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SEPARATION OF RELIGION AND STATE:

The Historical Perspective

The problem of "Church and State" is a legacy of the breakup of the Roman Empire. It was at that time that Christianity first rent the unity of the state by proclaiming a distinction between the duties due God and those due Caesar, and that Constantine annexed the church to the Empire. The two powers thus linked but not merged have made uneasy partners ever since, with each one contending for superiority. Their struggle has filled the annals of history with sound and fury, but it has also been responsible for political liberty and representative institutions in the modern world. Only in the last century and a half, however, has the problem of the relations of Church and State received solutions compatible with democratic and liberal ideas.

Israel's forthcoming election of a Chief Rabbi highlights the question of Church-State relations in that country. The First Amend-

ment to the Constitution of the United States, adopted in 1791, declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The French Separation Law of 1905 states: "The Republic neither recognizes nor salaries nor subventions any cult." Is the American or the French legislation applicable to Israel? Are the American, French, and Israeli situations comparable? These questions have been debated with great feeling in recent times and it is as a contribution to their clarification that this paper is presented. The approach will be historical, and the point of view and criterion that of the modern principle of religious liberty.

I.

The United States and France offer a sharp contrast in regard to the real purposes of *Separation*. In one country Separation was designed to promote religion, in the other it has been accused of aiming at the dechristianization of France. Separation is simply a device to regularize a pre-existent social situation, not an end in itself. The term "Separation" has had a flexible meaning in the United States. Not until 1917 did Massachusetts adopt an amendment to its constitution ending state aid to ecclesiastical establishments. In the 1920's there was still one state of the Union in which only Protestants might hold the highest offices. A regime of Separation of Church and State must recognize the underlying religious interests of the people or, if need be, their lack of religious interest. As Professor Holcombe puts it, "ours is a secular commonwealth in principle and a religious commonwealth in practice." There are no *a priori* reasons for favoring Separation over other arrangements independently of the social needs the system serves.

Similarly, Jurisdiction (a system in which one or several religious bodies are linked to the state) serves the purpose of formalizing or translating into political terms the basic religious needs of a community in which a majority of the people adhere to one church, and in which, for other reasons, a laissez faire attitude would be regarded as socially harmful.

If Separation is suited to the United States, Jurisdiction seems to suit England and the Scandinavian countries. Separation is favorable to organized religion; Jurisdiction is favorable to unorganized,

Separation of Religion and State: Historical Perspective

individual beliefs or disbelief. Hence in jurisdictionalist countries there exists freedom *from* religion as well as *of* religion. Privileges accorded by these countries to the established church or churches are *odiosa* as well as *favorabilia*, meaning that they impose responsibilities as well as confer rights.

In certain respects it has even been claimed that individual religious liberty is better protected in jurisdictional than in separationist countries. Ruffini, the distinguished Italian historian of religious liberty, writing in the first decade of the present century, makes this point with great force.

The Law of Guarantees of 1871 has not prevented a Jew, Luzzati, from becoming President of the Council of Ministers . . . In America, the character . . . Christian . . . Protestant makes it impossible . . . that a Catholic, let alone a Jew, should regard himself as capable of becoming president.

But contrast in the United States the inordinately powerful position given by New York State to the Catholic Church in 1895, unthinkable in Italy; so that the iron absolutist hierarchy of the Catholic Church is recognized and protected in the United States in such a manner as rigidly to exclude any democratic or representative velleity of the lay element . . . in a manner which has no parallel in the European states unless one goes back to the Middle Ages.

If public sentiment today had the same ideas about witchcraft as it had during the seventeenth century, severe laws against witchcraft could be expected in a separationist no less than in a jurisdictionalist country. There is no substitute for an enlightened public opinion under either system. But there is one advantage which a jurisdictionalist regime has from the point of view of religious minorities. This is in its commitment to the recognition of religious values. One may ask whether a proper concern with the religious needs of the Jewish Community would have deterred Switzerland, in which Church and State are separated, from outlawing *shechitah* by constitutional referendum in the 1890's. Switzerland divides her enmities. The Jesuit Order is still banned there, at least by law.

