CHURCH AND STATE: THE PROBLEM OF INTER-FAITH ADOPTION IN ONTARIO

by

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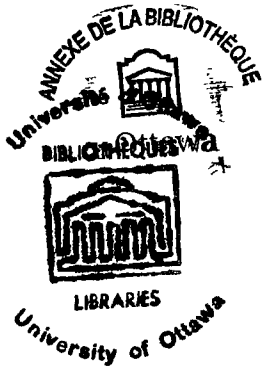

OTTAWA

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FOREWORD

The problem of Church-State relations is complex because it varies with the time, place, and subject matter in question. One must first attempt to disentangle principle from its historical application, the timeless absolute from the historically relative. Then one must assess the contingent facts of a given situation in order to determine the appropriate method of applying here and now, to this problem, the changeless principles, the timeless absolutes.

In 1961, the problem of Church-State relations in the matter of inter-faith adoption was raised in an Ontario court of law. Public reaction was immediate and volatile. Although Catholics and Protestants were reported to have joined in a petition in favour of the adoption of this Catholic child by Protestant parents, Catholics and Protestants sounded the battle cry in letters to the editors of various newspapers across the country. Smouldering religious prejudices had been fanned and were now ablaze. A notable exception was a Presbyterian minister who calmly stated that the problem was whether the State should sanction an interpretation of baptism peculiar to one segment of the Christian Church.

Contradictory press statements were made by

three prominent Catholics which prompted me to study the problem, and the result is the present work which develops the thought expressed by the writer in the Canadian Bar Journal, October 1962. A priest said the court decision was wrong from a strictly legal point of view. A minister of the Provincial Cabinet said the decision was quite correct from a legal point of view. A bishop said wisely that if the decision were correct from a legal point of view, the ramifications were far reaching and the law required amendment.

In the April 1963 issue of the Canadian Bar Journal, a fellow lawyer challenged my observations. His criticisms were not to the point because he completely by-passed the Church, its impact on history and its position in society, and particularly its twofold freedom, and attempted to slight "natural rights" and "changeless principles" simply on the basis of a quotation from Holmes' essay on natural law.

Yet his observations pointed to two valid problems: first, the existence of the natural law; second, State recognition of the full existential dimensions of a de facto baptised being. That these problems even suggest themselves is sufficient evidence of the pressing need for a reassessment and reappraisal of the natural law and the natural order, validated only by

reflective reason considering man as he is and building a systematic philosophy of being, of existence, without which there is no hope of a public consensus, no hope of a truly substantial legal theory and jurisprudence. And in relation to the problem of inter-faith adoption, there is need for a reassessment and reformulation of the supernatural order, that is, of baptism in relation to the natural order, hence of the State in relation to the twofold freedom of the Church.

The heart of the problem is to reassess the relation between the natural and supernatural orders in human society in the context of inter-faith adoption in this province. This work is a small beginning.

. . . . . .

My warm thanks to Father Jacques Croteau, Dean of the Faculty of Philosophy, University of Ottawa, who first planted in my mind the seed of personalism and completed the direction of this work; to Father Denis Dancause who began the direction; to Father Henri St. Denis, former Dean of the Faculty, who urged me on to graduate work in philosophy; to Father Jean-Marcel Belanger who introduced me to philosophy, - all Oblates of Mary Immaculate; to Father E. S. Sheridan, S.J., of Regis College, Willowdale, Ontario, who kindly offered

advice and encouragement; and to my dear wife Marita whose patient ear and eye and typing brought this work to final form.

ABBREVIATIONS

A.C.	Appeal Cases
Can. Bar Rev.	Canadian Bar Review
D.L.R.	Dominion Law Reports
O.L.R.	Ontario Law Reports
O.R.	Ontario Reports
O.W.N.	Ontario Weekly Notes
R.S.O.	Revised Statutes of Ontario
S.C.	Statutes of Canada
S.C.R.	Supreme Court Reports

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CHAPTER I

CANADIAN SOCIETY AND THE CONSTITUTIONAL FRAMEWORK

Canada is a nation, a national society. One might recall the classic definition of society: a group of individuals joined together in a common cause. The formal element of the society is its bond of unity. And this bond of unity will determine the strength or weakness of that society.

Canada was not always a nation. Preparations are now in the making for the coming celebration of the first hundred years of Canada's life as a national society. In order to understand Canada as a nation today, one must look to Canada as a colony yesterday.

It has been suggested that "aspirations for a British American nationality were the result of ambitions frustrated by the narrow confines of colonial identities."(1) The same author suggests that "the British believed that Confederation was the best defence measure. Confederation, by contrast with other forms of defence, was both cheap and simple. That was the principal reason for the unequivocal backing it received in London. Confederation cost Britain nothing but the trouble of despatches and the occasional

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(1) P.B. Waite, The Life and Times of Confederation 1864-1867, University of Toronto Press, 1962, p. 16.

juggling of colonial governors; ultimately it would save her the cost of administering seven, perhaps eight, colonies by making them one."(2) However this may be, and despite the perils of generalization, one might safely say that Confederation was essentially an economic and political move, an attempt to better the temporal welfare of the citizens of the various colonies.(3)

The reasons for this attempt are history, and historians may disagree about the importance to be attached to this or that reason. For, as Waite has observed, "it is important... to distinguish between public opinion represented by the public and the electorate and public opinion in the narrower sense, as reflected in newspapers and in public speeches of legislators."(4) The threat of an imminent invasion from the United States; the restlessness and dissatisfaction of the colonies; the British desire "to narrow her colonial commitments, especially in those areas where they meant inconvenience, expense, and danger;"(5) these surely must be included in any assessment of the matter.

Another factor, however, more important for our purpose, must also be considered if we are to understand the

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(2) Ibid., p. 24.
(3) Ibid., p. 3 where Waite says: "in British North America the problems were material as well as political.... Had the argument for British North American union been only a material one, there would probably have been no union at all. Confederation defied not a few material and geographic considerations; its creation was a political achievement."
(4) Ibid., p. 14.
(5) Ibid., p. 21.

peculiar nature of the distribution of legislative power in Canada. Confederation was indeed an economic and political move, an attempt to better the temporal welfare of the citizens. The citizens, however, were not beings with only a temporal goal, nor were they bloodless abstractions which we may now today, from the vantage point of history, group under the heading "citizens". The citizens in question were a religious people, a Christian people, albeit professing Christ in different ways, a people which recognized that the final destination of man transcends the temporal order.(6) They were also the product of a peculiar Canadian history of racial and religious strife during which the country, originally French and Catholic, became English and Protestant, and which accounted for the suspicion and distrust which existed at the time of Confederation and which, unfortunately, still linger today in the hearts of the people and the laws of the country.

Confederation, therefore, meant compromise. The federal principle, the desire for a highly centralized government determining the destinies of these particular citizens with their particular background would not be accepted without serious modification. Just as the Maritime colonies were proud of their local legislatures which they

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(6) This respect for the individual which is based on his supratemporal destiny has found legal expression in the Bill of Rights, S.C. 1960, chap. 44. See particularly the preamble.

would not give up, so were the French Canadians, at a deeper level, proud of their cultural heritage intermingled as it was at an even deeper level with their spiritual heritage. Nor could the French Canadians forget the attempt of the "maudits anglais" to swamp them, to swallow them up culturally and spiritually shortly after 1763.(7)

Great discussion there were; eloquence, rhetoric, and wine were not wanting; and, in a few short years, 1864 to 1867, a grand idea was an accomplished fact. What three years before was a vague, undefined ideal, was now a well-defined reality embodied in the British North America Act, 1867. Compromise had been achieved; the distribution of legislative power was now law.

Sections 91 and 92, the interpretation of which comprises the greater part of constitutional law, are the main provisions in the distribution of legislative power in Canada. They have given rise to numerous decisions of the courts which need not here detain us.(8) We shall, however,

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(7) See Edgar McInnis, Canada, a Political and Social History, New York, Rinehart & Company, 1947, chap. 7, "The First Years of British Rule," for an interesting discussion of this problem.

(8) See Frederick P. Varcoe, The Distribution of Legislative Power in Canada, Toronto, Carswell Company Limited, 1954, for a study of the varying trends in constitutional interpretation, i.e., interpretation of sections 91 and 92. See also Bora Laskin, Canadian Constitutional Law, Toronto, Carswell Company Limited, 1951, and Richard A. Olmsted's compilation, Canadian Constitutional Decisions of the Judicial Committee, Ottawa, Queen's Printer, 1954, (3 vols.).

consider one decision (9) in order to ascertain, at the outset, the constitutionality of the legislative provisions we shall later consider.

The decision in question was a reference by order of the Governor General in Council to the Supreme Court of Canada pursuant to the Supreme Court Act, for hearing and consideration of important questions of law regarding certain social legislation passed by several of the provinces of Canada, including Ontario.

The fundamental problem centered on the appointment of members of the tribunals constituted under this social legislation, and the judicial powers conferred upon these members. The essence of the problem was whether the provinces had the constitutional right to confer such extensive powers of a judicial nature which until then had been conferred only by the federal government.(10) The importance of the problem was not simply constitutional but eminently practical because the effective administration

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(9) IN THE MATTER of a Reference Concerning the Authority of Judges and Junior and Acting Judges of the County and District Courts; Police Magistrates, Justices of the Peace and Judges of Juvenile Courts, to Perform the Functions Vested in Them Respectively by the Legislature of the Province of Ontario....(1938) S.C.R. 398.

(10) Sec. 96 of the B.N.A. Act, 1867, provides as follows: 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

of the social legislation had been greatly impeded by the doubt raised as to the validity of the provisions relating to the exercise of judicial powers.

The Supreme Court of Canada decided that the conferment of these extensive judicial powers by the provinces was within their constitutional jurisdiction. In reaching this decision, the court also determined that the legislation itself, which included The Adoption Act, apart from the question of the exercise of judicial powers, was intra vires the provincial legislative jurisdiction. Chief Justice Duff, who delivered judgment on behalf of the court, stated:

> The starting point for the consideration of the statutes referred to us is this: In point of substantive law it is not disputed that the matters which are the subjects of this legislation are entirely within the control of the legislatures of the provinces....
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> The control by the legislatures over these subjects is supreme in this sense, that the Legislature of Ontario, for example, has for that province legislative authority in respect of them just as unqualified, subject to the powers of reservation and disallowance, as that of the Imperial Parliament.(11)

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(11) (1938) S.C.R. 398 at pp. 402-3.

CHAPTER II

ADOPTION LEGISLATION IN ONTARIO

I. HISTORY OF ADOPTION LEGISLATION

Unlike the Roman law which ages ago provided for adoption not only of children but also of adults,(12) the laws of England and Ontario have only recently provided for adoption.(13) Before the passing of the Adoption of Children Act, 1926, English jurisprudence decreed that, not only were the rights, liabilities, and duties of parents of legitimate children inalienable by any act of the parents themselves, but that those of mothers of illegitimate children were similarly inalienable.(14) And in Ontario, before the passing of The Adoption Act, 1921,(15) the law strictly speaking knew

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(12) Justinian Lib. 1, Tit. xi.

(13) See Kennedy, "The Legal Effects of Adoption", (1955) 33 Can. Bar Rev. 751; see also Baxter, "Recognition of Status in Family Law", (1961) 39 Can. Bar Rev. 301 at p. 337 where he observes: "The social value of adoption is increasingly recognized, especially as a means of fitting a neglected or an illegitimate child into a family structure. In the Anglo-Saxon countries there was no adoption at common law, and in France, adoption in the modern sense is recent."

