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THE PRACTICE OF GENDER SEPARATION ON BUSES IN THE ULTRA-ORTHODOX COMMUNITY IN ISRAEL: A VIEW FROM THE LIBERAL CATHEDRAL

On October 27, 2009, Israel's Ministry of Traffic submitted their conclusions of the committee findings on gender-separated public bus lines, known as '*mehadrin*' buses, to the High Court of Justice.¹ The '*mehadrin*' lines which began to operate in July 1997 allow separate embarking, debarking and sitting in their buses servicing various religious communities in Jerusalem and Bnei Brak. In the report, among the committee's recommendations is that separation means segregation and as such it is illegal, but passengers on these lines may opt to separate themselves. On February 18, 2010, the High Court held that no new '*mehadrin*' service should be offered but that the existing lines could continue to operate, as long as the passengers were not forced to sit in separate parts of the bus, but did so of their own free will. At the time, the High Court called for experimental implementation of the committee's conclusions for a period of one year. On July 26, 2010, the Israel Religious Action Center and five petitioners requested the High Court of Justice to affirm the committee report which argued that gender-separated public transportation is illegal. On July 27, 2010, the court convened a hearing on this petition. In fact, the petition was originally filed in 1997 by the Israel's Women Network and relied upon "the separate but equal" doctrine enunciated in the U.S. Supreme Court case *Brown v. Board of Education*² and argued that the existing arrangement was in

¹ In various instances of our presentation, we use the word 'separation' rather than 'segregation' because the latter term has certain connotations which we wish to avoid.

For an earlier committee's findings, see Recommendations of the Committee to Encourage the Use of Public Transportation within the Ultra-Orthodox Sector, May 1997.

² 347 U.S. 483 (1954).

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contravention of the notion of gender equality. On January 6, 2011, the Israeli Supreme Court ruled that gender segregation on Israeli public buses may continue as long as passengers agree. The Court, while acknowledging that state enforcement of segregation is illegal, upheld the Transportation Ministry's official policy which allows passengers to sit wherever they choose.

Earlier, in 2000, the Israeli Parliament enacted a statute prohibiting discriminatory practices in the public sector. Pursuant to Section 1 of the statute, the goal of the legislation is to foster equality and to prevent discrimination in the entrances to public places; providers of public services such as restaurant owners and amusement parks should furnish their services without any discrimination based on race, nationality, etc.³ One of the exceptions to this rule is memorialized in Section 3(d)(3)(b), which allows

The existence of separate spheres for men and women, when integration 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 services of 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 space, its importance, the existence of reasonable alternatives, and the needs of the public that may be affected by the separation.

Pursuant to the aforementioned exception, Israeli law legitimates gender separation in public transportation. Such a position is not only endorsed by the Israeli Ultra-Orthodox Jewish community but equally by some secular thinkers based upon the tenets of liberal ideology. In recent years, much has been written in Israeli legal academic literature regarding this question, and in this essay we will attempt to briefly outline the contours of the debate and the grounds for morally justifying the legality of this practice in a liberal society by utilizing the sources of halakha and explaining the practices of the Ultra-Orthodox Jewish community which complies with its tenets.

Until the 1980's, minority groups were expected to integrate themselves into the indigenous majority culture. In the United States, this sociological phenomenon was memorialized in writing in 1960, when Professor Nathan Glazer of Harvard University began writing a series of articles about New York ethnic groups, essays which were eventually collected, published, and co-authored with Daniel Moynihan's contribution into a book⁴ which became one of the most popular and influential works of sociology of its time.

³ *Sefer Hukkim* 2001, p. 54.

⁴ Daniel Moynihan, Nathan Glazer, *Beyond the Melting Pot*, Cambridge: MIT Press (1970).

