How Much Autonomy Do You Want?

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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 recent months over the Obama Administration’s 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 wearing a kippah? Should religious individuals be exempted from duties that would otherwise be required on the job:

a nurse who refuses to assist in an abortion or administration of contraception? A police officer who refuses to arrest anti-war, or anti-abortion, protesters? A postal worker who refuses to deliver mail that he or she considers blasphemous, or (as is now an issue in Israel) who refuses to deliver pamphlets proselytizing for Christianity, or who refuses to process military conscription documents?

In the United States, these questions—as with so many things in American life—can often be framed as Constitutional issues. The first Amendment says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." So perhaps some or all of the claims for religious exemption must be granted in order to satisfy "free exercise." On the other hand if they are granted, but people who might want to smoke peyote, marry polygamously, and/or carry ceremonial but sharp knives in public for non-religious reasons are prohibited from doing so, this can be said to be an "establishment of religion": it would certainly discriminate in favor of religion and against people who might want exemptions from the law for secular (but perhaps for serious or conscientious) reasons. Free exercise and establishment, especially if each is construed broadly, threaten to collide with one another.

The U.S. Supreme Court has followed a notably up-and-down course in recent decades about special religious accommodation. In two famous cases decided in 1963 and 1972, the Court held that the First Amendment requires exemptions from generally applicable federal and state laws unless there is a "compelling state interest" (or something close to it) for enforcing the law—a constitutional standard that usually means the government has to give way to a claim under the Bill of Rights. The first case, Sherbert v. Verner, involved a Seventh Day Adventist who wanted an exemption from a requirement to be available for work on Saturday as a condition of receiving unemployment benefit; the second, Wisconsin v. Yoder, involved an Amish community that wanted its children excused from compulsory school attendance past the eighth grade.1 The Court held that Free Exercise requires a religious exemption in both cases.

But in 1990, in a case called Employment Division v. Smith, the Supreme Court reversed course and said that the Free Exercise Clause does not require religious exceptions from generally applicable laws that are enacted for secular purposes.2 The idea implicit in the decision, clearly, is no official preference for religion over non-religion. The U.S. Congress reacted sharply to the decision by enacting the Religious Freedom Restoration Act of 1993 (RFRA), seeking to restore the pre-Smith "compelling state interest" standard, which favored religious exemptions. In 1997, the Supreme Court struck back, and struck down RFRA as

unconstitutional: Congress has no power to impose this pro-exemption requirement on the states.3 Recently, in yet another turn, the Court tacitly upheld RFRA for religious exemptions from federal laws (although Congress still cannot require such exemptions from state laws).

In practice, there has been less change in public policy toward religious exemptions than a reading of the (somewhat dizzying) Supreme Court decisions might suggest. In the era before Smith, exemptions were by no means granted as readily as Sherbert and Yoder might imply, and after Smith they are still available in various guises. Even in the post-1960s (but pre-Smith) era, the Supreme Court rejected all religious claims for exemption from tax laws; it rejected all claims arising from prisons and the military; it rejected a claim for exemption from the Fair Labor Standards Act. Virtually the only claims the Court accepted were—like Sherbert—for religious exemption from (Sabbath) requirements to be available for work under unemployment benefit laws. And after Smith, religious claimants still sometimes win in the Supreme Court. For example, the Court says that where the government actually considers individual eligibilities—as it does in unemployment cases—it still has to grant religious exemptions. The Court also strikes down laws that it finds to be discriminatory against particular religions or their practices, such as, in a famous case, animal sacrifices by the Santeria sect.4
Perhaps more importantly, federal and state laws—even, or especially, after Smith—have been strongly favorable toward religious exemptions.5 RFRA was enacted by unanimous vote in the House of Representatives (better than the Declaration of War after Pearl Harbor), and by almost unanimous vote in the Senate; it still applies to the federal government, requiring religious exemption unless a “compelling state interest” militates against it. More than half the states have enacted their own RFRA-like laws. Twenty-three states and the federal government allow sacramental use of peyote.

