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THE ROLE OF THE STATE

VERY REVEREND MONSIGNOR THOMAS O. MARTIN*

VARIED, INDEED, HAVE BEEN the positions taken by philosophers with regard to the right of the State to educate its citizens. In both ancient and modern times there have been those who suggested that the State be given all power. Thus, Plato in the dialogue, *The Republic*, advances the theory that the State should select those who would compose the elite class of "guardians," especially the rulers, and educate them according to definite rules which the State would lay down by law. While he does not propose to force into this the children selected, preferring to make education rather a sort of amusement at first, in order to discover the natural bent of the child, he does propose that those particularly selected at the age of twenty should thenceforth follow a pattern prescribed by the State. The parents would have nothing to do with the upbringing of their children, for the State would do all.¹ In his later dialogue, *The Laws*, Plato returns to the idea that children should be trained from the first with an eye to the callings which they would pursue in later life.²

George Hegel, too, with his idea that the State is the highest degree of the objective spirit, naturally attributes thereto all power over the lives of the citizens, in the field of education as well as in others.³ No

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¹ PLATO, *THE REPUBLIC*, BKS. II-VII (especially II-IV). See Jowett's transl., v. 2, pp. 72-302.

² PLATO, *THE LAWS*, BK. VII, pt. 2. See Jowett's transl., v. 2, pp. 443-48. Jowett observes that Plato admires and desires to imitate the manner in which the Spartans made education the business of the State and took the greatest pains about their children, failing to remember how feeble and stunted the intellectual life of Sparta became under the discipline of Lycurgus, and not reflecting that that city would have offered little or no scope for the growth and development of mental powers such as his own. *Id.* at 444.

³ Hegel's more important volumes are: *PHAENOMENOLOGIE DES GEISTES* (1807), *ENCYKLOPAEDIE DER PHILOSOPHISCHEN WISSENSCHAFTEN IM GRUNDRISSE* (1817), and *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* (1821). His further ideas on philosophy of religion, history of philosophy, philosophy of history, and aesthetics are to be found in the collated works published by a group of his students from collected lecture notes.

less admirers of the State are Friedrich von Schelling⁴ and Johann Fichte⁵ who deny the native right of parents with regard to their children, claiming that children belong first of all to humanity, in practice to the State. As a result, they conclude that the State alone, as *parens patriae*, has the right to control teachers and the public education of children.

At the other extreme are the laissez-faire philosophers of the last century who would reduce the State to the status of a traffic policeman, on duty merely to prevent collisions and congestions.⁶ He may know that one road is bumpy, the other smooth, but he should not hold up freedom of movement and should not interfere with the traveler's desire to get where he wants to be. Typical of these philosophers is Herbert Spencer, with his strong bias for individualism, who proposes that the State should simply protect individual rights, insofar as this is necessary, and hopes that such necessity will progressively decrease, *i.e.*, that the work of the State will diminish, leaving ever greater scope for individual initiative.⁷

Almost equally extreme have been the positions taken in practice by the various States, for one reason or another. Thus, in Western Europe, after the fall of that part of the Roman Empire to the invading Germanic tribes, the State (though one should,

perhaps, in dealing with this period, rather speak of a kin-organized society than of one politically-organized) was unable to take much care of the education of its citizens. It was at this point that the Church, by establishing schools in parish houses, came to the rescue.⁸ By the time of Charlemagne, we find laws being made which urged the establishment of schools by priests and monks to serve not only clerical and monastic candidates but also the children, both of servile and of noble condition, from the countryside.⁹ His son, Louis I, "the Pious," also provided for aid in establishing such schools.¹⁰

In more recent times, however, at the other extreme, we find totalitarian governments making every effort to revamp the system of education in such wise as to produce a citizen who will be a useful tool of the State. Thus, the sole aim of education under the Fascists was to bring about the complete identification of the individual with the State, imbuing him with a passionate zeal to serve his country. Education was compulsory from the age of four and was continued even after school years through the Dopolavoro movement. Administration and control of schools was centralized under the Minister of National Education. While non-State schools continued to exist, all schools were subject to the same regulations, e.g., no textbook could be used which had not been approved by the Minister of National Education, and local school authorities were supplanted by state inspectors and supervisors.¹¹

⁴ Schelling's ideas are set forth in his *SAEMMTLICHE WERKE* (1856-61). His political ideas are clarified in his *VORLESUNGEN UEBER DIE METHODE DES AKADEMISCHEN STUDIUMS* (1803).

