

New York's Religious Corporation Law: An Exercise in Legal Gymnastics

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New York's Religious Corporation Law is a legislation of 1909, which essentially consolidated various earlier pieces of legislation from 1784. While it contains specific provisions concerning the organization of certain denominations, it provides for two general articles whereunder other denominations may incorporate: Article 9 and Article 10.

These provisions are blatantly unsatisfactory options for other denominations. This article discusses some salient aspects of the RCL, and how New York courts have dextrously avoided nettlesome constitutional issues by interpreting the RCL pragmatically.

Articles 9 and 10: The Two Statutory Provisions Hitherto Used by Unspecified Groups

Article 9 deals with "free churches" A "free church" is one in which "no charge is generally to be made for the seats and pews of the church." *Application for New York Soul Clinic, Inc.*, 208 Misc. 612, 615 (N.Y. Sup. 1955). The hallmark of a "free church" is free pews.

This feature is categorically declared in Section 183:

§ 183. Seats and pews to be free

The seats and pews in every church, building or edifice, owned or occupied by any corporation organized under this article, shall be forever free for the occupation and use, during public worship, of all persons choosing to occupy the same, and conducting themselves with propriety, and no rent, charge or exaction shall ever be made or demanded for such occupation or use.

A pew is a long bench used for seating members of a church's congregation. *Diamond v.*

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*Art Contracting Co.*, 147 Misc. 88, 89 (N.Y.Sup.1933) (“The term ‘pews’ seems to have had its origin in the Dutch ‘puye,’ and to denote a seat inclosed in a religious edifice.”). It is a sacred part, and a valuable asset, of the church, *see, e.g., Church of Our Lady of Vilna v. Archbishopric of New York*, 2007 WL 1575509, 2 (N.Y.Sup. May 29, 2007) (referring to “many of the Church’s sacred items, including the pews . . .”). In fact, churches that are not “free churches” may sell pews, and pewholders may correspondingly buy, sell, transfer, or gift it, *see, e.g., Witthaus v. St. Thomas’ Church in City and County of New York*, 161 A.D. 208, 209 (1<sup>st</sup> Dept. 1914). Thus, absent pews, a religious organization cannot be a “free church,” *Emmett v. American Equitable Assur. Co. of N.Y.*, 194 Misc. 529, 531 (N.Y.City Ct. 1949) (“a church is not a church without pews”).

Pews appear to be an integral feature of western religious practice. However, they are unknown in many other religions. For example, Hindu temples do not have “pews”. Nevertheless, such groups have been known to have incorporated under Article 9 as a “free church”. Talk of a contradiction in terms, a “Hindu church”.

Should such Article 9 temples be mandatorily required to install “pews” and keep them free as required by Article 9? Or should their failure to install pews subject them to revocation of the very incorporation itself as an error? The statute gives no guidance, but both options are unacceptable from a constitutional perspective.

Besides, groups could have a religious belief in mandatory tithing, jaziya, or similar charges. They cannot be prevented from living by those beliefs. Section 183, which requires “free seats and pews,” would appear to forbid this.

Article 9 contains other problematic provisions. Sections 180-182 prescribe qualifications for trustees which can't survive scrutiny. For example, all trustees should be U.S. citizens. This requirement is *prima facie* unconstitutional under the Equal Protection Clause:

As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.

*Bernal v. Fainter*, 467 U.S. 216, 219-220 (1984). *Accord, DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir.1999) (“It is undisputable that our constitution provides due process and equal protection guarantees to aliens as well as citizens.”). State statutes have been routinely invalidated on this ground, *see, e.g., Sugarman v. Dougall*, 413 U.S. 634 (1973) (voiding law barring aliens from employment in permanent positions in the competitive class of the state civil service); *In re Griffiths*, 413 U.S. 717 (1973) (voiding law excluding aliens from eligibility for membership in the State Bar); *Board v. Flores de Otero*, 426 U.S. 572 (1976) (voiding law that excluded aliens from the practice of civil engineering). As the United States Court of Appeals for the Tenth Circuit reiterated, “Under Equal Protection Clause, states on their own cannot treat aliens differently from citizens without a compelling justification.” *Soskin v. Reinertson*, 353 F.3d 1242 (10<sup>th</sup> Cir. 2004).

Just what is a state interest in prohibiting aliens or non-citizens from being trustees of an Article 9 corporation? We cannot conceive of any.

Moreover, Article 9 also mandates that a majority of the board should *not* be “ministers of the gospel or priests of any denomination”, and that they be New York residents. This would also

appear to be an equally clear violation of the First Amendment. What concern is it of the State of New York if a religious organization chooses to have ministers or priests in its board, or that several board members are not New Yorkers? No such restriction appears in the provisions for other corporations.

Article 10 provides for congregational groups, but imposes restrictions on structure and governance. For example, Section 195, R.C.L. prescribes a 3-year term of office for elected trustees. This 3-year restriction could well be subject to religious objections. For example, many faiths have a religious belief in numerology - e.g., tithing - and may find a 3 year term religiously unacceptable.

The problem is further exacerbated by the fact that Articles 9 and 10 do not appear to be mutually exclusive. Section 190 – the first section under Article 10, RCL – enumerates a number of religious denominations to which Article 10 is *not* applicable and declares that

This article is applicable to churches of all other denominations.

R.C.L. §190. Article 9 entities are not amongst those enumerated.

