

**PARENT-FOUNDED SCHOOLS FOR THE
CATHOLIC EDUCATION OF CHILDREN:
CONSIDERATIONS FOR CANONICAL RECOGNITION
IN THE NORTH AMERICAN CONTEXT**

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LIST OF ABBREVIATIONS

AA	Apostolicam actuositatem
B.C.L.R.	British Columbia Law Reports
CIC/1917 can./cann.	1917 Code of Canon Law
CIC/1983 can./cann.	1983 Code of Canon Law
CICLSAL	Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
CCCB	Canadian Catholic Conference of Bishops
CLSA	Canon Law Society of America
CLSA Comm2	BEAL, J.P., J.A. CORIDEN, T.J. GREEN (eds.), <i>New Commentary on the Code of Canon Law</i>
CUA	Catholic University of America
DENZ	H. DENZINGER, <i>The Sources of Catholic Dogma</i>
Exegetical Comm	MARZOJA, A., J. MIRA, R. RODRÍGUEZ-OCAÑA (eds.), and E. CAPARROS (gen. ed. of English translation), <i>Exegetical Commentary</i>
FC	<i>Familiaris Consortio</i>
D.L.R.	Dominion Law Reports (Canada)
FLANNERY1	A. FLANNERY (gen. ed.), <i>Vatican Council II: The Basic Sixteen Documents</i> , vol. 1
FLANNERY2	A. FLANNERY (gen. ed.), <i>Vatican Council II: More Post Conciliar Documents</i> , vol. 2
GE	<i>Gravissimum educationis</i>
GS	<i>Gaudium et spes</i>
LEF	<i>Lex Ecclesiae fundamentalis</i>
LG	<i>Lumen gentium</i>
L.R.Q.	Lois refondues du Québec
MELS	Ministry of Education, Leisure and Sports, Quebec
NAPCIS	National Association of Private Catholic and Independent Schools
N.B.R.	New Brunswick Reports
O.Reg.	Ontario Regulation
O.R.	Ontario Reports
PCCICR	Pontificia Commissio Codici iuris canonici recognoscendo
R.R.O.	Revised Regulations of Ontario
RSBC	Revised Statutes of British Columbia
R.S.C.	Revised Statutes of Canada
R.S.O.	Revised Statutes of Ontario
RSY 2002	Revised Statutes of the Yukon (2002)
S.C.	Statutes of Canada
SC (Quebec)	Quebec Supreme Court
S.C.R.	Supreme Court of Canada Reports
S.C.C.A.	Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions
S.C.C.E.	Sacred Congregation for Catholic Education

S.C.R.	Supreme Court Reports (Canada)
S.Nu. 2008	Statutes of Nunavut 2008
S.N.W.T	Statutes of the North West Territories
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGAOR	United Nations General Assembly Official Reports
UNHRC	United Nations Human Rights Committee
UNTS	United Nations Treaty Series
U.S.	United States Supreme Court Decisions
USCCB	United States Conference of Catholic Bishops
Vict.	British statutes under the reign of Queen Victoria

N.B. Citations for legal cases, statutes and United Nations documents follow the standard form of legal citation. For a reference indicating the legal case in its entirety the following order is used: (a) style of cause, (b) volume number of the report/series, (c) abbreviation without italics (often with periods separating the title initials), (d) page number without “p.” for page number, and indicating only the first page of the decision when making a general citation of the case, (d) year. However, whenever a specific page of the judgment is referred to (as e.g. a citation from one of the judge’s reasons), it will be indicated simply with “p.” In some cases, paragraph numbers will also be given as publication over the internet does not always correspond to any particular page.

e.g. *Board of Education v. Allen*, 392 U.S. 236 (1968) = vol. 392 of the report series entitled *United States Supreme Court Decisions*, beginning at p. 236, reported in year 1968.

e.g. *Bal v. Ontario (Attorney General)* (1994), 21 O.R. (3d) 681, p. 684 (Ontario Superior Court). = vol. 21 of the Ontario Reports, third series, published in 1994, the judgment beginning at p. 681 and the particular reference to be found on p. 684, issued by the Ontario Superior Court.

INTRODUCTION

Founding an independent school at any time in recent history is a daunting prospect. Schooling itself is a complex task demanding attention to all members of the educating community. It is not just about the formation of youth, but about meeting parental expectations, teachers' needs, administrative burdens, volunteers' demands and ever more demands from civil authorities for everything from safe drinking water to child protection policies. Curriculum choices have to be made, and there is always the delicate balance between affordability and open access, on the one hand, and the need to provide just and competitive wages, on the other. In addition, the independent school has to provide a clear identity which conveys its distinctiveness in the wide landscape of schooling options available to parents today, and which also justifies its unique contribution to the larger society in which it exists.

Existing Catholic schools are facing many challenges as civil society in North American has been transformed since the Second World War. At the same time, there has been a critical rethinking of the role of laity in the life and mission of the Church, with an impact on lay involvement in apostolic works, particularly institutional apostolates such as schools, hospitals and universities, typically governed until recently by ecclesiastical authorities.

Some parents are looking at broader schooling options. No longer satisfied with either state schools or established Catholic schools, a growing number of parents are examining home-schooling, which has grown considerably in the last years as all forms of distance education gain popularity. Others look to privately-run Catholic schools, whether explicitly labelled Catholic or inspired by a Catholic ideal in education. Parents

today are seeking a variety of choices and seem less willing to accept uncritically the form of schooling that their parents or grandparents supported.

A number of initiatives are occasionally undertaken by parents to found schools in collaboration with other parents. They may be parents inspired by a particular spirituality, or parents involved in one of the growing ecclesiastical movements where they find a sympathetic desire with other Catholics to shape the formation of their children. Such initiatives may have the support of clergy or religious, but, given the shortage of both, they remain efforts undertaken by parents. To give some examples, in France, a resource centre for parents and such schools has been established, called *Créer son école*, and in the United States the North American Private Catholic and Independent Schools (NAPCIS) seeks to provide a similar support service.

Since the promulgation of the 1983 Code, a number of canonical studies have been done concerning parental rights over education and Catholic schools. Paul Baillargeon concentrates on the general rights and duties of parents and their participation in the teaching office and the sanctifying office of the Church, but he does not address schools and schooling in his analysis.¹ Lawrence Bordonaro has studied “separate” (i.e. Catholic public) schools in Ontario, with a particular emphasis on their canonical status and relationship to the Church, especially as regards Catholic identity². He does not analyse parental rights and parental initiatives to found schools, but addresses the existing status of Catholic schools in the province of Ontario. John K. Murphy examines and

¹ P. BAILLARGEON, “The Canonical Rights and Duties of Parents in the Education of Their Children,” JCD diss., Ottawa, Saint Paul University, 1987.

² L. BORDONARO, “Separate Schools in Ontario, Canada, Their Canonical Status and Relationship to the Church according to the 1983 Code of Canon Law,” JCD Diss., Rome, Pontifical University of St. Thomas Aquinas, 1989.

explains the system of reserved powers, particularly their role in preserving the Catholic identity of institutions.³ He touches on schools, but only as one of a number of institutions where preserving Catholic identity is an issue. Parental rights are not addressed. More recently Antiago Álvarez Avello has addressed the question of Catholic education in schools from the perspective of the jurisdiction of the Catholic hierarchy, but he does not specifically address parental rights.⁴ Obviously, much has been written from the perspective of secular legislation on the subject of the parents' involvement in schooling (including faith-based initiatives), nevertheless, this insight – no doubt valuable in itself – needs to be complemented by a properly theological and canonical approach.

