

## Religious Liberty - The Rights of Parents in the Education of their Children

D. Joaguin Ruiz-Gimenez Cortez

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Family, Life Course, and Society Commons](#), and the [Religion Commons](#)

---

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# RELIGIOUS LIBERTY— The Rights of Parents in the Education of Their Children †

D. JOAGUIN RUIZ-GIMENEZ CORTEZ\*

## Introduction

**F**EW PROBLEMS CAUSE MORE ANXIETY and concern for Christian Jurists than the problem of the fair ordinance of religious liberty within each political community and in the international sphere. The teaching of the integral values of the common good on all levels of society, and the need for a very deep and profound respect for the conscience of the individual are factors which converge in this problem of religious liberty.

To my credit and pleasure, I have been entrusted with introducing the analysis of one of the most attractive and complex aspects of that vast subject. In effect, it deals with reflecting seriously on the reciprocal implications between the “natural right of religious liberty” of each human being and the rights of parents in the education of their children.

These words suffice for an understanding of the depth and direction of the problem. Given the limited amount of time at our disposal, it is obvious that we cannot attempt to treat our subject in a systematic manner or in all of its ramifications. On the other hand, our task is better understood as directed toward the encouragement of collective thinking on this question so rich in nuances, and in recapping the thoughts of all the members of the Congress. Thus the minutes of this great assembly will contain the widest possible information concerning

---

† Paper delivered on the occasion of the Fifth International Congress of Catholic Jurists at Salamanca, Spain, September 8-12, 1965. Spanish manuscript translated by Martin I. Solomon, B.A., Queens College; M.S., St. John's University; and Anthony J. Indence, Jr., B.A., University of Notre Dame; LL.B., St. John's University School of Law.

\* Professor of Natural Law and Philosophy, University of Madrid.

the approaches and solutions to the problems that presently manifest themselves in the various countries here represented. With merited regard for the personal reflections of the illustrious jurists here assembled, and the countless others who are spiritually united with us from afar, I dare to point out some simple reflections. It is my hope that we shall thus find and put into effect adequate juridic formulae which guarantee, at the same time, respect for a true freedom of conscience and the cultivation of the fundamental values of the spirit.

To more deeply approach the subject under consideration, and in order to properly delineate its complexities and difficulties, it is important to emphasize the three sets of significant factors that enter into play.

1) The dimension of religiosity in human life, in all its aspects; from the most intimate—those that invade the sanctuary of the conscience—to the most external, *e.g.*, the public manifestations of the cult. This area of the relation of man to God cannot remain outside a fully human formation of the individual, if one does not want to mutilate man in regard to what is most profound and significant in his life. It does not deal, in fact, with preserving an “historical religiosity,” which the role of science and technology can eliminate. It deals, on the contrary, with cultivating an essential dimension which will have meaning in the present, and which will help to forge the future. As Jacques Maritain has accurately observed: “The education of tomorrow will have to put an end to the separation between religious inspiration and the secular activities of man, just as integral humanism must encompass among its principal roots the sanctification of profane and temporal being.” More recently,

from the Cathedral of St. Peter, Pope Paul VI has emphasized the same exigency:

Modern progress places more emphasis on spiritual goods. This is because progress itself needs good souls, strong men, well educated spirits, whole and intelligent men. And it is precisely Christian education that forms man in his totality and leads him to the conquest of supreme values, thus enabling him to properly enjoy the goods of this world as well.

As our historical experience amply demonstrates, in any attempt to formulate juridic norms for the regulation of the educative system of a particular society, we are obviously presented with a contrast of opposing considerations. That is, the norms we seek must at one time respect the freedom of the conscience of each citizen, and also the integrity of an education that fosters the highest spiritual values—at its peak, the value of Christian religiosity. He who refuses to retreat into the two extreme and inadequate positions of either secular and pseudo-liberal agnosticism, on the one hand, or ideological servitude to secular totalitarianism, on the other, will always feel an extreme anxiety in his soul. This is caused by the desire to achieve a beautiful harmony of personal liberty with service to objective truth. During this life, such a perfect harmony is never completely realized and, therefore, a constant tension results—but it is precisely this tension that gives immense drama to human existence.

2) From another perspective we must consider the essential role of the educative and directive authority within the family group. For as much as we insist—and I insist to the utmost—on the importance and necessity of the family having an ever-increasing communal and informal structure (and that the relationship between the

parents and the children be articulated in a heart to heart dialogue, with the language of love and understanding, over and above a hierarchical system of severity), it is impossible to eliminate, since it is in the nature of things, the illuminatory and corrective mission that parents share with respect to their children.

But all this is complicated by another dimension of the problem which is equally natural and undeniable: that of the dignity of the child, and the duty of respect for his conscience and for his sacred right to the free search for truth. If, in the first years of his life, these factors are embryonic, they must nevertheless be recognized. As the child grows, the tensions and struggles between these two fundamental attitudes (that of the parents, who try to conform the child to their deepest beliefs, and that of the child who reaffirms, as a human being, his right to the exercise of responsible liberty) become more apparent.

The jurists and, above all, the legislators, have to approach the mystery of the paternal-filial relationship with great delicacy and respect. However, they can not close their eyes to the often ignored fact of a break in the communications and peace of the family.

3) There is still more to be considered in this area. It is the problem of the equality of the father and the mother concerning the exercise of family authority and, above all, regarding the educative function. In absolute matriarchal or patriarchal systems, the question would have no more than an historic importance. However, in our society it acquires an immediate urgency. The equality of rights and duties of both the husband and wife concerning the conduct of the home and, above all, in the formation of the personality of the chil-

dren, is increasingly apparent in the social realities of our day and the juridic norms that reflect them.

No one with a truly realistic and human approach would dare to deny the mother an extremely important role in the molding of the child, especially in that which concerns religious education. In fact, in the immense majority of homes, the mothers are the ones who bring to life the faith and the love of God in the souls of their children. But precisely for that reason it is not possible to ignore (and jurists throughout the world have painful experience of it) the problems that exist concerning the role of the father and the mother with respect to the moral and religious education of their descendants. The tensions between the disbelieving father and the pious mother, and, in rarer cases, the unbelieving mother and the deeply religious father or (that which is particularly important to the ecumenical climate in which we live) the father of one religious confession and the mother of another, raise difficulties in the face of which neither the Church nor the State can remain indifferent. However, their intervention must be realized in a manner that will sacrifice neither the well-being of the child, nor a respect for his conscience. Furthermore, the educative function of the parents must be equally respected, and attention must be given to the essential unity of the family. At first sight, the problem would seem to require something like a "squaring of the circle."

It has seemed indispensable to us to point out the multiple and complex factors concerning the problem we are analyzing, in order to acquire a suitable understanding of its magnitude and difficulty, not with the temptations of sceptic indifferentism,

but rather with a deeply human desire of contributing, according to our vocation as jurists, to the finding of the most humane solutions to the problem. A scientifically methodic reflection on the problem would oblige us, consequently, to examine in detail each one of these aspects. But, since that is not now possible, nor even strictly necessary, considering the ideological homogeneity of those attending this assembly, we will content ourselves with the enumeration and consideration of three basic precepts.

First, the natural, inalienable and inviolable right of each human being, regardless of sex, age, or social position, to a just religious liberty, *i.e.*, according to the beautiful words of His Holiness John XXIII: "to honor God according to the dictum of his proper conscience and to profess his religion privately and publicly."

Secondly, the equally undeniable role of the parents, which is at once a right and a duty, in the education of their children according to their own beliefs and ideals, on all levels, from scientific and professional training to the highest moral and religious values. (For the moment we leave in parenthesis the difficult question of whether this right and duty of parents reaches the extreme of "excluding the dimension of religiosity" in the formation of their children when they, the parents, are formally agnostics or militant atheists.)

Thirdly, the co-ordinative and even perfective function of the State (in the light of the principle of subsidiarity), in the sense not only of making compatible coexisting or contrasting liberties (*e.g.*, the exercise of religious liberty and the educative mission of parents), but also in the blending and integration of these subjective attitudes within the service of the

common good. But it is most important to emphasize that the concept of the "common good" cannot be understood as synonymous with the good of the State, as something heterogeneous and superior to the personal good of each citizen. It is, in the language of John XXIII concerning the treatise of Pius XII, the conjunct of social conditions that make possible, precisely to each and every man, the most facile and intense affirmation of his personality.

