our considered judgments in reflective equilibrium (1971: 120). The justification for excluding controversial beliefs from the original position lies in the social role of justice, which is to enable individuals to make mutually acceptable to one another their shared institutions and basic arrangements. This justification is accompanied by an agreement on ways of reasoning and rules for weighing evidence that govern the

applications of the claims of justice. Mutual respect would enable social cooperation between individuals who affirm fundamentally different conceptions of the good.

In this stage, people choose the principles of justice behind a veil of ignorance to ensure that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances (Rawls, 1971: Chap. 3; Hinton, 2015). The second stage is a constitutional convention in which the veil of ignorance is partly lifted, so that people can know what societies they belong to; but, nevertheless, they are still unaware which people they are. At this second stage they choose a constitution, which includes the two principles of justice already chosen. The constitution will provide some form of majority rule, since it must secure equal liberties of voting, and equal opportunities for running for governmental posts (Rawls, 1971: Chap. 2).

The third stage is that of legislation, at which the legislators are still ignorant of their personal circumstances. To be just, the laws must comply only with the two principles of justice and the constitution. The fourth and last stage relates to the application of laws by judges, and then the veil of ignorance is totally removed (Rawls, 1971: Chap. 4; Cohen-Almagor, 2017. See also Salvatore, 2004).

Rawls argues that self-interested rational persons behind the veil of ignorance would choose two general principles of justice to structure society in the real world:

1. Principle of Equal Liberty: Each person has an equal right to the most extensive liberties compatible with similar liberties for all (Egalitarianism). To ensure fair opportunity regardless of social class of origin, the state must provide education and training for the less well-off, guarantee a basic minimum income and health care for all (Rawls, 1971: Chap. 2, 5).
2. Difference Principle: Social and economic inequalities should be arranged so that they are both (a) to the greatest benefit of the least advantaged persons, and (b) attached to offices and positions open to all under conditions of equality of opportunity (Rawls, 1971: Chap. 2, 5).

It is easy for liberal states to accommodate the demands of groups which are themselves liberal, but surely what some minorities desire is precisely the ability to reject liberalism, and to organize their society along traditional, non-liberal lines. Isn't this part of what makes them culturally distinct? If the members of a minority lose the ability to enforce religious orthodoxy or traditional gender roles, haven't they lost part of the *raison d'être* for maintaining themselves as a distinct society? Isn't the insistence on respect for individual rights a new form of ethnocentrism, which sets the (liberal) majority culture as the standard to which other cultures must adhere? Indeed, isn't it fundamentally intolerant to force a national minority or religious sect to reorganize their community according to our liberal principles? (Chaplin, 1993).

These difficult questions have given rise to important conflicts, not only between liberals and non-liberals, but also within liberalism itself. For tolerance is itself a quintessential liberal value, alongside other liberal-democratic values such as individual freedom and personal autonomy (Hill, 1991; Richardson, 2002). The problem, of course, is that these values can conflict: promoting individual freedom may entail intolerance towards illiberal groups, while promoting tolerance of illiberal groups may entail accepting restrictions on the freedom of individuals. What should be done in such cases? (Cohen-Almagor, 1994: Chap. 4, 2001, 2004; Kymlicka, 1997: 41-42; Kymlicka and Cohen-Almagor, 2000).

If an illiberal minority is seeking to oppress other groups, then most liberals would agree that intervention is justified in the name of self-defense (Rawls, 1971: 216-21). Behind the veil of ignorance people would opt for equality. There is no excuse or so-called justification to discriminate on the basis of gender. If at all, the Difference Principle would suggest to positively benefit women. Liberal democracy should protect third weak parties.

Reflecting on the dilemma of whether or not all conceptions may have a place in liberal democracies, Rawls concedes that no society can include within itself all forms of life. He argues that, in a democratic culture, a workable conception of political justice must allow for a diversity of doctrines and the plurality of conflicting, indeed incommensurable, conceptions of the meaning, value, and purpose of human life affirmed by members of existing democratic societies. But given the profound differences in beliefs and conceptions of the good, we must recognize that, just as on questions of religious and moral doctrine, public agreement on the basic questions of philosophy cannot be obtained without the state's infringement of basic liberties (Rawls, 1985: 225-30). Rawls explains that conceptions that directly conflict with the principles of justice, or that wish to control the machinery of state and practices so as to coerce the citizenry by employing effective intolerance should be excluded. The assumption is that these principles of justice underlie any conception of the good. By conception of the good is meant a conception that encompasses both personal values and societal circumstances. It consists of a more or less determinate scheme of ends that the doer aspires to carry out for their own sake, as well as of attachments to other individuals and loyalties to various groups and associations.

Rawls further asserts that if a conception of the good is unable to persist and gain adherents under institutions of equal freedom and mutual toleration, we must question whether it is a viable conception of the good, and whether its passing is to be regretted. He explicitly argues that no social world exists that does not exclude some ways of life that realize in special ways some essential values. Rawls (1988: 265-6; 1993: 197) maintains that by virtue of its culture and institutions, any society will prove uncongenial to some ways of life.