Anyone familiar with developments in France and Italy knows how much difficulty both countries have experienced in dealing with the Church-State problem. In both countries the overwhelming majority of the population belonged to the Roman Catholic Church. In both countries a strong anti-clerical movement existed. Anti-clericalism of the Latin type embodies hostility to religious belief

in general as well as opposition to the influence of the Roman Catholic Church in particular. In Italy the government had no alternative, when the law of Papal Guarantees was rejected by Pope Pius IX and his successors, but to act on the assumption that Church and State were separate. This led to a crop of evils which were only solved by the Lateran Treaty of 1929 which made the Roman Catholic Church the "official" church of the Italian people while recognizing the rights of other religious groups including the Jews. In spite of its Fascist genesis the treaty was made part of the Constitution of the new Italian Republic adopted after the war, indicating the value attached by Italian statesmen to a suitable relationship with the church of the majority of the Italian people.

France, after living under the Napoleonic Concordat since 1801, with some changes under the various regimes which succeeded one another, proceeded in 1905 to separate Church and State. Several considerations influenced French statesmen to take this step. There were political causes stemming from the opposition of some churchmen to the Third Republic as well as the involvement of several of the religious orders in the anti-republican campaign that accompanied the Dreyfus Case. There was also the idea of the Lay State which had been growing during the nineteenth century and which involved the triumph of the doctrine of State sovereignty with its accompaniment of the Concession Theory. This meant the subjection to State power, the sole *legal* power in society, of all religious associations. Only religious groups authorized by the government were permitted to remain in France, all others were expelled. A third motive was undoubtedly an anti-religious or at least a rationalistic attitude on the part of some of the promoters of the Separation Law. It will suffice to mention Combes and Briand.

The Separation Law of 1905 followed a diplomatic break with the Papacy. The disturbed situation created by this law in the relations between devout Catholics and the government was extraordinary and not conducive to a normal political life. This was demonstrated during and after the first World War by the restoration of diplomatic relations between France and the Papacy. The Law of Separation continued to regulate France's relations with the Church but with modifications or rather interpretations of some of its provisions calculated to allay criticism by the Church.

Germany in the decade of the 1870's was also in the throes of a

Separation of Religion and State: Historical Perspective

Church-State conflict, the *Kulturkampf*. In Germany, however, the Catholic Church, though it represented majority sentiment in Bavaria and the southern parts, was a minority group in the Empire as a whole. In spite of these disadvantages the members of the Catholic Church in Germany forced Bismarck "to Canossa" and obliged the Iron Chancellor to revoke the May Laws of 1873 and 1874.

There is enough in the experience of the European nations to justify the following characterization of the basic problem of Church-State relations by Professor Holcombe:

But when Church and State are separated in deference to the principle of complete toleration, the sovereignty of the Church-State is divided between the two organizations. One, the state, retains political sovereignty; the other, the church, acquires the supreme power in purely spiritual affairs, unrestrained by civil laws. In the last analysis the authority of Church and State alike is what men believe it to be. The boundary between them cannot be determined once for all upon any universal, logical principle. It must be determined in each case by the conscience and will of the body of people directly concerned.

II.

I have compared the advantages of the two systems of regulating the relations of the secular and the religious powers, known respectively as Separation and Jurisdiction, without particularizing further about either system. Separation and Jurisdiction can in actual practice, as well as in law, vary from one country to another. Jurisdiction, for example, may take the form of an Established Church, State Church, Dominant Church, or National Church which may in turn be Anglican, Lutheran, Calvinist, or Orthodox; sometimes it assumes the form of a single Establishment, and at other times that of Parity of confessions. But all these arrangements have this in common, that they are capable of being harmonized with the modern conception of religious liberty.

What we now need is a definition or characterization of religious liberty which will make clear in historical terms the meaning of the modern achievement of freedom of conscience and of worship. The methods by which the goal was approached also reveal a few para-

doxes worthy of note and expose a fallacy or two that has had the sanction of long acceptance.

Liberty of *conscience* has been described as a negative right because a man's conscience is inaccessible to human scrutiny. But it has its positive side in that it protects the individual from being forced to perform acts or rites against his religious convictions. Violation of freedom of conscience is sometimes charged to certain laws such as Sunday observance or those providing for the reading of verses from the Bible in the public schools. The same criticism has been made of the oath required in courts of law, but this has been met by the provision for the taking of an affirmation instead of the oath. Though freedom of the conscience may in strict principle be infringed in some of these instances, there is not much doubt that the principle is substantially recognized by the law of State and Nation.