(14) Hall and Morrison, Law Relating to Children and Young Persons, 6th ed., London, Butterworth & Co., 1960, p. 509; A Century of Family Law, London, Sweet and Maxwell Ltd., 1957, pp. 358-63.

(15) Statutes of Ontario, 11 Geo. V, chap. 55.

nothing of adoption.(16)

The Adoption Act, 1921, by section 4(1), required as a condition precedent to the granting of an adoption order one of various consents which included, inter alia, the consent of the mother only if the child was born out of wedlock, and the consent of the lawful parents or surviving parent or parent having custody of the child in the case of a legitimate child. The judge, however, could in certain circumstances dispense with such consent.(17)

The Adoption Act, 1921, was amended in 1925 (18) to broaden, in terminology at least, the power of the judge to dispense with consent of the child in certain circumstances. A further amendment in 1926 (19) provided that subsequent intermarriage of the parents of an illegitimate child would not invalidate a prior adoption order.

The Adoption Act, 1927,(20) repealed the three

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(16) Re Davis (1909) 18 O.L.R. 384 at pp. 386-7; Blayborough v. Brantford Gas Co. (1909) 18 O.L.R. 243; Re Morton (1921) 20 O.W.N. 536.

(17) Sec. 5 read in part:

The consent of the persons named in subsection 1 of section 4...shall not be required if the person to be adopted is of full age, nor shall the consent of any such person...be required if: (d) The Judge for reasons which to him appear sufficient, and which are approved by the Provincial Officer, deems it necessary or desirable that such consent should be dispensed with.

(18) The Adoption Act, 1925, 15 Geo. V, chap. 46.

(19) The Adoption Act, 1926, 16 Geo. V, chap. 45.

(20) 17 Geo. V, chap. 53.

previous Acts and re-enacted the statute in toto. The requirement of consent as condition precedent to the granting of an adoption order and the power of the judge in certain circumstances to dispense with the required consent were retained by section 3(4). Notice, however, had to be given to the person whose consent was being dispensed with. And the consent now required was that of the parent, guardian or actual custodian of the infant. Section 4 (21) was new and set out the duties of the court before making an adoption order. Section 5 permitted the court to make the adoption order subject to conditions and terms. Section 7 retained substantially what The Adoption Act, 1926, had provided.

The Adoption Act, 1927, appeared as chapter 189 of the 1927 revision and consolidation of statutes (22) with no substantial change. The Adoption Act, 1928, (23) amended The Adoption Act to provide that a children's aid

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(21) Sec. 4 read in part:
The Court before making an adoption order shall be satisfied that, -
(a) every person whose consent is necessary under this Act and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption order for which application is made and in particular in the case of any parent, understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights.

(22) The Adoption Act, R.S.O. 1927, chap. 189.

(23) 18 Geo. V, chap. 29.

society under The Children's Protection Act was deemed to be a guardian under The Adoption Act for purpose of consent. It provided also, as condition precedent to the granting of an adoption order, that the Provincial Officer certify his approval in writing. Further minor amendments were made by The Statute Law Amendment Acts, 1929 (24) and 1931 (25).

The Adoption Act appeared as chapters 218 (26) and 7 (27) of the 1937 and 1950 revisions and consolidations of statutes respectively. No substantial changes existed, except that the power of the judge to dispense with the required consent was, in the 1950 consolidation, as a result of a 1949 amendment,(28) broader in terms,(29) and notice to the person whose consent was being dispensed with was no longer a requirement.

The 1951 amendment (30) related to the Provincial Officer's certificate of approval and provided that the child to be adopted need live but one year with the applicant, and not two years, as previously required.

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(24) 19 Geo. V, chap. 23, sec. 11.
(25) 21 Geo. V, chap. 23, sec. 16.
(26) R.S.O. 1937, chap. 218.
(27) R.S.O. 1950, chap. 7.
(28) 13 Geo. VI, chap. 1, sec. 1. 3d.
(29) Sec. 7 read:
The court may dispense with any consent required by section 4 or subsection 1 or 2 of section 5 if, having regard to all the circumstances of the case, the court is of the opinion that the consent may properly be dispensed with.
(30) The Adoption Amendment Act, 1951, 15 Geo. VI, chap. 2.

In 1954, the legislature enacted The Child Welfare Act, 1954, as an Act to consolidate and revise The Children's Protection Act, The Children of Unmarried Parents Act, and The Adoption Act. (31) Section 86 repealed The Adoption Act, The Adoption Amendment Act, 1951, The Children of Unmarried Parents Act, The Children of Unmarried Parents Amendment Act, 1952, The Children's Protection Act, and The Children's Protection Amendment Acts, 1951 and 1952.

The Adoption Act became Part IV of The Child Welfare Act, 1954, and remained substantially the same. The provisions relating to consent, dispensing with consent, and the duties of the court before granting an adoption order were maintained. (32) There were various minor amendments and new subsections. The certificate of approval of the Director of Child Welfare replaced that of the Provincial Officer. (33)

Minor amendments were made to Part IV of the Act in 1956 (34) and 1957, (35) and The Child Welfare Amendment Act, 1958, (36) repealed and re-enacted Part IV in toto.

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(31) 3 Elizabeth II, chap. 8.
(32) Secs. 70, 72(2), 75.
(33) Sec. 73.
(34) R.S.O. 1960, chap. 53.
(35) 4-5 Elizabeth II, chap. 8, sec. 12.
(36) 5-6 Elizabeth II, chap. 12, sec. 20.

This has been carried into the 1960 revision and consolidation of statutes. (37)

The requirement of consent and the power to dispense with it remain; (38) the wording, however, as regards the court's power to dispense with it has been altered. The court must now be satisfied that the best interests of the child require it. (39) The length of residence of the child-to-be-adopted with the applicant has been reduced from one year to six months. (40) If the child has been placed for adoption by a children's aid society, the certificate of approval of the local director, rather than the Director of Welfare, suffices.(41) And before making an adoption order, the court must still be satisfied that every person who consents understands the nature and effect of the adoption order, and that the order will be in the best interests of the child.(42)

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(37) 6-7 Elizabeth II, secs. 3 and 4.
(38) R.S.O. 1960, chap. 53, secs. 62 to 80.
(39) Sec. 66.
(40) Sec. 66(5) reads:
Where a consent required by this section has not been given, the court may dispense with the requirement if, having regard to all the circumstances of the case, the court is satisfied that it is in the best interests of the child that the requirement be dispensed with.
(41) Sec. 68(1)(a).
(42) Sec. 69.

II. JUDICIAL INTERPRETATION OF ADOPTION LEGISLATION

The basic problem facing the courts in their interpretation of adoption legislation is parental consent and the power of the court to dispense with it. The courts are not unanimous in their determination of the problem. For this reason, it is not possible, and perhaps not desirable, to attempt to reconcile the decisions. From the conflicting decisions, one may, however, point to three attitudes adopted by the courts, which may be expressed as follows.

1. Natural parents have a clear private or vested right to their child and, accordingly, where they not only do not consent to but actually oppose the making of an adoption order, the court cannot make the order unless the statute clearly and expressly permits it. A provision in the statute that the court may dispense with any consent if, having regard to all the circumstances, it is satisfied that the consent may properly be dispensed with, is not such clear and express permission to dispense with the consent of the natural parents.(43)

2. Natural parents have a *prima facie* right to their child and no adoption order will be made without

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(43) *Re LeSieur* (1951) O.W.N. 186 followed and applied by the Alberta Court of Appeal in *Hawkins et al. v. Addison* (1955) 3 D.L.R. 435.

their consent, which must exist at the time the order is made, unless, for very serious and important reasons, the welfare of the child requires that the fundamental natural relation between parents and child be severed.(44)

3. The welfare of the child governs and on this basis the court is given a very broad discretion to dispense with the consent of the natural parents regardless of whether or not there have been specific acts of default by them.(45)

At this point, a detailed analysis of these attitudes is not necessary for our purpose. A few observations, however, may be made.

The weakness of the third approach, tinged with strict positivism, is its emphasis on "child welfare" while paying scant attention to the natural right of parents and to the family unit as the cornerstone of society. Here precisely lies the strength of the first and second approaches: the recognition of the natural right of parents, hence of the family as the basic societal unit. Although each of the latter approaches differs in its reasoning as to when consent may be

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(44) Re Baby Duffell: Martin et al. v. Duffell (1950) S.C.R. 737; Hepton et al. v. Maat et al. (1957) S.C.R. 606; McNeilly et al. v. Agar (1958) S.C.R. 52; Re I (1955) O.W.N. 721.

(45) Re Roumeliotes (1939) 4 D.L.R. 265; Ex Parte Lawson (1960) O.W.N. 267; Re Flynn (1960) O.R. 99.

dispensed with, each accepts without qualification the basic premise.

In the words of Mr Justice Ferguson in Re LeSieur:

> ....there is now much more at stake in this application than the scheme of The Adoption Act or even the welfare of this particular child. The right of parents to their own child is involved. In custody matters it has been held that the welfare of the child is the paramount consideration. That proposition has been stated too often by eminent judges to need further comment, but the right of adoption, the right to change parentage, is not, in my view, a right which depends on the welfare of the child but depends on the strict wording of the statutes, because apart from the statutes no such right exists. It may be better for any child of poor parents that it be raised by parents in well-to-do circumstances. It may be well for all children that they be raised in pious homes. But our society contains a great many people who are poor and not very pious and no matter how poor or impious they may be, they marry, have children and die. They raise their own children, and live and die much as their parents before them. The result is the society in which we live with all its strengths and weaknesses.(46)

And in the words of Mr Justice Rand:

> As 'parens patriae' the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to the disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the

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(46) (1951) O.W.N. 186 at p. 191.

> Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility - as if, for example he were a homeless orphan wandering at large.
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> The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; and when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in replacing the parents and assuming their duties....It might be that the foster parents would furnish to the children here a home of easier circumstances and better fortune than that of the respondents; but who can say that that difference is for the ultimate welfare of the child? It might, in fact, prove to be the reverse. Carried to its logical result, the presumption that it would be would involve the conclusion that a modest home can, with better grace, be torn apart than one of opulent means. This needs only to be mentioned to be rejected.(47)

Another problem was raised in a recent decision (48) of a district court judge in the province of Ontario: the problem of inter-faith adoption, i.e., the adoption of a Roman Catholic child by a Protestant couple and vice versa. In the words of the presiding judge:

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(47) Hepton v. Maat (1957) S.C.R. 606 at p. 607.
(48) Re Lamb (1961) O.W.N. 356.

> Should the child Joey now be deprived of the security which adoption would give him on the sole ground that the religion of his natural mother was Roman Catholic while that of the applicants is Protestant?(49)

In the following chapters we shall therefore analyse the fundamental problem of the delicate balance between parental rights and child welfare under the following headings:

1. State intervention against the will of parents where religion not involved.

2. State intervention against the will of parents where religion involved.

3. State intervention against the will of Catholic parents where religion involved.

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(49) Ibid., p. 358.