Given the present state of the canonical reflection on this recent emergence of parent-founded schools and the growing desire of many parents for greater schooling options, there is ample space for delineating the matrix of considerations within which canonists can meaningfully contribute to a better understanding of this phenomenon. The aim of this study is, therefore, an inquiry to see if some canonical structure might respond adequately to parent initiatives to found their own schools for the Catholic education of their children. Admittedly this remains a small segment of Catholic parents, but it seems a relatively persistent question. In many dioceses, parish priests and diocesan administrations are faced at one time or another with such parent initiatives. On the one hand, there is the respect due to initiatives of the laity in apostolic works, and, on the

³ J.K. MURPHY, "The Governance of Church Institutions and Protection of Catholic Identity with Particular Reference to Ontario, Canada," JCD diss., Rome, Pontifical Lateran University, 1995.

⁴ S. ÁLVAREZ AVELLO, *La educación católica en las escuelas: Aspectos canónicos de la relación de la jerarquía de la Iglesia con las escuelas*, Rome, Pontifical University of the Holy Cross, 2008.

other, Catholic schooling very clearly entails certain rights and responsibilities of pastors. Balancing the various interests is a delicate task.

In nineteenth century North America, Catholic schooling very quickly became an initiative of the hierarchy and of religious orders. The role of parents was, by and large, one of supporting ecclesiastical initiatives rather than of founding or governing schools themselves. The first chapter examines, therefore, the gradual change in the theological and social perspectives found in Church documents to that which favours the active role of the laity in apostolic works. In particular, the vocation of parents began to be re-evaluated and the proper sphere of their rights and duties over the education of their children revisited in the light of new theological principles. The development of the canons regarding education and schooling is examined in the light of this changed perspective with an eye to understanding how it might influence the choice of parents to found their own school.

Parental rights and duties, like any rights and duties, are not exercised in the abstract. They are promoted or hindered by the existing social, political and ecclesiastical context. The second chapter analyses, therefore, the complexities of Catholic schooling in North America, in particular those which arise from factors external to the Church. Among others, pressures for financing, state involvement in curriculum and growing secularism have an influence on Catholic schools. Other factors, interior to the Church, such as the decline of members of institutes of consecrated life actively involved in Catholic schools are also scrutinised. These same factors impact any new initiative in schooling, and the chapter will draw some general conclusions about the challenges facing parents who wish to found their own schools. The nature of this part of the thesis,

which gives it an interdisciplinary character, will call for an analysis of current social trends in education and of pertinent secular legislation in Canada and the United States.

The third chapter considers how existing Catholic schools have responded to the new social and ecclesiastical challenges. Building upon the second chapter's examination of the current social and ecclesial context in which parental rights are exercised, the third chapter narrows the scrutiny to Catholic schools in the United States and Canada. In particular, the question will be posed how Catholic identity has been achieved and maintained in the practical administration of existing schools facing significant sociological and ecclesial challenges. The various forms of Catholic schools in the United States and Canada will be analysed as to how they have organised themselves legally to pursue their educative goals.

The analysis of the interrelation between notions of identity and organisational structure in the history of Catholic schooling in North America will lead, in the forth chapter, to some practical implications for the exercise of parental rights and responsibilities over the education of their children in the current context. The last chapter evaluates thus the experience of Catholic health care institutions and Catholic institutes of higher education. In particular, their efforts to foster more lay participation in governance and to maintain Catholic identity have produced a rich legacy that should not be overlooked by parents who wish to found their own schools. Two key developments considered in the analysis will be, first, the challenges facing lay sponsorship in health care, and second, the fostering of institutional identity in Catholic higher education. The specific contributions arising from their responses to the challenge of preserving and fostering Catholic identity in Catholic health care and university institutions during the

last forty years (i.e. “partnership” and “sponsorship” concepts) will be evaluated in view of their application in the context of parent-founded schools for the Catholic education of their children.

Finally, in order to draw together the conclusions in a concrete fashion, draft by-laws for a private juridical person are proposed to address the rights of parents and the jurisdiction of bishops. The need for close collaboration between parents and bishop is evident in order to respect both the private initiatives of parents exercising their proper vocation, and, at the same time, to give a just place to the canonical jurisdiction of ecclesiastical hierarchy in the formation of youth. The by-laws are intended also to address weaknesses discovered through the experience of health care institutions which had founded private juridical persons as vehicles for lay governance. Similarly, they will address the need for a strong institutional identity which has been emphasised as Catholic institutes of higher education strove to find a fitting relationship with ecclesiastical hierarchy.

While the conclusions offered here cannot be taken as a roadmap for parents looking to found a school for the Catholic education of their children, they will attempt to provide markers along the diversity of paths open to them. If there is one thing that the history of Catholic schooling in North American has shown, it is that flexibility and adaptability are key to their future. Localised governance structures have been their strength as they continue to define an ambit of activity in the ever crowding landscape of educational options.

CHAPTER 1

1. THE VOCATION OF PARENTS AND THEIR RESPONSIBILITIES OVER EDUCATION OF OFFSPRING

A convenient starting point for studying the development of the canons regarding schools is by reference to legal rights: parental rights, Church rights and state rights. The subject of parental rights over education in general has been studied in P. Baillergeon's work, "The Canonical Rights and Duties of Parents in the Education of Their Children," mentioned in the Introduction. A different approach seems, however, to be possible and also promising: that which begins with the vocation of parents. While "vocation" is first and foremost a theological concept, nevertheless, it has a juridical aspect that finds expression in the contemporary ecclesiological discourse on legal rights. One of the key principles guiding the drafting of the 1983 Code of Canon Law was the protection of subjective rights.¹ While the theory of subjective rights arises largely from secular juridical discourse, the introduction of the notion of "vocation" gives a special, ecclesial meaning to the concept of rights and provides a framework for their promotion and exercise in the Church; in other words, the term "vocation" has not simply descriptive value, but performative value as well. There is, therefore, good reason to begin with a theological concept that contains within it the potential for influencing juridical norms.

¹ See JOHN PAUL II, apostolic constitution *Sacrae disciplinae leges*, in AAS, 75, pars II (1983), pp. vii-xiv, English translation in E. CAPARROS et al. (eds.), *Code of Canon Law Annotated*, 2nd ed., Montreal, Wilson and Lafleur, 2004, p. 55. See also Preface to the Code, English translation in *Code of Canon Law Annotated*, p. 67. The principles of revision were approved by the Synod of Bishops in 1967, see *Communicationes*, 1 (1969), pp. 77-85; the section regarding subjective rights is found at pp. 82-83.

To grasp the relationship between vocation and rights, two documents of the twentieth century are key: Pius XI's encyclical letter *Divini illius Magistri* (1929),² and the Sacred Congregation for Catholic Education's document *Catholic Schools* (1977).³ The former gives flesh to the norms of the 1917 Code, while the latter was the fruit of a commission requested by the Second Vatican Council to study educational issues further.⁴ The present chapter will, therefore, examine first the nature of the parental vocation, then the development of the legal discourse behind parental rights and duties over education, and finally, the relevant norms of the 1983 Code.

1.1. The Vocation and Mission of Parents

Vocation, in the Christian sense, simply means to be called by Christ. But how and whom does Christ call? How can this call be authenticated? What is the relationship between call and charism, between call and mission? These are all dimensions of one theological reality. Drawing out the normative content of vocation is the legal task that seeks to order human activity within the ambit of ecclesiastical rights and duties.

² PIUS XI, Encyclical on the Education of Christian Youth *Divini illius Magistri*, 31 December 1929, in AAS, 21 (1929), pp. 723-762, English translation under the title "Rappresentanti in terra" in C. CARLEN (ed.), *The Papal Encyclicals 1903-1939*, Wilmington, NC, McGrath Publishing Company, 1981, pp. 353-372. Subsequent references to the Carlen translation are styled *Encyclicals*, [years].

³ SACRED CONGREGATION FOR CATHOLIC EDUCATION, *L'école catholique*, French original in *La Documentation catholique*, 74 (1977), pp. 705-716, English translation (without footnotes) *Catholic Schools*, in *FLANNERY2*, pp. 606-629. The Congregation nowhere indicates the particular type of the document (instruction, letter *motu proprio*, etc.).