Much more vital is freedom of *worship* or, as Europeans would call it, liberty of the cult. The recognition of the private cult accorded by Spain does not satisfy the modern requirement which calls for liberty of public worship. This right is recognized explicitly in the French law of 1905 which declares that "the Republic guarantees the free exercise of the cults, under the sole restrictions appended hereto in the interest of the public order." This freedom is now recognized in all democratic countries with some restrictions, as in Italy and elsewhere, in the name of "public order." Generally also this important form of religious liberty means not only the liberty of specified groups, but also of individuals. It is true that the freedom enjoyed in the United States is often regarded as partial and incomplete, as recent cases in Pennsylvania and Maryland have demonstrated, but to expect it to be perfect in the eyes of all men is to be blind to the complexities of human nature and society. Basically it is a question of more or less, not all or nothing.

With these criteria in mind it will be useful to review a few historic situations which offer a contrast to the modern systems based on the recognition of the principle of religious liberty. One relationship which involved the complete subordination of the Church to the State is known as "Caesaropapism" and prevailed in the later Roman Empire, in Charlemagne's day, and, under the name of "Byzantinism," was transmitted by the Eastern Roman Empire to Russia. Another relationship, called "theocracy," really

Separation of Religion and State: Historical Perspective

the exercise of the *direct power* of the Pope over the temporal ruler, was realized under Innocent III and his immediate successors, but actually only achieved in a fully theocratic sense in the government of the Papal States. Neither of these conditions obviously suits a modern state nor satisfies the elementary requirements of political and religious liberty. It is true that Caesaropapism shades into modern regalism and may have logical ties with the legal union of Church and State or Jurisdiction; but logic, as suggested above, is no guide to politics or religion. It is also conceivable that theocracy could develop out of Jurisdiction, but the modern state is too strong and historically grounded in the Roman tradition for this development to take place.

In this connection we must also exclude the Roman Catholic conception of the relationship of religion and politics, even in the form of the *indirect* power of Church over State advocated by Aquinas, Bellarmin, and Suarez. It is based on a number of ideas—the Christian State, exclusive salvation, a theory of persecution inherited from St. Augustine, and a dogmatic system—not easily reconcilable with the modern democratic state, and lacking in Judaism. It must be noted in passing, however, that the Catholic Church in our day makes a distinction between *thesis* and *hypothesis*. In the thesis only a Christian State is supportable; under the hypothesis a schismatic or heretical establishment or even Separation is tolerable. In *principle* and philosophically, however, a Christian State, even heretical, is preferable to a secular State divorced from any religion.

The contrast between modern systems of regulating the relations of Church and State and the traditional order of Islam, in which temporal and religious functions were united in the Caliph, is striking. Authority in Islam, as a result, went unchecked by any other power. Yet since the system lacked a real legislative organ capable of introducing needed reforms, the progress that might have been secured by such an organ was lacking. Historic Islam has lacked a genuine State tradition. Its political system embodied the old oriental ethos with its emphasis on religion. (The modern State of Israel, contrariwise, not only represents the fulfillment of a religious ideal, but it incorporates the State and secular traditions of the Western peoples in its national life. It is the offspring of Rome as

well as of Jerusalem, and its religious and secular institutions, though distinct, work together to give it a strength lacking in any of the Arab States.)

In reading our history and drawing lessons from it, we must avoid being victimized, however, by the theory of legal sovereignty—an invention of the lawyers which would subject all activities including religion to the will of the State. We must think of the State and Law, as Goodhart urges, in terms of obligations accepted by the citizen rather than of authority imposed by the State. Obligation has essentially religious roots. But even state authority must somehow be legitimized by religion. There is only one way of legitimizing authority—by sentiment; and religion is one form of such sentiment. It is public opinion, to recur to an earlier theme, that determines the limits between two such necessary institutions as State and Church (or Synagogue), not some meaningless formula that takes no account of political and social realities. Religion is a force that the State cannot ignore either by pretending that it does not exist or by attempting to subjugate it to its own purposes. History demonstrates that a healthy social organism is built on religious as well as more strictly political foundations, to mention only two factors of social life. If England escaped the ordeal of a social and political upheaval in the period following the French Revolution it was because of the action of Methodism and the new Evangelical Movement in diverting popular discontent into constructive legislative activity, as Halevy has demonstrated in his classic work on England in the Nineteenth Century.

The history of the modern movement of religious liberty conveys a sense of paradox extremely disturbing to those who would like to stretch history on a Procrustean bed. It may seem extraordinary to such people that Separation originated in fanaticism while Jurisdiction was the system advocated by the first promoters of religious freedom in Western Europe.