⁵ Fichte's *GRUNDLAGE DES NATURRECHTS* (1796), *SYSTEM DER SITTENLEHRE* (1798), *DIE BESTIMMUNG DES MENSCHEN* (1800), and *DER GESCHLOSSENE HANDELSSTAAT* (1800) give his ideas.

⁶ See Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 459-62 (1909).

⁷ See especially SPENCER, *MAN VERSUS THE STATE* (1886).

⁸ See Martin, *Some Early Laws on Education, THE INTEGRATED CURRICULUM AT WORK*, 20-41 (especially pp. 21, 24-25, 28) (1954).

⁹ See Martin, *op. cit. supra* note 8, at 21, 34-36.

¹⁰ See Martin, *op. cit. supra* note 8, at 21-22, 25.

¹¹ See Brown, *Education in Italy*, 22 *PHI DELTA KAPPAN* 94-97.

The Nazis, too, tended to monopolize education, closing the door of private preparatory schools to new pupils,¹² and using terror to force the children out of the Catholic schools so that they might be trained to be the new type of man with "a will of steel in a magnificent racial body."¹³ Interesting is the decision of the Vormundschaftsgericht, Frankfurt am Main-Höchst, Germany, May 4, 1937,¹⁴ which held that a mother who, after getting a divorce and obtaining custody of the children, determined to withdraw them from the schools in which they were and to send them to a religious school, was abusing her right of custody, and withdrew the right, transferring it to the father. The court further stated that the transfer to religious institutions as intended by the mother did not further the interests of the children's education, but rather responded to the interests of religious-charitable circles which were eager to increase the numbers of their pupils.

Similar is the decision of the Amtsgericht, Wilster, Germany, February 26, 1938,¹⁵ which held that a father, a member of Jehovah's Witnesses, who prevented his children from joining the Hitler Youth was abusing his right of custody over his children and endangering their spiritual welfare. The court, therefore, deprived him of his right of custody in that regard and went on to say that side by side with the school and the Hitler Youth the home in particular was under a serious responsibility to discharge an important educational function assigned to it by the State, a func-

¹² Decree of April 4, 1936.

¹³ Decree of January 15, 1935. See Wunderlich, *Education in Nazi Germany*, 4 SOCIAL RESEARCH 347, 349-53 (1935).

¹⁴ See 7 DEUTSCHES RECHT 466.

¹⁵ See 67 JURISTISCHE WOCHENSCHRIFT 1264.

tion which formed part of the legal right and duty of the parents to care for the personal welfare of the children.

The Communist Party, also, dictates, in the countries where it holds sway, the system of education. As Plato suggested long ago, it has the children taught that their first loyalty is to the State rather than to their parents. The State takes entire charge of their education, decides what trade or profession they will follow, and supervises even their recreation and sports. They spend little time in the home. After the period of universal compulsory elementary education, divorced from the Church's influence,¹⁶ those who show promise are given scholarships for higher education, while those who do not are placed in the "Labor Reserves," "battalions" of which may be sent wherever they are needed. The scholarship student, however, cannot choose his vocation. Some are selected to take short courses in a trade or industrial school. Others enter a four-year technical high school (tekhnikum). Graduates of technikums and of the ten-year city schools are eligible to enroll in a technical institute or university.¹⁷ Outside of school too, the Party takes control of the youth through the "Octobrists," the "Pioneers," and the "Komsomols."¹⁸

How different from the theory and the practice of the totalitarians is that en-

¹⁶ See *Constitution of the Union of Soviet Socialist Republics*, c. 10, arts. 121, 124.