⁴ The preface to *Gravissimum educationis* states, "[T]he holy synod hereby promulgates some fundamental principles concerning Christian education, especially in regard to schools. These principles should be more fully developed by a special postconciliar commission and should be adapted to the different local circumstances by episcopal conferences" (*GE, Preface*, English translation in *FLANNERY1*, p. 576).

Minor editorial modifications, e.g., capitalisation, spelling, have been made in this and other quotations to conform to the adopted style for this work.

We are used to speaking of vocation in relation to predetermined categories: the vocation to the religious life, the vocation to the priestly life, the vocation to the married life. These treat ultimately of the authenticating value of vocation, whereby vocation establishes a person in a determined state of life. But speaking of vocation in this way already begs the question: who authenticates? Who has approved these states of life? Furthermore, this approach to vocation does not ask the fundamental question, “What is a vocation?” Rather, it assumes that the only relevant question for a person as far as his/her vocation goes is: “where do I ‘fit in?’” Certainly the question regarding the authority that authenticates these states of life, and thus a vocation, contains normative aspects,⁵ but it does not really get to the heart of what it means to be called by Christ.

Paul VI stated that “the grace and vocation proper to the Church” is evangelisation.⁶ Vocation in this sense also gives us the “deepest identity” of the Church.⁷ “Evangelisation” here means participating in the salvific work of Christ by

⁵ The authenticating aspect of vocation is the subject of certain legal norms. For example, no man may be ordained to the diaconate or priesthood by a bishop other than his proper bishop without dimissorial letters (see cann. 1018, §1, 1019, §1), after these letters have been received and their authenticity verified by the ordaining bishop (see can. 1022); any bishop who ordains without first having received these letters is prohibited from conferring orders for one year (see can. 1383). Or again, in the case of institutes of religious life, temporary and perpetual vows are valid only if received by a lawful superior (cf. cann. 656, 5° and 658). Similarly, for a valid marriage to take place in the Latin Church (apart from exceptional circumstances which are clearly defined) there is required the presence of the qualified witness who asks for and receives the consent of the parties in the name of the Church (see cann. 1108, §§1, 2). It is not sufficient for an individual alone to choose his or her state of life; it is required, further, that this choice be authenticated by the intervention of ecclesiastical authority, and it is precisely here that one finds the normative content in the authenticating value of vocation.

⁶ “Siquidem evangelizandi munus habendum est gratia ac vocatio Ecclesiae propria, verissimamque eius indolem exprimit” (PAUL VI, post-synodal apostolic exhortation *Evangelii nuntiandi*, 8 December 1974, no. 14, in AAS, 68 [1976], pp. 5-76, at p. 13, English translation in PAUL VI, *On Evangelization in the Modern World*, Boston, MA, St. Paul Books and Media, [no date], p. 8. Subsequent references are to the English translation).

⁷ See *ibid.*

spreading the good news of the redemption won on the Cross.⁸ “Church” does not mean only the established hierarchy, but the entire membership under the Head, such that no one is excluded from this vocation and each is indispensable to it.⁹ It is the vocation for each individually and of all together: “This mandate [to evangelise] is not accomplished without her [the Church], and still less against her.”¹⁰ The call is directed to the entire body united under Christ, the Head, who issues the call.

The call of the Church as a whole is, at the same time, the call of each of its members, working as one body: “evangelisation is for no one an individual and isolated act; it is one that is deeply ecclesial.”¹¹ This call is a reality “in the order of grace” and is not concerned only with “institutional relationships.”¹² In other words, the Church hierarchy is not the one who calls, but Christ alone; nevertheless it is for the hierarchy to organise this evangelising activity: “no evangeliser is the absolute master of his evangelising action...; he acts in communion with the Church and her pastors.”¹³ It is evangelising action, then, that is the subject of legal norms, not the call itself to evangelise. And the possibility, multiplicity and diversity of evangelising activity implies that, while evangelisation is the kernel of the Christian call and vocation, not all participate in evangelisation to the same extent or in the same way.

⁸ See *ibid.* The Church “exists in order to evangelise, that is to say, in order to preach and teach, to be a channel of the gift of grace....” This is how Paul VI understands Mt 28:19-20.

⁹ See *ibid.*, no. 15, p. 9: “It is the whole Church that receives the mission to evangelise, and the work of each individual member is important for the whole.”

¹⁰ *Ibid.*, no. 16, p. 10.

¹¹ *Ibid.*, no. 60, p. 39.

¹² *Ibid.*

¹³ *Ibid.*

The role of the laity in evangelisation can thus be circumscribed by legal norms, but these norms must always respect the original call and vocation of the faithful. With Paul VI, one can say that the role of the laity in evangelisation is “not to establish and develop the ecclesial community but to put to use every Christian and evangelical possibility... in the affairs of the world,” which includes also all “other realities which are open to evangelisation” like the education of children and adolescents.¹⁴ In this context the particular vocation of parents appears more clearly. It is linked to the proper vocation of the Church and its members to evangelise, but is given specific form in that the family is “to be a place where the Gospel is transmitted and from which the Gospel radiates.”¹⁵ It is the family that first transmits the Gospel to the children and which radiates then to the world around the home.

This fundamental notion of vocation was the fruit of the Third General Assembly of the Synod of Bishops, held from 27 September to 26 October 1974. The post-synodal apostolic exhortation *Evangelii nuntiandi* was issued on the tenth anniversary of the closing of the Second Vatican Council, “the objectives of which are definitively summed up in this single one: to make the Church of the twentieth century even better fitted for proclaiming the Gospel to the people of the twentieth century.”¹⁶ Yet in those ten years social change continued in such a way that the Synodal Fathers were led to ask “three burning questions” of which the first was, “In our day, what has happened to that hidden energy of the Good News, which is able to have a powerful effect on man’s

¹⁴ See *ibid.*, no. 70, p. 46.

¹⁵ *Ibid.*, no. 71, p. 47.

¹⁶ *Ibid.*, no. 2, p. 3.

conscience?”¹⁷ As to its timing, Paul VI’s reflection on the Church’s vocation stands, therefore, half way between the close of the Second Vatican Council and the promulgation of the new Code of Canon Law in 1983. It provides a sort of pivot in time in the discourse that would shape the current legal norms.

The Second Vatican Council’s Dogmatic Constitution of the Church *Lumen gentium* does not speak in general terms of the vocation of the Church in the same way that *Evangelii nuntiandi* does, but discusses vocation in the sense mentioned earlier, as a call to a particular state of life. The emphasis in the Dogmatic Constitution is rather on the universal call to holiness, that is to say, the “call to perfection” that arises from “filial” baptismal grace and which confers unity through “a common dignity of members deriving from their rebirth in Christ.”¹⁸ The diversity of “paths” to holiness is said to be the cause of the distinction “between sacred ministers and the rest of the People of God”¹⁹ which in turn implies an equality of dignity but a difference of roles in building up of the Body of Christ. At one place only do the Council Fathers speak of the deepest vocation of the Church (*intima Ecclesiae vocatio*) but that vocation is not made explicit in any way.²⁰

The Pastoral Constitution on the Church *Gaudium et spes* issued by the Second Vatican Council speaks of the generic vocation of men and women as “called to

¹⁷ Ibid., no. 4, p. 4.

¹⁸ *LG*, no. 32, English translation in *FLANNERY1*, p. 49.

¹⁹ See *ibid.*, p. 50.