In *Political Liberalism* Rawls (1993: 58-66) reiterates that some conceptions will die out in a just constitutional regime. He further clarifies his position by distinguishing between comprehensive doctrines and *reasonable* comprehensive doctrines. Rawls explains that comprehensive doctrines include conceptions of what is of value in human life, as well as ideals of personal virtue and character, of friendship and of familial and associational relationships, while reasonable comprehensive doctrines cover the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner; they organize and characterize recognized values so that they are compatible with one another and express an intelligible view of the world; and they normally belong to, or draw upon, a tradition of thought and doctrine.

Rawls (1993: xvi) maintains that a modern democratic society develops mechanisms to contain plurality of incompatible yet reasonable comprehensive doctrines. Political liberalism assumes that, for political purposes, this plurality is the normal result of the exercise of human reason within the framework of free institutions. Political liberalism also assumes that reasonable comprehensive doctrines do not reject the essentials of a democratic regime.

Rawls believes that the public culture of democracy is obligated to pursue forms of social co-operation that can be achieved on a basis of mutual respect. This co-operation involves the acceptance of common procedures to regulate political conduct. All citizens should be accorded equal respect in their pursuit of their idea of the good. Rawls's concept of justice is independent from and prior to the concept of goodness in that its principles limit the conceptions of the good that are permissible. He explains that the principles of any reasonable political conceptions must impose restrictions on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether (Rawls, 1993: 195). Rawls's ideal polity would not be congenial toward those who believe that their personal conception of the good involves enforcing others to abide by it. It would exclude some beliefs, such as those that entail coercion of others, causing harm to others, or deriving profit at the expense of others.

The next section provides some clarification regarding to the concept of coercion that is pertinent to our discussion.

Two Forms of Coercion: Internalized and Designated

When a given sub-culture in society denies some freedoms and rights to a certain group living in that same culture, we may feel that some form of coercion is being exercised. For example, if a religious sect denies rights and liberties to its female members, that sect may continue doing so because it is assumed that all members of that group internalized the system of beliefs that legitimizes the exclusion of rights

from women. It is further assumed that all members of that group conform to and abide by the particular conception of the good that guides and directs members of the said group. They are subjected to a system of manipulation that is working against the basic interests of the group inside the community not to be harmed and to enjoy equal respect. The discriminated members of the community do not feel that they are being coerced to follow a certain conception. Outsiders may claim that a whole-encompassing system of manipulation, rationalization and legitimization is being utilized to make women accept their denial of rights. But this view may only be the view of outsiders, not of the persons concerned. People who object to headscarves in France are making this claim (Chin, 2017; Laborde, 2008). If at all, one may argue that women of that sect are experiencing a form of coercion that could be called *internalized coercion*.

Difficulties arise when some women in the said cultural or religious group fail to internalize fully the system of norms that discriminates against them. Upon realizing that they are being denied fundamental rights, they might wish – for instance - to opt out of their community. If they are allowed to opt out, no question arises. If not allowed, then a case may arise for state interference to overrule this individualistic, designated coercion that aims to deny them freedom to leave their community. Then threats of physical harm, perhaps of significant economic loss that would leave the girl in question in dependent situation, are used. I call this form of coercion - *designated coercion* (Cohen-Almagor, 2006). Unlike the internalized coercion it is not concerned with machinery aiming to convince the entire cultural group of an irrefutable truth; instead it is designed to exert pressure on uncertain, “confused” individuals so as to bring them back to their community. Rawls does not elaborate on this form of coercion. Thus, for instance, there are Muslim communities in which female genital mutilation is being practiced and most of the girls in these communities grow to believe that this practice is essential for their integration as women in their communities. Because this cultural norm is backed by the elder women who lead by example, most girls do not object to the practice and accept it as is, as part of their growing up. They are not aware of the system of manipulation and the coercion is internalized into their way of life and conception of the good. However, when girls object to the practice and wish to protect their womanhood, then designated coercion is employed to safeguard the norms of the community and to “educate” the “stray weeds.” This form of coercion is unjustified and the state is warranted to interfere and to rescue the helpless girls who wish to retain their femininity and sexuality and have the power and the will to fight against their superiors and tradition. It is one of the roles of the liberal state to stand by weak third parties who seek defence and help to safeguard their basic human rights (for further discussion, see Anderson, 2011). Cultural and religious groups are often identity-conferring groups, where belonging to such a group operates as one of the constitutive elements of one’s identity. Thus exiting such a group might be most

difficult. The act of exit would mean not only leaving behind the group's influence, but also renouncing one's belonging, one's deep most identity (Vitikainen, 2015). The liberal state should be aware of these difficulties and provide not only economic assistance but also social and psychological support.

