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Religious Arguments in the Public Sphere: A View from Israel

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Abstract
It is commonly believed that, from a liberal point of view, there is something problematic in government action rooted in religious considerations. We begin by showing exactly what kind of religious considerations might thought to be ruled out as a basis for such action. We then discuss at length the approach expressed by the Supreme Court of Israel, according to which legislation and other government actions based on religious considerations are problematic because they violate the right to freedom from religion of non-religious citizens. We reject the court's interpretation of this right and conclude that the court has failed to explain why government action based on religious considerations is illegitimate.

Keywords
public reason; freedom from religion; religious coercion

1. Introduction

According to a widespread view, there is something wrong with government actions that are based on religious considerations. This view is prevalent not only among readers of Rawls and of other liberal philosophers,[1] but also among lay people who have never come across these names and have never heard the technical terms "public reason" or "public justification;" their liberal instincts lead them to believe that religious arguments must be

* The main ideas of this paper are drawn from an article we published in Hebrew in *Bar-Ilan Law Studies* in 2009.

[1] See, for example, John Rawls, *The Law of Peoples* (1999) 149-152; Robert Audi, "The Place of Religious Arguments in a Free and Democratic Society," 30 *San Diego L. Rev.* (1993),

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kept out of the public sphere. In the course of our work on this topic, time and again we were surprised to see how often this view is regarded as self-evident among liberals, despite the fact that it is the subject of serious philosophical dispute.[2]

When people are asked to explain the apparently unfair exclusion of religious arguments from the public sphere, a common response is that religion, by its nature, belongs to the private domain. Following Plato's argument in Book IV of the *Republic*, one is tempted to express this intuition as having to do with justice, which requires that each part of a whole (be it the state or the soul) restrict itself to its natural purpose and not trespass into the domains of activity that characterize the purposes of the other parts. In this vein, it may be suggested that religion, being essentially a private matter, acts unjustly if it moves into the public sphere.

But this response simply begs the question and it is therefore untenable. Had supporters of religion believed that religion belonged exclusively in the private sphere, they would not have attempted to rely on it in order to advance their political goals. Thus, if the privacy argument presumes to describe the way in which believers think of religion (namely, that it is "private"), the argument is clearly false. If, however, the argument is about how believers *ought* to think about religion (namely, that it ought to be kept "private"), then it begs the question because this is precisely what needs to be shown.

In the present paper we do not attempt to take sides in the ongoing philosophical debate on the role of religious arguments in the public sphere. Instead, we seek to accomplish two aims: (a) to clarify the conditions under which the objection to reliance on religious arguments in debates concerning public policy is reasonable, and mainly (b) to present and evaluate the arguments made by the Supreme Court of Israel against such reliance.

2. When is the involvement of religious considerations problematic?

Not every claim put forward by religious individuals or communities could be seen – even prima facie – as illegitimate merely because it involves religion in some way. If a religious neighborhood is hit by a flood, its demand

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677-690; Gerald F. Gaus, *Justificatory Liberalism: an Essay on Epistemology and Political Theory* (1996) 162-163; Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (1990) 52.

[2] For a powerful criticism of this view, see Christopher J. Eberle, *Religious Conviction Liberal Politics* (2002).

for assistance from the regional council or from the state does not violate any liberal principle simply because it comes from a religious community and is, therefore, in some loose sense, "religious." We must be more precise about the types of religious involvement in public policies that, at least *prima facie*, are incompatible with liberalism.

Consider demands to restrict liberty in order to avoid hurting or offending religious sensibilities. Could such a restriction be seen as a problematic case of relying on religious arguments in the public sphere? We think not. As explained elsewhere,[3] religious feelings assume religious *beliefs*. Muslims, who have certain beliefs about the impure nature of pigs, are offended if they see or even hear about pigs being driven around a mosque. Similarly, Christians who hold certain beliefs about the divine nature of Jesus Christ, are offended if the name Jesus is used as a trade mark for a company selling clothes, shoes, cosmetics, etc.[4] Although the above feelings are rooted in religious beliefs, the demand that they should not be hurt is not. It is based on a general moral requirement to show respect for the sensibilities of other people and to refrain, as much as possible, from actions that might hurt their feelings. The point is that in itself, this moral requirement does not depend on any religious premise, and its application is not limited to religious feelings. Thus, even those who hold that relying on religious arguments is problematic do not refer to this type of argument.