Congress granted the Amish an exemption from social security taxes after the Supreme Court turned it down. Congress granted members of the armed forces the right to wear “religious apparel” after the Supreme Court turned down a claim by an Air Force doctor, an observant Jew, to wear a kippah on duty.

Some of these enactments might actually give cause for second thoughts, even if one supports generous religious exemptions. The federal Civil Rights Act of 1964, for example, prohibits employment discrimination on account of race, religion, sex, and national origin. But under a 1972 Amendment, religious corporations and institutions may discriminate on the basis of religion.6 (The original 1964 law had allowed such religious discrimination more narrowly, only in relation to “religious

activities.”) The Supreme Court upheld the broadened exemption in the case of a gymnasium (open to the paying—not necessarily praying—public) operated by the Church of Latter Day Saints, which fired a janitor for failing to live by Mormon standards of religious practice.7 The exemption from anti-discrimination law is not merely for a few religious groups, under the new law, or for a narrow range of religious employees. Religious organizations employ more than a million Americans, and religious bodies can have large-scale business interests, with a lot of leverage over would-be employees. Churches own (or have owned) a major secular news agency (the United Press International), the largest beef ranch in the United States, and a major life insurance company. With the broad (or over-broad) exemption, there is the potential for enterprises owned by religious bodies to swallow the anti-discrimination law, at least in some localities or in some trades.

Meanwhile, 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 religious groups. An extensive network of Batei Din, or rabbinical arbitration courts, now exists in the United States. More recently, Islamic groups have called for the establishment of comparable Sharia courts. Thus, businesspeople 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.8 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.

In a sense, even “special accommodation” or religious exemption from secular law implies that religious groups must have some autonomy and power to decide, hence in a more or less formal sense, to adjudicate, relevant questions by their own standards: to decide at what age Mennonite children should leave school, for instance, or which day is the Sabbath and what are the rules of Sabbath observance, what apparel is religious apparel, what use of peyote is sacramental, and so on.

The creation of actual state religious courts in the United States, comparable to the Israeli religious court system, is improbable, to put it gently, given "separation of church and state" under the First Amendment. But to the extent that halakhic or Islamic arbitration awards are enforceable in the secular courts, such religious judgments would have binding force under American law. Supporters of religious "multiculturalism" and increased autonomy for religious groups have suggested that the usual rules of arbitration law should be relaxed for religious tribunals. For example, whereas a standard arbitration award is unenforceable if a court finds it to offend "public policy," it has been suggested that religious adjudication should be enforced by the secular courts unless the judgment is "unconscionable."9 On the other side, opposition to religious courts—in particular to the spread of Islamic Sharia law—has also grown. Oklahoma adopted a referendum in 2010, subsequently struck down by the federal courts, forbidding state courts to consider Sharia. At least six other states have considered similar measures, which might forbid state courts to enforce the judgments of religious arbitral courts. Along the same lines, after public statements by an Islamic leader in Toronto that only "bad Muslims" would fail to submit their disputes to Sharia arbitration panels, the Canadian province of Ontario now bans the enforceability of religious family law arbitration. In the words of the Premier of the Province: "There will be no religious arbitration in Ontario. There will be one law for all Ontarians." But despite occasional rebuffs, halakhic tribunals and their caseloads—and Muslim interest in Sharia tribunals—have grown in the United States in recent years. It remains an open question to what degree and on what terms the secular courts will accept and enforce their judgments.

The attractive side of increased religious autonomy is fairly obvious. Generous exemption from secular laws and increased availability and enforceability of religious adjudication all provide a framework for people to live more religious lives, under religious law if they choose. These developments empower religion accordingly. They might seem especially well suited to "nomo-centric" or law-intensive religions like Judaism and Islam. After all, Jews are obliged under Jewish law, at least under appropriate circumstances, to adjudicate disputes before halakhic courts and not to turn to secular tribunals.10
When religious autonomy is enshrined in secular law, however, there are potential and actual problems and drawbacks as well.

In the first place, the substance of religious law may be at odds with the values of a liberal society. This arises most obviously on points where both Jewish and Islamic law, for example, are not egalitarian as between men and women.