²⁰ See *ibid.*, no. 51, p. 78.

communion with God,” which call is said also to be the root of all human dignity.²¹ This call is an “invitation” that arises from the circumstance of one’s origin, in other words, from that fundamental, existential relationship between creature and Creator.²² This descriptive value of the human vocation nevertheless leads naturally to a consideration of human activity and the appropriate social means to pursue and fulfill this “total vocation.”²³ It is again the aspect of activity which opens the door to the performative value of vocation, and to the realm, then, of legal norms to regulate that activity. Christians, furthermore, “as citizens of both cities” cannot shirk their earthly responsibilities as if these do not concern their human vocation, but must seek earnestly to fulfill them in response to the Gospel spirit.²⁴ Building a more humane world in response to the Gospel spirit means that human culture enjoys an eminent place in the complete vocation of humanity (*integra hominis vocatio*) and is the specific activity by which human beings cooperate in society with others and participate in the design of God manifested at the beginning of time, to subdue the earth, perfect creation and develop themselves.²⁵ Like the Dogmatic Constitution, the Pastoral Constitution does not make explicit the nature of the Church’s vocation in the way Paul VI did in his Apostolic Exhortation. *Gaudium et spes* speaks rather of the “relationship between the Church and the world” and the “dialogue between them.”²⁶ Its concern is to look at the vocation of

²¹ See GS, no. 19, English translation in *FLANNERY1*, p. 180. See also LG, no. 3, p. 3.

²² See GS, no. 19, p. 180.

²³ See *ibid.*, no. 35, p. 201.

²⁴ See *ibid.*, no. 43, p. 211.

²⁵ See *ibid.*, no. 57, p. 232.

²⁶ *Ibid.*, no. 40, p. 206.

the human person, and then to address the Church's involvement in it. This seems to be an approach distinct from that of Paul VI, which starts rather from the vocation of the Church in order to discern the vocation of the individual within that larger vocation.

The Second Vatican Council's Decree on the Apostolate of the Laity *Apostolicam actuositatem* speaks of the apostolic activity of the lay faithful as something that "derives from the lay person's very vocation as a Christian."²⁷ Considered in this way, "the Christian vocation is, of its nature, a vocation to the apostolate as well."²⁸ This apostolic activity is part of the purpose of the Church itself, "founded so that by spreading Christ's Kingdom throughout the world to the glory of God the Father, every man and woman may share in the saving work of redemption, so that through them the entire world may be truly directed towards Christ."²⁹ This is a discourse similar to that of Paul VI's although Paul VI's is more specifically related to the concrete activities of teaching, preaching and channeling the gift of grace.³⁰

The Code of Canon Law promulgated in 1983 takes up the theme of the Church's vocation but couches it in terms of rights and obligations. It claims for the Church as a whole an evangelising role:

Can. 747, §1 – It is the obligation and inherent right of the Church, independent of any human authority, to preach the Gospel to all peoples, using for this purpose even its own means of social communication; for it is to the Church that Christ the Lord entrusted the deposit of faith, so that by the assistance of the Holy Spirit, it

²⁷ AA, no. 1, English translation in *FLANNERY*1, p. 403.

²⁸ Ibid., no. 2, p. 405.

²⁹ Ibid.

³⁰ See footnote 8 above.

might conscientiously guard revealed truth, more intimately penetrate it, and faithfully proclaim and expound it.³¹

If it is the “inherent” right and obligation of the Church to preach the Gospel, it is so because this is the vocation proper to the Church. Vocation in its performative aspect involves activity which cannot be neglected without denying in some way the vocation itself, and this imperative is given legal expression through the language of rights and duties. This means that rights and duties in the Church, even if their express formulation owes its inspiration to contemporary civil law systems, cannot be understood ultimately without reference to the proper vocation of the Church.³² As one Consultor on the special *coetus* studying the *Lex Ecclesiae Fundamental* (*LEF*) remarked, the notion of fundamental rights, borrowed as it is from civil law, must be applied differently in the Church, since in the civil sphere rights are exercised in opposition to public authority; it

³¹ *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation E. CAPARROS et al. (eds.), *Code of Canon Law Annotated*. All references to the canons of the 1983 Code will be styled can. for canon and cann. for canons, followed by the canon number(s).

The Code of Canons of the Eastern Churches has a similar provision, also emphasising the innate right: “Can. 595, §1 – Christ the Lord has entrusted to the Church the deposit of faith so that, with the assistance of the Holy Spirit, it may conscientiously guard the revealed truth, profoundly investigate it and faithfully proclaim and expound it; hence, the Church has the inherent right, independent of any human power, and obligation to preach the gospel to all people” (*Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus*, Libreria editrice Vaticana, 1995, English translation *Code of Canons of the Eastern Churches: Latin-English Edition, New English Translation*, Washington, DC, Canon Law Society of America, 2001). All references to the canons of the 1990 Code will be styled CCEO, can. for canon and CCEO, cann. for canons, followed by the canon number(s).

³² T. Green remarks that one of the short-comings of the Code revision process, in his view, was that the Commission “seems to restrict the basis of rights to one’s standing in society” and he argues that the Church has a broader view of rights, anchored in human dignity. See T. GREEN, “Persons and Structures in the Church: Reflections on Selected Issues in Book II,” in *The Jurist*, 45 (1985), p. 66. Nevertheless, one can argue that rights language in the Code is informed by an individual’s participation in the vocation of the Church, which certainly includes a respect for human dignity but which must be also linked with evangelisation.

must be otherwise in the Church.³³ Moreover, in the context of rights of the faithful, the term “Church” is not restricted to ecclesiastical hierarchy. This is explicit in can. 211 regarding the task of evangelisation:

Can. 211 – All Christ’s faithful have the obligation and right to strive so that the divine message of salvation may more and more reach all people of all times and all places.³⁴

Whatever one’s state of life, the Church’s vocation extends to all members, and from this vocation the Church’s law formulates legal norms framed as rights and duties. Nevertheless, the manner of exercising the rights and duties will vary depending on one’s particular state of life. Each member participates in the Church’s vocation and so each has an obligation and right to live it out, but canonical norms will spell out the various forms of participation by reference to the notion of mission:

Can. 204, §1 – Christ’s faithful are those who, since they are incorporated into Christ through baptism, are constituted the people of God. For this reason they participate in their own way in the priestly, prophetic and kingly office of Christ. They are called, each according to his or her particular condition, to exercise the mission which God entrusted to the Church to fulfil in the world.³⁵

If vocation means simply to be called by Christ, then mission means, in its essence, to be sent by Christ. Nevertheless, a vocation, while it is a personal call, does not end in oneself or find its finality in the individual person since it is part of the vocation of the

³³ “Animadvertit tamen iura fundamentalia in societate civili tutelam accipere adversus publicam auctoritatem; in Ecclesia autem rem alio modo se habere.” See the comment of K. Mörsdorf in PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Coetus specialis studii “De Lege Ecclesiae Fundamentalii,” Sessio VI^a, diebus 20-23 novembris a. 1972 habita*, Rome, PCCICR, p. 24. This work is subsequently referred to as *Coetus LEF*.

³⁴ For the Eastern Code, see CCEO, can. 14: “All the Christian faithful have the right and obligation to work so that the divine message of salvation may more and more reach all people of all times and of all the world.”

³⁵ See CCEO, can. 7, §1: “The Christian faithful are those who, incorporated as they are into Christ through baptism, are constituted as the People of God; and so, participating in their own way in the priestly, prophetic and royal function of Christ, they are called, each according to his or her condition, to exercise the mission which God has entrusted to the Church to fulfill in the world.”

Church as a whole. Vocation and mission are, in truth, two sides of the same coin, so to speak, and this accounts for the fact that the two words are often used in relation to the same reality, with the distinction that vocation is often associated with the dignity of the call inherent in baptism, while mission concerns the appropriate activity of the one called.

Lumen gentium speaks of the Church's "universal mission,"³⁶ "divine mission,"³⁷ "saving mission."³⁸ These adjectives describe the mission of the Church in its varying aspects: the subjects (universal), the commissioning agent (a divine Person), the goal (salvation). *Gaudium et spes* refers to the mission of the Church as a "religious" one, drawing on Mt 22: 37-40 and Gal 5:14,³⁹ and makes explicit that "in preaching the Gospel to everyone and dispensing the treasures of grace in accordance with its divine mission, [the Church] makes a contribution to the consolidation of peace over the whole world and helps to strengthen the foundations of communion among people and nations."⁴⁰ But the nature of the Church's mission itself is founded on the sending of Christ into the world, and, furthermore, through the idea of the Mystical Body, this mission is identified with the mission of the Son.⁴¹ In its most basic sense, then, the mission of the Church is a prolongation of Christ's own mission to re-establish all

³⁶ *LG*, no. 1, p. 1.