In more recent years, liberal-democratic societies have been adopting laws aimed at multicultural accommodation. That is, there is a need to preserve and protect the cultural values and practices of minority groups, allowing them to live by their own aspirations, traditions and institutions.⁵ Whereas previously such groups would assimilate into the national culture while simultaneously being guaranteed their own *individual* rights, now advocates of multiculturalism argue that *group* rights and privileges should be protected without any unnecessary legal or societal constraints. Though the dominant culture does not identify with many of the values of the minority group, nevertheless multiculturalists' proponents would claim that there should be equal recognition and representation of all values of all members of society. A prime example of social clashes between the dominant culture and minority groups can be found regarding the issue of gender equality. In our scenario, certain religious Jewish communities in Israel are advancing claims for special accommodation by providing separate public bus lines in order to allow them to preserve and maintain their unique lifestyle. These religiously defined minority communities are advancing their claims for recognition of their own identity and lifestyle while challenging the values of the Israeli liberal community who view some of their practices as discriminatory.

At first glance, although the duty to refrain from classic discriminatory treatment against an ethnic or cultural minority merely on account of its espoused values is self-evident, the extent of a liberal democracy's duty to grant special accommodations such as gender separation on public transportation is much less clear. Some contend that the language of multiculturalism and the value-laden agenda it propagates fails to capture, obscures, or possibly even distorts another fundamental liberal commitment, namely the commitment to equal respect and gender equality which finds expression in non-discrimination legislation passed by liberal

⁵ Will Kymlicka, *Liberalism, Community and Culture*, Oxford, 1989; Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 1995; Charles Taylor, "The Politics of Recognition," *Multiculturalism: Examining the Politics of Recognition*, Amy Gutmann (ed.), Princeton, NJ, 1994; Iris Young, *Justice and the Politics of Difference*, Princeton, NJ, 1990.

Though, as we will demonstrate, the practice of gender separation in public transportation can be brought under the umbrella of multiculturalism, nevertheless certain other practices such as ritual slaughtering which prohibits stunning the animal before it is killed may be legitimated based on the state's balancing of the interests of its citizens rather than the principle of equal treatment espoused by multiculturalists. See Brian Barry, "Liberalism and Multiculturalism," 4, *Ethical Perspectives* 2 (1997).

democracies.⁶ As Professors Avishai Margalit and Moshe Halbertal observe, the Israeli Ultra-Orthodox communities are characteristically anti-liberal.⁷ Judaism is characterized allegedly as intrinsically patriarchal in the sense that Jewish legal decision making is in the hands of males, and in many Orthodox Jewish communities women cannot serve in public office, are separated during public assemblies, and are frequently separated and relegated during times of worship to the back section of the Orthodox synagogue.⁸ Gender segregation on public transportation furnishes one more example of the anti-liberal stance of these communities. In our scenario, some would contend that the continued practice of gender segregation on buses contributes to obscuring the power relations between men and women as well as entrenching them.⁹ In effect, certain members of the minority culture are infringing upon the rights of other members of the group who should be free to choose whether or not to comply with such discriminatory practices of gender segregation in public transportation.¹⁰ Finally, whereas, numerous proponents of multiculturalism desire to defend the continued preservation of minority cultures in order to avoid the disappearance of their identity and values, others argue that women in Ultra-Orthodox communities in general and those traveling on segregated public bus lines in particular might be better off if the culture into which they were born or accepted after their birth would gradually become extinct.¹¹

What is the optimal approach of those who strive to promote the values of equal treatment for all in a multicultural society? How does one address this conundrum of legitimating this multicultural accommodation arrangement while simultaneously adhering to the liberal value of equal respect and concern for all? Is this a dilemma between “balancing” the right of Ultra-Orthodox Jews to religion against a woman’s right to equality? How does one defend the right of Ultra-Orthodox Jews to sustain their particular religious traditions without simultaneously disavowing the liberal values of the Israeli community?

⁶ Susan Okin, “Is Multiculturalism Bad for Women?,” *Boston Review* 22 (1997); Gila Stople, “Contextualizing Multiculturalism: A Three Dimensional Examination of Multicultural Claims,” 1 *Journal of Law & Ethics of Human Rights*, p. 309 (2007).

⁷ Avishai Margalit & Moshe Halbertal, “Liberalism and the Right to Culture,” 61 *Social Research* p. 491(1994).

⁸ Noya Rimlat, “Separation Between Males and Females is Sex Discrimination,” (in Hebrew) 3 *Alei Mishpat* 99, pp. 105-108 (5763).