Divergences from liberal norms can arise in religious commercial law and in other areas as well. For example, it may conflict with federal and state antitrust laws in the United States for Batei Din or rabbinic arbitration tribunals to enforce the halakhic principle of hasagat gevul, which restricts competitive business practices that might put an existing business out of business.11

A plausible response to this sort of concern is that a liberal society is pluralist and does not require everyone to live by liberal norms: indeed that it would be illiberal to do so. So long as there are ample choices and full freedom to affiliate and disaffiliate, and so long as the interests of third parties are not compromised, liberal society should not be offended if some people and groups, including religious groups, voluntarily opt for non-liberal ways of life. In the case of hasagat gevul, this runs into the objection that third parties are compromised: that the purpose of antitrust, and of public policy favoring competition, is to promote lower prices and better quality goods and services for everyone, and that the public suffers whenever there is less competition. As for respecting people's free choice to submit to religious law: the more readily secular courts enforce religious arbitral judgments, the more this implies scrutiny by the courts into just how voluntary, and how fully informed, the parties were when they consented to religious adjudication. Religious communities might feel such scrutiny intrusive, both as to the community pressures which undoubtedly affect whether people agree to religious adjudication, and also as to how much is known in advance about the interpretive or ideological leanings or commitments of particular religious tribunals.

There is also a concern, in terms of social cohesion, about the balkanizing effects of group autonomy, especially where religious groups, identity groups, or other groups inspiring deep passion and commitment are involved. This concern traces back to Hobbes and Locke, who wrote during or just after a period of religious civil war, and it has been a perennial worry in the history of liberal thought.12 The apprehension, of course, is that when such groups are empowered, it tends to diminish their members' loyalty to, or even involvement in, the broader liberal community. If things go too far, it threatens to begin pulling liberal society apart. This concern has re-emerged sharply in Western European countries in recent years, where Muslim communities have grown, and where Islamic or Islamist leaders have achieved a degree of autonomy under "multicultural" policy. The concern, of course, is that group differences, far from shrinking, are growing more intractable and more threatening as a result of these policies.

If religions are granted exemption and autonomy that others might not be granted, there is also the ever-more-uncertain question of who or what is a religion. When Will Herberg's famous book Protestant Catholic Jew appeared in the 1950s, it was broadly true that those were the three religious alternatives in America, with subdivisions among each of course, but each with a recognizable identity as well, and broad consensus about what is a religion, such that Americans could feel that they would know it when they saw it. Today it would be fair to say that there is an ever-expanding psychic shopping mall of religious, semi-religious, and quasi-religious beliefs, notions, groups, and ideologies. In American prisons, for example—not an entirely representative subset of the country, to be sure—there has been dramatic growth in adherence to a variety of sects including the Nation of Islam ("Black Muslims"), pagan groups such as Wicca, Odinism, Asatru, and Druidism (often associated with White Supremacists among the prisoners), and Native American spirituality.13 An American court today may confront not only the question of whether an Air Force doctor who is an observant Jew may wear a kippah on duty, but also a case of a Free Exercise claimant who asserts that his religious beliefs require him to dress like a chicken when going to court.14

If religions are granted exemption from otherwise applicable laws, and even a degree of autonomous authority, there is an obvious temptation for all sorts of groups to claim to be religions and to demand special privileges and powers. A well-known but by no means unique example is the Church of Scientology, which began as an entirely secular therapy-marketing enterprise founded by the science-fiction writer L. Ron Hubbard, but which went on to claim religious status, partly in hope of a tax exemption. Despite its considerable criminal history by then, Scientology was eventually granted tax exemption in 1993 as a bona fide religion.15

There is a further point, which perhaps deserves more emphasis than it sometimes receives. If the state offers a significant degree of religious autonomy—power over jobs, resources, and decisions that affect people's lives—it can encourage the take-over of religious communities by authoritarian and factional religious leaders. This may partly be due to the attraction that autonomous power might have for the most enthusiastic people within a religious group or its leadership, who may tend to be the most extreme people.