³⁷ *Ibid.*, no. 20, p. 27.

³⁸ *Ibid.*, nn. 30, 33 and 43, pp. 48, 51 and 67.

³⁹ See *GS*, no. 42, p. 209.

⁴⁰ *Ibid.*, no. 89, p. 277.

⁴¹ See *LG*, no. 7, p. 6. See also *AG*, no. 2, English translation in *FLANNERY I*, p. 444.

things,⁴² which was accomplished through his life, death and resurrection, ending with his pouring out of the Spirit “promised by the Father” upon the apostles:

Henceforward the Church, equipped with the gifts of its founder and faithfully observing his precepts of charity, humility and self-denial, receives the mission of proclaiming and establishing among all peoples the Kingdom of Christ and of God, and is, on earth, the seed and the beginning of that Kingdom.⁴³

In this understanding of the Church’s mission, each member shares in that same mission, just as he or she shares in that same vocation of the Church. All the baptised, then, receive their mission from Christ, but the modalities of the mission are subject to legal norms. Mission is related to vocation since both are concerned with evangelisation, and since both take their origin in God.⁴⁴ Mission has, in addition, that particular aspect linked to evangelisation of building up the Kingdom. For Christian parents, this link between their original vocation and mission was given legal formulation in an entirely new norm in the 1983 Code of Canon Law:

Can. 226, §1 – Those who are married are bound by the special obligation, in accordance with their own vocation, to strive for the building up of the People of God through their marriage and family.⁴⁵

⁴² See *LG*, no. 3, p. 2, referring to Eph 1:4-5 and 10.

⁴³ *LG*, no. 5, p. 4. See also *AA*, no. 6, p. 411: “The Church’s mission is concerned with people’s salvation; and people win salvation through faith in Christ and his grace. The apostolate of the Church therefore, and of each of its members, aims primarily at announcing to the world, by word and action, the message of Christ and communicating to it the grace of Christ.”

⁴⁴ See, for example, *LG*, no. 33, p. 51: “The apostolate of the laity is a sharing in the Church’s saving mission. Through Baptism and Confirmation all are appointed to this apostolate by the Lord himself.” John Paul II would say later that the “authentic evangelical discernment” of Christian parents is “unique” and “irreplaceable.” Cf. JOHN PAUL II, post-synodal apostolic exhortation *Familiaris consortio*, 22 November 1981, no. 5, in *AAS*, 74 (1982), pp. 81-191 (=FC), English translation in *FLANNERY2*, p. 818.

⁴⁵ *CCEO*, can. 401 speaks of the vocation of lay persons as seeking the Kingdom of God, in the first place, by administering temporal affairs and ordering them in conformity with God. *CCEO*, can. 407 speaks of the vocation of married persons as a special obligation to build up the People of God through marriage and family.

This new canon falls within the section on the rights and obligations of the People of God. Early on in the Code revision process, this section was included under the *LEF*. The *LEF* was intended as a constitutive law of the Church, applying not only to the Latin Church but to the Eastern Churches *sui iuris* as well. The whole concept of a sort of constitutional law for the entire Church was abandoned in the end under criticisms, first, that the Church is larger than any legal concept, and, second, that such a law would, at best, fall short of capturing the complex, entire reality of the Church and, at worst, misrepresent, misshape and impoverish the underlying *mysterium* of the Church.⁴⁶ When the *LEF* project was abandoned, most of the norms contained in it were, nevertheless, inserted into the Codes. James A. Coriden maintains, however, that they, although inserted into the Code, retain their original “fundamental and constitutive import” and so carry “greater weight than the exhortatory or statutory canons of the code,” providing a “bill of rights” as “part of the bedrock upon which is based the rest of our canonical system.”⁴⁷

Before moving to the specific relation between mission and parental rights and duties over education of their children, it will be useful to see how, through their vocation and mission, parents share in the triple *munera* of Christ. Canon 204, §1 (*CCEO*, can. 7, §1) draws its wording from *Apostolicam actuositatem* where the Council Fathers state

⁴⁶ For a brief summary of the discussion of the criticism, see B. FRANCK, *Vers un nouveau droit canonique? Présentation, commentaire et critique du Code de droit canonique de l'Église catholique latine révisé à la lumière de Vatican II*, Paris, Éditions du Cerf, 1983, pp. 36-42. The special *coetus* formed to study the possibility of drafting the *LEF* was itself aware of this problem: “omnes Consultores dicunt se concordare cum sententia parvi coetus in eo quod *LEF* esse non debet aliquod manuale doctrinæ theologicae de Ecclesiæ, sed naturam vere iuridicam habeat”; and for that reason the majority of the Consultors chose as a conception of the *LEF* the most restricted of three options: “*LEF* sit corpus normarum mere iuridicum, ius fundamentale seu constitutionale Ecclesiæ continens” (*Coetus LEF*, pp. 3-5).

⁴⁷ J.A. CORIDEN, “A Challenge: Making the Rights Real,” in *The Jurist*, 45 (1985), p. 3.

that “[i]n the Church, there is diversity of ministry but unity of mission” and concluding, therefore, that “[l]ay people too, sharing in the priestly, prophetic and kingly office of Christ, play their part in the mission of the whole people of God in the Church and in the world.”⁴⁸

Parents participate in the prophetic office by their witness to the Gospel within the household:

The state of life that is sanctified by a special sacrament, namely, married and family life, has a special value in this prophetic office. Where the Christian religion pervades the whole structure of life, constantly and increasingly transforming it, there is both the practice and an outstanding school of the lay apostolate. In it the married partners have their own proper vocation: they must be witnesses of their faith and love of Christ to each another and to their children.⁴⁹

As regards the kingly office, the mission of parents is not addressed specifically in the documents of the Second Vatican Council, but it can be understood generally in the context of the kingly office of all the laity. In particular, by drawing an analogy with the prophetic office, one can understand the kingly office of parents as that of building up the Kingdom in the home, creating a domestic environment of justice, truth, love and peace and grace:

Christ, obedient to the point of death and because of this exalted by the Father, has entered into the glory of his Kingdom. All things are subjected to him until he subjects himself and all created things to the Father, so that God may be all in all. He communicated this power to the disciples that they too may be established in royal liberty and, by a holy life of self denial, overcome the reign of sin in themselves, and indeed that by serving Christ in others they may through humility and patience bring their sisters and brothers to that King to serve whom is to reign. The Lord desires that his Kingdom be spread by the lay faithful also: the Kingdom of truth and life, the Kingdom of holiness and grace, the Kingdom of justice, love and peace.⁵⁰

⁴⁸ AA, no. 2, p. 405.

⁴⁹ LG, no. 35, p. 53.

⁵⁰ Ibid., no. 36, p. 54.

In terms of the priestly or sanctifying office, Christ “gives a share in his priestly office of offering spiritual worship for the glory of the Father and the salvation of humanity.”⁵¹ By this office, parents offer up all their prayers, works, endeavours and occupations as so many spiritual sacrifices, and “by their holy actions, the laity consecrate the world itself to God.”⁵² The priestly office of parents was given legal expression in can. 835, §4 in the 1983 Code. In the preceding paragraphs of can. 835 mention is made of this office as “principally exercised by bishops” (§1), but “also exercised by priests” (§2), and by deacons in the specific liturgical role given them by law (§3). The sanctifying office of the family, interestingly, was not originally mentioned in the drafts that led to can. 835 of the 1983 Code. The norm contained now in §4 was inserted only in the final draft of the *LEF*; it was “appended to the text as an *ex officio* addition and was melded into the fourth paragraph after the 1981 Plenary Assembly of the Code Commission.”⁵³

Can. 835, §4 – The other members of Christ’s faithful have their own part in this sanctifying office, each in his or her own way actively sharing in liturgical celebrations, particularly in the Eucharist. Parents have a special share in this office when they live their married lives in a Christian spirit and provide for the Christian education of their children.⁵⁴

What is interesting here is that the parental rights and duties to educate their children flow from the parents’ participation in the sanctifying office of the Church. Their mission to educate their offspring is not joined, at least in the legal discourse, to the prophetic and

⁵¹ Ibid., no. 34, p. 52.