A case at point is the Canadian *Hofer v. Hofer* (1970), which dealt with the powers of the Hutterite Church over its members. The Hutterites live in large agricultural communities called colonies, within which there is no private property. Members of the Hofer family, life-long members of a Hutterite colony were expelled for apostasy. They demanded their share of the colony's assets, which they had helped create with their years of labor. When the colony refused, the two ex-members sued in court. They objected to the fact that they had "no right at any time in their life to leave the Colony where they are living unless they abandon literally everything... even the clothes they are wearing" (*Hofer et al. v Hofer et al.*, 1970: 21). The Hutterites defended this practice on the grounds that freedom of religion protects a congregation's ability to live in accordance with its religious doctrine, even if this limits individual freedom.

The Canadian Supreme Court in a six to one decision accepted this Hutterite claim. The majority opinion (Cartwright C.J.C., Martland, Judson, Ritchie, Hall, and Spence JJ.) did not regard this as a case in which the Court can be asked to relieve against a forfeiture, for by the terms of the articles signed by the Hutterite members, the appellant never had any individual ownership of any of the assets of the Colony. Cartwright C.J.C. added 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: 963). It is regrettable, wrote Cartwright, that the appellants receive no compensation for their life's work. The trial judge was correct when he referred to their mistreatment as "strange, repellent and excessive"; but the task of the court is "to deal with the rights of the parties according to law" (*Hofer et al. v Hofer et al.* 1970: 964).

On the other hand, together with Will Kymlicka, I think that Justice Pigeon was right in his dissent. Pigeon argued that the usual liberal notion of freedom of religion includes the right of each individual to change his religion at will. Hence churches cannot make rules having the effect of depriving their members of this fundamental freedom. The proper scope of religious authority is therefore limited to what is consistent with freedom of religion as properly understood, that is freedom for the individual not only to adopt a religion but also to abandon it at will. Pigeon thought that it was "as nearly impossible as can be" for people in a Hutterite to reject irreligious teachings, due to high cost of changing their religion, and so were effectively deprived of freedom of religion (*Hofer et al. v Hofer et al.* 1970: 21). Justice Pigeon rightly wrote that such a construction of the contractual relationship means that members of the Colony cannot really exercise their right of freedom of religion.

Justice Pigeon conveys the appropriate liberal presumption according to which people have a basic interest in their capacity to form and revise their conception of the good. Hence, the power of religious communities over their own members must be such that individuals can freely and effectively exercise that capacity. If we accept this view, then we must interpret freedom of religion in terms of an individual's capacity to form and revise her religious beliefs.

Conclusions

The court in the Hutterite case supported the claims of illiberal groups, in the name of "tolerance" and "freedom of religion". But the court interpreted these ideals in a non-liberal way, rather than insisting on a distinctively liberal interpretation of tolerance and freedom. Hence it seems that the appeal to "tolerance" does not resolve the conflict between liberal values and illiberal minorities (Cohen-Almagor, 2016). Since liberal tolerance is individual freedom-based, not group-based, it cannot justify internal restrictions that limit individual freedom of conscience.

So there are many ways to strengthen mechanisms for respecting individual rights in a consensual way, without simply imposing liberal values on national minorities. Coercive intervention in the internal affairs of a national minority is justified in the case of gross and systematic violation of human rights, such as slavery or murder or inflicting severe bodily harms on certain individuals or expulsions of people. A number of factors are relevant in deciding when intervention is warranted, including the severity of rights violations within the minority community; the extent of coercion against dissenters; the extent to which formalized dispute resolution mechanisms and finding compromise exist within the community; the extent to which these mechanisms are seen as legitimate by group members; the ability of dissenting group members to leave the community if they so desire; and the existence of historical agreements which base the national minority's claim for some sort of autonomy (Kymlicka, 1995: 165-70, 2003; Cohen-Almagor, 1994: chapter 4; Réaume, 1995; Shapiro, 2002). For example, whether it is justified to intervene in the case of an Indian tribe that restricts freedom of conscience surely depends on whether it is governed by a tyrannical dictator who lacks popular support and prevents people leaving the community, or whether the tribal government has a broad base of support and religious dissidents have real options to leave.

Liberal democracies have a long history of seeking to accommodate ethnocultural differences. With respect to national minorities, liberal democracies have typically accorded these groups some degree of regional political autonomy, so that they can maintain themselves as separate and self-governing, culturally and linguistically distinct, societies. With respect to immigrants, liberal democracies have typically

expected that these groups will integrate into mainstream institutions, but they employ tolerance vis-à-vis identities and practices within these institutions.

Liberal democracies must explicitly address the needs and aspirations of ethnic and national minorities. This essay constitutes a step in the liberal direction that will help secure liberty and tolerance in democracies and at the same time will compel us to acknowledge the need for setting adequate boundaries so as to prevent the likelihood of coercion and abuse.

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