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Freedom of Conscience and the Rights of Non-TOTFers

Jónatas E. M. Machado*

Professor Michael Perry poses an interesting question in his article, *supra*: To what extent can a country, such as the hypothetical Elysium, intending to ensure eternal salvation to the maximum number of citizens possible through “the one true faith” (TOTF), create a legal regime that provides a strong incentive for its citizens to follow the dictates of TOTF, while at the same time remaining compatible with the basic tenets of religious freedom as enshrined in international human rights law?¹ Professor Perry notes that TOTF recognizes the inherent dignity of human beings, and thus would not tolerate anything violative of this value.² The Elysian State, therefore, has adopted a legal regime that attempts to favor TOTF without compromising some of its basic tenets: (1) no one would be coerced to accept TOTF; (2) no one would be required to support TOTF, financially or otherwise; (3) no one would be prohibited from practicing non-TOTF religions privately; and (4) no one would be allowed to promote non-TOTF religions.³ Professor Perry’s question is entirely relevant since there are several establishments around the world that closely resemble his Elysium. This “thought experiment” makes it possible for us to try to identify some of the problems with the Elysian understanding of religious freedom in light of the values and interests that this fundamental right should aspire to promote and protect in free

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1. Michael Perry, *A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385 (2005).

2. *Id.* at 401.

3. *Id.* at 401-06.

and democratic constitutional order. In this author's view there are good reasons why those of us who value human dignity and fundamental rights should promote normative change in the Elysian State.

INDIVIDUAL AUTONOMY AND COLLECTIVE SELF-GOVERNMENT

In a democratic society of free and equal citizens the State has a duty to impart at least two privileges: first, to provide public goods and correct market failures, leaving its citizens free to fully debate all questions concerning the origin, meaning and destiny of their lives; and second, to abstain from enforcing eternal salvation to some segments of the population on the basis of religious assumptions and doctrines held by other segments of that population.⁴ In the case of the Elysian State, the possibility of religious freedom for minorities is entirely dependent upon the assumptions and doctrines of TOTF – the majority religion – which results in a clear violation of the principle of equal religious freedom. It must be stressed that religious freedom, to be fully effective, requires a pre-commitment to equal freedom of conscience and popular sovereignty.⁵

The Elysian State did not meet this requirement, since by protecting only the *devotio privata* of non-TOTFers it significantly limited the religious minorities' potential to live and communicate with others in a manner consistent with their own consciences. Thanks to the Elysian position on religious freedom, non-TOTFers cannot publicly act on and speak about their most important convictions, those that matter more to them, and probably those that, in their own opinion, should matter more to others. But the right of religious freedom for TOTFers is also limited since they cannot

4. *E.g.*, JOHN LOCKE, A LETTER CONCERNING TOLERATION 18-19 (Prometheus Books 1990) (1689).

5. Locke states:

Our government has not only been partial in matters of religion, but those also who have suffered under that partiality, and have therefore endeavored by their writings to vindicate their own rights and liberties, have for the most part done it upon narrow principles, suited only to the interests of their own sects But whatever have been the occasions, it is now time to seek for a thorough cure *Absolute liberty, just and true liberty, equal and impartial liberty, is the thing that we stand in need of.*

Id. at 11-12 (emphasis added).

freely change their religion; such a decision would penalize both their freedom and civic status should they decide do become non-TOTFers. The end result, then, is that the dignity and autonomy of TOTFers and non-TOTFers alike is violated, because they are both severely limited in making some of their most important decisions. On the other hand, by basing State action on TOTF and placing TOTF above any challenge or discussion, the Elysian State has compromised the Elysians' capacity for democratic communication and self-government. In a democratic government composed of free and equal citizens, the State cannot commit itself to a religious doctrine even if it can accommodate the values and principles of the majority through open communication and the democratic process.