Having brought to light these basic difficulties, we shall concentrate our analysis on the great problems which we previously pointed out. We will handle these difficulties on a sociological and moral plane, as well as in regard to the juridic concepts either articulated in the existing positive law, on a national or international scale, or still *in fieri* under the impulse of the exigencies of natural law. Above all, we will consider these problems in relation to a Christian juridic understanding at the level of the present historical situation of the world.

We shall proceed from the most external or tangential perspective—that is to say, the existing tensions between the domestic community and the State—to the most intimate perspective, that is, the possible tensions within the family itself. Thus, we will first consider the contrasts and conflicts between the educative activity of the parents and the juridico-political function of the State. In order to illuminate the problem as much as possible, we will enter into a very short examination of the tensions between the spouses with respect to the education of their children, as much in situations which we could term "normal" living, as in circumstances of discord. Finally, we shall reflect on the harmony

and discord that exists between parents and their offspring regarding their religious formation.

**Tensions Between the Educative  
Mission of the Parents and the  
Juridico-Political Function of the State**

It is a fact of history that situations of tension and conflict between the family and the State concerning the education of new generations have occurred many times and, in fact, are still occurring. The factors which concur in creating these situations are of very diverse nature, but their ultimate root lies in the distinct and opposing ideological concepts of the world and of life.

It is not necessary to describe here the two, well known, extreme "statist" attitudes which, while derived from antagonistic philosophical roots, are nevertheless coincident in their understanding of the educative problem (a fact which at first sight would appear to be a paradox). The old liberal, or better, pseudo-liberal concept reached its peak in the latter half of the nineteenth century and in the first decades of the twentieth century. Relying on an affirmation of respect for the conscience of the child, and other similar declarations, (e.g., the necessity of eliminating all "supra-scientific" elements from the formation of the young and of giving the most homogeneous "secular" education possible to all the citizens in a single system of state-operated schools), this tradition generated very painful attacks, not only on the necessity for an integral education of the entire human being, but also against the natural right and duty of parents to care for the spiritual formation of their children.

As Christian jurists, that is to say, as men dedicated to the idea of justice as a vocation, we have to recognize that some of the preoccupations of the "old liberals" ought to be examined calmly and incorporated into a fully human scheme of education. I refer principally to the guarantee that all parents should always be able to find within the educative system of their country institutions which impart to their children moral and religious teachings in agreement with their beliefs, whatever they may be, limited of course by a respect for the values of morality and of public order. It is also undeniably important, especially in the primary and intermediate grades, that these schools, whether public or private, have as students children and young people from the various regions, races and social levels of the nation, so that it will be possible to achieve, from childhood, a better climate of understanding and of dialogue. This is imperative in any really human society, and is especially important in a society which pretends to nourish itself on Christian ideals.

But these aspirations and others like them must be achieved through a juridic ordinance which does not rely on the already anachronistic "secular liberalism," in which are found many of the totalitarian deviations of the past. Through the years, the supreme Magisterium of the Church has frequently confronted and condemned "secularism" in this area. Recall the censures of Pius IX's *Syllabus* or those of Leo XIII concerning "secular" education, as proclaimed by "liberal" Masonry, and later those of Pius XI, with regard to analogous problems in Mexico and in Spain.

Similar and still more serious secular interventions have occurred under the regimes of collectivist or totalitarian in-

spiration, whatever their ideological base (e.g., monopoly of nationality, race or social class), and regardless of the historic forms in which they have been crystallizing during the last century. It is also a painful fact that the juridic ordination of education within these political situations (call them German Nationalism, Italian Fascism, Soviet Communism) radically violates the natural mission of the parents with respect to the formation of their children. Consequently, these abuses have been severely condemned from the Cathedral of St. Peter. Leo XIII, in 1878, denounced the errors of Marxist Socialism on this point. Decades later, Pius XI did the same with regard to German National Socialism and Fascism. Pius XII repeated these protests against any educative system of totalitarian form.

From the depths of these false opinions rises the Christian concept which, while recognizing the respective functions of the Church and also of the State (although on different levels) in the education of the youth, clearly points out the role of the family and the rights and duties of the parents. It is neither possible nor necessary to systematically develop that doctrine here. It is well known to all the members of this Congress, and has always been unequivocally announced by the Pontifical Magisterium, especially since the second half of the past century.

The point of departure is the Gospel precept of carrying the light of the faith to all the peoples; *Docete omnes gentes*. In still more concrete form, it is St. Thomas Aquinas' idea that if God participates universally in reason from the beginning, the father participates according to a singular mode and is immediately responsible for the "generation, the education and the

teaching and even that which refers to the perfection of the human life." Therefore, it would be against natural justice if the child, before it had gained the use of reason, were to be taken from the care of the parents or in some manner dealt with against their wishes.

On this basis, the Supreme Pontiffs have insisted untiringly on the following key points.

1) Education must tend toward the integral formation of man, in both the natural and supernatural spheres.

2) The protagonists of this process of education are, in the most direct and primary way, the parents (and, by extension, the tutors), *i.e.*, the family, with the cooperation of the Church (in that which concerns the transcendent dimension of the human being) and, in a subsidiary way, the State (whose mission consists in providing facilities for the educative work of the primary agents, thus to supply their deficiencies and harmonize their different activities, with reference to the common good). This is in no way intended to prejudice the direct function of the State in that which concerns military instruction and purely civic formation.

3) In order that they be able to accomplish this broad educative program, it is necessary that the juridic norms of each nation guarantee to the parents the exercise of their rights and duties concerning the education of their offspring, while giving recognition, and aid, to schools on every grade level, be they Church or privately owned institutions, provided that they have the necessary moral, social and technical qualifications.

4) Due to the exigencies of distributive justice, the State should cooperate by setting aside a proportional ratio of public

funds for education, including the establishment of a system of public schools to supplement private institutions, thus assuring to all the children, young people and adults of the nation a sufficient education and, through it, a real equality of opportunity in the collective life of the society.

On this subject, it is especially important for us to draw attention to the often repeated exhortations of the Popes to all types of governments—that they respect the educative mission of parents and make possible its actual fulfillment. These statements have a direct bearing on the subject we are analyzing. Leo XIII saw in this policy one of the distinct roots of all authentically Christian political thought and one of the most sacred duties of all just government. In that vein, Pius XI, in addition to expressly contradicting, as we have seen, the concrete errors of the “pseudo-liberal” and of the totalitarian systems, dedicated a special and systematic attention to the theme of education in two of his great Encyclicals: *Divini Illius Magistri* and *Casti Connubii*. Principally in the first of these, and in extremely modern language, he explicitly and energetically defended the educative duty and right of parents against the intrusions of the State. He considered this a right and duty derived from the natural law and to be applied universally, not only to cases involving Catholic parents. Faithful to the inspiration of his predecessor, Pius XII did not miss an opportunity to underline the essential value of education in itself, and as a foundation of social peace. From the first encyclical of his Pontificate, he drew attention to the mission of the parents and of the teachers, the respect due the individual’s conscience concerning the cultivation of the supreme values of the spirit, and the

necessity and urgency of opposing dangerous influences, within and outside the family, in the process of forging and strengthening the humanity of the child.

As a perfect evolutionary recapitulation of that teaching, John XXIII inscribed this right of parents to the education of their children on the tablet of the natural rights of each and every man: “Parents have,” we read in *Pacem In Terris*, “the primary right to maintain and educate their own children.”

Now, in the climate of the Second Vatican Council, and as a preview of the solemn statements which that great Assembly will doubtless make, on approving the pastoral Constitution on the relations of the Church with the modern world, and more concretely, in the declaration precisely on the Christian education of the youth, His Holiness Paul VI has insisted on the cardinal role that the family must play in the decisively spiritual enterprise of education.

In the light of all these directives of the Pontifical Magisterium, and considering present conciliar tendencies regarding religious liberty and ecumenism, one can and must insist that the Christian doctrine concerning the educative mission of parents, and the just position of the State with respect to it, have an increasingly pluralistic character and, in fact, form a double perspective. First, with regard to recognizing and sanctioning, in educative matters, the independent legitimacy of the role of all the integral domestic communities of the nation, without diminishing either the mission of the Church in religious formation of the faithful or the proper function of the State in safeguarding the common good. Secondly, with regard to the assumption within the Christian world of the



principle of religious liberty (correctly understood, that is, not as autonomy before God, but as autonomy before temporal powers) such that, from day to day, the various Christian Churches (and even more distant religious confessions) coincide and unite their efforts in the defense of the right of the parents to religiously educate their children, according to their own beliefs, against the intrusion of other ecclesiastic or civil institutions.

