

THE FAITH AND THE LEVIATHAN-RELIGION AND STATE

SOHAM MADHUKAR SAKPAL¹

¹Government Law College, Mumbai, Maharashtra, INDIA

ABSTRACT

As I start writing this article one of the major state of the Indian union is mired in a controversy whose origin lies in that archaic era when instead of a modern day highly institutional governments there were monarchies, whose writ was subject to nothing but God himself or herself. The object of this article is not to critique the actions of certain states against one's profession of faith or to delve into the court's interpretation of any law but it is to discuss the origin of the conflict between the state and the religion in the World at large and in India(discussed in part 1 of the article) and religion's post Independence and present day Constitutional setting.(Discussed in part 2 of the Article). Before we start with addressing the focal questions of this article we must first try and find the answers to some basic questions like. What or who gave birth to this State ? . How did religion or faith rise to such prominence where the state began to feel threatened by it and even warrant state's intervention to contain its mystical, ethereal power over the state's subjects?

KEYWORDS: State, Religion, Faith, Hobs, Leviathan

THE STATE

The origin of the State lies in man's avarice and fear. As the wheels of imagination of the primordial man began to turn he abandoned his old occupation of hunting and switched to farming, pretty soon people started cohabiting in groups which transformed into villages, cities and metropolises. As this exponential transformation and greed for more began he realised that to satiate his greed he needed to keep in check the greed of others, who might try and deprive him of his possessions by using might or force. Thus began the saga of institutionalisation, where all the parties having vested interests came together to limit their own rights and subscribe to a general set of rules for harmonious cohabitation, thus abandoning the old practice of "Might is right". Thomas Hobbes the political philosopher describes it thusly, "The origin of all great and lasting societies consisted not in mutual goodwill men had for each other but, in the mutual fear they had for each other." To govern these rules man created institutions which after centuries of metamorphosis, a creature was born, Thomas Hobbes calls it The Leviathan, we know it as the State (or the Government). Hobbes describes this state as " *but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which the sovereignty is an artificial soul, as giving life and motion to the whole body*".

THE FAITH

Now that we have answered the first question we move on to the second, that is how did religion rise to such prominence?

History is replete with nothing but war and misery with short interludes of ephemeral peace and tranquillity. In such torturous times men and woman sought the solace and care of their almighty father. In the West that was Jesus in the Middle East Prophet Mohammad and in the East it was Gautum Bbuddha, Mahavir and a pantheon of Hindu Gods and Goddesses. Average men and women began reposing their faith in their respective religion so much so that religion became an indispensable part of their everyday life. Thus it was the popular mandate that led to the rise of Religion. Even Monarchs across the world became subjected to every religion's central tenets. These central tenets or testaments or edicts were the seeds of Rule of Law. The question is: How so? Political Scientist Francis Fukushima explains that Rule of the law means a law to which even the Sovereign(the then Monarchs) were subject to. Religious laws superseded even the common law and thus were not amenable to change. Since these laws(religious) had a popular backing and were socially acceptable to the public at large the Sovereign had to function within the constraints of said laws. Thus religion acted as an effective check against the absolute powers of a Sovereign. And the Clergymen, in the west, The Imams or the Ulemas in the Middle East, and the Brahmins in the East became the sole custodians of these basic tenets or religious law. Thus began the advance of the state.

STATE AND RELIGION LOCK HOMS

WEST

Perhaps there's no other religious institution in the world which is as organised as the Christian Church. Its ascendancy began in the 3rd century when the Roman

Emperor Constantine while on his deathbed was converted to Christianity, thus the Romans accepted Christianity as their State Religion. State and Religion thus merged for the first time in History. For centuries, clergymen using their spiritual powers legitimised and blessed the rules of the Sovereign. But the Church felt the need of autonomy since Sovereigns willy nilly appointed and dismissed Clergymen. To become autonomous the Church had to be financially independent. To this the church found out an ingenious solution. Since ancient times, across the world, societies permitted inter-marriage between cousins. This was done so that the estates or the properties could be consolidated and retained within the family or extended family thus preventing the leakage of wealth. In the west, the wife of an elder brother, in event of his death without leaving a son, could remarry his younger brother so that the property could remain consolidated within the close family. The Church passed a decree by which it banned all such intermarriages. The estate of any person without any legitimate heir would now pass on to the church, simultaneously the church also started encouraging voluntary donations, pretty soon the Church owned about 1/3 of the quarter of land across Europe. Now the Church felt sure of its footing and was ready to take on the state. The church also imposed a religious tax called the Tithe which also provided it with a steady source of Income. Popes could now hire mercenary armies to discipline recalcitrant Monarchs, it even controlled many territories in Italy. Thus began the internecine conflict between state and church. England was perhaps the first country to sever ties with the church (Rome was the then seat of all of christianity) When King Henry VIII declared himself as the ruler of the Church of England.