⁵² Ibid.

⁵³ BAILLARGEON, “The Canonical Rights and Duties of Parents in the Education of Their Children,” pp. 312-313.

⁵⁴ The *CCEO* does not specifically address the role of parents in the sanctifying office of the Church.

teaching office of parents, but to their sanctifying office. Searching for the reasons of the link between the sanctifying office and parental rights demands the consideration of the canonical development of parental rights and duties over the education of their offspring.

1.2. The Church's Response to Secular Claims over Education Prior to the Second Vatican Council

Couching parental rights and duties in the larger framework of vocation and mission was the particular contribution of the 1983 Code. The vocation of parents was not addressed in the 1917 Code, and the sources used to frame the canons of the 1917 Code, while they sometimes speak of parents' rights, make no reference to the nature of their vocation or the mission accorded to them. This can be understood when one looks to the larger context in which the canons were drafted.

An analysis of the development of the law that led to the 1917 Code and its application until the Second Vatican Council is necessary to understand the antecedents of the current norms. This investigation will be followed by an examination of the Council documents, and finally, of the pertinent norms of the 1983 Code.

1.2.1. The Development of the Ecclesiastical Legislation Prior to the 1917 Code of Canon Law

The sources for the 1917 Code's treatment of parental rights over the education of their offspring date for the most part from the second half of the nineteenth century. This was a century of social upheaval in Europe. Earlier, at the time of the Reformation, the Church was more or less content with encouraging the "most religious princes" to establish "public gymnasia" "for the defense and increase of the Catholic faith and the preservation and propagation of wholesome doctrine;" wherever they may have been

neglected, the secular rulers were enjoined to restore them.⁵⁵ The French Revolution and the ideas flowing from it turned relations between Church and state on its head. Modern national states were forged as ideas of liberalism, socialism and nationalism began to find a place in the public square, nurtured in the soil of an increasingly secular state. The Papal States collapsed under the force of national unification. Economic and colonial development in the Far East and Africa provided an engine for prosperity, bureaucratisation and industrialisation while scientific theories questioned more urgently the place of God in the universe.

Some of the first clashes over the Church's role in education in the face of this drive towards the modern national state arose in France. A confident state claimed a monopoly over education in order to produce citizens fit for the new secular order. Catholic bishops themselves were divided on the stance the hierarchy should take. By 1846, a political party was formed by lay Catholics with the support of Pierre-Louis Parisis, the Bishop of Langres, but with little encouragement from other members of the French episcopacy. The party's general aim was to defend religious liberty, but the actual issue in debate at that time was the freedom to found Catholic schools.⁵⁶

The idea of a state monopoly on schools was condemned by Pius IX in the Syllabus of Errors. The reprobated propositions read as follows:

45. The entire government of the public schools... can and should be assigned to the civil authority; and assigned in such a way, indeed, that for no other authority is the right recognised to interfere in the discipline of the schools, in the system of studies, in the conferring of degrees, in the choice or approval of teachers.

⁵⁵ COUNCIL OF TRENT, session 5, *de reformatione*, ch. 1, no. 6, English translation in H.J. SCHROEDER, *Canons and Decrees of the Council of Trent*, Rockford, IL, Tan Books and Publishers, Inc., 1978, p. 25.

⁵⁶ For the development of this political movement, see, for example, A. BOULANGER, *Histoire générale de l'Église*, vol. 9, Paris, Librairie Catholique Emmanuel Vitte, 1947, pp. 157-160.

47. The best state of civil society demands that the peoples' schools which are open to all children of any class of people, and the public institutions in general which are destined for the teaching of literature and the more exact studies, and for caring for the education of youth, should be exempted from all authority, control, and power of the Church; and be subjected to the full authority of the civil and political power, exactly according to the pleasure of the rulers and the standard of current public opinion.⁵⁷

Despite efforts to secure the freedom to establish schools in France, a serious blow was leveled in 1884 when the Third Republic suppressed religious orders, effectively ending the Church's involvement in schools. After the suppression of the orders, when the Church had little sure foothold in the emerging national state, Pope Leo XIII fell back on the duties of parents to educate their children:

Christian parents must ... be careful that their children receive religious instruction as soon as they are capable of understanding it; and that nothing may, in the schools they attend, blemish their faith or their morals. Both the Divine and the natural law impose this duty on them, nor can parents on any ground whatever be freed from this obligation.⁵⁸

In the British colonies of Upper and Lower Canada there was a similar movement around the same time. It was less overtly secular in nature, as it was aimed particularly at suppressing the special status that Catholic schools had enjoyed (or Protestant schools where that population was in the minority).⁵⁹ Rather than the right to found schools as such, the issue was their status: what ecclesiastical documents would call "mixed", "secular" or "neutral" schools. While the government's efforts failed at that time, the

⁵⁷ PIUS IX, Syllabus of Errors, in *Pii IX Pontificis Maximi Acta (=Pii IX Acta)*, vol. 3, Rome, Ex Typographia Bonarum Artium, [no date], pp. 701-717, English translation in H. DENZINGER, *The Sources of Catholic Dogma*, trans. by R.J. DEFERRARI, St. Louis, MO, B. Herder Book Co., 1957, reprinted by Marian House, Powers Lake, ND, [no date] (=DENZ), no. 1745, p. 439.

⁵⁸ LEO XIII, encyclical letter *Nobilissima Gallorum gens*, 8 February 1884, in ASS, 16 (1893-1884), pp. 241-248, English translation in CARLEN, *Encyclicals 1878-1903*, p. 86.

⁵⁹ The legal history of this unsuccessful attempt by the Solicitor General of the united Province of Canada, C.D. Day, is found in J.-P. PROULX and J. WOEHRLING, "La restructuration du système scolaire québécois et la modification de l'article 93 de la Loi constitutionnelle de 1987," in *Revue juridique Thémis*, 31 (1997), pp. 421-433.

same attempts appeared again in a more concrete form in the 1890s in what is known as the “Manitoba Schools Question.” Briefly, the province of Manitoba’s constitution guaranteed the right to found and administer Catholic schools separately and with full state funding where Catholics were in the minority.⁶⁰ The government suppressed these constitutional rights and their suppression was upheld upon appeal.⁶¹ The Catholic hierarchy was involved in these legal challenges to the minority Catholic right. In response to this situation, Pope Leo XIII published his encyclical letter *Affari nos* addressed to the Canadian bishops, in which he stated:

(...) it is the inherent right of a father’s position to see in what institutions his children shall be educated, and what masters shall teach them moral precepts. When, therefore, Catholics demand, as it is their duty to demand and work, that the teaching given by schoolmasters shall be in harmony with the religion of their children, they are contending justly.⁶²

The Sacred Congregation for the Propagation of the Faith also weighed in, advising of the dangers of sending children to so-called neutral schools, warning also that parents are not in a position to fully fund the needs of religious instruction from their personal financial resources.⁶³

In 1864, the Duchy of Baden put in place a new public school regime which was also interpreted as a restriction of the Church’s rights over education. In particular, the pedagogical method of separating general instruction, even in teaching natural subjects,

⁶⁰ See *Manitoba Act, 1870*, 33 Vict., c. 3 (Canada), art. 22.

⁶¹ At the time the Judicial Committee of the Queen’s Privy Council was the final court of appeal in Canada and its provinces.

⁶² 8 December 1897, in ASS, 30 (1897-1898), pp. 356-362, English translation in CARLEN, *Encyclicals 1848-1903*, p. 431.