#### *Present Juridic Perspectives*

Having observed, although in very synthetic form, the panorama of ideological currents which give rise to the problem of the relations between the family and the State, in that which most directly affects the education of the youth, we shall now attempt to summarize, also in abbreviated form, the attitudes concerning it which have been crystallized in contemporary juridic ordinances, or those which will appear in the immediate future.

In order to facilitate the integration of the contributions which the members of this Congress are able to make within our discussion, we shall examine successively in this chapter (as likewise in the other two chapters of our study) the area of existing positive law (be it the national laws of the most important countries, Canon Law, or international law) and, afterwards, evolutionary legislative proposals and efforts, stimulated principally by the activities of the United Nations and the Second Vatican Council.

#### *Existing Positive Law*

It obviously is not possible for us to examine here the entire area of comparative law on this subject. Rather, we must

confine ourselves to some examples of the two basic tendencies, *i.e.*, the most "secular" (in whatever form), and the most authentically democratic and, therefore, respectful of the educative rights of the parents in relation to the principle of religious liberty. (This classification is purely indicative, and we are conscious of the difficulty which is always involved in any attempt to enclose the complexities and dynamism of collective phenomena within a rational scheme.)

Among the existing positive juridic systems, there are some, in the East as well as the West, where an excessive intrusion of the State and, in general, of the public corporations, still prevails in the field of education. Such, for example, is the case in Mexico, where they follow precepts similar to those contained in article 3 of the 1917 Constitution. The latter, despite successive tempering modifications (on the 13th of December, 1934 and on the 30th of December, 1946), still places the monopoly of national education in the hands of the State, with the express purpose of excluding all religious doctrine from the education of the youth. It also obliges private schools to follow the same pattern. It is only fair to recognize that, during the last quarter of this century, the rigorous enforcement of these laws has softened. However, there still exists the inherent risk of their enforcement, and of the attacks which they now and again produce from a militant "secularism," *e.g.*, the May, 1963 pastoral letters of the Bishops and the polemics that followed in the national press. Knowing the Christian spirit of the people of Mexico, we are confident, therefore, that, through a process of authentic democratic evolution, the formal derogation of these precepts and the installation

of a system truly respectful of the liberty of beliefs in educative matters will be achieved.

Almost at geographical antipodes, we find another series of countries where the government rigorously imposes its own ideological beliefs and seriously curbs the educative rights of the parents, as well as many other fundamental liberties. Such is the case of the Eastern European and Asiatic nations, where political regimes inspired by dialectic materialism and militant atheism have triumphed. The prototype is the 1936 Constitution of the U.S.S.R., which imposes a general and obligatory public school system, separates the Church from the school, and guarantees the freedom of anti-religious propaganda.

Despite their formal declarations of religious liberty, Czechoslovakia and the People's Republic of China are in line with the Soviet system. So also is the legislation of Hungary, Poland, East Germany and Yugoslavia, although there is somewhat more respect for the individual conscience in these countries, due, no doubt, to the strength of the popular Christian substrata which lie latent under the prevailing political system.

In all of these totalitarian systems, to a greater or lesser extent, a respect for the autonomy of lesser social units and especially of the family, in that which concerns the moral and religious formation of new generations is inadmissible. Perhaps this is the clearest explanation of why the proposed United Nations *Agreement For The Elimination of All Forms of Religious Intolerance*, which was crystallized in a document approved by the corresponding subcommittee during the celebrated sessions at Geneva, last January (to which we

will later refer), incurred two dissenting votes, one from the Soviet Union and one from Mexico, and a Polish abstention (three nations which, although proclaiming in their constitutions the principle of freedom of belief and of religion, obstinately persist in an exclusive secularism with regard to matters of education).

On the other hand, the majority of the countries of the free world include in their constitutions and in their civil codes the right and the duty of the parents to educate their children according to their own religious beliefs within, of course, the limitations that natural morality and the common good impose on the exercise of any of these fundamental liberties. Thus, in Europe, such is the fundamental law of the Federal Republic of West Germany and it is contained in the constitutions of Belgium, Denmark, France, Ireland, Italy, the Netherlands, Portugal, Switzerland and Turkey. Furthermore, in Great Britain, a broad system of educative liberty prevails, with attention given to the interests of the family, their beliefs, and the welfare of the child. In America, the constitutions of Argentina, Paraguay and the United States of America emphasize these same points. In Asia, such is the constitution of Japan and the same considerations prevail in those of Africa's Ghana and Morocco.

Due to the uniqueness of their respective socio-political and religious situations, separate mention is made of the fundamental laws of Norway, Greece and Spain. In Norway, the official religion of the State is Lutheranism, and the citizens who profess that religion *must* educate their children in it. With respect to Greece, the principle of religious liberty reigns, but its official religion is that of the Eastern Orthodox Church of Christ, and all education must

be based on the ideological directives of Greco-Christian civilization.

With regard to Spain, according to the basic norms of the existing positive law, *Fuero de los Espanoles* of 1945, and the *Law of the Fundamental Principles of the Movement of the 17th of May, 1958*, the Catholic religion is the official religion of the nation and the State, and education on all levels must be inspired by it. Nevertheless, the legislature has forecast, in the sixth article of the *Fuero de los Espanoles*, the principle of tolerance and respect for religious creeds of non-Catholics in the private sphere. The existing Concordat between the Spanish State and the Holy See, executed on the 27th of August, 1953, despite its reaffirmation of the principle that all education will be inspired by the Dogmas of the Catholic religion, explicitly establishes, in its 27th article, that "the children of non-Catholics, when their parents (or those who act as parents) request it" will be dispensed from education in the Catholic faith.

Further, in article 23, *Fuero de los Espanoles* states generically that it is the obligation and, at the same time, the right of parents to educate and instruct their children. The Civil Code of 1889 legalizes this right without distinctions, so that other norms must be liberally construed so as not to impose on non-Catholic parents the difficulty of giving their children a moral or religious education discrepant with their own faith. In line with this approach is the new statute for the regulation of the juridical position of dissident confessions, now being prepared by the Spanish government.

The norms of Canon Law on this point are clear, definitive and in line with the traditional teachings of the Church. The Code of 1917 declares, on the one hand,

"the very grave obligation" which parents have "to procure, with every effort, an education for their children, as much in religion and morality, as in the material and civil areas," a precept indicated to be as much a right as a duty in the second paragraph of Canon 1372.

On the other hand, with regard to the content and levels of Christian education, the same Code prescribes that, on all levels, from the elementary schools to the secondary schools, there must be religious instruction comparable to the age of the child (Canon 1373). It orders that Catholic children are not to attend anti-Catholic, neutral, or mixed (that is to say, also open to anti-Catholics) schools, except in particular circumstances where, with due caution, the local ecclesiastical authorities, in accordance with instructions from the Holy See, could tolerate such attendance (Canon 1374). Furthermore, in order to reinforce what we would call the educative autonomy of the Catholic family in collaboration with the Church, the Code defines the right of the Church to establish schools of any discipline and grade, including universities (Canons 1375 to 1379). Finally, the Church's right to exercise vigilance and authority in all that affects the religious formation of youth in the different educational centers of the nation is underlined (Canons 1381 to 1383).

Viewed from this perspective, it would seem, at first sight, that there is little attention given to freedom of education for non-Catholic parents, in the sense that they could send their children to schools where the religious formation in their own beliefs would be guaranteed. However, one must remember that when the Church speaks of the right and the duty of parents to educate their children, it does so in the name

of moral exigencies and natural laws which are, therefore, universal and are not limited to men of the Catholic faith. Recall on this point the enlightened text of Pius XI in the Encyclical *Divini Illius Magistri*, cited above.

Furthermore, as the Code explicitly states, the laws contained therein apply only to those baptized in the Catholic Church and, consequently, they leave untouched the possible right of parents who are not formal members of the Church to the education of their children in their own beliefs (Canon 12).

Finally, in the majority of Concordats, including those with Catholic countries, it is expressly provided that the children of citizens who do not profess the Catholic religion should be excepted, at the petition of their parents, from receiving Catholic instruction.

We would not want to close this discussion without mentioning that the principles contained herein are analogically applicable to the peculiar circumstances of adoptive parents, teachers, godparents and, in general, those who act as parents and exercise legal responsibility for the care of minors (Canon 1335 of the Code).

In the area of international law the explicit and solemn recognition of the rights of parents to educate their children has been reinforced since the Second World War.