FREEDOM OF RELIGION AND EXCLUSIVE THEOLOGIES

Exclusive theologies are not necessarily incompatible with individual freedom of conscience. It is entirely possible for a religious community to subscribe exclusively to a single theology and yet abide by the principle of religious freedom. The history of religious freedom shows that many of its first defenders just wanted the freedom to promote their own exclusive theologies;⁶ that was why these groups defended the notion that it was inappropriate for the State to settle theological disputes with coercive power. The fact that TOTF adopts an exclusive theology, however, is neither an adequate reason for it to force others to embrace its teachings, nor to attempt to capture the Elysian State as a coercive tool over the people. In a free and democratic constitutional order it should be possible for a religious community to affirm the principle "*extra ecclesia nullam salus*,"⁷ while at the same time respecting the right of every individual to freely accept or reject this and other religious doctrines. In fact, the essence of religious freedom is precisely the capacity to make one's own decisions in matters of religious doctrine.⁸ Every individual must have the right to ad-

6. *E.g.*, Kathleen A. Brady, *Foundations for Freedom of Conscience: Stronger than You Might Think*, 10 ROGER WILLIAMS U. L. REV. 359, 374-75 (2005).

7. "Outside the Church there is no salvation." CATECHISM OF THE CATHOLIC CHURCH art. 9, ¶ 3, § 846.

8. LOCKE, *supra* note 4, at 19:

No man by nature is bound unto any particular church or sect, but

here – or not – to any religious community, and to accept – or not – its religious tenets, whether they be exclusive or inclusive.

The right of religious freedom is especially important where there exists a dominant religious group with an exclusive theology, as well as where there is a public confrontation between different exclusive religious doctrines. In a free and democratic society, the fact that one group adheres to an exclusive theology is not a strong enough ground to deny religious freedom to those who reject that theology; likewise, the fact that one rejects exclusivist theologies of salvation is not a sufficient reason to deny religious freedom to those who hold exclusivist theologies.⁹

Although some citizens of the Elysian State may reject the truth claim of TOTF, it does not follow that there is sufficient ground for the State to resort to coercion. First, the State has no privileged access to religious truth.¹⁰ Second, even if it had, there is no such thing as a legal duty to get saved. Considering the fact that even the most exclusive theologies have changed over time, it makes no sense to entrust the State with the power to enforce an exclusive theology as if it had a privileged knowledge of a whole, timeless truth. An open sphere of public discourse seems to be the ideal forum to subject different exclusivist theological claims to critical debate and cross-examination.

THE STATE AND THE OFFICIAL RELIGION

The existence of an official religion such as TOTF raises sev-

every one joins himself voluntarily to that society in which he believes he has found that profession and worship which is truly acceptable to God. For if afterwards he discovers anything erroneous in the doctrine . . . why should it not be as free for him to go out as it was to enter?

Id.

9. Locke has asserted

that seeing one man does not violate the right of another, by his erroneous opinions, and undue manner of worship, nor is his perdition any prejudice to another man's affairs; therefore the care of each man's salvation belongs only to himself . . . Every man . . . has the supreme and absolute authority of judging for himself . . . because nobody else is concerned in it, nor can receive any prejudice from his conduct therein.

Id. at 57.

10. *Id.* at 19 (arguing that the power of the magistrate may never be "extended to the salvation of souls.").

eral questions. One of them concerns the factors that led the State to adopt certain religious tenets, such as orthodoxy. Another has to do with the process observed in making that decision. As to the first problem, there can be no impartial and objective way to assert the truth of a religious doctrine as superior to competing claims. The reality is that there are several religions with competing and antagonistic claims; this means that either some are truth and others are false, or they are all false. They cannot all be truth at the same time, since they often contradict each other (e.g., "Jesus is the Son of God" versus "Jesus was one among many human prophets"). This, of course, does not preclude the real possibility that some religious claims, despite their supernatural and meta-rational elements, appear more plausible than others, from a theological, anthropological, historical and scientific perspective.