⁶³ See letter to the Canadian Bishops, 14 March 1895, in S.C. DE PROPAGANDA FIDEI, *Collectanea S. Congregationis de Propaganda Fidei, seu decreta, instructiones, rescripta pro Apostolicis Missionibus*, Rome, Typographia Polyglotta, 1907 (=S.C. DE PROPAGANDA FIDEI, *Collectanea*), vol. 2, no. 1890, p. 319.

from all aspects of the faith and from the jurisdiction of the Church was condemned first by Pius IX in his letter to the Archbishop of Freiburg im Breisgau,⁶⁴ and then included as a condemned proposition in the Syllabus of Errors:

Catholic men can approve that method of instructing youth which has been divorced from Catholic faith and the power of the Church, and which regards only, or at least primarily, the natural sciences and the purposes of social life on earth alone.⁶⁵

The Church wished to emphasise, first, that no curriculum of studies is adequate where there is no overarching reference to the faith. Instruction in natural and purely human subjects cannot be divorced from the comprehensive Christian understanding of man and the world. Secondly, Pius IX was concerned to assert the right of the Church to play some role in oversight over education generally, and not just religious education as such.

In Europe as a whole, the question of attendance at schools not founded and administered by ecclesiastical authority was becoming a predominant concern of the Church hierarchy by the mid-1860s. In 1866, the Sacred Congregation for the Propagation of the Faith issued an instruction in response to three questions posed by the Swiss bishops regarding “mixed” schools, that is, schools where Catholics and non-Catholics alike attend. One of the questions was whether or not parents may send their children to such institutions. The response encouraged the bishops to try to persuade Catholic fathers that nothing worse could befall their children (*nihil peius de prole sua*,

⁶⁴ See PIUS IX, letter *Quum non sine*, 14 July 1864, in *Pii IX Acta*, vol. 3, pp. 650-656, especially pp. 653-654.

⁶⁵ *DENZ*, no. 1748, p. 439.

de patria, de re catholica universa mereri posse).⁶⁶ The 1875 instruction from the same dicastery, addressed to the American bishops, asserted further but without elaboration, that both natural and divine law exclude this option for Catholic parents.⁶⁷ For this reason, the Congregation earnestly encouraged the American bishops to found Catholic schools.⁶⁸ Nevertheless, knowing that Catholic parents did, in fact, send their children to the public schools, and did so in good conscience, the Congregation made allowance for “sufficient cause,” to be judged, however, by the Ordinary.⁶⁹ Moreover, in such cases, parents still had the duty to educate their children in the faith, and those who contumaciously persisted in their neglect could not be absolved in the sacrament of penance.⁷⁰

Belgium likewise, by legislation passed on 1 July 1880, wished to exclude the role of the Church and bishops in education. By founding “neutral” schools, the government wished to assert state control over schools to the exclusion of all

⁶⁶ See Instruction on Mixed Schools, 21 March 1866, in S.C. DE PROPAGANDA FIDEI, *Collectanea*, vol. 1, no. 1286, pp. 710-712, especially, p. 711.

⁶⁷ The danger was three-fold in this case, namely the exclusion of religious doctrine from instruction, the presence of teachers from all denominations, and the existence of co-ed classes: “Quæ omnia efficiunt, ut periclitentur. Hoc autem periculum perversionis nisi e proximo remotum fiat, tales scholæ tuta conscientia frequentari nequeunt. Id vel ipsa clamat lex naturalis et divina” (Instruction to the Bishops of the United States *De scholis publicis*, 24 November 1875, in S.C. DE PROPAGANDA FIDEI, *Collectanea*, vol. 2, no. 1449, p. 94).

⁶⁸ “Scholis ergo catholicis sive condendis, ubi defuerint, sive amplificandis, et perfectius instuendis parandisque, ut institutione ac disciplina scholas publicas adæquent, omni cura prospiciendum est” (ibid.). The encouragement to establish schools in each diocese was not something new at this time. Already in 1819, the Holy Office had encouraged bishops in Scotland to found Catholic schools in each of their dioceses, especially for the education of the poor and for those in rural areas. This was encouraged to counteract the foundation of schools by the Methodist Biblical Society, to which Catholic children might be sent. See SACRED CONGREGATION OF THE HOLY OFFICE, encyclical letter *Ad Episcopos Hibernienses*, 18 September 1819, in S.C. DE PROPAGANDA FIDEI, *Collectanea*, vol. 1, no. 738, p. 432.

⁶⁹ See *De scholis publicis*, p. 95.

⁷⁰ See ibid.

ecclesiastical involvement. Leo XIII prohibited Catholics from attending such schools except in certain cases (*nisi certis casibus*).⁷¹ In this widespread push for state intervention in schooling, and, in particular, by the founding of neutral, mixed or lay schools, Leo XIII saw a clear intention to undermine religion generally, and he encouraged bishops to struggle vigorously against the current.⁷²

Even in states friendly to the Church's claims over education, such as Bavaria, Leo XIII reminded the bishops in 1887 of their duty of vigilance over education even in those schools where the Church's role was lessened or excluded.⁷³ He went further, reminding parents (though he mentioned only fathers) that this duty arises from their role in procreation.⁷⁴ A similar theme was struck in Leo XIII's encyclical on the Church in Poland, issued in 1894. Parents were reminded of their duty to "provide protection and advantages for their children, especially education," warning that "[p]arents must realise

⁷¹ See, for example, LEO XIII, allocution *Summi Pontificatus*, 20 August 1880, in *Leonis Pontificis Maximi Acta* (= *Leonis XIII Acta*), vol. 2, Rome, Typographia Vaticana, 1882, p. 118.

⁷² See LEO XIII, encyclical letter to the Bishops of Hungary on the Bicentennial of the Liberation of Budapest, for the Feast of St. Stephen *Quod multum*, 22 August 1886, in ASS, 19 (1886-1887), pp. 97-106, English translation in CARLEN, *Encyclicals 1878-1903*, p. 136.

⁷³ LEO XIII, letter to the bishops of Bavaria *Officio sanctissimo*, 22 December 1887, in *Leonis XIII Acta*, vol. 7, Typographia Vaticana, 1888, p. 234: "Cavendum insuper est vehementerque curandum, ut in scholis quæ ditionem Ecclesiæ vel omnino vel partim excusserint, ne quo iuventus periculum subeat neve ullum in fide catholica morumque honestate detrimentum capiat." It had been possible in friendly states, such as the Kingdom of the Two Sicilies, to enjoin the bishops in mid-century to be vigilant in inspecting both public and private schools. While this theme was muted in the last decades of the century in the face of increasingly hostile regimes, the right was never renounced. See PIUS IX, Encyclical to the Bishops of the Two Sicilies *Cum nuper*, 20 January 1858, in *Pii IX Acta*, vol. 3, pp. 8-16, English translation in CARLEN, *Encyclicals 1740-1878*, p. 348.

⁷⁴ *Officio santissimo*, p. 235.

that they can provide for their education properly and well only by exercising great vigilance.”⁷⁵

It was Leo XIII who began this new emphasis on the role of parents themselves. The struggle for the Church’s place in education had made it difficult during the nineteenth century for the Church to intervene directly with state authorities and so the hierarchy turned to parents, imploring them to take up the duty imposed on them through marriage. Moreover, Leo XIII encouraged lay persons, as citizens, to work for the right ordering of Church-state relations. While not using the vocabulary of vocation and mission, Leo XIII spoke, nevertheless of “essential duty” and the “fountainhead” of all duties:

Wherefore, to love both countries, that of earth below and that of heaven above, yet in such mode that the love of our heavenly surpass the love of our earthly home, and that human laws be never set above the divine law, is the essential duty of Christians, and the fountainhead, so to say, from which all other duties spring.⁷⁶

In sum, Leo XIII sought the active assistance of parents in defending their own rights and those of the Church over education.