The Anabaptists, for example, advocated Separation of Church and State, but only as an alternative to an Anabaptist theocracy. Their ideas flowed into Holland where they mingled with and influenced those of English refugees fleeing from James I's Anglicanism. The Pilgrim Fathers brought from their stay in Scrooby, Holland, a determination to hold to their own religious ways. If they could not impose them on the Anglican Church they were

Separation of Religion and State: Historical Perspective

prepared to advocate Separation of Church and State in England. But when they reached Plymouth they established a complete theocracy in which freedom of dissent was suppressed. Out of the Reformation conflicts also emerged the Sozzini brothers, founders of the Unitarian movement, which is undoubtedly the first Christian denomination to uphold religious liberty for its own sake. But Faustus and his brother Laelius also advocated a union of Church and State and hoped to see genuine liberty realized under such a system rather than under a separate organization of the two. What a paradox, at least to Americans of the present day: fanatical Anabaptists advocating Separation, purely as a lesser evil, but an evil just the same; while liberal Socinians defend Jurisdictionalism and oppose Separation, because the former was more likely to restrain fanaticism, promote comprehension, and protect religious liberty from the violence of sectaries!

But the tale is not done. The two diverse streams converged, the Socinian emphasis on religious freedom and the Anabaptist recourse to Separation, to produce the typical American solution, freedom of religion under Separation, in the colony of Rhode Island in 1636. Roger Williams had "imbibed" from the Dutch Arminians, the liberal element in the Calvinist church, the idea of a commonwealth in which the magistrates only dealt with civil matters and exercised no authority in religion, thus allowing complete freedom of conscience to all believers, even Jews, though at first the latter did not qualify for citizenship in Rhode Island. Driven out of Massachusetts for advocating such views, he founded Providence and lived to see Rhode Island receive a charter from Charles II in 1663. Roger Williams anticipates the Fathers of the Constitution and inaugurates that fusion of liberty and Separation which is typically American.

Just as Roger Williams inaugurated the American solution, a French thinker of the eighteenth century became the principal advocate of religious freedom in France. This was Voltaire, who was neither an orthodox churchman nor a democrat after the modern fashion. Paradoxically, he advocated toleration under a system in which Church and State were united. In a real sense Voltaire represents the continental tradition and practice of Jurisdiction.

In the light of these developments it is not surprising that the theory of religious persecution, which was extremely long lived, has had some of its most ardent defenders among English freethinkers

TRADITION: A *Journal of Orthodox Jewish Thought*

who, following in the footsteps of the medieval sceptic, the Emperor Frederic II, supported the crown and advocated the most rigorous control of religious belief by the State. Such was Thomas Hobbes who, in his *Leviathan* and other writings, worked out with marvellous logic a theory of sovereignty that left nothing outside the scope of State control. Such also were Hume and Bolingbroke. The contrast with John Locke is striking; for the latter, a devout churchman, advocated religious toleration as well as civil liberty and implied his readiness to accept Separation of Church and State if these fundamental freedoms were protected.

Lecky concludes that political and religious liberty in England was created by men of a definitely religious cast of mind while the champions of the same movement in France were sceptics, like Voltaire. It is worth noting that scepticism or "philosophy," as it was called in eighteenth century France, did not necessarily guarantee a commitment to religious liberty. Rousseau, for example, advocated a civic religion to be imposed on all citizens, and the disciples of the master sought to establish such a system during the French Revolution.

In brief, religious liberty has been advocated by religious men as well as by sceptics under a jurisdictional as well as a separationist system.

III.

It is sometimes assumed that countries living under a system of Separation, like the United States, are free from the difficulties attending jurisdictional regimes. While there is no doubt that Separation is the only arrangement possible in the United States with its multiplicity of sects, it cannot be denied that problems of a serious nature beset the American system. These problems are a result of changing social and religious conditions which have altered the traditional relationships of religious denominations to one another and to governments of State and Nation. The Protestant groups, which at one time divided the religious loyalties of the American people, are now confronted by a competitor whose whole official outlook, political as well as social, is directly antithetical to all that Protestantism has stood for. In 1790 there were perhaps 30,000 Roman Catholics in the United States out of a total popula-

Separation of Religion and State: Historical Perspective

tion of almost 4,000,000. By 1950 there were, by Catholic estimates, over 25,000,000 Roman Catholics out of a population of 150,000,000.

When one group with the solidarity of the Catholic Church becomes so numerous, the effect in a separationist, unlike a jurisdictionalist, country is that no adequate control or restraint on that Church exists other than that provided by public opinion. When the trusts toward the close of the nineteenth century threatened the freedom of economic life, public opinion was aroused; but it was the legislation enacted as a result of this popular feeling that placed a check upon the inordinate growth of business combinations. The effect of public opinion even within the membership of the Catholic Church in restraining the hierarchy has in the eyes of competent and impartial observers not thus far proved palpable. At the same time, as the examples in the following few paragraphs show, there is considerable influence exerted by the Catholic Church on legislation. Whether or not the community at large exercises pressure on the Church, there is little doubt that the hierarchy does exert great influence on legislators.