⁹ Himani Bannerji, “The Paradox of Diversity: The Construction of a Multicultural Canada and ‘Women of Color’,” 23 *Women’s Stud. Int’l F.* pp. 537, 547 (2007).

¹⁰ Rimlat, supra n. 8, at 120.

¹¹ Okin, supra n. 6.

One response that has been suggested is that one of the defining characteristics of a liberal order is to be neutral; to refrain from interfering in the internal affairs of minority groups, allowing diverse cultures to pursue their different conceptions of the good.¹² Implicit in this “non-interventionist model” is a liberal commitment to tolerance and the maintenance of a strict separation between law and morality. Such nonintervention by the state in the internal affairs of these groups allows these groups to develop their own religious traditions while retaining civil peace in the public arena.

Some would uphold state neutrality regarding such religious clashes and would accommodate even illiberal practices of discrimination practiced by minority groups.¹³ Some proponents of minority rights argue that such culture should be preserved provided that their continued existence is at risk.¹⁴ As Professor Joseph Raz notes,¹⁵

Toleration is a distinctive moral virtue only if it curbs desires, inclinations and convictions which are thought by the tolerant person to be in themselves desirable. Typically a person is tolerant if and only if he suppresses a desire to cause another a harm which he thinks the other deserves.

Tolerance is obtained where a person refrains from reacting even when one thinks that one’s opinion is right. The classic example, Raz explains is if one believes that his fellowman’s behavior is immoral and yet, he restrains himself from offending or harming him. Consequently, though a liberal will be offended by gender segregation in public transportation, finding it reflective of the male-dominated culture of the Ultra-Orthodox Jewish community in general and the demeaning of women

¹² Michael McDonald, “Should Communities Have Rights? Reflections on Liberal Individualism,” 4 *Canadian Journal of Law & Jurisprudence* p. 217 (1991); Chandran Kukathas, “Liberalism & Multiculturalism: the Politics of Indifference,” 26 *Political Theory* p. 686 (1998); Brian Barry, *Culture & Equality: An Egalitarian Critique of Multiculturalism*, Cambridge, 2001, pp. 24-25.

Others such as Dworkin, Rawls and Kymlicka would argue that a liberal order will intervene if there are violations of racial and gender equality. See Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, NY: Oxford, 2002, p. 218.

¹³ Chandran Kukathas, “Is Feminism Bad for Multiculturalism?” 15 *Public Affairs Quarterly* 83 (2001); Yael Tamir, “Two Concepts of Multiculturalism,” (in Hebrew) in *Multiculturalism in a Democratic & Jewish State*, eds. Mautner, Sagi and Shamir, Tel Aviv, 5758, pp. 79, 85-91.

¹⁴ Margalit and Halbertal, *supra* n.7.

¹⁵ Joseph Raz, *The Morality of Freedom*, Oxford, 1986, pp. 401-402. Whether, in fact, Raz would identify with this policy of state nonintervention is beyond the scope of our presentation.

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in particular, liberal multicultural ethos dictates that one treat such behavior with due respect and tolerance.¹⁶

Should an Ultra-Orthodox Jewish woman feel alienated and/or maltreated in certain social arenas such as traveling on the *mehadrin* lines, she has the crucial escape hatch of the right to exit by choosing either to refrain from using this form of public transportation or by freely leaving her group. In Jon Elster's words,¹⁷ "If I want to do X and I am free to do X and also free not to do X, then my want cannot be shaped by necessity."

In fact, in stressing the initiative as spearheaded by the Ultra-Orthodox Jewish community, one legal commentator aptly observes,¹⁸

The voluntary acceptance of the policy by the community, the overall satisfaction of the passengers, and the lack of any complaint by passengers, the State denied the Network contention of gender discrimination altogether.