¹⁷ 12 COMPTON, PICTURED ENCYCLOPEDIA 273-74 (1955 ed.). See also Watson, *Education in Soviet Russia*, 4 SOCIAL RESEARCH 360 (1935). For a discussion of the principles of the French Revolution, as expounded by Danton, Robespierre, et al., with regard to the State taking over all education, see TAINE, *LES ORIGINES DE LA FRANCE CONTEMPORAINE*, 69-378.

¹⁸ See Woody, *Towards a Classless Society Under Hammer and Sickle*, 182 ANNALS 140 (1935).

nunciated by the United States Supreme Court in *Pierce v. Society of Sisters*!¹⁹

There the Court said:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²⁰

It, therefore, struck down as unconstitutional the Oregon statute which would have given the State a monopoly of education, saying: "The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade."²¹

The Court also noted:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.²²

Our state courts, too, have expressed themselves in a similar vein. Thus, the Supreme Court of Kansas has said:

Sometimes it is declared that the rearing of children is a function which the state delegates to parents, and which it may resume at will, for its welfare through welfare of the child. The rearing of children is not in fact a function delegated by the state to the citizen, any more than the begetting of children is a delegated state function, and the theory of government recognized by the declara-

tion is responsible for absolutism in its most tyrannical form. . . . The interest which a parent has in the nurture of his own offspring, and in nearness to them for that purpose, lies in a different plane from that occupied by property; it transcends property. On the child's side, it has no higher welfare than to be reared by its parents. The state has no higher welfare than to have children reared by their parents, and free government is instituted for the protection and benefit of parenthood as one of the natural rights which the citizen possesses.²³

Time and again our courts have asserted that "education is a process for the mental, physical and moral development of human beings,"²⁴ adding, sometimes, that education means not merely instruction in the pursuits of literature, but comprehends a proper attention to the moral and religious sentiments of the child.²⁵

Pope Pius XI, citing with approval the words of the United States Supreme Court in *Pierce v. Society of Sisters* regarding the rights of parents, in his Encyclical on Education, *Divini illius Magistri*,²⁶ sets forth the Christian teaching on the rights of the Church, the family, and the State, with regard to education. He states that the family has directly from the Creator the duty and consequently the right to educate the

¹⁹ *Denton v. James*, 107 Kan. 729, 193 Pac. 307, 310 (1920).

²⁰ *Zorach v. Clauson*, 198 Misc. 631, 635, 99 N.Y.S.2d 339, 343 (Sup. Ct. 1950), *aff'd mem.*, 278 App. Div. 573, 102 N.Y.S.2d 27 (2d Dep't), *aff'd*, 303 N.Y. 161, 100 N.E.2d 463 (1951), *aff'd*, 343 U.S. 306 (1952). See also *First Nat'l Bank & Trust Co. v. Falligant*, 208 Ga. 479, 67 S.E.2d 473, 475 (1951); *McNair v. School Dist.*, 87 Mont. 423, 288 Pac. 188, 190 (1930); *Kaplan v. School Dist.*, 178 Pa. Super. 88, 113 A.2d 164, 166 (1955).

²¹ *Commonwealth v. Armstrong*, 1 Pa. Law J. 392-94.

²² *Christian Education of Youth* (1929), FIVE GREAT ENCYCLICALS 37 (1939).

¹⁹ 268 U.S. 510 (1925).

²⁰ *Id.* at 535.

²¹ *Id.* at 531.