The Supreme Court of Israel seems to have accepted this point, although some of its pronouncements are potentially misleading. We refer mainly to the decision on what has become known as "The Pork Law," a law that imposes restrictions on the selling of pork in Jewish cities. Although Chief Justice Barak acknowledged that the purpose of this law is to protect the feelings of Jews, for whom pigs have an especially negative symbolic meaning,[5] he noted elsewhere that this law was "motivated by religious arguments."[6] This seems misleading to us because, as noted above, no religious premises are needed to be assumed in order to substantiate the claim that government bodies should take into consideration the effects of their actions on the religious (as well as the non-religious) feelings of their citizens.

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[3] Daniel Statman, "Hurting Religious Feelings," 3 *Democratic Culture* (2000) 199.

[4] Basic Trademark SA's Trade Mark Application [2005] RPC 25

[5] See HC 963/01 *Solodkin* v. *Municipality of Beth Shemesh* 58(5) PD 485 Sec. 2 of Chief Justice Barak's opinion; see also, Daphne Barak-Erez, *Outlawed Pigs: Law, Religion and Culture in Israel* (2007) ch. 8.

[6] *Solodkin*, *ibid.*, Section 21 about Chief Justice Barak's opinion.

A similar analysis applies to arguments that seek to establish the duty of the state to respect the *religious freedom* of its citizens. As we show elsewhere, these arguments are of two main types, one based on the importance of conscience, the other on the importance of culture.[7] As such, they are clearly not limited to religion but to a large extent are content-neutral. Pacifists are exempted from military service although the state explicitly rejects their worldview, and by the same token, believers enjoy various exemptions under the umbrella of religious freedom without the state committing itself in any way to accepting their beliefs. As a result, here too these exemptions create no particular difficulties for liberals concerned about government policies or actions being based on religious arguments.

The fact that claims about the protection of feelings and about religious freedom pose no special problem for those who wish to keep religious arguments out of the public sphere leaves much open regarding the validity and scope of these claims. It may turn out that feelings – including, but not limited to, religious ones – are entitled to much less protection than commonly thought, just as it may turn out that respect for conscience implies much narrower exemptions on this ground.[8] Our point is that even for thinkers like Rawls and Audi there is nothing illegitimate *a priori* in the demand that the state respect religious freedom or religious sensibilities.

What types of demands, then, *are* illegitimate in their view? These are demands that rely on religious premises, by which we mean premises about God ("God said that one ought not to do X"), about sacred texts ("It says in *Matthew* that X is deplorable"), or about religious authorities ("The Chief Rabbi ruled that X is forbidden"). But what exactly is meant by the term "rely" (on religious premises) in this context?

Consider a Christian politician deeply inspired by the New Testament who proposes a radical redistribution of property in society based on the politician's interpretation of the Gospel. In a clear sense, such a proposal *relies on religious considerations*, but this reliance does not seem worrisome and indeed it is not. To see why, we must distinguish between the different ways in which a politician, P, may rely on some religious considerations, R:

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[7] Gidon Sapir and Daniel Statman, "Why Freedom of Religion Does Not Include Freedom from Religion," 24 *Law and Philosophy* (2005) 467.

[8] See Daniel Statman, "Critical Reflections on the Exemption from Military Service on Conscientious Objection Grounds," 31 *Iyunei Mishpat* [Tel-Aviv University Law Review] (2009) 669 [in Hebrew].

1. P advances some government action, A, on the basis of R, but also, explicitly, on the basis of some non-religious consideration, NR, such that both R and NR would alone be sufficient (in P's view) to establish A.
2. P advances A on the basis of R only, but there are good NRs in favor of A, which P is either ignorant of or opposed to.
3. P advances A on the basis of R because there are no NRs for A.

Although in all three cases P relies on R, they are not troubling in the same way. In particular, it is difficult to see why one should object to option (1), which is the case of our Christian politician. Insofar as P acts on a reason, NR, that is "public" and (in principle) accessible to all citizens, then surely the fact that P adduces a further reason, R, which (let us assume) speaks only to some citizens, should not make the action illegitimate from a liberal point of view. If reason NR is sufficient to justify A, supplementing it with other reasons of whatever nature should not be seen as a problem. In option (2) the picture is less obvious. On the one hand, P is acting clearly and exclusively according to religious considerations. On the other hand, there are good non-religious reasons for A, which all citizens can understand and appreciate, therefore there is no need for liberals to be concerned. Liberals worry about restrictions on liberty that citizens cannot understand, restrictions which are assumed to constitute a violation of their autonomy, but this worry seems not to apply to option (2).[9]

Of the three ways in which P may be said to rely on religious considerations, option (3) seems to be the most troubling for liberals because in this case P advocates or supports some law or public policy only on the basis of religious premises. There are no secular reasons for this support, nor does the politician believe that such reasons exist. *If* the liberal argument against relying on religious considerations in the public sphere has a bite, this is where its bite is most relevant.