CHAPTER III

STATE INTERVENTION AGAINST THE WILL OF PARENTS WHERE RELIGION NOT INVOLVED

I. EXAMPLES OF SUCH INTERVENTION

Two situations have arisen in the three cases we shall now consider. First, the position of a legitimate child of parents who subsequently divorce, one of whom remarries and attempts to adopt the child. Secondly, the position of an illegitimate child whom a married couple wish to adopt. In both situations, one of the natural parents actively opposes the making of the adoption order.

In Hawkins v. Addison,(50) the Alberta Court of Appeal upheld the right of the natural parent to the child. The facts briefly were as follows.

A wife divorced her husband and obtained custody of the child of their marriage. She then remarried and with her second husband wished to adopt the child of her first marriage. The divorced husband refused to consent to the making of the adoption order. The court thereupon dispensed with the necessity of his consent "for sufficient reason", and granted the adoption order. The father therefore appealed on the ground that there was no sufficient reason for dispensing with his consent.

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(50) (1955) 3 D.L.R. 435

His appeal was sustained by a majority of four judges. The dissenting judge held that the welfare of the child prevails, and distinguished the statement of Mr Justice Rand in Re Baby Duffell on the basis that the latter referred to a father who was not divorced. The majority of the court accepted the reasoning of Mr. Justice Rand, and of Mr Justice Ferguson in Re LeSieur, and stated in part:

> Adoption was unknown to English law. It was created by statute. It did not appear in Alberta until 1913. It did not exist in England until 1926. The effect of an adoption order...is to sever forever the natural relationship and all legal rights of the parent to the child and of the child to the parent, even after the child attains the age of discretion....In questions of custody the welfare and happiness of the infant is the paramount consideration to which all others yield....But the right of adoption where the consent of the parents is required and has been refused, the right to alter the child's status, a right to destroy the parent's relationship to the child and the child's relationship to the parent, including, in this case, the right of access given the father by the Texas Court, is a right that depends not on the "welfare of the child" but on the strict wording of the statute, because apart from the statute no such right exists....(51)

In Ex Parte Lawson,(52) an Ontario county court decision, the welfare of the child was held to be the

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(51) Ibid., p. 442 .
(52) (1960) O.W.N. 267.

paramount consideration. The facts, almost identical to those in the Hawkins case, were briefly as follows.

A husband and wife separated, after which the wife divorced her husband and obtained custody of the three children of the marriage. The wife remarried and with her second husband wished to adopt the three children. The divorced husband refused to consent to the making of the adoption order. The court considered various decisions, including Re Baby Duffell, Re LeSieur, Hawkins v. Addison, McNeilly et al. v. Agar, and Re I, and concluded from these cases that the welfare of the child is the paramount consideration. The court also referred to Re Flynn, which dealt with custody not adoption, and granted the adoption order without the consent of the natural father.

In Re I,(53) an Ontario county court decision, a father of an illegitimate child made arrangements with a married couple to board the child. After two and one half months, the father stopped paying for the child's board. Two years later the couple filed application to adopt the child. The natural father consented to the making of the adoption order; the natural mother actively opposed it. The court granted the adoption

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(53) (1955) O.W.N. 721.

order, distinguishing Re LeSieur as obiter, and accepting Re Roumeliotes as the law. After considering Mr Justice Cartwright's decision in Re Baby Duffell, the court concluded:

> From the above it is apparent that two principles of law must be considered in deciding whether or not the consent of the mother should be dispensed with. The first is that the welfare of the child is paramount; and the second is that the mother of an illegitimate child has a prima facie right to its custody in preference to any other person unless there are very serious and important reasons why she should not have the custody, one of the important reasons being that she is unfit to have the care and guidance of the child....
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> Although the welfare of the child is the sole consideration in custody applications this application goes further. If granted it wipes out all the rights of the mother and changes the name of the child, and therefore though the A(foster) home and living conditions may be far superior to those of the respondent, nevertheless the right of CD to her illegitimate child should not be interfered with unless she is unfit to have the care and training of this child....(54)

II. LEGITIMACY AND LIMITATION OF SUCH INTERVENTION

A. Assessment of Judicial Opinion

The status in law, for adoption purposes at least, of a natural mother in relation to her illegitimate child, and of natural parents in relation to their

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(54) Ibid., p. 725.

legitimate children, is basically the same. Accordingly, in our assessment we need not concern ourselves with the distinction between legitimate and illegitimate children since what is said will apply, mutatis mutandis, to both.

The three foregoing cases point to a fundamental difference of approach. Hawkins v. Addison and Ex Parte Lawson are in fundamental opposition. Although the facts of each case are almost identical, the governing principles are basically different: natural right of parents versus child welfare. From a strictly legal point of view, Ex Parte Lawson is bad law inasmuch as the cases relied upon do not support the paramountcy of child welfare theory. An explanation in defence of the outcome (as opposed to the legal correctness) of the decision, might be the fact that the three children had been raised apart from the father for a period of twelve years.

Re I is somewhat confusing since, on the one hand, it asserts the primacy of the child welfare theory only to qualify this immediately by a distinction between custody and adoption and a further assertion that in the latter case the right of the natural mother should not be interfered with unless she is unfit to have the care and training of the child. The court then

proceeded to grant the adoption order, on a finding of fact that the mother was unfit because, among other things, she was a heavy drinker and had previously committed perjury in another court. The court therefore appears to have adopted as governing principle the natural right of the parent subject to court control in the interests of the child when the parent is unfit.

What further confuses the Re I decision, is the affirmation that Re Roumeliotes is the law. Re Roumeliotes,(55) an Ontario Court of Appeal decision, was a case in which the natural parents would not consent to the making of the adoption order. The judge thereupon refused to grant the adoption order because in his opinion this was not a case where his discretion could be exercised to dispense with consent. An appeal was taken and allowed, and the application was remitted to the judge of first instance to determine the matter. The Court of Appeal unanimously held that the judge did have power to dispense with consent and stated:

> Whether or not the evidence would support a finding that the parents have persistently neglected to contribute to the support of the infant need not be determined....It is not necessary for that purpose (dispensing with consent) to find that the parents have

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(55) (1939) 4 D.L.R. 265.

> committed some offence, such as abandonment or desertion of the infant, or neglect or refusal to supply the necessaries of life. A much wider discretion is given to the Court to dispense with the consent....No doubt in every case the Court must exercise a judicial discretion and must act upon credible evidence of circumstances that form a reasonable ground for dispensing with consent.(56)

The wider discretion given to the court to dispense with consent, as explained in Re Roumeliotes, and the necessity of finding that the natural mother is unfit before dispensing with her consent, as explained in Re I, are quite dissimilar. If Re Roumeliotes is the law, as stated in Re I and purportedly followed, there was no reason in Re I to qualify, as it did, the paramountcy of child welfare theory by the assertion of the necessity to find the natural mother unfit. Such assertion was in effect a departure from the law expounded in Re Roumeliotes.

The real problem, however, is not to be resolved at the level of strictly legal considerations and legal precedent. We must look beyond to determine what norms ought to govern. To this end, various factors must be considered.

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(56) Ibid., p. 266.

B. Factors to Consider

1. Parental Rights

The principle of the natural right of parents may be stated in the following manner. The natural duty of parents to care for and educate their children necessarily implies the natural right to the means and the choice of means to fulfill this duty. For some parents the choice of means has been to permit other persons to adopt their child. Until recently, the law refused to recognize this as a valid exercise of their natural right to choose the means, and insisted that their natural duty to care for and educate their children devolved upon them personally, and could not be alienated. Nevertheless, de facto adoption existed, although not recognized by law. The law then chose to recognize adoption, hence to recognize that the offering by parents of their children for adoption was a valid exercise of their natural right to choose the means of caring for and educating their children. As we have seen, this came about in Ontario in 1921 and has gradually developed to the present-day state of the law.

It is essential to underline that the legal recognition of adoption was the legal recognition of a valid exercise of the parents' natural right to choose the means. This explains the legal requirement of

consent before the making of an adoption order. The law also recognized, however, that in certain circumstances it would be most difficult, if not impossible, to obtain this consent, and therefore provided that the judge might dispense with consent if he deemed it advisable. This was the beginning of the recognition of the importance of the welfare of the child. Gradually this initial recognition was transformed to emphasis of the child's welfare. The natural and inevitable problem then arose as to the circumstances which would permit a judge to dispense with consent. This, precisely, is the problem which immediately concerns us, and which leads to a consideration of the other factors.

2. Child Welfare

This poses the great problem. The pendulum has swung from recognition, through emphasis, to paramountcy of child welfare in adoption. We must, however, tread with caution for, as Mr Justice Rand observed in Re Baby Duffell, "only omniscience could, certainly in balanced cases, pronounce with any great assurance for any particular custody as being a guarantee of ultimate 'benefit' however conceived."(57)

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(57) (1950) S.C.R. 737 at p. 747.

The problem of course hinges on the meaning of "child welfare" and the norms to be used to determine the best interests of the child. Shall an individual judge have an absolute discretion to determine the best interests of a child, and hence an unfettered discretion to grant an adoption order on this basis, notwithstanding active opposition by the natural parent, or shall his discretion be qualified and circumscribed by fundamental norms stemming proximately from acceptance of the family as the basic societal unit, and ultimately from a public philosophy?

3. Parental Incapacity

The question here is to what extent, if any, parental incapacity and the quality of such incapacity, should be considered in determining whether consent may be dispensed with. Or should we accept the position adopted in Re Roumeliotes that "it is not necessary for that purpose (of dispensing with consent) to find that the parents have committed some offence, such as abandonment or desertion of the infant, or neglect or refusal to supply the necessaries of life. A much wider discretion is given...."?(58)

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(58) (1939) 4 D.L.R. 265 at p. 266.

4. The State and the Common Good of Society

The purpose of the State is to promote the temporal common good of society which, though temporal, is not strictly material. As Cardinal Léger has observed:

> Le bien commun de la société ne se limite pas en effet au bien être matériel de ses membres; il exige un climat favorable à la pratique de la vertu. La paix sociale résulte de l'équilibre entre ces deux pôles. Qui dirait que notre société opulente ne risque pas d'oublier cette dimension spirituelle du bien commun?(59)

The requirements of the common good will therefore determine equally the extent of the discretion in the court to dispense with parental consent, and of parental rights over their children.

C. BALANCING OF FACTORS

We must begin with the proposition that the family is the basic societal unit. As Mr Justice Rand has observed, "As 'parens patriae' the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit."(60)

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(59) Cardinal Paul-Emile Léger, Détresse des enfants sans famille, Allocution au Richelieu-Montréal, Fides, Montréal, le 8 mars 1962, p. 15.

(60) Hepton v. Maat (1957) S.C.R. 606 at p. 607.

The same learned justice has further observed:

> ....In determining welfare we must keep in mind what Bowen L.J. in the case of Re Agar-Ellis, as quoted in Scrutton L.J. in Re J.M. Carroll, says: "...it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a general rule what is good for his children than a Court of Justice can."(61)

In this context it will therefore be seen that it is not so much a question of natural right of parents versus child welfare, but rather child welfare interpreted in the light of the family as basic societal unit, hence of the natural right of parents.