²² *Id.* at 534.

offspring²⁷ (as the Kansas court noted).²⁸ He also states that this right both cannot be abdicated, since it is joined to a most serious duty, and is antecedent to any right of civil society and of the State, and for that reason it is not permitted for any power on earth to infringe upon it.²⁹

He quotes St. Thomas Aquinas³⁰ who says that nature does not intend the begetting alone of a child, but also intends that it be led and moved forward to the perfect status of a human being insofar as he is a human being, *i.e.*, the state of virtue. It is for this reason, says the Pope, that the Church in its Code of Canon Law clearly states that parents are bound by a most serious obligation to care for the education of the child both religious and moral, and physical and civil, in keeping with their abilities, and to provide for their temporal welfare, too.³¹

Rejecting, as do our courts, the idea that the child belongs to the State rather than to the family, he quotes Leo XIII who wrote that the children are something of the father, as it were a sort of amplification of the person of the father, and that, if we wish to speak with exactness, they do not enter into and become participants in civil society by themselves, but do so through the domestic community in which they are begotten.³²

The family may exercise its right and perform its duty to educate in various ways. An isolated family on a lonesome frontier may not be able to provide more than the

rudiments at home. Another family, in more affluent circumstances, may be able to hire a private tutor, duly qualified, to teach the subjects usually taught either in its own home or in that of the tutor. To this an Indiana appellate court has found no objection.³³ Most families, however, have neither the skills nor the resources to provide by themselves for the education of their children. They, therefore, must be assisted by others. Those others may be other families who are willing to pool their resources to hire a teacher, or teachers, or they may be all the other citizens of the State who pay taxes to provide a fund out of which the State can assist families in performing their duty to educate their children.

That the State should provide this assistance to families so that children thereof may be properly educated follows not from any relationship of parenthood between the State and the child, but from the authority which has been given to the State to promote the common welfare on earth, which is its particular reason for existence.³⁴ This common welfare consists in preserving peace and security for families and individuals to enjoy in exercising their rights and in gaining as great an abundance of spiritual and temporal blessings as is possible in this mortal life through the concordant efforts of all.³⁵ The State has, therefore, a duty inherent in its authority to protect

²⁷ *Id.* at 47.

²⁸ *Denton v. James*, 107 Kan. 729, 193 Pac. 307, 310 (1920).

²⁹ *Christian Education of Youth* (1929), FIVE GREAT ENCYCLICALS 37, 45 (1939).

³⁰ *Ibid.*

³¹ *Id.* at 45-46.

³² *Id.* at 46.

³³ *State v. Peterman*, 32 Ind. App. 665, 70 N.E. 550, 551 (1904).

³⁴ *Christian Education of Youth* (1929), FIVE GREAT ENCYCLICALS 37, 48 (1939).

³⁵ *Ibid.* See also Declaration of Independence: ". . . certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men . . ."; and Preamble to the Constitution of the United States.

and to advance the rights of families and individuals without absorbing them, as it were, or substituting itself for the family. Particularly with regard to education, therefore, it has the right, or, to speak more exactly, the duty to protect by its laws an antecedent right of the family, and to observe the supernatural rights of the Church with regard to Christian education.³⁶

Pius XI notes that sometimes the inertia, the lack of skill, or even the unworthiness of the parents brings it about that the State has to protect the child's rights with regard to education. The right of the parents to educate, after all, is not absolute, but depends upon the natural and divine law, wherefore it is subject not only to the authority of the Church, but also to the vigilance and care of the State, for the common welfare. In doing this the State is not substituting itself for the family, but is, in keeping with the natural rights of the child and the supernatural rights of the Church, providing for the need with opportune assistance.³⁷

Particularly, Pius XI teaches, it is the function of the State, as the common welfare requires, to promote the education of the young in several ways.³⁸ Negatively, it can and should remove public impediments to a moral and religious education of youth. Our courts, indeed have repeatedly said education involves moral training.³⁹ Positively, the State can favor and aid the work undertaken by the Church and the family. It can also provide for education where the efforts of the parents are lacking

or insufficient by founding its own schools and higher institutions. The State, after all, has more resources than others, which were given to it for the common needs of all, and it is but just and fitting that it use those resources for the welfare of those from whom it has received them. Further, the State can command and see to it that all citizens learn thoroughly the laws of the country and that they are suitably instructed in science, morals, and physical culture and in such wise as is fitting and is required for the common welfare in our times. Whether the State will choose to do this through its own inspectors or through the efforts of voluntary associations of schools which will undertake to rate teachers and courses, is for the State to decide. Another duty of the State is vigilant inspection that nothing harmful occur, e.g., by reason of subversive teachers or teaching manifestly inimical to the public welfare.⁴⁰