The conclusion of this section is that the number of cases that would be worrisome, at least *prima facie,* if we accept that religious arguments should not be admitted into the public sphere, is much smaller than what one

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[9] Not everybody would agree. Robert Audi, for example, says that "one has a *prima facie* obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, *and is willing to offer*, adequate secular reason for this advocacy or support" (Audi, *supra* note 1, at 687, italics added. In his view, then, the politician in option (2) would be acting wrongly because although there is a secular reason in favor of A, the politician is not willing to *offer* it.

might expect given the vast legal and philosophical literature on the topic. They do not include policies or laws aimed at the protection of religious feelings, nor policies or laws intended to protect religious freedom. Much more significantly, they do not include cases in which religious politicians add non-religious arguments to the religious ones, and perhaps not even cases in which non-religious arguments exist even if they are not mentioned.

This conclusion is significant because in the real world religious politicians and activists almost always go beyond religious considerations and recruit secular ones as well in their attempt to advance their goals. If they argue against abortion, they say more than "God is against it" and add pro-life moral arguments. If they argue for the closing of stores on Sabbath, they add arguments about the social and national value of the Sabbath. Most uses of "religious arguments" in the public sphere, then, are not problematic even *prima facie*.

It may be argued in response that although it is true that religious arguments presented in the public sphere are often supplemented by secular (i.e., non-religious) ones, this is a disingenuous act on the part of believers. While deep inside they believe that secular reasons are worthless, they realize that in a liberal society they cannot openly say so, and therefore they must "play the game" and use secular reasons as well. Therefore, the response continues, even cases that fall under option (1) should bother liberals, and cases of this type surely abound.

This is a serious charge against believers, accusing them of dishonesty and hypocrisy. Fortunately, the charge is unsubstantiated. As Eberle observed:

> I doubt that religious citizens, even the most devout, often support coercive laws on the basis of their religious convictions alone. I surmise that most of the citizens who employ their religious convictions to determine which laws they ought to support have both religious and nonreligious reasons for their favored laws.[10]

Why should we accept this surmise? First and foremost, because of the way in which most believers in most religions perceive religion. They do not perceive its norms or values as arbitrary commands of God, but as expressing moral wisdom that is often beyond the full apprehension of human beings. As argued at length by Ronald Green, "religion has its basis in a process of moral and religious reasoning common to all human

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[10] Eberle, *supra* note 2, at 5.

beings."[11] Because Jews, Christians, and Muslims (as well as other believers) view their religions as rational, in the sense of being grounded in reasons that refer to human flourishing and to basic notions of justice, when such reasons are recruited to support proposals for laws or for public policies, this is done in good faith. Christians who campaign against abortion and recruit philosophical pro-life arguments to assist their campaign truly believe in these arguments, just as Jews in Israel who demand that stores be closed on Saturdays truly believe the social and national arguments they adduce to justify this demand. The thought that when one subscribes to the dictates of religion, one unsubscribes (so to speak) from all moral and political thinking is a caricature of religion.

Second, if believers were motivated only by religious considerations, the criteria for selecting which laws and policies to advocate would reflect the religious importance of the laws and policies in question, that is to say, believers would try to advance laws and policies that reflect the most serious demands of their religion. But this is not what one finds in reality. From the point of view of Jewish law, smoking on the Sabbath is a far graver sin than driving a car (and even more so than riding *in* a car driven by another person), but whereas nobody even contemplates supporting a law that would forbid smoking on the Sabbath, religious neighborhoods and villages demand and receive permission to close off their streets to traffic on the Sabbath and on festivals. The aim of this policy is not to prevent the desecration of the Sabbath, because had this been the case, the demand would have been to prohibit all traffic across the entire country (at least across all Jewish neighborhoods and cities). The fact that the demand to close roads to traffic on the Sabbath applies only to Orthodox neighborhoods shows that the rationale behind this demand is to help the residents of these neighborhoods create a "Sabbath atmosphere" in their public space. Whether or not this demand should be accommodated is irrelevant to the present discussion. Our point is just that when Orthodox politicians in Israel try to advance regulations restricting traffic on Saturdays and on Jewish festivals, they are not dishonest when they use non-religious reasons to support such restrictions, especially when they resort to national and cultural reasons that talk about the Jewish character of the state of Israel and to reasons that talk about the right of religious communities to some kind of self-rule in their areas of residence.