The Universal Declaration of the Rights of Man, approved by the United Nations on December 10, 1948, not only guarantees to each man the right to liberty of thought and religious belief, but also emphasizes that this right embraces a series of liberties, internal and external, and includes the teaching and preaching of one's own faith (article 18). In addition, it un-

derlines the fact that education must "attend to the complete development of the human personality," and reinforces respect for the rights of man and for his fundamental liberties. It attempts to foster understanding, tolerance and friendship among all nations and all racial and religious groups. But, above all, and that which is most important to our present purposes, it declares solemnly (article 26) that "parents have priority in the right of choosing the kind of education their children are to receive."

It was announced at the concluding session of the UNESCO meeting in Hamburg, in January, 1953, that parents are the first educators of their children. That same spirit inspired the Charter of the Rights of Children also approved by the General Assembly of the United Nations on December 20, 1959.

It is unfortunate that, since the Declaration of 1948 is only a "recommendation," many of the member states who subscribed to it nevertheless seriously violate in practice the educative rights of parents. Therefore, it is praiseworthy that the member states of the Council of Europe included in their *Agreement for the Protection of the Rights and Liberties of Man*, approved by the Treaty of Rome, in 1950, the obligation of respecting freedom of conscience and of religion in all its dimensions, including education, without any further limitations except, as is logical, those imposed by the law "in a democratic society for the public security, the protection of order, health, morality, and other rights and liberties." In the *Paris Protocol Supplement* of 1952, the members prescribed that "the State, in the exercise of its functions in the field of education and of teaching, will respect the right of parents

and assure education and teaching in conformity with their religious and philosophical convictions" (article 2).

Precisely in order to end the discrimination that still exists in the area of religious liberty and, within it, against the rights of parents in the education of their offspring, the General Assembly of the United Nations, in its seventeenth session, December, 1962, agreed to prepare a declaration and another pact "in order to eliminate all the forms of religious intolerance." After numerous difficulties, the complete sub-committee, in its celebrated meetings at Geneva last January, approved, as is well known, a resolution that constitutes a "proposed pact" of thirty articles.

While we cannot enter into an analysis of its structure and content, it is especially important for us to underline certain points that directly concern the material which we are examining.

1) It assures to every human being the liberty of embracing any religion or belief and of changing it, according to the dictates of his conscience and free of any coercion. It also guarantees his right to the public or private manifestation of his faith.

2) It confirms that this liberty includes not only the right to honor, pay tribute to and make the pilgrimages of his faith, etc., but also the liberty of "teaching, divulging, and learning his religion or belief—its sacred language and its traditions, and to prepare people who wish to dedicate themselves to its activities." Further, it insists that this liberty includes the practice of his religion or belief in the establishment and maintenance of charitable and educational institutions (article 3 of the "proposed pact").

In addition, this "proposed pact" main-

tains that the agreeing states must oblige themselves to respect "the primary right of the parents and, in their place, the tutors, to select a religion or belief for their children." It is hoped that the proposed agreement will be definitively approved by the Assembly of the United Nations, despite the arguments against it, formulated, as we said, by those states where a "secular" concept of public life and especially of the educative system is predominant. Let us also hope that, as a result, the intrusions of the State in this area, so seriously damaging to human rights, will gradually disappear. Of course, the State can and must continue to secure a reciprocal respect among the distinct racial and religious groups in the nation, and must provide adequate technical and pedagogical facilities for both public and private education.

#### **Tensions Between the Husband and Wife With Respect to the Education of the Children**

Until now we have concerned ourselves principally with the basic question of the relations—in harmony and in discord—between the family, considered as a whole, and the State. But our analysis would remain seriously deficient if we did not examine the interior tensions within the family itself, between its founders, the parents, and also between them and the children (we shall cover this last aspect in the following chapter).

It is a painful but true fact that in the bosom of the home there arise, at times, differences and even serious arguments between the spouses concerning the education of the children, especially in its moral and religious aspects. But before entering into an analysis of these tensions it seems indispensable to us to point out,

although in very succinct form, the characteristic roots of the social change that has occurred during the last one hundred years.

Generically considered, although confining ourselves to the Western World and, within it, to the middle class family (since an examination of other types of families, in oriental countries, and also those of the working, farming and, above all, industrial classes would make matters too complicated to handle here), it is noteworthy that, until the end of the nineteenth century and, in some regions, even until well into the twentieth century, a situation had prevailed which we could call the "Roman image of the family," strongly hierarchical, with "monarchical" power very much concentrated in the hands of the father. A spirit of obedience and monologue permeated the paternal-filial relationship.

This is not to say that the rebellious romantic movements characteristic of the second half of the nineteenth century did not attack this concept many times. They did, but from a sociological point of view, they failed to alter it in any generic sense. Within this concept, the educative mission of the parents was centered very definitely on the father, at least in a juridic sense (although, in fact, the mother has always been a very active participant in the moral and religious formation of the children, above all during infancy and adolescence).

This attitude is manifested in the majority of the Civil Codes promulgated in the past century. Let us take for example the Napoleonic Code, the senior of all those of Western Europe, which in its first rendition of article 373, as we will see later, attributed to the father, that is to say to the male, a monopoly of family authority. Or

consider the Spanish Civil Code of 1889, which, in its article 154, states that family authority over minor legitimate sons is concentrated in the father and, in his absence, in the mother (although without failing to note, as we shall emphasize later, a very important participation of the mother in some substantial ways).

That which we would very respectfully call the "traditional" attitude of the Catholic Church moves in the same direction, although it must be recognized that, to its honor, the Church has always opposed the preponderance or abuse of the father's power in the bosom of the family, or in regard to the wife or with respect to the relationship between the parents and the children.

Furthermore, the Church has underlined in every instance that the union of the husband and wife must be a union of love and of peace, similar to the union of Christ with His Church; that the power of the father is not a despotic or tyrannical power but a "political" one, subject, therefore, to ethical and juridic norms, in service always to the common good of the family and the personal well being of each one of his children and that to the mother belongs an indispensable educative function in the bosom of the home. But along with this dedication to principles and moral exigencies, it is a fact that the prevalent tendency among traditional Catholics of the nineteenth century and part of the twentieth (even with support from some texts of the Pontifical Magisterium, like Leo XIII's Encyclical, *Quod Apostolici Muneris* of 1878) has been a defense of the pyramidal structure of the family, vitalized and mitigated by the necessity for a reciprocal charity and respect.

During the decades in which we have

lived, the socioeconomic, cultural and political transformations have been so intense that they could not fail to be reflected strongly—in both their good and bad aspects—in the structure of the family, above all, as it affects our discussion most directly, in regard to a certain leveling of the husband and wife concerning the exercise of family power and in regard to the new pedagogical methods in the formation of the children. The “monarchic” approach which tended to monopolize power in the hands of the father is giving way to the dynamism of social life, resulting in a certain “diarchy,” a combine of power in the hands of the father and the mother together. This “family power,” while it remains an inherent *right* of the family, is interpreted still more in the sense of a function of duty and service. We will examine both aspects of the problem.

With regard to the position or respective levels of the spouses, it is not necessary to point out that the change that has occurred has been rapid and fundamental, due to the effect of very diverse factors which have vigorously and inexorably promoted that which has been called the “advancement of womanhood,” both within and outside the home. The Holy Fathers have proclaimed it with increasing clarity, without failing to note certain dangers that could threaten the very dignity of a woman and her most genuine functions. They have exalted the value of this process and have emphasized the essential role of the mother in the education and, above all, religious training of the young.

World War II accelerated this process. Pius XII, with his sharp sensitivity, echoed it. While fighting against the serious dangers to the dignity of womanhood, lurking in certain degenerative aspects of contem-

porary life, he underlined strongly her very essential role in domestic and social education and praised all the positive aspects of the movement promoting the feminine sex, both within the family and in the community at large.

His Holiness, John XXIII, took decisive steps in the same direction; considering the advancement of the woman as one of the signs of our times, and emphasizing the equality of rights and of duties between the man and the woman when creating a family, and when exercising, with the husband (speaking of them in the *plural*), the mission of maintaining and educating the children.

Finally, His Holiness, Paul VI, in addressing himself to the International Union of Family Organizations, has refused to ignore the great transformations that have occurred within the family. While voicing some legitimate anxieties, he has nevertheless unequivocally stated that the Church is in accord with the positive aspects of many of these innovations, principally in that which refers to the greater liberty of conscience of each of the spouses and to a more lively interest in the education of the children.