As long as members of the group have a formal right to exist, no other groups and/or individuals may be proactive and demand changes in the group's behavior lest they be labeled intolerant and morally dogmatic.¹⁹

In contrast to the policy of state nonintervention vis-a-vis minority cultures, which grants much weight to multiculturalism, others invoke "the civil-republican model" and argue that any practices of minority group cultures which preserve patriarchal conduct and systematically disadvantage women must be eliminated. It is the outside liberal observer who assesses which practices of the minority culture are deemed to be in sync with the liberal ethos and those which are discriminatory. And even if those Ultra-Orthodox Jewish women traveling on the *mehadrin* lines who are presumably victimized by this conduct claim that they do not feel any injustice has been perpetrated against them, the "liberal verdict" handed down may be to the contrary. And even if these women might not view themselves disadvantaged by the distinct gender roles practiced within their religion, the liberal thinker may yet contend that these women are powerless victims who are unable to understand the import of their

¹⁶ For critiques of this policy of state nonintervention, see Ayelet Shachar, *Multicultural Jurisdictions*, Cambridge: Harvard University Press, 2001, pp. 37-40; Yaacov Ben-Shemesh, "Law and Internal Cultural Conflicts," 1 *Journal of Law & Ethics of Human Rights*, pp. 271, 278-281 (2007).

¹⁷ Jon Elster, "Sour Grapes," in *Utilitarianism and Beyond*, Sens and Williams (ed.), London: Cambridge University, 1985, p. 228.

¹⁸ Ruth Halperin-Kaddari, "Women, Religion & Multiculturalism in Israel," 5 *UCLA Journal of Intern'l Law & Foreign Affairs*, pp. 339, 363-364 (2000).

¹⁹ Shachar, *supra* n. 16 at 69.

behavior or resist the damage they suffer at the hands of their own cultures. Adopting such a perspective, in effect, means that the values and conduct of that minority culture are to conform to the values of the dominant liberal community. It is a judgment call for “full assimilation” rendered by outsiders to this culture who have been labeled as “cultural imperialists,” who respect minority cultures only when they identify with their perception of a liberal agenda.²⁰ In short, such a position is invoking a “boutique multiculturalism” agenda which endorses a recognition and affirmation of the language, the arts, dress and the ethnic foods of the minority group while implicitly rejecting any practices which threaten the values of the liberal state.

In sum, whichever approach one adopts, we have an either/or solution to address the perils of multiculturalism. On one hand, the noninterventionist model attempts to preserve the values of the religious minority’s traditions while having little reason to intervene in their internal affairs even if the minority violates certain of its members’ rights. The civil-republican option, on the other hand, attempts to address the potentially negative effects of well-intentioned multicultural accommodation by scrutinizing the practices of religious minority groups and offering legal-institution solutions to the problems of group-sanctioned violations. Thus, the conundrum of multiculturalism vs. equality will either be resolved by gradually “extinguishing” the practices of the religious cultural minority and assimilating the group into the dominant culture or by allowing the group to continue their practices, albeit some of them being illiberal.

In order to transcend this either/or framework for resolving multicultural vulnerability, argues Dr. Alon Harel, Professor of Law at The Hebrew University Faculty of Law, we must discover the Jewish legal rationale for this practice of gender separation within the religious and non-religious contexts.²¹ Regarding the religious context, R. Dr. Norman Lamm notes,²²

²⁰ Shemesh, supra n. 16, at 292; Bhikhu Parekh, “A Varied Modern World,” in *Is Multiculturalism Bad for Women?* Cohen et al eds., NJ: Princeton University Press, 1999. Such thinking is characteristic of the one-dimensional man who is incapable of imagining a qualitatively different universe of discourse and action than the one he inhabits. See Herbert Marcuse, *One-dimensional Man: Studies in the Ideology of Advanced Industrial Society*, Boston: Beacon Press, 1964.

²¹ Alon Harel, “Benign Segregation? A Case Study of the Practice of Gender Separation in Buses in the Ultra-Orthodox Community in Israel,” 20 *South African Journal of Human Rights*, pp. 64, 74-84 (2004).

²² Norman Lamm, “Separate Pews in the Synagogue,” in N. Lamm and W. Wurzbarger, (ed). *A Treasury of Tradition*, NY: Hebrew Publishing Co., 1967, pp. 255-60.