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[11] Ronald Green, *Religion and Moral Reason* (1988) xi.

In sum, cases of clear reliance on religious arguments to advance some law or public policy are less common than often thought. Nevertheless, they do exist and definitely can exist, and therefore the theoretical problem they raise still must be addressed: Is there anything wrong in relying on religious arguments to promote laws or public policies? In the next section we present the answer given by the Supreme Court of Israel to this question.

3. The Supreme Court of Israel on religiously-motivated public actions

As is well-known, the role of religion in Israel is much wider than in other liberal democracies. The most noteworthy illustration is the case of marital law, according to which Israeli citizens can marry only in a religious ceremony conducted by an official of the relevant (Jewish, Christian, or Muslim) religious authorities. Despite this remarkable status that religion enjoys, there is relatively little discussion on the legitimacy of resorting to religious considerations in decisions that affect the public at large. The Supreme Court of Israel is no exception. Although for the last three decades the court has been one of the most activist supreme courts in the democratic world, it has refrained from reviewing the legitimacy of religious legislation, especially in matters regarding personal status. This is not surprising, given the nature of Israeli constitutional law. Israel does not have a regular constitution, and it was only in 1992 that it legislated its first semi-constitutional laws – known as the "Basic Laws" – the most important of which is "Basic Law: Human Dignity and Liberty." Therefore, before 1992, judicial review of primary legislation on any grounds was not a real option. But even after the basic laws were enacted, it is unclear whether they provide sufficient resources to review and possibly annul Knesset legislation based on religious arguments. Moreover, from a political point of view such a move would be too radical for any court to take without undermining the trust it enjoys in society. It would almost certainly backfire and lead to the Knesset acting to limit the power of the Supreme Court.[12]

Judicial review, however, is not limited to primary legislation (in Israel this means legislation by the Knesset), but extends also to secondary or

[12] Threats to do so have become quite prevalent among religious right-wing politicians in the last decade because of what they see as a "leftist" or "post-Zionist" agenda of the court. In the current political situation we see no real chance that these threats will materialize, but things could change if the court declared all religious legislation unconstitutional.

delegated legislation, enacted by the executive branch: government ministers, mayors, and so on. In this section we present the reasons suggested by the court for the illegitimacy of secondary legislation based on religious grounds and discuss them critically.

When the court reviews decisions made by the executive branch, it refers to questions about *authority* ("was the relevant body acting within its authority when deciding to do X?") and to questions about *discretion* ("is the decision a reasonable one?"). In the present context, the arguments offered by the Supreme Court were all at the level of authority. Their conclusion was that executive bodies, especially local municipalities, have no authority to make decisions regarding religious affairs. We are not familiar with a similar view held by other courts in the world.

The first expression of this view by the Supreme Court appears in the 1954 *Axel* affair. The facts were as follows. Mr. Axel and others filed a request with the municipality of Netanya (a city north of Tel-Aviv) for a license to operate a food store. The municipality refused to grant them a license unless they agreed not to sell sausages manufactured from pork. It argued that its authority to impose this condition was grounded in a local Netanya regulation prohibiting the sale of pork anywhere in Netanya. In response, Axel et al. petitioned the Supreme Court, arguing that the regulation was legally void because the municipality had no authority to enact it.

The court (Chief Justice Olshan and Justices Vitkon and Zussman) accepted the petition. They reasoned as follows:

> Insofar as the problem is national rather than local, commonsense requires that it should be within the authority of the Knesset and not within that of the municipality. Moreover, even when a problem like this has special significance in a specific city, it is still a matter for the Knesset, which, depending on the local conditions, may grant some specific municipality the power to deal with this problem according to local conditions. Insofar as the Knesset has not done so, the municipality is not allowed to take upon itself the authority to enforce on its residents a solution to a national problem as it [the municipality] sees fit.[13]

The reason why regulations against the sale of pork are "a general and national problem" is that they touch upon fundamental issues regarding the nature of the Jewish state: Can its Jewishness express itself in restrictive laws, such as the one under discussion, or do such laws contradict its democratic nature and thus should be ruled out? In the court's view, such issues

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[13] *HCJ 122/54 Axel v. Mayor, Council Members and Residents of the Netanya Area, 5 PD 1524.*

must be decided by a body that represents all groups in society, that is, by the Knesset. Local bodies have no authority to make such decisions.

