CHAPTER SIX

The Protection of Religious Liberty in the United States*

The Supreme Court Jurisprudence

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I Introduction

How much legal autonomy – and how much exemption from otherwise applicable laws – ought religious groups to have?

When government grows larger and more ambitious, laying down the law in more and more areas of life, these questions arise more often and more urgently.

It is a common motif that without some special accommodation or exemption from various laws, it would be difficult for religious communities or even individuals to live religious lives. If public law forbids employment discrimination on the basis of religion, for example, religious groups have an obvious claim for exemption when choosing their clergy, and a claim for autonomy to decide who qualifies to be rabbi, priest, or pastor.

The controversy in the United States recently over the Obama Administration mandate to Roman Catholic institutions over abortive drugs and contraception is just one example of the almost limitless situations in which the question of special accommodation can arise. Should Native American or Rastafarian sects be exempted from drug laws that forbid peyote or marijuana? Should Mormons or Muslims be exempted from laws against polygamy? Should Christian Scientists be exempted from laws requiring parents to provide for medical treatment for sick children? Should Sikhs be exempted from laws prohibiting carrying knives in public? Should observant Jewish soldiers or officers be exempted from military uniform rules which would not permit

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wearing a *kippah* (headcovering)? Should religious individuals be exempted from duties that would otherwise be required on the job: a nurse who refuses to assist abortion or contraception? A police officer who refuses to arrest anti-war, or anti-abortion, protesters? A postal worker who refuses to deliver mail which he or she considers blasphemous, or (as is now an issue in Israel) who refuses to deliver pamphlets proselytising for Christianity, or who refuses to process military conscription documents?

In American constitutional law those questions are analyzed in two main headings. One issue is whether accommodation of religious claims are a violation of the Establishment clause in the US constitution, and the second is whether the recognition of the religious needs are mandated by The Free Exercise Clause of the US constitution.

II Establishment Clause Issues

There have been increasing calls in recent years both in the United States and in other Western democracies, not merely for religious exemptions from secular laws, but also for actual power to adjudicate under religious law. There are already steps in this direction with binding arbitration in religious courts: halakhic or sharia tribunals, for example, created by Jewish and Muslim groups respectively. An extensive network of *batei din* or rabbinical arbitration courts now exists in the US. More recently, Islamic groups have called for the establishment of comparable sharia courts. With such tribunals, business people can contract to arbitrate future disputes in a religious court; or a couple might sign a prenuptial agreement to arbitrate family disputes, including divorce, under religious law. Going further, there have been suggestions in the academic literature that insular or self-contained religious groups might be given public judicial powers, by analogy to the powers of tribal courts on Indian reservations in the United States. The Archbishop of Canterbury recently provoked a flurry when he called, in somewhat general terms, for aspects of Islamic sharia law to be adopted in Britain. The role of religious courts in Israel is sometimes cited as an example of how religious adjudication might function in a democratic society.

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