Thus a widely held conviction that a certain religion (e.g., Christianity, TOTF) is the true religion, if accepted, means that others must be erroneous. If that religion is adopted by the State without any evidence of its truth – whether proved beyond reasonable doubt, or even a simple doubt – and is presented to all citizens as definite truth without any opportunity for challenge and debate, all those who are convinced (and think they have good reasons to be) of the falsity of that religion would be prohibited from publicly voicing their arguments. There are many historical examples of minority religions whose doctrines have made lasting contributions to the public good of political communities dominated by one main religion, while at the same time contributing to the rethinking and revision of even the most "true" and "infallible" dogmas of dominant religions.¹¹ Without the presentation of evidence and a meaningful opportunity for comment, the question of the truth or falsity of the established religion is arbitrarily re-

11. For example, the aftermath of the Protestant Reformation in Europe had an substantial impact upon the once dominant Catholic Church. The religious historian Hans Küng noted that the Reformation brought the Catholic Church out of an "all too human ecclesiocentricity of a powerful church to the christocentricity of the gospel, all under the sign of the freedom of the Christian." HANS KÜNG, *CHRISTIANITY: ESSENCE, HISTORY, AND FUTURE* 644-45 (John Bowden trans., Continuum Books 1995) (1994). Catholicism's struggle with the Reformation culminated with the ground-breaking adoption of the Second Vatican Council reforms through which the Catholic Church incorporated the principle of *ecclesia semper reformada*, "[the] constant renewal of one's own church in life and teaching according to the gospel . . ." *Id.*

moved from public debate.

The problem becomes even more acute when one acknowledges that by endorsing a certain religion and by privatizing all dissent to it, the State deprives its non-subscribing citizens of the ability to publicly challenge religious doctrines that form the basis of the State's power to enforce their political and legal subordination. Even when the State's decision to establish a religious doctrine does not appear to be arbitrary, but instead seems to be based on circumstantial evidence – the ability of which to withstand the test of time suggests the plausibility of its truth claims (e.g., evidence of design in nature, the ability of religious doctrine to promote political stability and economic and social prosperity) – that decision is never without controversy since there may be other explanations for the alleged efficacy of this evidence.

A second question relates to the decision-making process that led to the establishment of a religion. Often the establishment of official religions resulted from the decision of a monarch according to the principle *cuius regio, eius religio* (the religion of the King should be the religion of the kingdom).¹² It is not impossible, however, to have a social contract between free and equal citizens or their representatives, all members of the same religious community, in which the parties decide to establish their own faith as the only official and true religion to be observed by all members of the political community, both present and future. The American colonial experience seems to exemplify the possibility of the establishment of religions by social contract.¹³

This solution is problematic in that it inevitably encourages the exercise of state coercion over individual conscience since the non-adherents, even when not positively coerced to endorse the established religion, are negatively coerced to not bring their own convictions to the sphere of public discourse. This solution also denies the Lockean principle of separation between the coercive state and the voluntary church. This idea is based on the notion

12. *E.g.*, Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289, 308 (2005).

13. *E.g.*, DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* 515-527 (2003) (describing the manner in which many of the original American colonies became incorporated as covenant communities consisting of like-minded religious believers seeking to establish a way of life based upon religiously orthodox ideas).

that the church is a free and voluntary society;¹⁴ the State, however, which is not chosen by individuals, should use its monopoly over coercive power only to protect human rights and promote public goods. Thus, while the individual must be granted the freedom to decide whether or not he should join one particular religious community, he should not be forced to do so by a democratic decision of the political community, nor should he be forced to forsake his own personal religious convictions by democratic decision.

The Lockean separation principle precludes the establishment of TOTF as the official religion of the Elysian State. In fact, it encourages the adoption of an open sphere of public discourse where persuasive conversation can inform topics concerning religious doctrine, and where TOTF can be publicly assessed on its merits. This is not the same as establishing relativism and indifferentism since it does not do away with the basic theological and epistemological categories of truth and error; instead it leaves the final determination to the critical assessment of individuals and communities.¹⁵ Put simply, it avoids placing the coercive power of the State on either side of the equation.