The same ruling was adopted a few years later in the *Freidi* case, which also dealt with local regulations of the sale of kosher meat. The court concluded by saying:

> We cannot allow a body that has authority to make secondary legislation on local issues to regulate religious problems in the guise of regulating the sale of meat in some specific place. It is the Knesset and not local municipalities that ought to regulate religious affairs.[14]

Why exactly must religious affairs be decided by the Knesset? Court decisions in this matter provide three different answers:

(a) Local decisions about the role of religion in public life have implications at the national level, therefore it is the national body – the Knesset – that must make them.
(b) Decisions regarding state and religion are of utmost importance, hence democracy requires that the Knesset make them.
(c) Decisions about the role of religion in public life involve a violation of rights, and only the Knesset has authority to approve such violations.

Let us review each of these answers.

(*a*) *Implications at the national level*

We concede that local decisions about the role of religion in the public sphere, e.g., about allowing or prohibiting the sale of pork, may have implications beyond the boundaries of the local body. The reason is that such decisions may serve as a model for other local bodies facing similar problems, or for other parts of the executive branch that make decisions about religion. One can see the logic of arguing that it is the Knesset that should instruct all executive bodies about the desirable policy vis-à-vis religion rather than allowing it be decided in some remote corner of the country. Nevertheless, we do not find this argument convincing. First, the argument leaves too limited legislative power in the hands of local bodies. After all, not only decisions regarding religion may have implications at the national level, but many other decisions as well, such as the regulation of traffic

[14] HC 72/55 *Freidi* v. *Municipality of Tel Aviv*, 10 PD 734, 751-752.

(e.g., raising parking fees for non-residents), the accommodation of minorities (requiring public signs to be written in both Hebrew and Arabic), the hosting of various controversial demonstrations (like the Pride Parade), and so on. If a city like Tel-Aviv made any of these decisions, it could definitely encourage other cities to imitate them, but nobody would contend that because of that it lacked the authority to make them. It is difficult to see why decisions about religion should be any different.

Second, the idea behind delegating authority to cities and regional councils to make decisions about their everyday life stems from the recognition that different cities have different needs, different populations, and different ways of conducting their lives. It reflects the recognition that there is no single template for living together, coupled with the understanding that local residents are best equipped to decide what is best for their community. But precisely for these reasons religious affairs within some local authority should be decided by that authority rather than by the Knesset. If a strong majority of residents in some city prefers pork not to be sold within the boundaries of their city, why should the residents of *other* cities interfere to enforce a uniform policy across the country?

(*b*) *Democracy and decisions about religion*

Why should the idea of democracy entail that decisions on religious affairs are within the exclusive authority of the Knesset? The answer rests on two premises. The first was formulated succinctly by Chief Justice Barak:

> One aspect of democracy is the view that decisions that are essential to the lives of citizens and that touch on matters of principle must be decided by the body that was elected by the people to make such decisions. Social policy must be shaped by the legislative body.[15]

Thus, although democracy can and should tolerate some forms of decentralization, decentralization must be limited. The fundamental forms of living together ought to be decided upon by the majority of citizens in the country.

The second premise is that decisions on religious affairs "are among the most difficult problems in the state."[16] The conclusion that purportedly follows from these premises is that democratic principles deny municipalities the authority to make their own regulations regarding the sale of pork.

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[15] HC 3267/97 *Rubinstein* v. *Minister of Defense*, 52(5) PD 481, 510-511 (1998).

[16] *Freidi*, *supra* note 14.

But why, and in what sense, are decisions on religious affairs more "essential" to the lives of citizens than other decisions made by local communities? Why can municipalities legislate in their area of jurisdiction against, for example, the sale of shark meat (maybe on animal rights basis), but not against the sale of pork? One answer might be that religious affairs tend to stir up social tension, conflict, and violence, especially when decisions on such affairs are made at the local level. By contrast, when the Knesset makes them, it is clear to all citizens where the majority lies, and therefore the feelings of unfairness and exclusion that often underlie social tension are less intense.