This social change has, of course, produced deep repercussions in existing positive law (as we shall see later). The position of the woman in the administration of the home and, above all, in the education of the children (which is here most directly important to us), has been or is being explicitly recognized, depending on the particular country involved. This does not eliminate but rather, in a certain sense, accentuates certain problems, like the resolution of the tensions or conflicts between the spouses, which endanger “family unity.”

As a matter of fact, there is still no complete agreement among moralists and jurists as to whether it is possible to recognize an absolute equality of the father and the mother in the management of the family. No one seriously disputes—we repeat—that the wife is an active subject, a protagonist, and not a mere passive subject (at times almost an object) in the marriage and in the family; nor does anyone deny her a co-participation, to a greater or lesser degree, in the exercise of family power. But the problem is more complicated when it involves spouses with very divergent opinions regarding the administration of the home and, more precisely, with respect to the moral and religious education of the children. The problem is whether the reasoned (non-arbitrary) opinion of the father should ultimately prevail, or whether it should defer to a formula which combines the attitudes of both spouses or supercedes them, through the intervention of some legal organ outside the family. The question is found—as we shall see—in the majority of existing juridic systems.

Since marriage has an unquestionable aspect of a pact or contract resting on the mutual consent of the parties, and since it is related to the juridic-natural principle of “*pacta sunt servanda*,” an important criteria for resolving such marital problems, especially in cases of “mixed religion” are the “matrimonial capitulations” agreed to before the marriage. But it must not be forgotten that we are dealing with a pact *sui generis* which, however, gives birth to an institution with essential roots that cannot be modified at the will of the parties. Accordingly, the welfare of the family, the spiritual interests of the offspring, and the respect for the intimacy of

beliefs which evolve with time, oblige us to search for equitable formulae which are or could be applicable to situations other than those foreseen by the spouses on a particular day.

Besides this process of equalizing the husband and wife, which we have just expounded in a general way, another characteristic of the change which the family is undergoing is—as we have said—the fact that the family power is being increasingly understood not so much as a subjective right of the parents (which it continues in fact to be), but rather as a duty and a function of service. The paternal-filial relationship is leaning towards a spirit of reciprocal understanding and of dialogue, although in not a few instances this has produced outbreaks of rebellion, with anarchical tendencies within the domestic community. In one way or another, the strongly hierarchical and unilateral structure of the family is being sociologically replaced by a more communal and informal image.

All this cannot but have repercussions in the concepts of marriage itself and of the home. We are living through the epiphany of a new concept of both, latent in many of the publications of Christian intellectuals of our time and, above all, in the discussions of the Fathers gathered at the Second Vatican Council from all over the world.

Awareness of the personal element in religiosity is being accentuated; there is a search for a more lucid, comprehensive and harmonious relationship between authority and obedience within the family. There is likewise a very strong emphasis on the functional dimension of family authority. Consequently, there is a blending of both the personal and social educative



rights and duties of the parents with respect to their children. There is also an inclination toward new forms of liberty of teaching within that great public service which is education. But, above all (and this is the point that most concerns us) there is a determined advance toward the recognition of religious liberty as a natural right of each man and, in consequence, there is a precognizance of reforms in the Canon Law concerning the requirements in cases of mixed marriage and the exercise of the educative function.

It is to be hoped that the declaration on religious liberty, which the Council is preparing, as well as the schema on the relations of the Church with the modern world, will indicate a decisive crystallization of these currents and will occasion all Christians to defend the educative liberty of parents, and the necessity of respect for the conscience of the children in all the legal systems of the world.

Through these enlightening considerations (which would actually require broader development), we can synthesize panoramically the tensions and conflicts which can and do arise within the family situation, and which specifically concern the problem of the religious education of the offspring, with respect to the beliefs of the parents and the normal or abnormal relations between the spouses.

In order to facilitate this discussion, we shall distinguish the different possible situations:

1) Situations in which father and mother are of the same faith or both father and mother are non-believers.

Despite the increasingly pluralistic nature of contemporary society, this is perhaps the most ordinary situation, especially in countries where there exists a preva-

lent religion, or a social climate of anti-religiosity. In this situation, if the husband-wife relationship is "normal" (relatively speaking, since even in homes with the greatest peace and security there are differences of temperament and of ideas which affect religious attitudes), the father and the mother will operate harmoniously in the formation of their children and will give them, through their own efforts or through those of freely chosen educators, the necessary instruction so that the children may also embrace, consciously and freely, the religious attitudes of their parents.

From a human point of view, this is the ideal situation because it creates a more homogeneous climate of deep communion in supreme values of the spirit and in the transcendent dimension of personal destiny.

In these cases, the function of both Church and State must be to agree to respect the legitimate autonomy of the parents in the formation of the souls of their children. It is certain that within the juridic discipline of the Catholic Church, parents who profess that religion have a very serious moral obligation—according to what we have seen of the existing Code of Canon Law—of baptizing their children, and of educating them in the faith, and in general, within the home or in Catholic schools. It would not be licit to permit their attendance at anti-Catholic, neutral or mixed schools, except when competent ecclesiastic authority tolerates such attendance, in particular circumstances and with the exercise of due caution.

It is clear that when dealing with parents of religions different from Catholicism, *i.e.*, separated Christians or non-Christians, the Roman Church, although

perhaps with difficulty, also respects the right of the parents to baptize and to form their children in line with their own beliefs, and definitively prohibits anyone being obliged by force to accept the Catholic faith: *Ad amplexandam fidem catholicam nemo invitus cogatur.*

In relation to this principle, which we could call respect for the ideological autonomy of parents in relation to their children, we must discuss the delicate and complex problem of the attitude that the Church and the State, each one in its own order, must adopt in cases where both parents are non-believers or, more precisely, atheists.

Since religious values are an essential element of man's integrity, is it not fitting that the agreement of the father and mother in this conception of the world and of life should produce an intervention of the ecclesiastic or civil authorities on behalf of the children? With some justifiable anxiety, and submitting my judgment at all times to that of the ecclesiastical Magisterium, it seems to me that it is necessary to make a distinction. If the incredulity of the parents is a mere agnosticism or indifference to the religious problem, but does not amount to an active intervention against the awakening of religious awareness in the souls of their children, all authorities outside the family ought to abstain from intervening, for the rights of the parents in the formation of their children belongs to the natural law. In this connection, the words of Pius XI in the Encyclical, *Divini illius Magistri*, in which the Pontiff makes reference to this right as a right of *all* men, seem to me of extraordinary importance.

If the attitude of the parents were that of militant atheists, would not a prudent

intervention of the State, by means of an accredited teaching organization, as is now permitted in a very general way in the majority of juridic regulations dealing with the curtailment of abuses against the health or natural morality of children, be licit? I think that the answer would have to be in the affirmative, although any such measure would always have to be strictly interpreted as a temporary and exceptional measure, effective only until the parents gave guarantees of respect for the conscience of the child.

If the marriage relations are disturbed and arrive at a breaking point, then the question arises as to which of the two spouses will continue to exercise the educative function, especially with regard to the religious formation of the children. It is obvious that "a priori" solutions can not be given on this point. In the case of an amicable separation, it will be the husband and wife themselves who will resolve this difficulty, or it will be, in an extreme situation, the competent judicial authority who will in fact resolve it, bearing in mind not only the innocence or culpability of one or another of the spouses, but also and very principally the spiritual interest of the child.

2) Situations in which a religious disparity exists.

The problem is more serious when there is a disparity of beliefs between the husband and wife, whether they are both of a positive faith, but of different confessions, or whether one of the spouses is a believer and the other a non-believer or an atheist. Here arise the most painful tensions and those most difficult of solution. In an attempt to illuminate this subject as much as possible, we shall distinguish, as we have done before, "normal" marital re-

lations from cases involving a disturbance of matrimonial tranquillity.

In the first case, that is to say, where the marriage is harmonious, the pattern for the religious education of the children will have been established, in principle, as we have already mentioned, by the agreements that the spouses executed on this point prior to contracting the marriage. Subsidiarily, it will also be controlled by the criteria imposed by the positive law and by the necessity of securing the spiritual well-being of the child and the peace of the family.

Simply from the point of view of natural reason, it is necessary to eliminate the possibility of both husband and wife trying to influence contradictorily the spiritual development of the child, because this would occasion a true psychological torture of the child and a serious threat of indifference. Rather than risk such a situation, it is preferable that the future spouses compromise, if neither is Catholic, with respect to the religious formation of the children. That is, they should agree to raise the children in line with the belief of one of the spouses, which would not have to necessarily be that of the father (whose position of supremacy, as we have seen, is in a process of transformation). While living together, the spouses should respect such an agreement in order to avoid the greater damage that an active conflict of the discrepant religious attitudes of the parents would produce in the soul of the child. Acquiring his own criteria, through his reason and his personality, the child can then choose which parental religion satisfies the deep yearnings of his own heart.