The fact that the Elysian State should refrain from establishing TOTF as its official religion does not mean the State is totally forbidden to use TOTF's assumptions as a source of meaning and value. States are, by themselves, unable to generate the large amount of foundational, anthropological, aesthetic and ethical materials and *metanorms* necessary to put in place political and legal institutions, and to guide sensitive policy decisions (e.g., abortion, family, social security, the environment, war and peace). In these and other matters States must make fundamental decisions on the basis of metanormative criteria that are exogenous to them.

14. LOCKE, *supra* note 4, at 19-22.

15. Locke himself illustrates what a society based upon the free exchange of religious ideas should resemble. Although he readily denounces the teachings of Catholics, Jews and "heathens" as being "false and absurd," he nonetheless assures his largely Protestant audience that religious truth can, and must, stand and fall on its own epistemological merits:

[T]ruth certainly would do well enough, if she were once left to shift for herself. [Truth] is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. But if truth makes not her way into the understanding by her own light, she will be the weaker for any borrowed force violence can add to her.

Id. at 55-6.

Imagine, for instance, a non-TOTFer, believing in the doctrine of reincarnation, would like to marry a dog, and seeks permission from the Elysian State to do so. In this case, the State would make its decision based largely on the conception of family shared by the majority of its population – probably members of TOTF. This is because the State cannot make fundamental decisions on the definition of the family without relying on some set of aesthetical, ethical and moral assumptions that determine the limits of cultural permissibility. States will unavoidably rely on the normative materials generated by existing moral communities, and in a democracy it should not be a surprise when the State relies more heavily on those values, principles, goals and interests shared by the majority of the population, or by those more politically motivated segments of it. By itself, this is not establishment of a religion.

ESTABLISHMENT FOR REASONS OF CONVENIENCE

Some of the above considerations suggest that – apart from the conviction that a given religion is the true religion – there may be other political, social and cultural reasons why a State may find it politically convenient to explicitly endorse a particular religion. In many cases, religious unity has been seen as a guarantee of national identity, singularity, stability and security. Religious unity has also provided legitimacy to a ruler, or a dynasty thereof.¹⁶ The only way to defend religious liberty in these situations is to argue that religion plays a crucial role in the individual and collective quest for truth and meaning, and that individual conscience and integrity cannot be held hostage by political interest and expediency. Religious freedom cannot fall prey to the demands of national history and tradition, since religion concerns the individual and collective search for basic answers to questions

16. For example, the emperor Constantine's conversion to Christianity provides historians with one of the most prominent examples of how an established religion can solidify the legitimacy of a particular ruler. Constantine's mission to establish Christianity as the official religion of the Roman Empire was, in large part, facilitated by the manner in which the Christian religion had successfully "transcended class barriers" and "penetrated all classes," thereby providing Constantine with a ready-made ecclesiastical establishment by which he could unite his subjects easily under a unified socio-religious hierarchy. PAUL JOHNSON, *A HISTORY OF CHRISTIANITY* 95-6 (Touchstone 1995) (1976).

of origin, meaning and destiny. The question may involve one's relationship to a Supreme Being, which is something very different from one's relationship with his or her nation. If there are any political, social and cultural values that can in some way be used to justify the establishment of a particular religion, these must be gradually but deliberately reshaped and adjusted so as to accommodate the right of individual and collective religious freedom. As people can and should engage in intercultural dialogue to advance human rights, so they can and should be free to engage in intracultural dialogue to promote the same. The ability to freely and fully discuss and promote religious doctrine within the limits of equal freedom of conscience should be a central tenet of both national and international law.

THE VICIOUS CIRCLE OF ESTABLISHED MAJORITY RELIGIONS

Another problem presented by established religions such as TOTF is known as the vicious circle of established majorities. In many instances political establishments are justified by the fact that the official religion is the religion of the majority. In reality, however, many religions become majoritarian because they were established in a way that prevented any dissenting and challenging perspectives from being voiced.¹⁷ Thus the existing establishment is justified as a consequence of majoritarian preference, but the reality is that the preference is, to a large extent, actually endogenous to the existing establishment. The only way to break this vicious circle is to enshrine a broad principle of religious freedom and disestablish the dominant religious tradition. In the case of the Elysian State this can and should be done in a way that promotes the equal freedom of religion for both TOTFers and non-TOTFers, yet recognizes the role that TOTF has played, and still plays, in shaping the political, legal and cultural life of the majority. There is significant empirical evidence showing that when there is a broad freedom of religion in a given society there is a natural tendency for religious pluralism to emerge, even within