In other words, Article 10 provisions would appear to be fully applicable to Article 9 entities also. That only adds to the confusion and unacceptable statutory prescriptions.

#### New York Courts' Approach

Clearly, if the RCL provisions were to be strictly construed, it would be requiring “minority faiths . . . to distort their religious structures to conform with” the legal category, *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)). Religious groups that are not one of the enumerated ones would be unable to

incorporate, which would be prima facie unconstitutional. The “clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,” *Larson v. Valente*, 456 U.S. 228, 244 (1982).

But New York courts appear to have taken a pragmatic approach in construing this mish-mash of a statute. Thus, for example, courts have held that a religious corporation may exist “in fact without being legally constituted.” *Matter of Kaminsky*, 251 A.D. 132, 136 (4<sup>th</sup> Dep’t 1937), *aff’d mem.*, 277 N.Y. 524 (1938); *Kroth*, 105 Misc.2d at 910. Indeed, even with respect to applicability of the RCL, courts have not restricted themselves to the certificate of incorporation; instead, they have looked at the totality of the situation. *Id.*; *see also Watt Samakki Dhammikaram, Inc. v. Thenjitto*, 166 Misc.2d 16, 19 (N.Y.Sup. 1995) (“The only conclusion that can thus be drawn is that the plaintiff corporation was established primarily for religious purposes, continues to operate as such, and thus falls within the ambit of the Religious Corporations Law”).

Courts have also held that mere incorporation under a specific Article of the RCL does not mandate a specific structure of a religious organization; in fact, such incorporation is far from conclusive. As the Appellate Division held:

The mere act of incorporating under article 10 was not determinative of the issue of whether Calvary was independent or hierarchical. Special Term reasoned that if Calvary intended to become an independent church it would have incorporated under article 8. We find no support for this conclusion.

*New York Dist. of Assemblies of God v. Calvary Assembly of God*, 64 A.D.2d 311, 314 (4<sup>th</sup> Dep’t

1978). Consistent with this, another Appellate Division has held that a religious corporation under Article 10,

*for the purpose of exercising its contractual right to withdraw must be considered a congregational church, is governed by Religious Corporations Law article 8.*

*York Annual Conference of the Methodist Church v. Nam Un Cho*, 156 A.D.2d 511, 514 (2<sup>nd</sup> Dep't 1989).<sup>2</sup> See also *St. Matthew Church of Christ Disciples of Christ, Inc. v. Creech*, 196 Misc.2d 843, 851 (N.Y.Sup. 2003); NYJUR 2d, *Religious Organizations* § 5.

But then, what is the implication of incorporation? If, for example, an Article 10 corporation wants to have a 2-year term for its board, or wants to have a self-perpetuating board, the mandatory language of Section 195 would appear to forbid that. The answer may lie in construing these provisions permissively, so that mandatory statutory provisions are, in view of the First Amendment, construed as discretionary or default provisions.

“[T]he line between mandatory and directory statutes cannot be drawn with precision,” *People v. Karr*, 240 N.Y. 348, 351 (1925) (“shall” construed as “not mandatory”); accord, *People ex rel. Huff v. Graves*, 277 N.Y. 115, 119-120 (1938); *Matter of King v. Carey*, 57 N.Y.2d 505, 513 (1982) .

Whether a statute \* \* \* is framed in mandatory language is not necessarily of paramount importance in determining whether the provision in question is in fact mandatory or permissive. Rather, the considerations which control are the intent of the provision, gleaned from the entire [statute] and the surrounding circumstances, the

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Article 8 concerns incorporation of Churches of the United Church of Christ, Congregational Christian and Independent Churches.

purpose of the provision, the policy to be promoted, and the results which would obtain if one conclusion were followed to the exclusion of another.

*State v. Town of Wallkill*, 170 A.D.2d 8, 10-11 (3<sup>rd</sup> Dept. 1991) (citations omitted). Here, the “policy to be promoted” is simply the First Amendment, and a contrary conclusion would lead to an unconstitutional result.

By this construction, Section 5 would provide the outlet for complete First Amendment freedom. That provision indisputably applies to all religious corporations in New York; it is part of the “General Provisions” of the RCL. Providing for the “powers and duties” of such corporation’s trustees, it details the procedure for adoption and amendment of bylaws in mandatory terms:

By-laws may be adopted or amended, by a two-thirds vote of the qualified voters present and voting at the meeting for incorporation or at any subsequent meeting, after written notice, embodying such by-laws or amendment, has been openly given at a previous meeting, and also in the notices of the meeting at which such proposed by-laws or amendment is to be acted upon. By-laws thus adopted or amended shall control the action of the trustees

The Section goes on to impose restrictions in certain respects, e.g., with respect to “calling, settlement, dismissal or removal of its minister,” *id.* Significantly, however, it does not impose any restriction on bylaws based on mere incorporation under a specific article of the RCL.

Thus, a religious organization’s bylaws should be supreme under Section 5. In other words, the mandatory language “shall” of Section 5 should be construed mandatorily, and overriding the other provisions which *also* contain the same mandatory language. That would

permit any religious organization to function under its own Bylaws. While this would appear to permit certain provisions of the RCL to be trumped by bylaws, it appears to be the only way to save the statute from constitutional infirmity. That is, of course, short of the state legislature enacting a cleaned up legislation which would not require interpretational acrobatics.