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To know the effect of mixed seating on the Jewish religious quality of prayer, we must first have some idea of the Jewish concept of prayer... When the Jew prays,...he judges himself before God...Nothing is calculated to give man a greater feeling of awe and humility...When we know before Whom we stand, we forget ourselves...the direction of one's mind to God in utter and complete concentration upon Him, is indispensable for prayer...

For *kavvanah*, i.e. concentration, to be present in prayer, it is necessary to eliminate every source of distraction...It is not only that what one *sees* prevents one from experiencing *kavvanah*, but that mixed-company...is conducive to a kind of frivolity- not disrespectful, but levity nonetheless...It may be true...that Judaism see nothing inherently wrong or sinful about sex. But that does not mean that it is to be regarded as a harmless exercise not subject to any control or discipline...as Rabbi J. B. Soloveitchik has pointed out, this reliance upon a husband or wife is precisely the opposite of the Jewish concept of prayer. As was mentioned before, the approach of the Jew to God must be out of a sense of isolation, of insecurity, of defenselessness.

The implementation of separate pews in the synagogue has nothing to do with equality or inequality. On the contrary, given that prayer requires the fostering of *kavvanah*, i.e., concentration, Harel argues that halakha mandates a separation in order to prevent looking at the opposite sex, which would distract the worshipper beseeching his Creator. Concomitantly, the erection of separate pews equally contributes to the seriousness of the experience of prayer and serves as one of the vehicles for fostering sexual restraint rather than the experience of frivolity resulting from the commingling of the sexes in a mixed group.²³

This concern for creating an atmosphere marked by sexual and moral restraint coupled with a sense of devotedness during times of worship is embraced in the full gamut of the life experiences of the members of the

²³ For alternative liberal defenses utilizing psychological reasoning to validate the practice of separate seating in synagogues and other public places in general, and the fostering of the norms of modesty and sexual restraint for members of Orthodox Jewish communities in particular, see Naomi Seidman "The Erotics of Sexual Segregation," in Danya Ruttenberg (ed.), *The Passionate Torah: Sex and Judaism*, NY: NYU Press, 2009, 107-115; Shira Wolosky, "Foucault and Jewish Feminism: The Mehitzah as Dividing Practice," 17 *Nashim*, 2009, pp. 9-32.

For additional reasons for erecting separate pews in the synagogue, see Baruch Litvin, (ed.) *The Sanctity of the Synagogue*, NY: Balshon Printing, 1962; Lamm, supra n. 22, at 258-263.

Ultra-Orthodox Jewish communities. Ideally, some of these communities in the United States would have preferred gender separation on buses in order to foster the values of their religious agenda; however, in modern society such a practice is unrealistic. To bolster his argumentation, Harel cites various sources of halakha, including the following ruling of R. Moshe Feinstein who states,²⁴

With respect to the subway or bus, when people go to work and men go together such that it is difficult to avoid touching and being touched by women, is it permissible to ride?...There is no prohibition where there is no lust and therefore, it is permissible to ride the subway even if he cannot avoid touching and being touched by women...there is no prohibition either to sit near a woman where there is no other place available. But if he knows that he will feel attraction, preferably he should avoid riding the subway, and if he has to go he has to uphold himself and think about the Torah.

Yet, in cases where special accommodations for gender separation in public transportation can be made, halakha would promote such an arrangement in order to prevent sexual attraction and lustfulness between the sexes.²⁵

Lest one challenge the claim that the principle of gender separation is an integral ingredient of Ultra-Orthodox Jewish living by pointing out that numerous other Orthodox communities practice otherwise, or that some arbiters of other Orthodox communities rule differently,²⁶ such sociological observations are totally irrelevant in assessing the liberal propriety of these religious practices. For the practice to be an integral part of daily living there is no need to ascertain that all members of the Orthodox Jewish community and/or its arbiters identify with this practice. It is sufficient to demonstrate, argues Harel, that halakha justifies such a practice and that members of a particular Jewish community have adopted this practice.²⁷ The existence of diverse Jewish legal rulings and/or communal practices which fail to endorse the principle of gender separation in

²⁴ *Iggerot Moshe, Even ha-Ezer*, 2:14 cited by Harel, supra n. 21, at 82.