The case is different when one of the spouses is Catholic. We here confront the most difficult question of mixed religious

marriages, an issue which continues to be one of our most important problems, having many times caused extremely painful obstacles to the contemporary ecumenical climate. You all know well the present traditional attitude of the Catholic Church on this point, crystallized in her Code of Canon Law (which we shall summarize). Long and painful experience teaches us that this type of marriage frequently results in a grave spiritual crisis for one or another of the spouses, with a corresponding effect on the children. This explains the unfavorable attitude of the Church, not only the Catholic Church, but frequently the Protestant Churches as well. The same dangers can occur, and with even greater seriousness, if the discrepancy is not between Christians of different confessions, but between a Christian and the believer of a non-Christian religious faith.

It occurs frequently in the modern secularized world that one of the spouses retains his religiosity, while the other is agnostic or openly hostile to any form of religiosity. The conflicts can then be extraordinarily serious, and in the present climate of respect for the religious liberty of each person and, moreover, of gradual recognition of joint authority of the father and the mother in the education of the children, it does not seem just that the criteria for solution should always be one of the predominance of the will of the father or the predominance of the Catholic spouse. Rather, we should attempt to arrive at a more flexible formula for the pastoral intervention of the Churches to which the spouses belong, above all, if both are Christian. Finally, in the most difficult cases, this should include a moderate intervention of the State by means of competent judicial or educative authority.

In the case of families with internal religious plurality, if a separation or break occurs, there would be no other remedy than to confide in the State (by means of the competent judicial authority, or better, by means of an educational organ) the establishment of the patterns for the education of the children who remain in the custody of one or the other of the spouses, according to their relative degree of innocence or guilt, but attending always principally to the welfare of the offspring.

#### *Present Juridic Perspectives*

##### *Existing Positive Law*

As we already stated, in describing these tensions, the civil codes of the past century, stemming from the French Code of 1803, are based in large measure on the "Roman image" of paternal authority, with a subordinate or subsidiary authority for the mother. In fact, in the first edition of article 213 of the Napoleonic Code, it was said, laconically: "the husband must protect his wife, and the wife must obey her husband." In the same vein, and with reference to the education of the children, article 373 of the same Code, in its original form, established with no less a monopolistic spirit, that "only the father exercises this authority [authority over minor or unemancipated children] during the marriage."

However, through the influence of exigencies newly revealed to the human conscience, reforms have been introduced since 1938, which crystallized, above all, in the Law of the 23rd of July, 1942. Pursuant to it, the original article 213 was changed to read that the father is the head of the family and exercises this function in the "common interest of the home and of the children." But the woman now concurs

with the husband in securing the moral and material administration of the family, in providing for its sustenance, in educating the children, and in preparing them for their professions in life; she even replaces the husband "in his function as head of the family" in those cases in which the husband is incapacitated, absent, far from the home or for any other reason incapable of performing his function.

The said Law of 1942 also modified the old article 373, and established that authority over the children "belongs to the father and to the mother" and, although the father exercises it during the marriage in his role as head of the family, it, nevertheless, could be passed to the mother in those cases in which the father forfeits his rights (according to the Law of July 24, 1889), either having been condemned for abandoning the family or having in effect abandoned his authority. Furthermore, it should be borne in mind that the preamble to the French Constitution of the Fifth Republic (September 28, 1958) strongly emphasizes the equality of rights of man and woman. This cannot help but influence the interpretation that is otherwise given to the text of the Code.

A similar evolutionary process has occurred in Italy. The existing Code, which remains substantially the Rocco Code, of 1942, notwithstanding its relatively recent date, maintains a traditional position on this matter. In effect, after stating that the child is subject to the authority of his parents until coming of age or emancipation, it emphasizes that this authority is exercised by the father, and only after his death (or in other circumstances established by law) by the mother (articles 316 and 317). Nevertheless, the same Code, on the regulation of marriage, states that

this "imposes on both husband and wife the obligation of maintaining, educating and instructing the offspring," and adds that "such education and instruction must conform to the principles of morality" (article 147).

Prior to the adoption of the new Constitution of the Republic (December 27, 1947), many commentators were inclined to maintain the principle which we could call "predominance or priority" of the paternal power, even in the area of education of the children, when differences arose in the home. Their purpose was to preserve the unity of the family, without attempting in any way to eliminate a very active participation of the mother in the entire educative process, above all in the religious and moral areas.

The promulgation of this Constitution has promoted the tendency of "equalization," as we would call it, since it is the concept which inspires the generic principle of identical social dignity and of equality of all citizens before the law, "without distinction as to sex" (article 3). Moreover, and very precisely, the Constitution of 1947 establishes that "the marriage will be governed by the moral and juridic equality of the spouses," with limitations established by the law for safeguarding the family unity (article 29).

The sharp juridic spirit that has always characterized the Italian people is taking this opportunity to develop a fine debate concerning the scope of these constitutional declarations and their influence on precepts of the Civil Code. Some jurists, basing themselves precisely on the language of the Second Paragraph of article 29 (concerning the establishment of limitations in the law in order to "guarantee family unity"), are inclined to maintain that article 316 of

the Civil Code remains in effect. However, others defend a contrary interpretation. They appear to be supported by several legal decisions and invoke, in reference to education, article 147 of the Code and article 30 of the Constitution, which establish the instruction and education of the children as a right and a duty of both parents (speaking of them in the plural and without distinction as to sex).

On the whole, it can be said that Italian jurisprudence looks toward formulae which harmonize the unity of the family, on one hand, with respect for the rights of the mother and the welfare of the children, on the other. Of course, in cases of very serious disparity, it may be necessary to resort to the limited intervention of judicial organs of a tutelar character.

With regard to Spain, we are faced with a problem which is in some aspects the same, but set in the rather unique context of its juridico-political system. The Civil Code of 1889, strongly influenced, as is well known, by the French Code, establishes a system pursuant to which a dominant authority is given to the father and a subsidiary role to the mother. The Code provides that "the father and, in his absence, the mother, have authority over their legitimate unemancipated children; and the children must obey them while remaining in their household and must always give them respect and obedience" (article 154).

More precisely, and again within this hierarchical context, the Code establishes that the father and, in his absence, the mother, have, with respect to their minor children, the duty of feeding them, caring for them, educating and instructing them. They also have the authority to correct and reasonably chastise them, including the

right to solicit the aid of such governmental or judicial authority as the case may require (articles 155 to 157).

Certain observations must be made which point toward a more liberal interpretation of these precepts and a more adequate understanding of them. In the first place, it is important to note that, within the Spanish judicial tradition, from the Visigothic Period through the entire Middle Ages, we find parental authority exercised jointly by the spouses. This has been pointed out in the important works of Professors Urena, Gisbert and others, and there is a vestige of this tradition in statutory laws, especially in Aragon, Navarre, and Vizcaya.

Moreover, there are many Code commentators who are inclined to recognize an active and authentic participation on the part of the mother and a joint right with the father in the education of the children (although, in other areas, especially with regard to the juridic representation of the children, the father prevails, while living and otherwise retaining his authority).

In any case, there is a growing tendency among Spanish jurists to recognize the necessity for a modification of the Code on this point, so as to emphasize the participation of the mother in the exercise of parental authority, and in order to facilitate more equitable solutions in cases of disagreement between the spouses concerning, above all, the education of the children.

This tendency is reinforced by the fact that the *Fuero de Los Espanoles* of 1945, states, in plural form, that "the parents are obliged to feed, educate and instruct their children" (article 23). Since this language is neither hierarchical nor discriminatory, as between the spouses, and since they are said to have an equal duty, they must also

have an identical right and should participate in a joint mission. In cases of serious differences between the spouses, it will be the competent judicial authority which will definitively and fairly decide the issues involved, considering the conduct of each of the spouses and the welfare of the child.

With regard to the treatment of this subject in other countries, it is interesting to point out the prevalence of that tendency which favors a joint or equal authority of the parents in matters concerning the children. In Portugal, the Civil Code provides that the mother should participate in the paternal power, and must be heard in all matters involving the interests of the children. However, during the marriage, it is the father, as head of the family, who exercises, in a special way, this authority over and protection of the children (article 138).