In providing all this, however, the State should respect the rights of the Church and of the family. Consequently, it would be wrong for it to take over all education, forcing the family to send its children only to the state schools (as the United States Supreme Court said)⁴¹ whether it do so physically or morally,⁴² or, one might add, by economic pressure.⁴³

³⁶ *Ibid.* As to the trend toward State monopoly in education and the Catholic reaction thereto, see also ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, 359-66 (1957).

³⁷ *Id.* at 49.

³⁸ *Ibid.*

³⁹ See note 24 *supra*.

⁴⁰ *Christian Education of Youth* (1929), FIVE GREAT ENCYCLICALS 37, 49 (1939). See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁴¹ *Pierce v. Society of Sisters*, note 40 *supra*.

⁴² *Christian Education of Youth*, *loc. cit. supra* note 40.

⁴³ See Martin, *Distributive Justice and Aid to Education*, PROCEEDINGS OF THE EIGHTH ANNUAL CONVENTION OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA 161-73. See also Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953); Katz, *Canon Stokes on Church and State*, THE LIVING CHURCH 14 (Sept. 16, 1951).

In addition to the duty to assist families both negatively and positively in educating their children the State has a definite right, all its own, to establish certain schools which are necessary for proper public administration or for the defense of peace at home and abroad and which require a particular skill and a special training, e.g., the academies of the Armed Services. Another thing for which the State has a right to provide is what one might call "civic" education, not for children alone but also for citizens of all ages. The purpose of such education, which is so broad as to embrace practically everything the State does for the common welfare, would be to enlighten the minds and stimulate the feelings of the citizens by proposing what is fitting and counteracting whatever tends to drag men down.⁴⁴

The right of the family to educate its children and the subsidiary right of the State to assist it in educating them are, in final analysis, subject to the right of the supernatural society established by God, the Church. The Church, too, has its place in education, for Christ sent it to "teach all nations." Schools are a means, always useful, sometimes necessary, for it to accomplish the purpose which He set for it. In establishing schools⁴⁵ the Church provides better for instruction of the young in Christian doctrine and in good morals and

so directly performs its mission. Sometimes, too, schools are a necessary means for the Church to accomplish its purpose, e.g., when the authorities in control of the schools insist upon a program which limits education to the knowledge of natural sciences and to the rules of life in society here on earth, either wholly or primarily, or when the existing schools constitute a danger for the faith of the Catholic children for other reasons.⁴⁶

In the light of natural law, too, apart from its divine mission, the Church certainly has the same right as any other voluntary association established to provide education for the children of the families which wish to pool their resources for this purpose. Finally, the Church has for centuries had its schools as a means of performing one of the spiritual works of mercy, an expression of the charity of Christ which urges it.⁴⁷

The State's right, therefore, to educate, one aspect of its general right and duty to promote the common welfare, is subsidiary to the primary and native right of the family to educate its children and to the supernatural right of the Church to accomplish its mission to "teach all nations," but it is, at the same time, a very extensive right and duty, whether in its negative or in its positive applications.

⁴⁶ See Pius IX, *Syllabus, seu collectio errorum modernorum*, DB nn. 45, 47-48 (1869).

⁴⁷ See Ottaviani, *Compendium Iuris Publici Ecclesiastici* 405-21 (4th ed.); Ottaviani, 2 *Institutiones Iuris Publici Ecclesiastici* 228-53.

⁴⁴ *Christian Education of Youth* (1929), FIVE GREAT ENCYCLICALS 37, 50 (1939).

⁴⁵ CODEX IURIS CANONICI, Can. 1375.