But autonomy has a perverse logic of its own, which more directly encourages extremism: namely, if autonomous rulings are not going to differ from the rules of secular, liberal society, then why is it important that the religious group should

have autonomy? Whereas the more radically the group's rulings do differ—including the rulings of religious arbitration courts—the more necessary and justified the claim for autonomy. Once there is autonomy, in other words, there is liable to be a "cascade" effect towards more distinctive, which is to say more extreme, positions on the part of the autonomous institutions and those who steer them, if only to justify the idea that autonomy is necessary in the first place.

The religious courts in Israel may be a cautionary example in this context. The State of Israel, as is the case with many Muslim-majority countries, maintains a religious court system within the state framework, with jurisdiction over family law, including marriage and divorce and related questions of "personal status". The religious courts trace back to the "Millet" system under the Ottoman Empire—where the phenomenon of "Balkanization" originated—and was kept on under the British mandate in Palestine and again after the establishment of the State in 1948. It is common knowledge in Israel that the religious courts have increasingly come under the sway of Haredi rabbinical judges in recent years, and there have been notorious cases of the religious courts refusing to issue marriage licenses where one of the parties is a non-Haredi convert to Judaism; the religious courts have even attempted to revoke Orthodox but non-Haredi conversions retroactively and to render Jewish families abruptly "non-Jewish".16 The polarization of religious life in Israel, and the growing power of Haredi ultra-Orthodoxy, undoubtedly has complex origins, and can surely not be laid to the existence of state religious courts alone.

But the religious court system, and the autonomous power of the religious "establishment" in Israel, have certainly not stopped the drift towards religious extremism in the Orthodox rabbinic world, nor prevented the estrangement of Jews of various religious tendencies from one another, both in Israel and abroad.

Extensive religious autonomy, in short, can lead to the creation—with state approval—of "islands" of authoritarianism in an otherwise free and democratic society. It can also promote corruption of various kinds, which often accompanies authoritarianism. Corruption, not on a modest scale, has certainly been one of the issues in Israel in the context of religious legal autonomy and political power.

A consideration of these various problems, actual and potential, with religious autonomy is not to suggest that religious exemptions from secular law, and a measure of a religious autonomy, are simply undesirable. On the contrary, they may be indispensable for religious people and groups to be free to live religious lives. Special accommodation of religious needs under secular law, and arbitral

“alternate dispute resolution” in religious courts, may actually work reasonably well if there is a degree of moderation on all sides. If the government authorities are basically respectful towards religious concerns—which they generally have been in American history; if a rough consensus about who and what is a “religion” does not break down in a welter of opportunistic or unhinged claims; if religious groups themselves do not seek to abuse either the host society or their own members: then there is the prospect of a reasonable balance of interests. All this presupposes a degree of social cohesion and good faith, of course: that all concerned should be “touched… by the better angels of our nature.”17

Relying on everyone’s being touched by the better angels of our nature, unfortunately, can sometimes be uncertain. It is all the more uncertain in a fractious and polarized society. At root, the question of special accommodation, and of religious adjudicatory independence, arise most urgently when government grows in its reach and ambition. After all, if most areas of life, including those that touch on religious life, are left to people’s private arrangement, then not much special accommodation will be necessary. But when government takes control over more and more areas of life, regulating who shall do what, under what rules and conditions, then clashes with one or another religious way of life are almost inevitable. The dispute over government mandates to provide abortive drugs and contraception, in the framework of increasing government control of health care in America, is merely a well-known recent example.

With a relatively open market in health care and private health insurance, religious institutions needed no special exemptions to adopt their own approaches, on questions of contraception and abortion as on other matters. But greatly increased government regulation implies more uniform standards and rules, and hence more controversy over whether there should be religious exemptions, and if so, for whom, to what degree, and on what terms.

Special accommodation for religion, and special adjudicatory powers, are problematic, for reasons I have tried to suggest. In the long run, especially under less-than-favorable social circumstances, they might not be workable. If not, then society may ultimately have to choose between big government—an ever-growing and ever-more-powerful administrative and redistributive state—on the one hand, and lively religious pluralism and thriving religious life on the other. This, perhaps, is what religious people and groups ought to fix their attention on.