We do not find this answer convincing either. First, it is true that some controversies about the role of religion in the state result in tension and conflict, but so do other controversies about various social and national affairs. Second, and consistent with the argument made above, we see no reason to assume *a priori* that the way to handle the presumed potential tension is to move the relevant decisions to the Knesset rather than allowing them to be decided at a local level. Precisely because of the subtlety of these decisions, it makes good sense to allow the local bodies, which are most familiar with the nuances of their communities, to make the decisions. Third, and in the same vein, why assume that religious (or non-religious) members of society would be more ready to accept decisions on religious affairs made by the Knesset than those made by their local municipality? For those whom a certain decision would offend, the fact that it was made by the Knesset would provide little comfort. If anything, it may increase their frustration by creating the impression that although they enjoy significant political power in their own region, this power is unfairly neutralized by the Knesset. They may see this as yet another case of tyranny by the majority.

The second explanation for the democratic demand that religious affairs be decided by the Knesset is based on the assumption that such decisions necessarily involve a violation of rights. More accurately, not any decision is assumed to have this character but decisions *in favor* of religion. Such decisions violate rights because whenever a government body acts on religious reasons, it violates the freedom from religion of the non-religious citizens. Because violations of rights are very worrisome from a democratic point of view, democratic principles demand that only the highest democratic institution, namely the Knesset, should have the authority to approve them.

The argument about the right-violating nature of religious legislation is the most interesting one among those put forward in support of entrusting

decisions on religious affairs to the Knesset. It is also stronger than the others, in the following sense: The other arguments do not show that there is anything intrinsically problematic with the regulating of religious affairs (e.g., in a prohibition against the sale of pork), but only with the fact that local bodies are allowed to make such regulations. By contrast, the latter argument implies that such regulations are problematic even when carried out by the Knesset. Let us then turn to examine it.

(c) *Religious legislation and freedom from religion*

In the early 1990s, the Ministry of Trade and Industry refused to grant a firm called *Mitrael* a license to import beef because *Mitrael* was importing non-kosher meat, and the government wished to limit such imports. *Mitrael* applied to the Supreme Court arguing, inter alia, that the Ministry had no authority to condition the import of meat on the state of its *kashrut*. Justice Cheshin accepted this claim arguing as follows:

> The meta-principle of religious freedom and freedom from religion implies the rule that one should not enforce religious commandments upon the non-observant, and those who are not interested in observing the commandments of religion… Only on the basis of a law of the Knesset – at a national level – can one enforce religious commandments. The authority for such coercion must not only be determined by primary legislation, but such determination must be specific and explicit.[17]

This is the logic of the argument: Restrictions on liberty that are based on religious considerations are restrictions on liberty *in the name of religion*. Therefore, such restrictions infringe upon the right of *freedom from religion* of the non-religious citizens, who are coerced to do such and such, or refrain from doing such and such, merely because this is what religion demands. Therefore, only the Knesset has the authority to legislate on religious affairs (to "enforce religious commandments").

As indicated above, this argument can lead to the relatively modest conclusion reached by Justice Cheshin, namely, that only the Knesset can legislate on religious affairs, but it can also lead to a stronger conclusion, namely, that such legislation is inherently wrong because it inevitably violates a fundamental right.

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[17] HC 3872/93 *Mitreal* v. *The Prime Minister and the Minister of Religious Affairs*, 47(5) PD 485, sec. 5 of Justice Cheshin's ruling.

The idea that freedom *from* religion is somehow included in or entailed by freedom *of* religion is prevalent among jurists and courts.[18] But the idea that freedom from religion implies the illegitimacy of religious legislation (at least if enacted through secondary legislation) is, as far as we know, an innovation of the Supreme Court of Israel.

Yet we do not think it is a good innovation. Elsewhere we tried to show that the fact that restrictions on liberty are based on religious considerations does not make them any more objectionable than restrictions based on other considerations.[19] Because unrestricted movement is valuable, blocking a road to traffic is *prima facie* problematic, but as far as the protected interest (movement) is concerned, it makes no difference whether the road is closed for religious reasons (respect for the Sabbath), national reasons (a military parade), or any other reason (the Pride Parade). The right in question protects free *movement*, and from this perspective all obstructions to movement are treated equally, whatever their source or motivation. Therefore, if people's freedom of movement is violated for religious reasons, they have only one ground for complaint, namely, that *their right to free movement was violated*. They do not have an additional complaint, namely that their freedom from religion was violated.