The New York State Law of 1895 is the crowning example of the special treatment of religious corporations, not in accord with common law rules, which the Catholic Church was able to secure. By this law a Roman Catholic Church is put in an entirely different legal category from a Protestant or Jewish Congregation: it is not subject to popular election of officers and trustees, and its members cease to have control of it after its establishment. The author recalls the interesting case of a non-Roman church in Pennsylvania which wished to withdraw from the jurisdiction of Rome after having unwittingly accepted it with a new priest. The judge's decision rendered abortive the action of a majority of the members in voting to withdraw from the Roman Communion.

The extent of Catholic influence on legislation is revealed in the Massachusetts law forbidding interreligious adoptions, thus stamping a child with an indelible religion. It is revealed in the restraint of divorce legislation in New York in spite of the patent frauds employed under the present law and the curious use of annulment to beat the devil around the bush.

It would be idle to undertake a repertory of Catholic influences on legislation. There is no question of the right of the Church to promote legislation favorable to its ideology, but there is serious

TRADITION: *A Journal of Orthodox Jewish Thought*

question about the existence of a situation which allows enormous power to be exercised by a hierarchy without moral or legal responsibility to either its members or the community at large. This was the burden of Professor La Piana's complaint against the Catholic Church in the lectures delivered several years ago at Butler University on the subject of an "Authoritarian Church in a Democratic Society."

There is danger that because of these developments the era of *laissez faire* in religion may end, just as *laissez faire* of trusts ended and just as *laissez faire* of labor unions threatens to end. Inequality apparently has been the result of an original equality in law. All this need not mean a calamity for American democracy, but it may well mean a decline of certain traditional institutions. One of the victims of this movement in the meantime may well be the public schools which are finding the competition of Catholic parochial schools in many communities difficult to sustain.

IV.

What are the lessons from all this to be pondered by a legislator in Israel, or any other country, seeking to find the right road in adjusting the relations of Church and State? His first duty is clear. The system he adopts must guarantee individual liberty of religion. But if his people in majority have a commitment to religion and to one religious organization in particular, he must also be concerned with another liberty, ecclesiastical liberty. This kind of freedom entails a special regime for large aggregates of religious people who might otherwise upset the balance of religious forces and disrupt the life of the State.

In Israel this arrangement can only mean the union of Synagogue and State. Religious groups other than Jewish would be similarly recognized. Such a system is in keeping with the regime inherited from the British and the Turks which has built religious status into the legal system.

But there are more compelling reasons why Jurisdiction is desirable in Israel and why Separation would be unworkable.

There are a great many questions which the government of the State, assuming a commitment to Judaism of most of Israel's people, must submit to ecclesiastical authority. Jewish law must be per-

Separation of Religion and State: Historical Perspective

mitted to rule on such questions and Jewish law can only be expounded under these circumstances by an official body. The *ius respondendi* is as necessary to Israel as it was to Rome in the days of Augustus and Tiberius. The alternative is religious anarchy and this could only bring grief to the State. The decisions rendered by an official Rabbinate will not only develop Halakhah but promote the interests of the State. Synagogue and State must work together. Ancient Judaism was inconceivable without a political or social organization. Part of the difficulties faced by modern Judaism in the *Galut* are traceable to the absence of such an authority. In the State of Israel there is an opportunity and necessity to overcome this deficiency.

But there may be a question in the minds of many whether Jurisdiction may not promote intolerance and even fanaticism. The experience of the European peoples definitely refutes this fear, as in fact does the recent history of the Israeli community itself. It is Separation that would arm fanaticism. Jurisdiction would promote responsibility, moderation, and comprehension. Sliver groups will probably always exist and they should be given every right to exist. But the great majority of Jews will find their religious needs served by an Establishment which will carry on the tradition of historic Judaism and not of the sects which divide it.

Liberals will recognize that under such a jurisdictional system the Synagogue and the State will mutually check the other's pretensions and allay the danger of that totalitarianism which has been gnawing at the vitals of free states throughout the world. And with Ruggiero, the liberal will recall that "the deepest significance of the struggle between Church and State lies in the conflict itself, not in the respective claims of the contestants, because it facilitated the free development of the individual conscience."

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