1 Sherbert v. Verner, 374 US 398 (1963); Wisconsin v. Yoder, 406 US 205 (1972). Justice William O. Douglas dissented in Yoder, suggesting that a high school child

may or may not want to be “harnessed” for life to the Amish community: “[h]e may want to be a pianist or an astronaut or an oceanographer. To do so, he will have to break with the Amish tradition… The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.”

2 Employment Div. Dept of Human Resources v. Smith, 49 US 872 (1990).

3 City of Boerne v. Flores, 521 US 507 (1997).

4 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 US 520 (1993).

5 The Supreme Court decisions are about whether religious exemptions are required as a matter of Free Exercise by the Constitution. But federal or state statutes are free to grant more “special accommodation” than the Constitution (minimally) requires: so long, of course, as the “special accommodation” isn’t viewed as rising to the level of an Establishment of religion.

6 42 US Code 2000e -1.

7 Corporation of Presiding Bishop v. Amos, 483 US 327 (1987).

8 E.g. Mark Rosen, “The Radical Possibility of Limited Community-Based Interpretation of the Constitution,” 43 William and Mary Law Review 927 (2002).

9 E.g. Michael A. Helfand, “Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders,” 86 NYU Law Review 1231, 1287-8 (2011).

10 Gittin 88b; but see Sanhedrin 23a. See generally J. David Bleich, “Survey of Recent Halakhic Periodical Literature: Litigation and Arbitration Before Non-Jews,” 34:3 Tradition 58 (2000); Michael A. Helfand & Yaacov Feit, “Confirming Piskei Din as Arbitration Awards,” 61 Journal of Halacha & Contemporary Society 5 (2011). Of course Jewish law does not, because it cannot, prescribe to what extent (if at all) non-Jewish secular courts will enforce halakhic arbitration judgments in cases where the losing party does not submit voluntarily to the judgment.

11 See generally Simcha Krauss, “Hasagath Gvul,” 29 Journal of Halacha & Contemporary Society 5 (Spring 1995).

12 See Richard Boyd, Uncivil Society: The Perils of Pluralism and the Making of Modern Liberalism (Lexington Books 2004).

13 For the religious situation in the prisons, see the United States Commission on Civil Rights report, Enforcing Religious Freedom in Prison, September 2008: http://www.usccr.gov/pubs/STAT2008ERFIP.pdf, especially the Statement of Commissioner Gail Heriot at p. 118. For a statistical survey of American religion generally, see the Pew Forum on Religion and Public Life, US Religious Landscape Survey 2010: http://religions.pewforum.org/reports. The Pew Survey summarises: “religious affiliation in the US is both very diverse and extremely fluid. More than one-quarter of American adults (28%) have left the faith in which they were raised in favor of another religion—or no religion at all. If change in affiliation from

one type of Protestantism to another is included, 44% of adults have either switched religious affiliation… or dropped any connection to a specific religious tradition altogether."

14 Compare Goldman v Weinberger, 475 US 503 (1986) (upholding prohibition of the kippah) with State v Hodges 695 S.W. 2d 171 (Tenn 1985) (quashing a contempt citation and remanding to the trial court for further consideration of the religious claim for the chicken costume). In a nutshell, the kippah lost. The chicken costume, at least tentatively, won.

15 See Hugh B.Urban, The Church of Scientology (Princeton University Press 2011).

16 See Marc D. Angel, "The Conversion Crisis and Challenge" (November 2008): http://www.jewishideas.org/min-hamuvhar/conversion-crisis; Zvi Zohar, "From Periphery to Core," 10 Conversations 93 (2011). For an account of a case in which the rabbinic court purported to revoke a conversion, see "The Interrogation of the Convert "X" by the Israeli Rabbinic Courts" (February 2011): http://www.jewishideas.org/susan-weiss/interrogation-convert-x-israeli-rabbinic-courts

The Center for Women's Justice in Jerusalem is active in behalf of converts entangled in such cases, and posts about recent developments: http://cwj.org.il/home/cwj-news/newrabbiniccourtrulingcwjclientsarejewish

17 Abraham Lincoln, First Inaugural Address (1861).