However the credit of the theory of separation of the State and the Church must go to John Locke. In his social contract posited in the book, A Letter Concerning Toleration, Locke posits that the writs of the church must be confined within the four walls of the church and its clergymen since the church was a "voluntary community of members". Locke reasoned thusly. "That church can have no right to be tolerated by the magistrate, which is so constituted that all who enter it *ipso facto* pass into the allegiance and service of another prince". If this were to be tolerated, "the magistrate would make room for a foreign jurisdiction in his own territory and...allow for his own people to be enlisted as soldiers against his own government".^[8] This has been interpreted by historians as a reference to the Catholic Church, with the Pope being the prince to whom Catholics owed allegiance. Voltaire defended some level of separation but ultimately subordinated the Church to the needs of the State.

Presently Christianity is the official religion of England with the Queen being the Supreme Governor of the Church of England. While the United States has no official

religion. Freedom of Religion in the US is guaranteed by the First Amendment.

INDIA

Throughout ancient and mediaeval history India has never been under the canvas of one ruler or government except for short interludes. The Indian religion was divided into 4 fold hierarchy, with Brahmins at the top and Sudras at the bottom, the legitimacy of this segmentation was derived from Dharmashastras or as the British called it the Text of Manu. Thus Indian law was deeply rooted in religion, and Brahmins were the sole proprietor and enforcer of those laws. Kings derived their legitimacy from Brahmins who officiated their coronation and anointed them. Even Chatrapati Shivaji Maharaj could not call himself a Chatrapati without being coronated which was presided over by a Brahmin. The Brahmins maintained their "social supremacy" by restricting the access to education, this they did by memorising the religious text (vedic texts) and restricting written form of those texts thus effectively depriving common people of chance for development. But Unlike the Church in the West which had an organisation with a central figure at its head i.e. the Pope, the Brahmins in India were never organised, they themselves were horizontally divided, e.g. A Brahmin performing coronations will never perform the rituals of a funeral. Thus Brahmins without any organisation of their own relied on the Kings for their sustenance while the Kings relied on the Brahmins for legitimacy of their rule. However the reader should note that at no point did the kings had the authority to dismiss Brahmins unlike their western counterpart where Monarchs could dismiss the Church's clergymen from their appointment. Thus in Ancient India religion superseded the State.

The Codification of Indian Law began during the "brutish rule" of the East India Company when Warren Hastings ordered to compile Gentoo Code (or A code of Gentoo Laws or Ordinations of the Pundits) which was translated from *Vivādārṇavasetu* (A Hindu Law Digest) in Sanskrit to Persian by Pandits and from Persian to English by Nathaniel Brassey Halhed, a British grammarian. Thus, initially even the British, unbeknown to this country's customs and traditions accepted the centrality/ authority of Religious laws to adjudicate matters for their new subjects. However this changed when the First Law Commission under the Chairmanship of Lord Macaulay recommended a comprehensive Penal code (Indian penal code) which did not rely on religious laws, based on Based on a simplified codification of the law of England at the time, elements were also derived from the Napoleonic Code and from Edward Livingston's Louisiana code of 1825 (referred from wikipedia-History of IPC).

The East India Company officials from 1757 to 1828 (when their meteoric rise to power began) steered clear from temptations of dallying/ interfering into the religious matters of the natives, probably either because they hadn't any iota of idea about the ways of a native's life or because they didn't want to incite discontent amongst the masses whose favour they sought to bolster their own ranks which were employed to battle with the native royalty. The first act of intervention into the religious sphere was during the Governor Generalship of William Bentick who issued the Bengal Sati Regulation which sought to outlaw the practice of Sati at the behest of Raja Ram Mohan Roy. This attempt of social reform was viewed by the more orthodox/ conservative elements of the society as an interference in Hindu religious affairs and violation of George III's Statute 37, which had assured Hindus complete autonomy over religious matters. However what started as a social reform now took on a more insidious turn when the East India company passed the Religious Disabilities Act 1850 which sought to amend the Hindu and Mohammedan Property Law. This law removed all the restrictions on the son who has converted his religion inheriting the property of his Hindu or Mohammedan Father. The prevailing opinion was that this law gave incentive to abandon one's own faith in favour of another, preferably to Christianity. The culmination of such interventions led to the bloody mutiny of 1857 whose immediate cause was that the Company had deliberately hurt the religious sentiments of the natives. The Company learnt their lesson the hard way, in 1858 the British Crown succeeded the company as its ruler, Lord Canning the First Viceroy of British India announced the Queen's proclamation which promised "non intervention in matters of religious belief or worship within British India", thus after 1858 the British policy was to create difference among different religions (Divide et Impera) and the project of social reform was left to the initiative of the native leaders.

PART II

The British found the country divided and left the country divided in 1947. While the esoteric debates on the various articles of constitution echoed in the constituent assembly the country for whom these articles were meant to govern was waging a crusade with itself. The cause of this conflict was again, Religion.