From this follows the next proposition, namely, that the only justification for dispensing with the consent of a parent who actively opposes the making of the adoption order is culpable default or incapacity on the part of such parent resulting in gross mistreatment of the child. Judicial discretion to dispense with consent cannot be broader unless we are to deny, at least implicitly, the basic societal unit, hence the natural order. We must keep in mind the far-reaching effects of an adoption order, as opposed to an order for custody, and weigh these effects in the context of the natural right of parents. If there is justification other than

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(61) Re Baby Duffell (1950) S.C.R. 737 at p. 747.

culpable default, as explained, for dispensing with consent, the burden of proof for such justification lies with those who assert it. For the presumption which arises from the acceptance of the natural right of parents, is contrary to such further justification.

This is not to suggest that the state cannot intervene in situations where parents attempt to impose upon their children something manifestly unreasonable, hence contrary to the natural order, which seriously threatens the welfare of the child and disturbs the peace of the social order. In such cases, the state does not, even implicitly, deny the primacy of parental rights and the natural order, but rather protects them. For in so intervening, the state simply asserts its autonomy in promoting the temporal common good and reminds parents that their rights must be exercised according to the dictates of reason, hence not contrary to the natural order, always respecting therefore the nature of their children who are not parental chattels, but, rather, like their parents, bearers of rights, natural and legal.

Taparelli, in his essay on natural law, has observed:

> Mais en quoi consiste donc l'influence sociale sur les mariages? elle consiste dans l'usage que l'autorité suprême fait de ses droits, sans détruire les droits

> de ceux qu'elle gouverne(694). Or, les droits de l'autorité suprême consistent à empêcher directement le désordre individuel et social, et à promouvoir avec opportunité le bien de chaque associé(740 et suiv.), avec le concours de tous(728). L'autorité sociale pourra donc empêcher les désordres publics dans le mariage, et prendre la défense de l'enfant, contre la cruauté possible de parents dénaturés....(62)

The richness of the approach of the Supreme Court of Canada therefore becomes apparent. Natural parents have a prima facie right to their child and no adoption order will be made without their consent, which must exist at the time the order is made, unless, for very serious and important reasons, the welfare of the child requires that the fundamental natural relationship between parents and child be severed. The prima facie right stems from the family as basic societal unit; the very serious and important reasons, to our mind, must amount to culpable default or incapacity resulting in gross mistreatment of the child. The objective order, therefore, which is at once the condition and the guarantee of truth, is healthily accepted as starting point.

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(62) Taparelli D'Azeglio, Essai théorique de droit naturel, 4ième Ed., Paris, Librairie Internationale Catholique, Tome Premier, p. 506, para. 1115; see also Tome Deuxième, Livre Septième, chap. II, art. V, "De l'autorité paternelle et de ses limites."

The paramountcy of child welfare theory and the consequent very broad discretion in the court to dispense with parental consent regardless of whether there have been specific acts of default by the parents, need but be mentioned to be rejected. For, in the absence of fundamental norms circumscribing this discretion, the personal thinking of a judge is, according to this theory, in the last analysis, the supreme criterion, which results in a denial, implicit at least, of the objective order of values.

A last word about the approach in Re LeSieur and Hawkins v. Addison. Although, in the manner of the Supreme Court of Canada, these decisions accept the natural right of parents, hence the family, as starting point, there is a hint of positivism in the reasoning which follows as to when consent may be dispensed with. For, while rejecting the child welfare theory as justification for the right of adoption, these decisions assert the supremacy of the legislature in its stead: "the right of adoption...is not...a right which depends on the welfare of the child but depends on the strict wording of the statutes, because apart from the statutes no such right exists."

We see here a willingness to accept as starting point the natural right of parents, but an unawareness of the intrinsic, transcendental validity of this principle.

The absolute judicial discretion, which is denied, is substituted by the absolute will of the legislature, which is affirmed as supreme criterion. There is once again, therefore, implicit at least, a denial of the objective order of values. The essential structure of the family, which exists prior to the state, and which is accordingly an autonomous sphere of right, subject to state intervention where a family is delinquent in its own duty, is not recognized.

We need not look far to see the danger of this position. We have witnessed this century, particularly the Second World War, the logical outcome of the denial of this objective order of values. Strict positivism and its assertion that there are only positive rights; strict positivism as a philosophy of life could only result in the holocaust which was the Second World War. As Rommen has observed in this connexion:

> The will of the State, the formal general will of the citizens, is the source and criterion of law. The State is the creator of morality and law, but the state in turn is merely a product of the struggle of social classes and servant of the class that rules at any given time. Hence, the political order is the moral order for the time being, and the self-interest of the state (which is itself a product of naked power) is an element of morality. All the highest goods that man possesses - freedom, property, family, personal rights - he owes to the State. Law is thus not a genuine

> norm. It does not tell what ought to be, but is merely an indication of how far the power, the material and psychological power, of the ruling class extends. The law indicates what the sociological situation is.(63)

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(63) Heinrich A. Rommen, The Natural Law, St. Louis, Herder Book Co., 1959, p. 127.

CHAPTER IV

STATE INTERVENTION AGAINST THE WILL OF PARENTS WHERE RELIGION INVOLVED

I. EXAMPLES OF SUCH INTERVENTION

As far as we are able to ascertain, religion as a major factor for opposing the making of an adoption order has been raised in only two reported decisions of the Ontario courts.

In St Vincent de Paul Children's Aid Society v. Spence et al., (64) an Ontario Court of Appeal decision, the St Vincent de Paul Children's Aid Society sought custody of a Roman Catholic child who had been adopted, by court order, by a couple - the husband being Protestant, the wife Roman Catholic - who were raising the child as a Protestant contrary to an agreement between the Society and the couple. The majority of the Court of Appeal confirmed the decision of the trial judge who ruled that the best interests of the child required that he remain with the couple. The dissenting judge relied on section 28(1) of The Children's Protection

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(64) (1934) O.W.N. 389.

Act(65) to find that the Roman Catholic child could not be placed with this couple of mixed religion. An appeal to the Supreme Court of Canada was dismissed.(66)

In Re Lamb,(67) a decision of a district court judge, a Protestant couple was permitted to adopt a baptized Catholic child. In this case the required consent and certificate of approval had been filed with the court. The prospective adopting parents had well cared for the child. The question, in the words of the judge, was:

> Should the child Joey now be deprived of the security which adoption would give him on the sole ground that the religion of his natural mother was Roman Catholic while that of the applicants is Protestant?(68)

The judge answered this question on two bases: (1) on the basis of the statute; and (2) on the basis of any logical reason beyond the statute.

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(65) R.S.O. 1914, chap. 231. Section 28(1) read:

> Notwithstanding anything in this Act, no Protestant child shall be committed to the care of a Roman Catholic children's aid society or institution, nor shall a Roman Catholic child be committed to a Protestant children's aid society or institution; and in like manner no Protestant child shall be placed out in any Roman Catholic family as its foster home, nor shall a Roman Catholic child be placed out in any Protestant family as its foster home.

(66) (1935) S.C.R. 652.
(67) (1961) O.W.N. 356.
(68) Ibid., p. 358.

Before analysing this decision, we should recall what our earlier review(69) of adoption legislation makes clear. First, adoption legislation in Ontario, from its inception until now, has required one of various consents before the making of an adoption order, but has permitted the court to dispense with the required consent if it deems it advisable. Secondly, adoption legislation in Ontario, at least until the 1954 consolidation, did not prohibit inter-faith adoption, i.e., the adoption of a Roman Catholic child by a Protestant couple and vice versa.

It is manifest that until 1954 a court was, from the point of view of the statutes, absolutely competent to permit inter-faith adoption.(70) Whether or not the various children's aid societies of the province as a matter of policy discouraged the practice is not our concern. It is only with the passing of The Child Welfare Act, 1954, that doubt arises as to the

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(69) See chap. II, sec. I: History of Adoption Legislation.

(70) This is confirmed by the decision of St Vincent de Paul v. Spence. Although we are aware of only two reported Ontario cases on this point, there are many United States decisions which are pertinent. For a review of the attitudes of the American courts, see Columbia Law Rev., vol. 54, pp. 376-403, "Religion as a Factor in Adoption, Guardianship, and Custody"; see also (1953) 28 Indiana Law Journal 401; (1955) 30 Notre Dame Lawyer 490; (1955) 57 West Virginia Law Rev. 81; (1955) 5 De Paul Law Rev. 89; (1955) 64 Yale Law Journal 772.

court's competence to do so. The sole reason for the doubt is the existence of the religious provision, which was formerly in The Children's Protection Act and now appeared in the one, consolidated Act, and the consequent question: when interpreting Part IV of The Child Welfare Act, must one read into Part IV the religious provision, section 31, found in Part II on the basis of a necessary inference that, if such provision exists as to custody of neglected children, a fortiori the legislature necessarily intended such provision to apply to adoption which, unlike custody, not only deprives the natural parents of their child, but also severs forever the status of the child in relation to its natural parents?

This was the basic problem facing the court in Re Lamb which we shall now consider.

On the basis of the statute, the judge refused to draw the inference that section 31 must be read into Part IV of the Act. In his own words:

> This section refers only to the placing of children in foster care and makes no reference to adoptions. One cannot infer that the requirement regarding religion therein set forth should be applied to Part IV of the Act where no reference to religion is made. It is clear that the legislature did not intend any such limitation in adoptions, otherwise it would have said so. Furthermore, as far as this

> application is concerned, the provisions of section 31 cannot apply as this district has only one children's aid society.(71)

The judge then went on to declare that there was no logical reason beyond the statute that prohibited inter-faith adoption:

> Is there any logical reason why religion should be an obstacle? In my view there is not. This does not mean that the spiritual welfare of the child must not be considered. It should be weighed together with his physical, social, intellectual, and emotional well-being. Evidence before a court that the applicants to adopt a child were atheists, agnostics, or did not practice the religion which they professed, might well be considered in determining if it would be in the best interests of the child to be adopted by such applicants. But that is not the situation here. The Lambs are both professing and practicing members of their church. To deprive a child of the advantages which adoption would give him simply because the applicants though Christian are of a different denomination would, in my view, be a denial of natural justice.(72)

The judge, therefore, made the adoption order.

Before assessing the decision, it is not necessary to re-state the three basic approaches of the courts to statutory interpretation. The golden rule, the literal rule, and the mischief rule are phrases familiar to those acquainted with the law. The warnings

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(71) (1961) O.W.N. 359.
(72) Loc.cit.

of Mr Willis, however, are pertinent:

> Rule III - Do not be misled in your reading of cases by pious judicial references to "the intent of the legislature." The expression does not refer to actual intent - a composite body can hardly have a single intent: it is at most a harmless, if bombastic way of referring to the social policy behind the Act. If the Court is following the "literal rule" it will presently explain that the intent of the legislature can only be gathered from the words the legislature has used: in other words, that it is not concerned with the social policy behind the Act, but only with the "meaning" of words in a document, which document merely happens to be a statute. If the Court is following the "mischief rule" and openly considers why the Act was passed, you should know that a rule of positive law debars it from referring to the only sources which can give a trustworthy answer to that question viz. Hansard or the Reports of Royal Commissions: you should then conclude that the Court's reference to "the intent of the legislature" is a polite notice that it is about to speculate as to what it thinks is the social policy behind the Act. A Court's speculation about the policy of statutes dealing with "lawyer's law" is very likely to be right: about the policy of social reform statutes, of which it is almost certainly ignorant, and to which it is probably hostile, very likely to be wrong.(73)

One might also recall the observation of Lord Watson in Solomon v. Solomon & Co.:

> Intention of the legislature is a common but very slippery phrase, which, popularly understood may signify anything from

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(73) "Statutory Interpretation in a Nutshell," (1938) 16 Can. Bar Rev. 1 at p. 3.

> intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary intendment.(74)

Accordingly, one may disregard the reference in Re Lamb to "intent of the legislature." We may now state the question in the following manner. Was the judge justified in refusing to draw the inference that section 31 must be read into Part IV of the Act? If so, was he justified in finding no logical reason beyond the statute to prohibit inter-faith adoption? If so, what are the consequences?

The argument for the judge's interpretation of the statute might be put this way. Clearly, the legislature did not enact in express words a religious provision in Part IV of the Act. Now, until the 1954 consolidation, it is evident that The Adoption Act did not prohibit inter-faith adoption. This is confirmed by the decision in the St Vincent de Paul case. Surely, The Adoption Act would have been amended as a result of this decision if it had been the wish of the legislature

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(74) (1897) A.C. 22 at p. 38.

to prohibit inter-faith adoption. Since it was not amended, there is no reason to believe that, because of the 1954 consolidation, section 31 of Part II of The Child Welfare Act, formerly section 28 of The Children's Protection Act, should be read into Part IV of the Act. The judge, therefore, was justified in refusing to draw the inference.

The argument against the judge's interpretation might be stated as follows. Legislation forbids the temporary placing of a Roman Catholic child with a Protestant couple and vice versa. If it forbids inter-faith custody which does not sever the fundamental relation between natural parents and child, surely the reasonable and necessary inference to be drawn is that it forbids inter-faith adoption with its vast ramifications. Accordingly, the judge was wrong in refusing to draw the inference.

Each argument appears to be quite valid. On the one hand, it does not make much sense to prohibit inter-faith custody and at the same time to permit inter-faith adoption. On the other hand, the history of adoption legislation and pertinent case law seem to confirm this incongruous state of the law and so make it not unreasonable for a judge to refuse to draw the inference. That the inference might validly be drawn cannot be

doubted. That the inference must be drawn is another matter which depends on a theory of the respective roles of the legislature and the judiciary not within the compass of this thesis. Suffice it to say here that the judge's interpretation of the Act can be defended on historical and reasonable grounds, and on the basis of accepted norms of statutory interpretation.

However, that part of the decision based on any logical reason beyond the statute why religion should be a bar, raises serious difficulties. Here in striking fashion a judge's personal theological attitudes bear heavily on the determination of the best interests of the child. In the Lamb case, for instance, the judge's Protestant theological attitude permits him to find no significant difference between various Christian denominations as regards the best interests of the child: "to deprive a child of the advantages which adoption would give him simply because the applicants though Christian are of a different denomination would, in my view, be a denial of natural justice."

The point here is not the theological soundness of the judge's position or the meaning he attaches to the words natural justice. The significant point is that the theological attitude of a judge will inevitably determine the answer to the question whether there is any

logical reason beyond the statute why religion should be a bar. One may wonder how a Roman Catholic judge would answer the question, generally, and in this particular case. Surely his theological position would not permit him to accept the premise in Re Lamb that there is no significant difference between various Christian denominations as regards the best interests of the child. Surely he would be faced with a profound difficulty, particularly where a Roman Catholic child were before him for adoption by a Protestant couple. Surely he would attach to the words "natural justice" a meaning different from that attributed to them by the judge in Re Lamb. And surely he would be as justified in his attitude as was the judge in Re Lamb.

Again, the point is not the soundness of the theological attitude, but the inevitability of the attitude and the consequent weakness of the interests of the child theory as sole or even dominant norm in deciding whether an adoption order should be made. We must recall, even here, the position of the Supreme Court of Canada, in those cases where religion was not an issue, which affords a sure clue to a solution in cases where religion is the issue.

II. LEGITIMACY AND LIMITATION OF SUCH INTERVENTION

A. Principles to Consider

We come now to the age-old problem of God and Caesar, Church and State. This complex problem, which is part of the legacy of Christ - problematic, paradoxical, and mysterious because of its theandric nature - must be reexamined, rethought, and reexpressed in the context of each age and place. No ready solution presents itself because in its concrete manifestations the problem is intimately linked with the contingent facts of a situation, and these contingent facts must be weighed in any attempt to understand the problem. And so, the problem of Church-State relations in the matter of education is not the problem in the matter of divorce, or abortion, or adoption, or birth control. And the problem as it relates to any of these matters in Canada is not the problem in relation to the same matter in Italy, Germany, Spain, or China.

Nor is the problem simplified by the multiplicity of Christian denominations engendered by the Reformation. On the contrary, the complex becomes more complex; Church and State becomes Churches and State.

Nevertheless, despite these variations of age and place and subject-matter, certain principles remain

constant, and, before considering the concrete manifestation of the problem as it relates to adoption in Ontario, we shall review these constant principles which are valid for each age and place.

1. The State is for Man, not Man for the State

This principle is rooted in the very nature of man whose final destination transcends the temporal order and the common good of the body politic. Man is naturally social and the most basic society in which he lives is the family. Man, however, cannot fulfill himself, cannot satisfy all his needs and natural impulses within the family. Accordingly, he joins his fellow men in a larger society, a political society, the body politic. Immediately the natural need for authority arises because of the very fabric of political society. A directive power is needed to ensure that the common good of the body politic will be achieved. Hence, the state, -/the legal order of society; "that part of the body politic which specializes in the interests of the whole. The state is but an agency entitled to use power and coercion, and made up of experts or specialists in public order for the welfare of man. The body politic or political society is the whole. The state is a part - the topmost part - of this whole."(75)

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(75) See J. Maritain, Man and the State, University of Chicago Press, 1951, chap. 1.

2. The Church and the State are Distinct; Each is Supreme in its Order

Any distinction implies an order of values. The things of God are superior to the things of Caesar. But the things of God do not exclude the things of Caesar, nor Caesar's the things of God.(76) The Church and the State are distinct; each has a different purpose and in carrying out that purpose each is supreme in its order. But the orders are of unequal value. One is superior to the other, a superiority of dignity not of instrumentality. The role of the Church is superior to the role of the State because the spiritual is superior to the material, the eternal to the temporal. Each has its role to play, and each is autonomous in carrying out its role. But each cannot simply ignore the other and develop independently because each is

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(76) See J.F. Costanzo, "The Divided Allegiance of the Catholic" in Problems and Progress, edited by Robert W. Gleason, Newman Press, 1962, at p. 28: "Almost all theologians and political philosophers hold that the province of faith is that of the Church and that politics is the proper domain of the state. Almost all agree that morality is the common concern of both jurisdictions because man as citizen and believer acts as a moral agent. This provides the potential source of conflict and friction between the two authorities, religious and secular, and it may be attributed not so much to the mutual denial of jurisdiction as to the priority and extent of its exercise."

concerned with the same person who is at once a citizen of the body politic and a citizen of the eternal City, a Christian. Hence, there must necessarily be cooperation between the Church and the State.(77)

3. The Church Which is Superior to the State Must be Free to Carry Out its Mission Without Interference from the State

We shall not tackle here the difficult topic of the meaning of the concept "the Church" in Protestant

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(77) This cooperation does exist in fact. Land held for Church purposes is exempt from taxation; holidays which are really religious feasts are statutory; military chaplains are provided for the armed forces. And as Costanzo (footnote 76) has further observed: "Political authority may not shirk its responsibilities in assisting the moral life of its subjects and yet on the other hand should not arbitrarily impose one moral philosophy rather than another upon its citizens. Reason would require that the political authorities should expect and welcome the efforts of all duly constituted religious authorities such as the Board of Rabbis, the Protestant Council of Churches, and the Catholic Bishops, as well as private citizens to express themselves on grave moral questions affecting the public order as becomes their duty." Op.cit., p. 29.

and Catholic theology.(78) Suffice it to say that the Church is a fact and that, in the words of Murray, "it is an historical commonplace to say that the essential political effect of Christianity was to destroy the classical view of society as a single homogenous structure, within which the political power stood forth as the representative of society both in its religious and in its political aspects."(79)

From this radical distinction between the order of the sacred and the order of the secular introduced into society by Christianity, emerged the new concept of the "freedom of the Church." This freedom, as Murray has observed, is twofold:

> First, there is the freedom of the Church as a spiritual authority. To the Church is entrusted the "cura animarum";

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(78) Apart from there being no necessity here to enter upon this discussion for our purposes, the obvious reason is the inadequacy of the writer, and the vast theological learning required in this connexion. A most remarkable book relating to this matter is Christianity Divided, New York, Sheed and Ward, 1961, in which eminent Protestant and Roman Catholic theologians discuss their respective positions about key issues. See also E. Schillebeeckx, Christ the Sacrament of the Encounter with God, New York, Sheed and Ward, 1963, a masterful work on the sacraments which provides profound insights into the nature of the Church; and Henri de Lubac, Catholicism, London, Burns & Oates, 1950.

(79) John Courtney Murray, We Hold These Truths, New York, Sheed and Ward, 1960, p. 202.

> and this divine commission endows her with the freedom to teach, to rule, and to sanctify, with all that these empowerments imply as necessary for their free exercise. This positive freedom has a negative aspect - the immunity of the Church, as the suprapolitical sacredness ("res sacra"), from all manner of politicization, through subordination to the state or enclosure within the state as "instrumentum regni."
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> Second, there is the freedom of the Church as the Christian people - their freedom to have access to the teaching of the Church, to obey her laws, to receive at her hands the sacramental ministry of grace, and to live within her fold an integral supernatural life. In turn, the inherent suprapolitical dignity of this life itself claims for the faithful the enjoyment of the right to live in civil society according to the precepts of reason and conscience. And this comprehensive right, asserted within the political community, requires as its complement that all the intrapolitical sacrednesses ("res sacra in temporalibus") be assured of their proper immunity from politicization.(80)

This second aspect of the freedom of the Church as the Christian people affords another sure clue to a solution of the religious issue in adoption. With these principles in mind, we may now turn to the complex, many-sided, concrete problem of the intervention by the state in adoption cases where religion is the issue.

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(80) Ibid., p. 203.

B. Application of the Principles

The statement of the principles raises no difficulty. The difficulty arises in their application to the concrete actualities of the historical moment. One must consider, therefore, what these concrete actualities are in order to determine how to apply the principles.

First, Canada is a Christian country of religious pluralism, i.e., a Christian country without a state religion but with various religious denominations living side by side, enjoying the same freedom of worship guaranteed by the State. This freedom of worship is guaranteed by the State not because of a conviction (if we may speak of conviction in this sense) that all denominations are equally true or equally false but because, as we have seen, Confederation was a political and economic move to better the temporal common good of the people who in fact were of different denominations. This was and remains the fact. And in this way the freedom of the Church is ensured in Canada.

Secondly, of the various Christian denominations, one, the Roman Catholic Church, claims to be the one, true Church of the God-Man, Jesus Christ, commissioned and empowered by Him to teach the fulness of the

Christian Revelation. The point here, as before, is not the validity of the claim but the fact of it. This must be kept in mind if we are to understand the natural reaction, an organic, family reaction of this Church when a Roman Catholic child is permitted to be adopted by a Protestant couple. Again, the point is not the legitimacy of the reaction, but the fact of it.