17. Professor Edward Eberle provides an insightful analysis into the manner in which some of the original colonial communities in America imposed mandatory church attendance upon all inhabitants in order to stifle public dissent and the dissemination of heterodox ideas. Eberle, *supra* note 12, at 319-20.

existing dominant traditions.¹⁸ Once the legal preconditions are in place this can develop as a slow and gradual process, without doing violence to the feelings, history and tradition of the political community. In general, it is not hard to uncover evidence that the establishment of a given religion is much more a function of political and social conditions than of any convincing capacity for a State to discern spiritual truth, or a genuine concern, on its part, for the eternal salvation of its citizens.

PATERNALISM, RESENTMENT AND TENSION

The kind of establishment promoted by the Elysian State is paternalistic and treats its non-TOTF citizens as mentally and spiritually handicapped. By privatizing the religious activity of non-TOTFers the State publicly questions their moral and rational competence, as well as their capacity to pursue truth and knowledge, and to provide alternative perspectives and insights to public discourse.¹⁹ Furthermore, public endorsement of TOTF puts pressure on non-TOTFers to conform and convert for social convenience without any further assurance of eternal salvation. Not only is this hypocrisy, but non-TOTFers are subjected to humiliation and suffering, and are likely to have their self-esteem and

18. An example of this important principle can be found within the writings of Alexis DeTocqueville. While observing the plight of American Catholic immigrants living within predominantly Protestant localities, DeTocqueville credits the separation of church and state within American jurisprudence for the ability of Catholics to profess their faith publicly without fear of government reprisals: "I found that all of these men differed among themselves only in details [of religious worship]; but all attributed the peaceful dominion that religion exercises in their country principally to the complete separation of church and state." ALEXIS DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 282-83 (Harvey C. Mansfield et. al. eds., Univ. of Chicago Press 2000) (1835).

19. See THOMAS PAINE, *RIGHTS OF MAN* (1791), reprinted in THOMAS PAINE, *RIGHTS OF MAN, COMMON SENSE, & OTHER POLITICAL WRITINGS* 137 (Mark Phillip ed., Oxford Univ. Press 1998):

Who, then, art thou, vain dust and ashes! by whatever thou art called, whether a King, a Bishop, a Church or a State, a Parliament or anything else, that obtrudest thine insignificance between the soul of man and its Maker? Mind thine own concerns. If he believes not as thou believest, it is a proof that thou believest not as he believeth, and there is no earthly power [that] can determine between you.

Id.

sense of self-respect negatively affected.²⁰

Thus the establishment of TOFT has demoralizing costs for non-TOTFers that are passed to the whole political community. Resentment builds among this second-class citizenry with negative externalities that can affect the whole Elysian State. If the number of non-TOTFers increases significantly, chances are that tensions between TOTFers and non-TOTFers will increase as well. Prevented from voicing their views in the sphere of public discourse, there is an incentive for non-TOTFers to look for alternative means and alternative channels to promote political change. That is why those of us who value human dignity and fundamental rights should promote normative change in the Elysian State.

20. See BENEDICT DE SPINOZA, *A THEOLOGICO-POLITICAL TREATISE & A POLITICAL TREATISE* 258 (R.H.M. Elwes trans., Dover 1951) (1670):

However unlimited, therefore, the power of a sovereign may be . . . it can never prevent men from forming judgments according to their intellect Since, therefore, no one can abdicate his freedom of judgment and feeling; since every man is by indefeasible natural right the master of his own thoughts, it follows that men thinking in diverse and contradictory fashions, cannot, without disastrous results, be compelled to speak only according to the dictates of the supreme power Men's common failing is to confide their plans to others, though there be need for secrecy, so that a government would be most harsh which deprived the individual of his freedom of saying and teaching what he thought.

Id.