²⁵ The fact that under extenuating circumstances, an Ultra-Orthodox Jew will travel on an intercity bus or fly in plane is recognized by R. Feinstein and others as *be-di'avad*, i.e., an after the fact-ex post situation. Ideally, gender separation in public transportation is halakhically preferable and this arrangement reflects how the members of this community aspire to live. As such, Harel would contend that this practice should be justified by a multiculturalist.

²⁶ *Mishneh Halakhot*, Vol. 4, no. 186.

²⁷ Harel, supra n. 21, at 78.

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public transportation does not preclude a liberal multicultural validation of these minority cultural-religious practices.

Moreover, numerous thinkers argue that these Ultra-Orthodox Jewish women have been conditioned and ideologically hijacked into acquiescing to demeaning practices such as gender separation in buses and that they should be “liberated” from the shackles of their “oppressive” religious tradition rather than allowed to “freely” imbibe such values.²⁸ Additionally, these women have become co-opted by their community group-think.²⁹ In reply to this argument, Harel contends that these women voluntarily endorse their lifestyle, including the principle of gender separation, in all spheres of life, and feel that their personal dignity and privacy is being enhanced rather than compromised. In fact, on the whole, the findings of Israel’s Ministry of Transportation were that commuters were satisfied with the arrangement of gender separation on buses.

In short, instead of assessing these religious practices through the lens of a liberal outsider and articulating just one particular vision of objectively-defined gender roles, Harel argues that there is a two-pronged test which can determine the liberal propriety of a particular minority culture’s practice by assessing its Jewish legal rationale and deciphering the social meaning and moral significance perceived by those who are sustaining this practice. Firstly, the rationality of the arrangement of gender separation must be viewed through the religious and moral standard of the minority culture which imbibes this practice. Given that halakha understood gender separation as fostering the development of the norms of privacy, sexual restraint and modesty to argue that all gender separation practices are discriminatory is overly simplistic. Here in the United States, the separation of men and women in public toilets or locker rooms serves to protect individual privacy, and the existence of single-sex educational institutions and minority-only colleges are examples of special accommodations which suffice to establish that not all practices of gender separation are discriminatory in nature. Similarly, the practice of gender separation in public transportation in Israel, argues Harel, reflects a similar liberal multicultural accommodation agenda.³⁰

Secondly, to describe the practice of gender separation as discriminatory and as encoding the hierarchy of patriarchal Judaism would be unjustified

²⁸ See supra n. 11.

²⁹ Okin, supra n. 5; Patricia Jeffrey, “Agency, Activism, & Agendas,” in *Appropriating Gender: Women’s Activism and Politicized Religion in South Asia*, Jeffrey & Basu (eds.), NY: Routledge, p. 221.

³⁰ Harel, supra n. 21 at 74-75.

and would constitute a denial of a deeply rooted religious practice. Moreover, the status of these practices depends on the social meaning attributed to them by the Ultra-Orthodox Jewish women. The policy of gender separation, which may seem objectionable and discriminatory to the outside liberal observer, is perceived by these women as a source of dignity, a means designed to protect their privacy and address their concerns for modesty. In fact, these women preferred to be relegated to sit in the back of the bus in order to facilitate additional freedom of movement.³¹ In effect, a practice which a liberal observer may perceive as discriminatory may be looked at very differently by a minority group. In sum, there is an acute need to realize that the same social practices can have varied social meanings, and therefore differing moral significance, in the context of different cultures of a particular society.

Our discussion of gender separation on buses reminds us that distinguishing between enabling and oppressive cultural-religious norms is a fundamental challenge of liberal multiculturalism, a challenge that we hopefully have successfully confronted by examining the issue through the prism of halakha and the practice of members of a group of the Jewish covenant-faith community who adhere to its norms.

³¹ Halperin-Kaddari, *supra* 18, at 364. Whether the relegation of women to the back of buses poses a liberal dilemma in terms of equal treatment, see Harel, *supra* n. 21, at 84, n. 51.