Thirdly, many Canadian citizens accept this unique claim and its consequent implications, while many others do not. Nevertheless, Roman Catholics must be understood with their belief as Protestants with theirs, and vice versa. The point here is not the objective content of what either the Roman Catholic or Protestant believes, but the "subjective" right in conscience of each to believe and to be free and unfettered in this belief.

With the changeless principles and concrete actualities in mind, we may now turn our attention to the Church-State problem which may be stated in the following manner.

The twofold freedom of the Church is guaranteed in Canada. The Church as spiritual authority is free to carry on its mission of teaching and sanctifying the people who are at once Christians and citizens of the body politic. The Christian people are free to have

access to the Church and to live within her fold an integral supernatural life. Now Canada is a Christian country of religious pluralism. Accordingly, two questions may be posed. First, can the Church in Ontario, Protestant or Catholic, as spiritual authority, demand, as necessary for the exercise of its freedom as spiritual authority, that the State simply forbid the adoption of a Protestant child by a Roman Catholic couple, and vice versa? Secondly, can the Church in Ontario, Protestant or Catholic, as the Christian people, demand, as necessary for the freedom of the Christian people to have access to the Church to live within her fold an integral supernatural life, that the State forbid the adoption of a Protestant child by a Roman Catholic couple, and vice versa, without the consent of the natural parents?

The answer to the first question, in our opinion, should be no, because the freedom of the Church as spiritual authority does not require that the State simply forbid inter-faith adoption. Such a demand in reality is a demand that the State by its laws sanction this and that interpretation of baptism, Roman Catholic and Protestant; that the State in promoting the temporal common good of society take an official stand as to the equal validity of each interpretation of baptism, hence an official stand about a supernatural reality beyond

the pale of the function of the State. Surely from the point of view of the State in promoting the temporal common good of the body politic through adoption legislation, it makes no difference, in a pluralist society such as ours, whether a Roman Catholic child be adopted by a Protestant couple, and vice versa. And surely, therefore, such a demand from the Church as spiritual authority would infringe seriously upon the autonomy of the State in fulfilling its specific role which is essentially distinct from that of the Church. With the Church not the State rests the role of leading citizens along the path of grace to the eternal City. With the State not the Church rests the role of promoting the temporal common good of the body politic in which the Christian citizen lives.

The answer to the second question, in our opinion, should be yes. The answer is not simple because of an interplay of two basic principles of different orders: the principle of the natural right of parents, which is of the natural order, the exercise of which may therefore be restricted by the state in certain circumstances because of the exigencies of the common good; and the principle of the freedom of the Church as the Christian people, which stems formally from the Christian Revelation and relates essentially to the

supernatural order of grace, and which, therefore, transcends the authority of the State.

We have discussed the principle of the natural right of parents in the preceding chapter,(81) and we may briefly restate it here for convenience only: the natural duty of parents to care for and educate their children necessarily implies the natural right to the means and the choice of means to fulfill this duty. The principle of the freedom of the Church as the Christian people has also been explained. Its validity cannot be challenged and is in fact accepted in Canada. We must now demonstrate its immediate relevancy to determine its method of application.

Its immediate relevancy may be shown in this way. The freedom of the Church as the Christian people, i.e., their freedom to have access to the Church and to live within her fold an integral supernatural life, belongs to each Christian individually, including Christian children. The latter, however, are incapable of exercising this freedom. Hence it is left to the natural parents to determine how their children are to be raised as Christians. The freedom of the Church as the

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(81) Supra, p. 25.

Christian people, therefore, in the case of parents, includes the right to determine the religious upbringing of their children. This must be so because it is manifestly unrealistic to suppose that children of Christian parents in a Christian country are to be raised as amoral creatures in a spiritual vacuum devoid of any religious training until they are capable of exercising for themselves their freedom as Christian people. Someone must decide the nature of their religious upbringing, and this decision naturally rests with the parents. Hence the freedom of the Church as the Christian people, in the case of the right of parents to determine their children's religious upbringing, is linked with the natural order, with the principle of the natural right of parents. Nevertheless, because this freedom relates essentially to the supernatural order of grace and stems formally from the Christian Revelation, its exercise by Christian parents on behalf of their children cannot be interfered with by the State.

As we observed last chapter(82) when discussing the natural right of parents, this is not to say that the State cannot intervene when, in the name of freedom of the Church as the Christian people, parents attempt to force upon their children something manifestly

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(82) Supra, pp. 30-31.

unreasonable, hence contrary to the natural order, which seriously threatens the welfare of the child and disturbs the peace of the social order; for example, a refusal to allow their child to receive necessary blood transfusions. In such instances, the State does not interfere with the freedom of the Church as the Christian people, but simply asserts its autonomy in promoting the temporal common good. For the freedom of the Church as the Christian people must also be exercised according to the dictates of reason, hence not contrary to the natural order, and anything else is not a true and valid exercise of this freedom but an abuse of it. The determination by parents of the religious upbringing of their children is clearly not unreasonable as such, hence not contrary to the natural order.

Accordingly, the Church as the Christian people can demand that the freedom of access of Christians to the Church, which in the case of Christian parents includes their right to determine their children's religious upbringing, be safeguarded when they offer their children for adoption, either directly to the adopting parents or indirectly through a children's aid society. The Church as the Christian people can demand this because it is their right; and the Church as

spiritual authority can and must demand it on behalf of the Christian people because of its duty to proclaim and defend their rights.

We may state the question in another manner. Since the legislature may reasonably provide that a judge may in certain circumstances dispense with the consent of parents, may the legislature with justification empower a judge to grant an inter-faith adoption order without the consent of the parents or contrary to their wishes? Or, adopting the terminology of Mr Justice Rand, does the right of the Sovereign, on the broadest social and national grounds, to replace the parents and assume their duties when the welfare of the child is threatened, include the right to determine how the child will worship as a Christian?

The answer, in our opinion, must be no, because this constitutes an infringement by the State or Sovereign on the freedom of the Church as the Christian people, scil., as the Christian people who are parents and whose freedom of access to the Church includes the right to exercise on behalf of their children that same freedom which they enjoy but are yet unable to exercise.

We would here repeat that in our pluralist society the State, in promoting the temporal common good of the body politic by means of adoption legislation,

is not concerned about whether a Roman Catholic child be adopted by a Protestant couple, and vice versa. This statement, however, must be rightly understood. It suggests only that the State is unconcerned because the temporal common good, the sole concern of the State, sought through adoption legislation will be achieved whether or not Roman Catholics are adopted by Protestants, and vice versa. It does not suggest, however, that the State may therefore determine how the child will worship as a Christian, hence that the legislature may empower a judge to grant an inter-faith adoption order without the consent or contrary to the wishes of the parents. It is precisely because the State in our pluralist society is not concerned about the Christian denomination in which the child will be raised, that it cannot decide this matter.

Although broad social and national grounds may justify the Sovereign's replacing the parents and assuming their duties in the interests of the child, this cannot extend to the determination by the Sovereign of the child's religion because (1) the welfare of the child never requires this since it matters not from the Sovereign's point of view in what Christian denomination the child is raised; and (2) the Sovereign cannot exercise for the parents their freedom as Christian people to

determine the child's religious upbringing because this freedom which formally stems from the Christian Revelation relates to a supernatural reality about which the Sovereign is not competent to judge.

Otherwise, the State enters the arena of the Church to engage officially in judgments about supernatural realities beyond its legitimate authority. And, in a pluralist society such as ours, this means that the State through a judge determines this matter in the light of a particular judge's theological position.

Accordingly, for the same reason that the Church, Protestant or Catholic, cannot demand that the State simply forbid inter-faith adoption, the State cannot determine the religion in which a Christian child will be raised. In the one case, the Church fails to respect the autonomy of the State; in the other, the State fetters the freedom of the Church. In both, the necessary cooperation which must exist between Church and State is lacking.

CHAPTER V

STATE INTERVENTION AGAINST THE WILL OF CATHOLIC PARENTS WHERE RELIGION INVOLVED

One might ask whether this chapter is not superfluous in view of the preceding one which dealt equally with the Catholic and Protestant parent. Does not the very existence of the present chapter suggest that, in some way, the Catholic child is a unique case requiring unique treatment; that, in some way, what was said previously does not, cannot really, apply in the same manner to a Catholic; that, in some way, the exclusive claim of the Roman Catholic Church does require exclusive treatment? Is this not another example of Catholics demanding religious liberty for themselves when they are a minority, only to deny it to others when they, Catholics, are in authority, on the basis of a fully documented Catholic principle that error has no rights? Is not the Catholic, really, more concerned with and better versed in "agitating for his own rights than in constructing the theoretical basis for a democracy which, working through the machinery of government, can assure attention to the rights of all?"(83)

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(83) Daniel Callahan, The Mind of the Catholic Layman, New York, Charles Scribner's Sons, 1963, p. 34.

The reasons for these legitimate doubts and fears have, in another connexion, been well summed up as follows:

> Anti-Catholicism in its rational core is a composite of three apprehensions: a Catholic, it is said, by reason of his spiritual allegiance to the papacy, as his Faith prescribes, is subject to the foreign jurisdiction of the pope, who is also a temporal sovereign.... Secondly, the religious dogmatism of Catholicism is dialectically incompatible with political democracy. Doctrinal dogmatism and intolerance conduce to political dogmatism, civil intolerance, and absolutism, while, on the contrary, religious and philosophical relativism promotes civil tolerance and political democracy. Thirdly, the growth of Catholicism poses a grave threat to the existence of Protestantism. A numerically superior Catholic electorate might be tempted to change the Constitution in order to restrict the exercise of religious freedom for non-Catholics.(84)

Costanzo, in connexion with the problem of a Catholic candidate for the presidency of the United States of America, has provided a full and fair answer to these apprehensions which we shall attempt to do in relation to the problem of inter-faith adoption in Ontario.

I. THE PROBLEM

In terms of the Church we are living in an

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(84) Costanzo, op. cit., p. 18.

ecumenical era. It is an age which naturally turns its attention to the mystery of the Church. As de Lubac has observed, "it certainly seems as if the present day has brought about the moment for carrying out a labour of this kind a propos that particular section or aspect of the total Christian mystery, that particular member of the 'body of truth', which is the mystery of the Church."(85)

The Church, the mystery of God among us, of the divine contact with man through Jesus Christ, God and man, the Son of Man, Who, though ascended to Heaven, continues His work through His Body on earth, called Mystical, the Church. Hence the Catholic missionary spirit, the desire and prayer that all be Catholic, that every man may come to accept, individually, the Catholic Church. For God, as we believe, has imposed on man the obligation to seek out his salvation according to the divinely ordained means which, we believe, is the Church. Does it not therefore follow that the Catholic Church should use all means at hand to increase membership in its own ranks for the salvation of the individual and the glory of God? And is not the talk of

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(85) Henri de Lubac, The Splendour of the Church, Deus Books, Glen Rock, N.J., Paulist Press, 1963, p. 18.

freedom of conscience really only a position imposed on Catholics as a minority to safeguard their "absolute" rights in the face of rapid world secularism and pluralism, - a fact which we grudgingly accept while secretly hoping for the dawn of a new "Christendom"? And in the matter of adoption, do we not think that it does not matter, really, if a Protestant child is allowed to be adopted by Catholic parents (because, really, in the last analysis it will inevitably be better for the child to be fully initiated into the mystery of the Church), but under no circumstances should a Catholic child be adopted by non-Catholic parents (because the child will thereby lose the opportunity for full initiation into the mystery of the Church)? But since we do not have a "Catholic State" but only a pluralist society, albeit Christian, in this country, we cannot insist on this right only for Catholics but must argue that this right exists for all (in order, of course, to ensure that a Catholic child remain Catholic, and for no other reason). For, surely, if a child is raised as a Catholic, is not his eternal salvation more secure than if raised as a Protestant? Not of course that he will lose eternal salvation if raised as a Protestant. But are his chances not better if raised as a Catholic? And is this "Catholic position" therefore not justified?

