

CASE COMMENT

Social Masters on the Legal Stage: The phenomenon of the battle between Church and State in the socio-legal arena.

*By Johannan Lafeuille**

Introduction

The institutions of the Church and State are known 'power holders' in society. For centuries monarchs ruled by the idea of divine right, a theory known as caesaropapism (the concept of combining the power of secular government with, or making it supreme to, the spiritual authority of the Christian Church). On the other side was the belief that the Pope, as vicar of God on earth, should have the ultimate authority over the state.

After the fall of the Roman Empire in the 5th century, there arose a central ecclesiastical power: the Christian Church. In this power vacuum, the Church rose to become the dominant power. As it expanded; and as secular kingdoms rose in power; there naturally emerged conditions for a power struggle between Church and Kingdom over authority.

This conflict is a uniquely Western phenomenon and today, there exists a contentious relation between Church and State, although both sides are quite modest towards each other so as to retain a resemblance of balance between them in the eyes of the public. The case of *Bishop of Roman Catholic Diocese of Port Louis and Others v. Suttibudeo Tengur*¹ is a caricature of the prevailing political conditions in Mauritius and represents the Church-State battle. The constitution is the weapon used in destruction of the weaker of the two powers. This paper addresses the tactics employed by the State to uphold constitutional rights and the notion of the ongoing struggle is exposed and addressed.

The Case of Bishop of Roman Catholic Diocese of Port Louis and Others v. Suttybudeo Tengur and Others.

This appeal is representative of a 'counter-battle' of the State over the Church. Somehow, although the supreme law of the Constitution prevails, the jab of this reality into the aging 'ego' of the Catholic Church was felt as the Hindu defendant, and the appellant, a Catholic Bishop, sought to iron out an issue of unconstitutionality.

Administrators of a group of secondary schools in Mauritius, known as "the Catholic Colleges", appealed against a decision that its system for allocating places at the schools was unconstitutional. The normal practice was to set aside half of the places at the schools for the Government. The remainder were allocated to the Catholic Colleges. Proceedings were brought by the father of a Hindu girl who contended that the allocation system might prejudice his daughter's admission to one of the colleges, if she failed to earn one of the places allocated to the government. The government denied knowledge of the appellants' preference for Catholic pupils in the allocation of places, while conceding that if they had known of such arrangements they would have deemed them unconstitutional. The appellants relied on the authority of s.3 of the Constitution of Mauritius, which conferred the right to establish schools, and contended that the right to establish a denominational school was not accompanied by a right to receive support from public funds.

The Privy Council held that the arrangements for the allocation of the places were in breach of s.16 of the Constitution, which provided that "no law" shall make any provision that is discriminatory either of itself or in its effect. Although s. 3(b) of the Constitution refers to establishing, but not maintaining schools, it was clear that the freedom to establish schools must include the freedom to maintain them, as specified in s. 14(1).² In this case, the Catholic Colleges had been established by the Catholic authorities without expense to the state, but were at the relevant time maintained by the state. The defendant had made out his argument that the government bore responsibility for the admission system in that it made available public money for its implementation.

Dollars: Weapons of Supremacy?

Up until independence in 1968, Mauritius survived on a low-income agriculture based economy. An ordinance of 1856 permitted the government to support schools from public funds, but Roman Catholic authorities received no public subsidy until 1947 and cost of running and administering schools were met from fees paid by pupils. Under the Education Act of 1957, grants in aid to non-Government secondary schools were authorised. To qualify, section 35 of the Act provided that schools in receipt of grants shall be "open to pupils of any race or religion". This regulation put the Catholic authorities in a precarious position, but if this 'grant' was not sufficient in luring power into the hands of the State, their tactic of 'free for all' did.

In 1977, the government resolved to provide free secondary education for all. In these terms it would be a breach of law for the Catholic Authorities to continue charging fees from their students as government paid direct grants to these colleges. It has been noted that 'it appear[ed] that the government now paying the piper, endeavoured to call the tune'.³

This tactic was recognized by the religious denominations for what it was. They expressed that the character of 'the very existence' of such schools was under threat and attack.⁴ The steps taken by the State were orchestrated so that they could be the strongest link in the struggle. The power, opinion and ideals of the Church are stripped by the strategic approaches.⁵ Kenneth Ballharchet suggests that since before decolonisation, officials sought to divide and rule them - into émigré French elite, a Creole community, and an Indian community - and to suspect each in turn of disloyalty and treachery. This rule by division is reflected in what this boils down to- the sore of a Hindu and Catholic dilemma.