In Switzerland, the Code of 1907 declares explicitly that "the father and the mother exercise jointly the parental authority during the marriage," but adds that, in cases of disagreement, "the decision of the father will prevail" (article 274).

In countries having an Anglo-Saxon heritage, there is an increasing tendency toward an equality of the parents in matters regarding the education of the children, with primary attention given to the interests of the latter. Such is the case in Great Britain and in the United States of America.

In the area of Canon Law, it is necessary to distinguish the generic principle of the joint participation of the parents in the education of the children, on the one hand, from the particular case of mixed marriages, on the other. With regard to the first aspect of the problem, the Code of 1917, while in line with the traditional

concept of the family, points out that the educative function pertains jointly to the father and the mother. Canon 1113 states, in the plural, that "the parents have the very serious obligation of procuring an education for their children." Consequently, *a sensu contrario*, it must be concluded that they have a joint right to fulfill that duty.

However, what happens if disputes arise regarding the religious education of the children? Will the father, as head of the family, resolve them? Up to now, the solution provided by the Code has been what we could call the "principle of favoring the Catholic faith."

In cases of disputes in a marriage involving a Catholic party, the educative criteria of the Catholic spouse had to prevail, unless the competent ecclesiastical authorities had decided otherwise in the interests of the children. We may infer that this would apply to difficulties involving the separation of the spouses and custody of the children. In fact, one of the causes of such separations, according to the Code, is precisely the fact that "one of the spouses gives his name to a non-Catholic sect or gives the children a non-Catholic education." Once the separation is in effect, "the children must be educated according to the beliefs of the innocent spouse and if one of the spouses is non-Catholic, according to the views of the Catholic spouse, provided in either case that the Ordinary has not decreed something else, attending always to the welfare of the children and the preservation of their Catholic education." The same principle still inspires the rules concerning "mixed marriages."

In the Code of Canon Law, it is understood that, as a matter of Divine Law, a

marriage is illicit if there is danger of perversion of the Catholic spouse or of the offspring. The Church "severely prohibits" such marriages, and only dispenses from this impediment for just and serious causes, and on the basis that the non-Catholic spouse must give guarantees of not exposing his Catholic spouse to dangers of perversion. Moreover, both spouses guarantee that all the children will be baptized and educated in the Catholic religion alone. These promises must be given in writing and there must be a moral certainty that they will in fact be fulfilled. Furthermore, there is a prohibition against approaching a minister of a non-Catholic sect, whether before or after the Catholic marriage ceremony, for the purpose of receiving matrimonial consent or authorization. In addition, the proper ecclesiastical authorities must give careful attention to the performance of the promises made by the spouses.

All these requirements are equally applicable to the marriage of Catholic persons with those who have notoriously abandoned the faith, although they are not affiliated with a non-Catholic sect; and with those who have given their names to associations condemned by the Church.

Since this Canonic norm remains in effect and unmodified, it is evident that in case of a difference between the spouses concerning the religious formation of the children, the educative rights of the Catholic spouse would have to prevail, regardless of whether the father or the mother were the Catholic party (which alone causes serious problems). In cases of marital separation, however, there is one very important exception. These regulations apply only so long as competent ecclesiastical authority has not decreed otherwise, for the benefit of the children and

the preservation of their Catholic education.

The Conciliar climate has brought about a very decisive transformation in this area as well as in others. In the Third Session of the Second Vatican Council, the Fathers sent a message to the Pope, urging him to modify, through his supreme authority, the existing legislation on this matter. They specifically asked that the non-Catholic spouse be exempted from the necessity of educating his or her children in the Catholic religion. Although that obligation would remain with the Catholic spouse, he should only be required to remain faithful to his conscience, rather than to the existing requirements of Canon Law.

Without eliminating the problem entirely, this will alleviate any excessive psychological burdens, and will, perhaps, make it possible for the spouses to respect the interior peace of the souls of their children.

In the international field, the principle of the identical dignity, worth and equality of rights of men and women has been decisively applied. Language to this effect appears in the Preamble and in article I, paragraph 3 of the Charter of the United Nations, adopted at San Francisco on June 26, 1945. The Universal Declaration of the Rights of Man (1948) establishes the same criteria. More concretely and precisely with reference to education, it provides (in the plural and non-hierarchically) that "the parents have the prior right to choose the kind of education their children are to receive" (article 26, paragraph 3). Similar criteria were adopted in the *European Agreement for the Safeguarding of the Rights and Fundamental Liberties of Man*, where the mission of the parents in educating and instructing their children

according to their religious and philosophical convictions is spoken of in the plural.

### **Tensions Between the Child and His Parents Regarding His Religious Education**

When there is discord or discrepancy in the religious area between the parents and the child, there arise new and painful difficulties. In principle, the parents have at once a duty and the right to direct their child in all aspects of his education, especially in the moral and religious areas. On this point, there is substantial agreement among Catholic and non-Catholic theologians, and with the major portion of existing legislation. Even those who criticize most severely the traditional concepts of parental authority recognize that it is the parents who control the spiritual development of their minor children and that it is not licit for their educative function to be opposed without serious cause.

It is certain that one's religious life is at all times something intimate, untransferable, intensely personal—one does not inherit a faith as one inherits certain somatic conditions, temperament or nationality. All authentic religiosity passes sooner or later through a crisis, through a real process of conversion in which the child, and especially, the adolescent overcomes the "social phase" of his religious life, as something received from without, and becomes conscious of its drama—the drama of Redemption—which is the dialogue of the soul with God. A temporary loss of faith often occurs at that critical moment. It is a risk of human freedom, a risk which God permits in order that the path toward Him be always traveled in love and understanding. Those who are entrusted with the care



of souls and those who dictate the juridic norms that regulate collective life can not approach this reality with rigid and inflexible categories.

With regard to the child of agnostic or atheistic parents, who one day feels in his heart the call of the faith, or another who, educated in an environment of Catholic religiosity, falls away from the faith at a particular moment in his development and embraces indifference or another religious conviction, it is necessary to provide some kind of tutelage or direction, with the least possible damage to the peace of the family. In these always painful situations, which is to prevail, the educative mission of the parents or the independence of the child? We are aware that we here touch on one of the most delicate aspects of the problem we are examining.

The problem has become especially acute in our time, not only because the conditions of modern life facilitate and even instigate, at times, the assumption by the child of an attitude of autonomy with respect to the family, but also because the human conscience has become increasingly aware of the necessity of respecting the dignity of the child. The child can never be considered as a mere "object" of education, or as an "instrument" at the service of the family. Rather, he must be treated as a person, as a protagonist in the family community, as a future citizen and, finally, as an image of God, equal to his parents.

Furthermore, we modify our position ever more deeply as we come to understand the meaning of the dialectic relation between authority and liberty within the home, between command and dialogue, and between hierarchy and integration in a "communal friendship."

Finally, the development of moral and religious teachings on this subject has been influenced to a great extent by deep psychological and psychiatric studies, and the consequent growing awareness of the need for respecting the conscience of all human beings, regardless of their age. This does not mean that parents, or those who act on their behalf, should abandon their educative mission and blindly submit in all cases. Nor does it mean that they must forego any attempt to influence the spiritual formation of the child. It simply means that any such formation must be accomplished without interfering with the free development of the child's conscience, with loving tact and deep respect for the growing personality of the child.

His Holiness, Paul VI, has spoken of this subject:

If the educator were to confine his activity solely to a patient, meticulous and, if you wish, scientific examination of the environment in which the child develops today, realizes his experience and shapes his personality, it would not be a complete job. There would be a danger that the educator, admired of the phenomenology of the environment, would accept it as it is, would describe it very well and would classify it according to very beautiful categories, but would do little or nothing to modify that environment and its consequent phenomena. He would conclude in accepting them or, even, in defending them as an expression of our times. We think, for example, that to simply describe the environment whose spectacle surrounds the child is not enough. The educator is not a passive observer of the phenomena of juvenile life; he must be a friend, a teacher, a trainer, a healer, a father who is not so much interested in knowing the behaviour of his pupil in a given set of circumstances, but rather in preserving him from useless offenses and in teaching him how to love, enjoy life and sublimate his experience. . . .

This is because the environment, by itself, does not make men. There is nothing like rebellious youth, with little understanding of the precepts of the past, especially those closest to them, imitatively adoring instead that which is fashionable and new. Wake up in these young souls the ability to judge, to free themselves and to find their identity as human beings and not as numbers in a crowd.

The tensions that these factors give rise to can be very complex and consequently there is a need for flexible formulae within indispensable guarantees of "juridic security."