This line of criticism seems to entail that the notion of freedom from religion is empty, that people have no separate right to protection *from* religion. But this is not so. People do have a right for protection from laws and regulations that would coerce them to participate in religious ceremonies, for instance, make them recite a prayer, bow in front of the altar, wear religious items of clothing. Instances of this nature represent an attack on their conscience, or their identity, similar to the one committed when *believers* are forced to act in ways that contradict their dearest principles. But these instances constitute a small subcategory within the wider category of laws or regulations enacted for religious reasons. Most of them impose restrictions on liberty that cannot reasonably be described as involving participation in religious acts or ceremonies, and therefore are not violations of *rights*.

Consider again the *Mitrael* case. Suppose that the government imposed limits on the import of meat for reasons that have to do with animal rights. Suppose further that these reasons entailed the same type of economic loss

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[18] See, for example, Kathleen Sullivan, "Religion and Liberal Democracy," 59 *U. Chi. L. Rev.* (1992) 195, 197; Samantha Knights, *Freedom of Religion, Minorities, and the Law* (2007) 43; Kent Greenawalt, *Religion and the Constitution – Free Exercise and Fairness* (2006) 149.

[19] See *Sapir and Statman, supra* note 7.

for *Mitrael* as did the restrictions based on kashrut laws. In this case the firm would definitely have a claim against the projected harm to its business, but it would not have an additional claim for the protection of its right not-to-be-limited-by-animal-rights. There would, therefore, be no reason to think that only the Knesset could impose such a limit. In our view, the same holds true for limits on imports based on religious reasons. Individuals and firms definitely have a *prima facie* claim against laws imposing restrictions on their free trade. But the fact that such restrictions have their origin in religion raises no special concern and grants these individuals or firms no special protection.

It is time to tie some loose threads. In the previous section we explained what type of religious arguments would be problematic *prima facie* when resorted to in the public sphere. We suggested a narrow understanding, according to which the relevant arguments are such that include in their premises claims about God, sacred texts, or religious authorities. In the present section we introduced three arguments offered by the Supreme Court of Israel to substantiate the claim that decisions on religious affairs are not within the authority of secondary legislators. We can now better appreciate the difference between the first two arguments and the third one. If the requirement that religious affairs be decided by the Knesset is based on the fact that such affairs have implications for all citizens, or on the fact that they are issues involving deep social disagreement, then the expression "religious affairs" is understood in a much wider sense than that developed in Section 2. It would include laws or policies aimed at protecting religious feelings, religious culture, or religious communities, not only laws and policies that are strictly based on theological propositions.

By contrast, the third argument (the one based on the assumed violation of freedom from religion) is more compatible with the stricter notion of religious considerations defended above. The reason is simple. If the purpose of some law is to protect the feelings of some group of citizens, then the contingent fact that these citizens are religious does not justify the conclusion that they merit any weaker protection. The duty to respect other people's feelings is a moral duty, not a religious one. Therefore, enforcing such duty (at the national or the local level) cannot be seen, even *prima facie*, as a violation of the right to freedom from religion. Such a violation may occur (again, at least *prima facie*) only when the restriction imposed is grounded in religious reasons in the strict sense. In such cases, non-religious members of society cannot regard the duty imposed on them as a moral one, as in the case of protecting feelings, but arguably must perceive it as flowing from religion, as limiting their liberty *in the name of religion*.

Our own conclusion, however, is that none of these arguments is convincing. There are no good reasons for all religious affairs to be decided by the Knesset. On the contrary, it would be a good idea for many decisions in this area to be delegated to local bodies, an idea that is also consistent with the basic teachings of multiculturalism.[20] We find the understanding of the Supreme Court of the right to freedom from religion to be misleading. This right is violated only in cases of coercion to carry out religious acts, strictly speaking, mainly when non-believers are coerced to participate in religious ceremonies. Most of what falls under the rubric of "religious affairs" does not fit this description, therefore merits no special protection under the above right and need not be decided specifically by the Knesset.

[20] For the prevalence of multiculturalism in current philosophy and practice, see Will Kymlicka, *Multicultural Odysseys* (2008). In particular, see his quotation from Nathan Glazer "we are all multiculturalists now" (p. 72).