II. PERSONALIST CONSIDERATIONS

A. Ambiguities

The problem under consideration is confused by certain commonplace expressions: error has no rights; the Church cannot renounce its dogmatic intolerance; civic peace requires civil tolerance in a pluralistic society. This last statement has a ring of opportunism or at least of practical expedience owing to the factual exigencies of the historical moment. The other statements suggest a despotic, totalitarian society with no room for the individual's free and personal search for truth. All these historically-conditioned expressions belie the genuine nature of the Church.

First, the expression error has no rights confuses the objective order of values and ends, the teleology or purposefulness of all things, with the subjective element of right. Moreover, in the final analysis, the objective order which gives rise to subjective right is rooted in the person who is the only true subject of right because of his personal destiny to God. Hence only persons can properly be said to <u>have rights</u>. Neither animals, nor things, nor abstractions, nor concepts <u>have rights</u> - objectively or subjectively. Error indeed

has no rights, but nor does truth, but only the person, who faithfully and in good conscience must diligently seek truth which is the basis of his subjective right and the fulfillment of his divine destiny.

Secondly, the statement that the Church cannot renounce its dogmatic intolerance is unhappily worded and misleading. Framed in a negative way, it seems to suggest that in relation to truth - its dogma - the Church cannot help but be intolerant. The word intolerant, however, is equivocal particularly when the assertion of the necessity of the Church's dogmatic intolerance follows the assertion of its tolerance in relation to persons. In this context, dogmatic intolerance smacks of sophistry, though this is not at all intended, and the assertion of its tolerance towards persons sounds suspect. For if the Church must be dogmatically intolerant, what is the real nature of its tolerance towards persons except a negative putting up, so to speak, with their erroneous opinions, hoping all the while that they will hurry along to the acceptance of dogma.

Let us rather say more accurately that the Church must be faithful to its own truth and its mission. As ministra fidei, the Church, the living community of Christ, must be faithful to First Truth, veritas prima,

which is "by no means simply an absolute metaphysical essence, existing in itself. It is much more God as eternal truth, the revealing act of God in which he gives testimony of himself within us and declares himself to be our true salvation."(86) Two immediate consequences flow from its fidelity to truth: (1) the Church cannot be dogmatically indifferent; (2) the Church must be genuinely and deeply tolerant.

The Church cannot be dogmatically indifferent precisely because of its fidelity to truth and of the nature of religious truth. "To be convinced of a faith means to regard its truth as absolutely binding; Christian faith is simply impossible on any other terms. Dogmatic indifferentism contradicts the very nature of Christian belief."(87) And the Church must be genuinely and deeply tolerant precisely because of its fidelity to truth. For genuine tolerance presupposes truth. Maritain has well expressed it in this manner:

> Be it a question of science, metaphysics, or religion, the man who says "What is truth?",

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(86) Stephanus Pfurtner, Luther and Aquinas - a Conversation, London, Darton, Longman & Todd, 1964, p. 55.

(87) Ibid., p. 15.

> as Pilate did, is not a tolerant man, but a betrayer of the human race. There is, in other words, real and genuine tolerance only when a man is firmly and absolutely convinced of a truth, or of what he holds to be a truth, and when, at the same time, he recognizes the right of those who deny this truth to exist, and to contradict him, and to speak their own mind, not because they are free from truth but because they seek truth in their own way, and because he respects in them human nature and human dignity, and those very resources and living springs of the intellect and of conscience which makes them potentially capable of attaining the truth he loves, if some day they happen to see it.(88)

Thirdly, the statement that civic peace requires civil tolerance in a pluralistic society has overtones of expedience. Religious tolerance is seen as a practical necessity because in our pluralistic society it is not without its advantages to Catholics. Legal toleration of all religious groups is an acceptable practical norm for domestic tranquillity. The implications seem clear: if civic peace does not require civil religious tolerance, there is no need for the latter, provided Catholics are free in the exercise of their religion. There is then no reason in principle for such civil tolerance, and the ideal

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(88) J. Maritain, Reflections on America, Image Books Edition, New York, Doubleday & Company, 1964, p. 46.

to strive for is the "Catholic State."

Such an attitude belies the essential structure of the act of faith and the full impact of Christianity. For although, as we said earlier,(89) the essential political effect of Christianity was the introduction into society of the radical distinction between the order of the sacred and the order of the secular, we cannot restrict our gaze to this alone. As Croteau has observed, beyond a simple transformation of institutional structures, the very status of the person was revised and his autonomy affirmed:

> Or, ce qu'il importe surtout de souligner pour la suite de ces propos, c'est le lien étroit qu'elle posa entre l'affirmation de la valeur primordiale de la personne et celle d'une double souveraineté. La connexion échappera facilement au regard de l'historien superficiel. Celui-ci sera porté à s'arrêter au phénomène extérieur, c'est-à-dire à l'apparition de deux nouvelles structures.... En réalité, les changements effectués se produisaient en même temps à un niveau plus profond. Au delà d'une simple transformation de cadres institutionnels, c'est le statut même de la personne qui était revisé, son autonomie mise à jour. Car, tout en demandant de rendre à César son dû, le christianisme libérait la personne. Il la soustrayait, en son sanctuaire intime, à tout pouvoir humain... une revendication des droits de la conscience devant la puissance étatique.(90)

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(89) Supra, pp. 49-50.

(90) Jacques Croteau, "Personnalisme et Pluralisme Religieux," in Dialogue, 1(1962-63), p. 260.

B. Personalism and the Catholic Ideal

Christ's affirmation of the supremacy of individual conscience before the statal power is the key to a fuller understanding of Church-State relations. This notion was taken over and developed by Christian thinkers (91) and, as Croteau has observed, "à l'actif de la religion chrétienne, il faut inscrire, entre autres réalizations, qu'elle est la première responsable d'une prise de conscience progressive de l'éminente dignité de la personne humaine."(92) When one considers how Christ affirmed the preeminent value of the person thereby delivering him, in his inner self, from the bondage of all human authority, one begins to see that in our secular and profane modern society, Church-State relations must change. Church and State will meet in the person who is at once the foundation, norm, and end of human society. And in the world at large, if one accepts Rahner's thesis of the Church as the diaspora, one should not be perturbed that the change in Church-State

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(91) For an excellent study of the meaning of conscience as understood by leading Christian thinkers prior to and including Aquinas, see Eric D'Arcy, Conscience and its Right to Freedom, New York, Sheed and Ward, 1961.

(92) Croteau, op.cit., p. 260.

relations is radical. As Rahner has observed:

> We shall not have so much of the Church and the State confronting each other, whether in conflict or concordat. For this relationship of the past was based upon the fact that everyone (or nearly everyone) was simultaneously both a citizen and a member of the Church. In the future, contacts between Church and State will tend to take place within the individual and his conscience.(93)

We should not be disturbed by such an approach. For in the last analysis, the problem of Church and State is fundamentally the problem of the person and his destiny. It is the confrontation of two essentially different conceptions of man and his destiny which gives rise to the problem of Church and State. The formulation of the problem does and must vary with time and place. Certain latent principles may come to the fore in a given historical moment and the problem always is to disengage the unchanging substance from its historically-circumscribed formulation, to set apart the timeless absolute from the historically relative. In such a way, one is better able to grasp the absolute and reformulate it according to the exigencies of the historical moment. Our historical moment requires that the problem be reformulated in terms of the person and his destiny.

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(93) Karl Rahner, The Christian Commitment, New York, Sheed and Ward, 1963, pp. 25-26.

Undoubtedly, history is irrevocably committed to Christ and will find its consummation in Him. Mankind as a whole because of the Word made flesh has taken a new direction which cannot be halted or rubbed out. There is no longer a question of success or failure. The fate of the world and public history is sealed in the blood of the God-Man and triumph is assured. The Church is the effective sign of the triumphant Christ. God is reconciled to mankind. All are therefore called to the Church which effects what it signifies. And in this sense, one might say that while the State is for man, man is for the Church.

Nevertheless, in a more fundamental sense one might say that both the State and the Church are for man, and man is for God. For de facto, man has only one destiny, a supernatural destiny to the eternal vision of God, and the Church is the divinely ordained means to this end. Accordingly, the Church, the juridically and hierarchically constituted "people of God", the community of the living Christ, is superior to the State because of its mission and of man's destiny, and its twofold freedom as spiritual authority and as the Christian people must not be interfered with by the State. None the less, the Church is for man - propter nos homines et propter nostram salutem - whose destiny to God must

be accomplished by personal response, ratio et voluntas, to His grace which is not restricted to the Church. For although God has imposed on man the obligation to seek out his salvation according to the divinely ordained means, He has not so restricted Himself. As Rahner has observed:

> If we were to see our Faith and the Church as what they really are, an absolute miracle of grace, an astonishing act of election, then we should be less appalled at finding this grace vouchsafed to so few. We could then, without disquiet, leave to God's own wisdom the question of how many people find ultimate bliss, for though he has enjoined on us that we are to seek our salvation through the means he has laid down for us, he has not so bound himself or his grace. If we saw things from this point of view there would be no need for us to be perturbed by the thought that in former days there were relatively more people who enjoyed the grace of believing in God and the Church than there are today. For in the last analysis belief in God and the Church is only of value if it leads to ultimate salvation.... Where salvation is concerned, what counts is the absolute, not the relative, number of people involved, for in this matter everyone is alone.(94)

It is not surprising then that today the Church and the State will not confront each other as two entities concerned about a third - man-- but rather Church and State will meet in the person. For it is

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(94) Karl Rahner, Free Speech in the Church, London and New York, Sheed and Ward, 1959, p. 66.

this person with his divine destiny who is the raison d'être of both. Unity of faith is no longer the basis of national or international unity, but rather the human person ordained to the vision of God.

Certain corollaries follow. First, the medieval reality of Church-State relations is not the Catholic ideal, the ideal we should today hope to strive for, and perhaps was not even the ideal for that particular time. As Croteau has stated:

> Les principes qui furent mis en oeuvre en ce temps là, sont sans doute immuables et supra-historiques. La primauté du spirituel sur le temporel, la solidarité des deux ordres.... Mais leurs voies d'application peuvent et doivent diverger en fonction des situations existentielles. On en percevra mieux le pourquoi, si l'on veut bien se rappeler que le climat historique concret n'est pas formé seulement de faits empiriques constatables. Il ne donnerait lieu dans le cas qu'à des adaptations superficielles. Il comprend par surcroît des acquisitions nouvelles d'ordre politique, social, culturel ou idéologique, ou des développements nouveaux de principes dont on n'avait pas dégagé, dans le passé, toutes les implications.(95)

And Rahner goes further:

> The loss of the Church's medieval omnipotence in public life... was, then, theologically, something to be expected, however much it may have involved guilt as well. The value given to the Church

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(95) Croteau, op. cit., p. 266.