The principle of neutrality of state or the ambition of a secular state was first envisioned in the Nehru Report 1928 which said that There shall be no State Religion; men and women shall have equal rights as citizens. It also did not provide for a separate electorate for any community. The Constituent Assembly took a leaf out of the Nehru report and extended this principle of neutrality.

From 3rd December to 6th December the Constituent assembly debated on what religious rights should

the citizens of a newborn country possess, keeping in mind the central role religion plays in an average Indian's life to what extent should the state be neutral but also be not blind to the modern exigencies of reform and social welfare. What degree of autonomy should be afforded to individuals and religious groups. These intractable questions vexed the learned members of the Assembly and are still cause for vexation to the Hon'ble courts. But the principle that India should and will be a secular country was never the matter of debate, K.T batting for secularism thundered in the assembly that " - religion because that is by its very essence, a non-worldly activity, and as such the State which is--may I say it without any disrespect--essentially an earthly organisation, should have no concern".

Thus the constituent assembly passed the Rights to Religious Freedom which were enumerated from Article 25 to 28 in Part III of the constitution with the central idea being that the State is Godless, However not Blind.

Article 25 and 26 are the articles which expressly deals with individual and group freedom of religion, and thus the subject matter of further discussion.

Article 25 (1) of the Constitution guarantees that subject to public order, morality and health all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.

The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.

In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

The constituent assembly debate revolved around the words profess, and propagate. TajaMul Hussain moved a provision which sought to prohibit profession of any sign, mark or name, or wear any dress from which a person's religion could be recognized. To which one Naziruddin Ahmed asked how does the member plan on making the

names invisible as a person's religion could easily be recognized from his name.

The debate then moved on to the word Propagate, which some members saw as a threat to their own religion from Christianity. Before independence Christian missionaries opened schools, hospitals and other social infrastructure which were made accessible to the most vulnerable sections of the society (such as lower castes, adivasis etc.). People from said sections were enchanted with the novelty of the idea that the Christians were placing them on the same footing as themselves. This made Christianity more alluring to the vulnerable sections than their own religion which afforded them only slights and derisive comments of the upper caste.

K.T. Shah though in the favour of the word propagate moved that the word propagate must be subject to the provision that "no propaganda in favour of any one religion, which is calculated to result in change of faith by the individuals affected, shall be allowed in any school or college or other educational institution, which is maintained wholly or partially from public revenues, or is in any way aided or protected by the Government." His reasoning was that the people of tender age, of infirm mind and vulnerable section readily favour the views of the authority due to their "inherent advantages of their position" But this change of view cannot be deemed as a genuine change rather it is a change due to undue influence and would deprive this right of the individual which this constitution guarantees to protect. This provision was later enumerated in Article 28 which guaranteed freedom as to attendance at religious instruction or religious worship in certain educational institutions.

Shri L. Krishnaswami Bharathi from Madras speaking in favour of the word "propagate" explained that this word should not be misunderstood to be associated with any particular religion as this right has been given to each and every individual. The word "propagate" as he understood it means that we should educate the people on religious tenets and doctrines. Thus the word ought to prevail in the article.

One member moved that the scope of clause 2(b) must be extended to other religions like Buddhists, Jains and Christians so as to promote religious harmony amongst people of different faiths. This clause was at first rejected but later the clause was extended to include Jain, Buddhists and Sikhs.

Thus, even though the constitution does not expressly declare that India is a secular nation, Article 25 and

Article 26 are implicit testaments to the secular will of the nation and our founding fathers,

CONCLUSION

A stark question that still needs to be answered is How much latitude does the state have while intervening in a religion. The Constitution in Article 25(2) permits the state to intervene in such activities which are secular in nature but have been given a religious colour. Also as and when public order, health and morality of the citizenry is threatened. Thus the state can intervene to weed out the pernicious practices of any religion and also to achieve social equality promised in the preamble of the constitution, at the same time adhering to the principle of state neutrality towards religion. The task to determine the reasonableness of the state's affirmative action was left by the constituent assembly for the future generations to decide for themselves. Thus Article 25 is a contradiction within itself, while in clause 1 it provides the freedom, in clause 2 it allows the state to intervene to maintain the edifice of a secular polity. However Good its intentions were, The Constituent assembly failed to prescribe a test to distinguish as to which activities have a secular character and thereby would warrant state intervention and which activities are religious and thereby free from state intervention. In absence of such a test has given the state a carte blanche power to intervene in religious affairs. To circumvent this loophole the Supreme Court posited the Essential Practices Test. However, Of late some of the Judges of the Supreme Court have observed that this test has its own fault lines and has become untenable, since it gives power to the Court to alter and make changes within the religion and it could define the nature of religion itself. In these egalitarian times religion has taken a backseat, while in mediaeval period it was a fulcrum on which the state power stood, in present times the role of religion has been relegated and kept limited to the personal life, and deservedly so.

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