Critique of the Judgement in *Bishop of Roman Catholic Diocese of Port Louis v. Suttihudeo Tengur*

The decision in *Bishop of Roman Catholic Diocese of Port Louis v Suttihudeo Tengur* captures the social situation in Mauritius and also considerably reflects other jurisdictions such as Belize⁶ and British Colombia.⁷ Behind the curtains of the legal stage, this debate reduces

itself to the social power struggle between Church and State at large.

Any practice or law inconsistent with the constitution is null and void to the extent of its inconsistency. Section 16(3) of the constitution describes 'discriminatory' as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race... colour, creed or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not.

First, it is necessary to examine the initial stage - the government not taking account of religious belief or affiliation exercised by the Catholic colleges when allocating seats to pupils. They did not persist in their assertion of ignorance, described by the Supreme Court as 'indefensible'.⁸ Was this a mere oversight on their part or is it an indication of the State treading on eggshells - careful not to reveal the extent of the depleted power of the Church? Steps towards establishing schools and providing teachers were often taken by religious groups inspired by a belief in the virtue of education and a desire to rear the young at an impressionable age, within the tradition of a particular system of belief. This seems to have been so in Mauritius where by 1947 the Catholic authorities had established five secondary schools. The State, on the other hand, had only two secondary schools.⁹

The conclusion of the judgment is based on human rights and recognition of discriminatory treatment. The constitution is the ultimate judge and the Church is forced to accept what it upholds. The judgment must be applauded, as it upholds the ideal of the constitution - equality of individuals. Moreover, the judgment has broken the stalemate between the two powers in the educational arena that lay dormant for years.

Such 'discrimination' was also ousted in Belize in the case of *Roches v Wade*,¹⁰ where the Supreme Court found no justification for dismissing a teacher who became pregnant placing her employer, the Catholic Church, in breach of both the constitutional right to work provisions. The Court agreed with the applicant that given the Church's role in managing the schools it was subject to human rights obligations.

On this semblance, the silent war waged against the Church by the State is clearly seen in the educational institutions. The victory is

a clearly overwhelming, as the present government was forced into taking a side. Its state of 'ignorance' of the unconstitutional arrangement with the Catholic Colleges was confronted and they emerged from their lair. This case reveals the skeletons of the power play between the Church and State and unashamedly so, as the favorable decision has clothed these bones with a frock of justice.

Conclusion

Whether this battle will continue depends on the changes that occur in spheres of the society. As has been observed, the decision in *Bishop of Roman Catholic Diocese of Port Louis and Others v. Suttyhudeo Tengur* is validated upon the authority of the Mauritian Constitution and the upholding of human rights.

At the same time steps were undoubtedly taken by the State to relegate the [Catholic] Church from having any definite input into the educational decision making process in any critical way. Power over many centuries has slid from the hands of the Church by their ignorance, or because they were lured into defeat. The reverence of constitution in various jurisdictions is to be re-examined, for as has been aptly demonstrated, unconstitutional practices can go unnoticed for many years. Close watch is therefore necessary to ensure that statutes are obeyed by *every organ* of the society.



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1. *Privy Council Appeal 21 of 2003, delivered 3 February 2004.*
2. *Constitution in section 14(1) confers fundamental right on religious denominations or religious, social, ethnic or cultural associations or groups to establish and maintain schools at their own expense, the responsibility of regulating such schools is reserved to the State.*
3. *Lord Bingham of Cornhill in Bishop of Roman Catholic Dioces of Port Louis v Suttyhudeo Tengur , Privy Council Appeal 21 of 2003, delivered 3 February 2004. Privy Council Appeal 21 of 2003, delivered 3 February 2004 para 9.*
4. *Representations on behalf of the Catholic Colleges and two other denominational secondary schools, 1982.*
5. *The Structure of British Official Attitudes: Colonial Mauritius, 1883-1968, Historical Journal, Vol. 38, No. 4 (Dec., 1995), pp. 989-1011.*
6. *See Roches v Wade (2004) Civil Appeal No. 5 of 2004.*
7. *See Eileen Flynn v Sister Mary Anna Power and the Sisters of The Holy Faith [1985] IR 648.*
8. *Ibid.*
9. *See Bishop of Roman Catholic Dioces of Port Louis v Suttyhudeo Tengur , Privy Council Appeal 21 of 2003, delivered 3 February 2004. Privy Council Appeal 21 of 2003, delivered 3 February 2004 para 5.*
10. *(2004) Civil Appeal No. 5 of 2004.*