> in the public life of society, state and culture in the Middle Ages cannot be regarded as something demanded by the very nature of the Church; not if the Church is bound to be, permanently, the Church of contradiction and if it was also to be, and had in fact become, a world-wide Church. The medieval form was possible only so long as the Church was the Church of a more or less closed culture. It became impossible from the moment when the West became an integral part of world history.... Furthermore, the value set upon the Church in public life, in its medieval form, is not attributable, as a phenomenon, simply and solely to the supernatural power of the Church and Christianity. That particular form (not the Church's essential theological value) was also, at least in its factual, existential realization, the result of temporal, secular combinations of historical forces. It was a fact rather of cultural history than of theology.(96)

Secondly, under modern democratic government, there is no Catholic ideal which, although not requiring a return to medieval Church-State relations, requires that Catholics strive and hope for a Catholic majority to legislate Catholic norms "ad majorem Dei gloriam." No doubt, in our day of democratic government in a secular and profane age, some Protestants have a genuine fear, and certain Catholics a genuine hope, that a Catholic majority will emerge to legislate

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(96) Karl Rahner, The Christian Commitment, New York, Sheed and Ward, 1963, p. 21.

Catholic standards of conduct for society at large. If this hope is simply the desire for what may appear to be the only foreseeable means of obtaining equitable treatment for Catholics, in matters of education for example, while at the same time ensuring that all members of society are treated equitably in all respects, then such a hope is understandable. But the basic question is whether this is the Catholic ideal in a pluralistic society under democratic government: a Catholic majority, not simply for self-protection, but to legislate a Catholic social order (it being understood, of course, that being Catholic it is a priori the best order, hence good for all, despite what others may think).

This too must be rejected as the Catholic ideal for our day. In essence there is little difference, if any, between the desire for a return to medieval Church-State relations and the desire for a Catholic majority to legislate a Catholic order since the end is the same. And as Rahner has observed:

> In the sphere of secular, worldly living, there is never any period that can be called the Christian age, any culture which is the Christian culture, etc. This does not only mean that according to Catholic teaching there are always Church and State, redemptive history and secular history, nature and grace, and that these can never adequately be united in one thing. It means rather that it is never possible simply to deduce,

> from Christian principles of belief and morality, any one single pattern of the world as it ought to be. In principle, there is neither in respect of the state, nor of economics nor of culture nor of history any one clear, concrete imperative which could be deduced from Christian teaching as the one and only possible right course.... nothing is ever the Christian culture, the Christian education, the Christian political system, the Christian party, etc. There can at most, in principle at any rate, be things which are unchristian in so far as they definitely contradict general Christian norms; there can be Christian cultures, systems of education, parties, etc., in so far as these are, in principle, in intention, and to some degree in practice, in harmony with these norms; but there can never (apart from the Church herself) be any single concrete thing in the sphere of world history and culture which can lay claim to be, in principle, uniquely and exclusively the Christian realization of anything.(97)

Moreover, if we reflect further with Rahner on the nature of the Church which "is not a substance but a happening, an event, constantly renewed in concrete human beings,"(98) we may conclude that, in the last analysis, the notion of a Catholic ideal is perhaps misleading unless we agree that the only basic and truly Catholic ideal is that each individual live in God's love by personal commitment in response to His grace. And no social, cultural, political, or legal system can either effect

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(97) Ibid. pp. 7-8.
(98) Ibid. p. 117.

this ideal or provide certain evidence of its realization. In the words of Rahner:

> If you do not dare to conclude, from the indubitable fact of a greater degree of homogeneous "Christendom" at an earlier period, that there were relatively more Christians in the grace of God than there are today, you must in fact admit that the achievement of the widest and most homogeneous measure possible of Christianity in the empirical sphere of social and institutional life, in normal morality, public opinion, tradition and custom (desirable though all this may be) is no guarantee that there will be any larger number of real Christians in God's sight.(99)

Vis à vis the State, the Catholic parent or child is therefore not the subject of special privilege which would justify a Catholic majority's legislating preferential laws which would require that, in the case of Catholic children, only Catholic parents would be eligible to adopt, while in the case of Protestant children, both Catholic and Protestant parents would be eligible. For, in both cases, such legislation would be an intrusion into matters beyond the jurisdiction of the State, and a grave violation of the freedom of the Church as the Christian people as explained in the preceding chapter. It would, moreover, be a violation of natural justice as this relates to

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(99) Ibid. p. 97.

the parents' right to determine their children's religious upbringing. And no end, however exalted, can justify a violation of either natural justice or the freedom of the Church as the Christian people or the freedom of personal conscience in fulfilling one's divine destiny.

To legislate that only Catholics would be eligible to adopt Catholic children would be to violate the freedom of the Catholic parents as the Christian people whose freedom includes the determination of their children's religious upbringing without interference by the State as explained in the preceding chapter, - and this whether or not the State be "Catholicly oriented." For if Catholic parents consent to their children's being raised as Protestants, it is to the Church as spiritual authority to impose directly on these parents the spiritual sanctions required and which the Church is fully empowered to impose, and not to have recourse to the State to impose by means of civil legislation prohibitions or religious sanctions not properly within the competence of the State, hence contrary to natural justice and to the freedom of the Church as the Christian people.

CHAPTER VI

CONCLUSIONS AND PROBLEMS

I. ADOPTION LEGISLATION

If the foregoing diagnosis of the problem of Church-State relations in inter-faith adoption in Ontario is generally correct, it suggests several conclusions with regard to adoption legislation in this province.

The existing legislation does not protect the freedom of the Church as the Christian people, scil., the right of parents who place their child for adoption, either directly with the adopting parents or indirectly through an agency, to determine the religion in which their child will be raised.

An amendment to Part IV of The Child Welfare Act is therefore required to safeguard this freedom. At best, the amendment should provide that no Protestant child shall be adopted by a Roman Catholic couple and vice versa without the consent of the natural parents. At least, the amendment should provide that where a Protestant child is adopted by a Roman Catholic couple and vice versa the adoption order shall, unless the natural parents consent to the contrary, be conditional

upon the child's being raised in the religion of his natural parents.

There will also be the difficulty of working out the legal presumption. In a Christian pluralist society such as ours, the legal presumption should be that the child is to be raised in the religion of the natural parents, and not that it does not matter in which religion the child is raised. This means that, as regards the religion of the child, the onus of proof of parental consent to the change in religion would rest with those alleging this consent. If the presumption is otherwise, the State officially adopts the attitude that it matters not in which denomination the child is raised. Hence the State by legal presumption sanctions, as a Presbyterian minister has put it,(100) an interpretation of baptism peculiar to one segment of the Church, scil., the Protestant segment. It is one thing for the State to be rightly unconcerned about the Christian denomination in which the child is raised; it is another to raise this unconcern to a legal presumption that all denominations are equally valid. This unconcern undoubtedly gives rise to a presumption; the

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(100) The Globe and Mail, Letters to the Editor, November 25, 1961.

presumption, however, should favour the freedom of the parents as the Christian people if the State is to remain unconcerned.

Failing such amendment, the State through the judge invades the order of the sacred; the freedom of the Church is seriously jeopardized; and the necessary cooperation between Church and State wanes.

II. THE CHURCH AND MODERN SOCIETY

The Church is a mystery and, therefore, her inexhaustible depths will never be fathomed. The problem of inter-faith adoption involves, essentially, the concrete relationship between the natural and the supernatural orders in human society. Hence the problem is linked with a mysterious element, the supernatural element, and this involves the mystery of the Church.

When discussing the problem in the context of the province of Ontario in our Christian, pluralistic society, we have assumed the existence and acceptance of this supernatural dimension, and have attempted to work out the concrete application of certain immutable principles. We have only touched upon the problem of the mystery of the Church because, as previously explained, theological erudition, which this writer does

not possess, is required as a condition to fruitful examination and discussion of this mystery. Accordingly, the problem of the degrees of incorporation into the mystery of the Church, beginning with baptism, has been avoided, although this problem is essentially related to the problem of inter-faith adoption in a Christian, pluralistic society. And so, this thesis is by no means the last word on the subject but only a modest beginning. There remains a great deal of theological work to be done. This we must leave to others.

The problem of inter-faith adoption, as we see it, is essentially the problem of baptism and its effects, and the consequent recognition by the State of the new existential dimension of a de facto baptized child, Protestant or Roman Catholic. In our Christian, pluralistic society, the State should not prefer one religion to another, and we are not suggesting that the religion of the natural parents should be given a preference. We do suggest, however, that the State must accept the child in his de facto existential situation, as a Protestant or Roman Catholic, and that, accordingly, this new dimension, this supernatural dimension of the child is one over which the judge has no jurisdiction whatever.

The problem, therefore, is the problem of the

supernatural order and the freedom of the Church as the Christian people which the baptized child now shares, although he is yet unable to exercise this newly-acquired freedom. However, since this new existential dimension conferred by baptism relates to a human being, the child, who by nature is part of a concrete network of social relations the most basic of which is the family, principles of the natural order come into play. The difficulty, therefore, is to attempt to resolve the problem in terms of natural-law thinking, - in the context, however, of Revelation, and in relation to the supernatural mystery of grace.

The problem is therefore part of that fundamental and vast task in which we are all involved, the task of giving a truly human note to modern civilization. In the realm of legal jurisprudence one can observe the resurgence of natural-law thinking which is almost demanded by our world today for its further development and even for its continued existence. The need to determine whether there is a minimum of truth about which we agree as a nation, as a people, as members of the human race is imperative. Walter Lippmann speaks of the public philosophy; John Courtney Murray of the public consensus. Whatever the expression used, the idea conveyed is the same, and the urgent need is recognized.

And so we are in the realm of metaphysics, of a rationally validated philosophy of existence, and in particular of man's existence. Time or space does not permit our entering here upon this discussion. It is clear, however, that we have assumed the existence of such a rationally validated philosophy of existence, a metaphysics which is the foundation of natural law, a validly constituted metaphysics which can be properly understood only in the religious context, the context which acknowledges God, man's essential relation to God, and man's personal immortality. Only within this context can the changeless principles be recognized and validated: the State is for man, not man for the State. This is changeless because of man's changeless nature which is essentially related to God as his final destiny.

And likewise, when this public consensus takes into account the order of Revelation and the historical fact of the emergence of Christianity and its consequent impact on human society, particularly the radical distinction introduced into society between the order of the sacred and the order of the secular, one recognizes the validity of the other changeless principles: the Church and the State are distinct, each is supreme in its order; the Church is superior

to the State because of its mission, and must therefore be free to carry out its mission without interference from the State.

And in our dealings with our fellow men, in attempting to work out the public consensus, we should keep before us the words of the medieval monk:

> When you are at prayer you are in my presence, and I am in yours. Do not be surprised because I say presence; for if you love me, and it is because I am the image of God that you love me, I am as much in your presence as you are in your own. All that you are substantially, that am I. Indeed, every rational being is the image of God. So he who seeks in himself the image of God seeks there his neighbour as well as himself; and he who finds it in himself in seeking it there, knows it as it is in every man.... If then you see yourself, you see me, for I am not different from you; and if you love the image of God, you love me as the image of God; and I, in my turn, loving God, love you. So seeking the same thing, tending towards the same thing, we are ever in one another's presence, in God, in whom we love each other.(101)

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(101) Quoted in Henri de Lubac, Catholicism, Universe Books ed., London, Burns & Oates, 1962, p. 31.

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