Subject to a degree of relativity essential to any compartmentalization of man's psychological evolution, it can be said that the first period of a child's life (something almost prejuridic) embraces the first seven years of his existence, *i.e.*, from birth to the age when it can be said that he acquires self-awareness and the full use of his reason. During this phase, there are obviously moments of tension and discord, but these are of an instinctive or temperamental rather than ideological character. During these years, the educative mission of the parents and especially of the mother can and must be exercised to its fullest extent, above all in the areas of moral and religious formation. This does not mean that she should impose physical or moral violence on the child, the vestiges of which remain forever in the deep psyche of the child. On the contrary, the educative mission is to be accomplished by means of moral stimulants which cause a religious awareness to form in the soul of the child, such that it will make the religious beliefs of its parents its own.

It would be contrary to reason and seriously injurious to the rights of the parents if foreign elements were to be in-

jected into this family dialogue, except in extreme cases of brutality, *i.e.*, of authentic abuses of parental rights, when the State, by means of adequate educative organs or institutions, must intervene.

In the second phase of child development, tensions can, and in fact do, multiply in the majority of families. This is the age when the individual, through his studies, is first exposed to half truths. The unsuspected horizons of life roll back and his energies grow on all levels. Anxieties and emotional difficulties begin to occur. This all happens when the mystery of life first begins to reveal itself and, above all, when he enters a university or other institution of higher learning. His personality is forming and his character is asserting itself, while the tremendous adventure of his personal conscience is beginning. It is then that the most difficult and, at times, most violent conflicts arise within the home, especially if the parents seek to remedy the situation through an assertion of their own will, an application of their own criteria and, perhaps, resort to sanctions. There are, after all, two equally sacred and undeniable rights involved in these situations: the right, duty and function of parents in the education of their children and in forming them religiously according to their own faith; and the right of the child to a free conscience and a free quest for his destiny.

The legislator can not remain indifferent to these conflicts, especially if there is a difference not only as between the parents and the child, but also between the parents, regarding the attitude which they should adopt. As in the other instances discussed, the intervention of the State must be subsidiary. At the request of either of the parents or of the child, it will have to take action at a given moment and, by means

of an appropriate administrative body, attempt to mitigate, as much as possible, the damage resulting from the conflict. Of course, it will be necessary to estimate what we would call the child's age of "religious majority."

*Present Juridic Perspectives*

*Existing Positive Law*

Until the present moment, it has not been possible for us to gather information dealing with the paternal-filial conflicts in regard to education so that an adequate picture of the juridic situation in the principal countries of the world might be presented. Therefore, we shall now attempt to point out some basic considerations in summary form, subject, of course, to such additional material as the members of this Congress are able to provide.

1) Until the child comes of age (which, as you know, is generally fixed between the ages of 18 and 23), the usual rule is that the decision of the parents will prevail with respect to his moral and religious formation.

2) The intervention of an educative organ or of the competent judicial authority is provided for in cases where the parents have seriously abused their authority in the area of the child's religious education or in any other area.

3) In order to minimize the harm that results from a psychological-religious break in the educative process, it is especially important to bear in mind the interests and well-being of the child when tension or conflict results from a change in the religion or ideology of the parents during the child's formative years.

As concerns the presently effective positive law of the Catholic Church, Canons 113 and 1372 of the Code—as we have

already seen—fix no time limits on the right and the "very serious obligation" that the parents have of procuring a religious and moral education for their children. It seems implicit in Canons 1372 to 1382 that the educative mission of the parents, with regard to the spiritual formation of their children, continues until the latter enter the university, *i.e.*, practically until they leave the family home.

In the international sphere, it is necessary to say, in the first place, that the recognition of the rights of the human being, especially the right to an education and the right to religious liberty, is stated in existing texts without any discrimination as to age (The San Francisco Charter, The Universal Declaration of the Rights of Man of 1948, and The European Agreement of 1950-52). Thus, the rights of "minors" in this area are recognized, especially when parents or other educators abuse their authority. Moreover, the principles contained in the Charter or "Declaration of the Rights of the Child," already cited as approved by the General Assembly of the United Nations on November 20, 1959 (which referred to and amplified the principles previously announced in the Declaration of Geneva of the League of Nations of 1929) merit new and special mention. According to the Declaration, the child enjoys all the human rights generically proclaimed in previous texts and, among still others, the following:

- (1) The right to a special protection and all means necessary for his healthy and normal development, under conditions of freedom and dignity;
- (2) The right to such special treatment, education and care as is necessary in cases of under-privileged or under-developed children;

- (3) The right to develop in an atmosphere of affection and of moral security and, to whatever extent possible, under the guidance and care of his parents;
- (4) The right to a free and obligatory education, at least on the elementary level; which education must contribute to his general cultural growth and, under conditions of complete equality of opportunity, to the development of his faculties, his personal judgment and his sense of moral and social responsibility;
- (5) The right to be protected from any form of negligence, cruelty or exploitation;
- (6) The right to be protected from any discriminatory practices whatsoever, and of being educated in a spirit of understanding, tolerance and friendship among peoples.

Despite the significance of the above "Declaration," which was approved unanimously, it must be remembered that it ranks merely as a "recommendation." Consequently, the principles announced therein remain to be reinforced by a text binding on all nations. It is natural, therefore, that the subject we are dealing with has been discussed in connection with the proposed "Agreement for the Elimination of All Forms of Religious Intolerance," which, as we have indicated, is currently under consideration. The text which was approved in principle last January, at Geneva, provides, in its Fourth Article, that the signatory States will respect the primary right of parents, or those who act on their behalf, in the selection of a religion or beliefs for the child. However, it also states that, when the child "has achieved sufficient use of his reason or an

adequate level of understanding, his wishes must be considered and, in either case, the competent authorities must be guided in their decisions by what is in the best interests of the child."

### Epilogue

By way of recapitulation and, in a certain sense, as a basis for any legislative enactment (and, until its promulgation, as a decalogue of exigencies for the conscience of Christian jurists), we dare to suggest the following conclusions:

(1) All the nations of the world must formally recognize and guarantee the exercise of the right of religious liberty for all men, in the spirit of the Second Vatican Council. They must likewise guarantee the liberty of teaching, understood in a twofold sense—the right to establish educational institutions on all grade levels (conforming, of course, to the necessary moral and pedagogical requirements), and the right to teach in these schools such scientific, ethical and religious disciplines as correspond to the current cultural level of the society, the beliefs of the institution's founders and the proper conscience of the educators.

(2) In order that these rights be made effective, States must eliminate from their respective internal legislation all existing obstacles to their exercise. Any exceptions in this area must be carefully enumerated as necessary, within the spirit of a democratic society, for the prevention of injury to the rights of others or to the public morality or the common good (correctly understood as the sum of social conditions that make possible the fullest expansion of the human personality).

(3) Similarly, the States must facilitate the exercise of the twofold liberty of teach-

ing, both institutional and academic, through subsidizing all schools, both private and public, in accord with the principles of distributive justice and without any discrimination whatsoever.

(4) In the relations of the State with the family, the principle of the legitimate autonomy of the latter must prevail, with no more intervention of the public authority than is absolutely necessary in cases of grave abuses on the part of the parents.

(5) The role of educating the children pertains jointly to the father and the mother, without any discrimination. Both spouses must, therefore, harmonize their views so as to avoid the harm that results from conflicts regarding the purposes and methods involved in the moral and religious education of the children.

(6) In case of disputes and differences between the spouses with respect to the education of the children, beyond those normally involved in domestic affairs, a moderate and reasonable intervention of the State, in a primarily educative form, will be permitted, subject to the principle of subsidiarity.

(7) For the equitable solution of such intramarital conflicts, the State will con-

sider the "matrimonial capitulations" agreed to by the spouses prior to the marriage, but subordinating them always to that which appears most conducive to the peace of the family and the well-being of the children.

(8) Analogous norms are to be applied in cases of conflict between the parents, on the one hand, and the child, on the other, concerning his religious education, attempting as much as possible to resolve such problems from within the family circle, without any outside interference. However, in extraordinary cases, a path must be left open for the peaceful intervention of the particular State or Church involved in the dispute.

(9) These criteria must be applied, with any appropriate adaptation, to the educative mission of adoptive parents, tutors, teachers and godparents, within their respective areas of activity.

(10) Resolutions of the United Nations, or of regional international organizations must establish the appropriate judicial means toward an efficacious protection of these rights and liberties before an independent administration of justice.