1.2.2. Catholic Education according to the 1917 Code

The 1917 Code, as has been noted in many commentaries, adopted a division of matter based on the Roman civil law tradition: persons, things, actions.⁷⁷ The issue of

⁷⁵ LEO XIII, Encyclical on the Church in Poland *Caritatis providentiæque*, 19 March 1894, in ASS, 26 (1893-1894), pp. 523-532, English translation in CARLEN, *Encyclicals, 1873-1903*, p. 343. See also LEO XIII, Encyclical to the Hierarchy of Austria, Germany and Switzerland on the Tricentennial of the Death of St. Peter Canisius *Militantis Ecclesiæ*, 1 August 1897, in ASS, 30 (1897-1898), pp. 3-9, English translation in CARLEN, *Encyclicals, 1878-1903*, p. 421.

⁷⁶ LEO XIII, Encyclical on Christians as Citizens *Sapientiæ Christianæ*, 10 January 1890, in ASS, 22 (1889-1890), pp. 385-404, English translation in CARLEN, *Encyclicals, 1878-1903*, p. 213.

⁷⁷ For example, see the comments of T. GREEN, “Persons and Structures in the Church,” p. 29.

parental rights over education, as well as the norms that govern schools in general, fall under the general heading of “things” (marriage and schools) in Book III.

The parental obligation to educate one’s children is considered one of the “effects” of marriage:

Can. 1113 – Parents are bound by the most grave obligation to take care as far as they are able for the education of children, both religious and moral, as well as physical and civil, and of providing them with temporal goods.⁷⁸

This duty was restated in the title regarding schools:

Can. 1372, §2 – Not only parents according to the norm of Canon 113, but also all those who take their place, have the right and grave duty of taking care of the Christian education of children.⁷⁹

These canons do not mention the origin of this right and duty, which, as it was indicated earlier, were understood to be precepts of divine and natural law.

The gravity of the obligation was reinforced by *latae sententiae* excommunications for a deliberate failure to fulfill the specific duty to educate children in the Catholic faith:

Can. 2319, §1 – Those Catholics fall under automatic excommunication reserved to the Ordinary who: ...

2° Enter marriage with the explicit or implicit agreement that all or any of the children will be educated outside of the Catholic Church; ...

4° Being parents or holding the place of parents, knowingly hand their charges over for non-Catholic education or formation.

Moreover, such parents were suspected of heresy, according to can. 2319, §2.

As regards sending their children to primary and secondary schools, the concerns of the Church were codified in eight canons: 1372-1375, and 1379-1382. What is striking in

⁷⁸ *Codex iuris canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Typis polyglottis Vaticanis, 1917, English translation E.N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001. This translation is used for all subsequent citations of the canons of the 1917 Code.

⁷⁹ Since this thesis is about schools, it will not address the obligation of parents to see to the catechetical instruction of their children; this was the subject of can. 1335.

these norms on schools and schooling is the primary role of and emphasis on ecclesiastical authority. It is clear that, although parents enjoy the right and duty to educate, they are, nevertheless, quite constrained in how this right and duty are carried out. They were to follow the directives of the hierarchy, which in many important respects had the final say in the schooling of children of Catholic parents.

The emphasis on hierarchical authority in the canons is understandable in the context in which the law developed. Throughout the nineteenth century the Church was struggling to maintain a voice in the public sphere. Developments in political theory made it increasingly difficult for the Church to influence public debate. With the rise of the modern national state, a distinction between the “people” (or nation) and the “state” was introduced; this distinction affected notions of legitimation and the exercise of power. The complex aggregation of a people into a unified nation came to be seen as the source of legitimacy for the exercise of the power of the state. The organic conception of the Church as Head and Body fit poorly into this new conception of legal relations. As long as there had been general consensus that the state and the Church shared a common origin in God, quarrels with civil authority centered on questions of jurisdiction and primacy. But where civil legitimacy was seen rather as flowing from the nation, then the relations between Church and state had to be reappraised and forged anew. The role of the Church in society was viewed as increasingly irrelevant, if not harmful, to the progress of the nation. In this new political climate, the Church fought to maintain a voice in certain aspects of civil legislation, while the loss of the Papal States was interpreted as a threat to the hard-won independence of the Church.

In the new political and social environment, education, and schools in particular, were regarded as formation centers ensuring the unity and cohesion of the nation. As the power of the state was brought to bear on the establishment and governance of schools, the Church's claim to an independent role was considered unacceptable. The idea of schools as houses of formation for man's supernatural end was challenged; from the point of view of the state, schools were needed to form national citizens. In this atmosphere where the role of the Church in civil society was questioned, it is not difficult to understand the concern of ecclesiastical authorities to reassert their independent status and to reclaim a role for the Church in schooling, with rights of parents subordinated to the pressing needs of the Church.

The norms regarding education and schooling in the 1917 Code assert that the faithful are to receive religious and moral instruction, guarding against all that is contrary to "Catholic religion" and an "upright life."⁸⁰ Religious instruction in particular must be adapted to the age of elementary school children,⁸¹ while students enrolled in secondary schools "should be afforded a fuller religious doctrine" provided by priests "outstanding for their doctrine and zeal."⁸²

The 1917 Code takes up the themes which resonated in Church documents during the previous half century. The Church reasserts its right to found any kind of school:

Can. 1375 – The Church has the right to found schools of any type, not only at the elementary level, but at intermediate and superior levels as well.

⁸⁰ *CIC/1917*, can. 1372, §1.

⁸¹ See *CIC/1917*, can. 1373, §1.

⁸² *CIC/1917*, can. 1373, §2.

While not made explicit in this canon, this right arises from divine and natural law. It is therefore a right which no civil authority can deny. This is clear from the context of the canon, falling as it does under the section on the ecclesiastical magisterium, which begins with a general norm:

Can. 1322, §2 – The Church has the right and duty, independent of any civil power, of teaching all peoples evangelical doctrine: and thus, by divine law, all are bound to embrace the Church of God and rightly to heed her truth.

While this canon speaks of the right to teach “evangelical doctrine”, can. 1375 is more specifically aimed at the foundation of schools, and, in fact, goes beyond formation aimed merely at teaching Christian doctrine. Moreover, if Catholic schools had not already been founded, local Ordinaries were to take care that they be established and the faithful to support that initiative:

Can. 1379, §1 – If Catholic schools according to the norm of Canon 1373, whether elementary or middle, do not exist, care should be taken, especially by local Ordinaries, that they be founded.

§3 – The faithful shall not fail to support to the best of their ability the founding and support of Catholic schools.

Clearly, the initiative for founding schools was considered as coming not from the parents themselves, but from ecclesiastical authority. The parents had a supporting role. The foundation of a school was an act involving, above all, the local ordinary, and was not an act of the parents independent of his authority.

The primary role of ecclesiastical authority in organising Catholic schooling was reinforced by two other prerogatives of the local ordinary: vigilance over religious instruction⁸³ and the right to visit any school that imparted religious or moral

⁸³ “Can. 1382, §1 – The religious instruction of youth in any schools whatsoever is subject to the authority of and inspection by the Church.

instruction.⁸⁴ These norms were not restricted to authority only over schools founded at the initiative of the ecclesiastical authority, but they extended even to those founded by civil authority. Moreover, the discretion of parents in sending their children to a non-Catholic school was curtailed by ecclesiastical authority:

Can. 1374 – Catholic children should not frequent non-Catholic, neutral, or mixed schools, namely, those that allow non-Catholics to attend. Only local Ordinaries can make decisions in accord with instructive norms from the Apostolic See concerning circumstances of things and any necessary precautions that will prevent the danger of perversion, [and] whether these things can be tolerated and such schools used.

After having examined the legal discourse over the last half of the nineteenth century, it is not surprising to find that in the Church's legislation the role of ecclesiastical authority takes precedence over the rights of state and of parents. The 1917 Code does not use adjectives like "primary" or "inalienable" when speaking of parental rights. While the rights and duties of parents to educate their children are explicit, they are not absolute and must be exercised under the watchful gaze of the hierarchy. This observation has led Paul Baillargeon to qualify the parental role in education at that time as "passive," even though the local Ordinary often delegated his authority to other agencies involving the laity.⁸⁵ What appears from the 1917 norms regarding schools and schooling is, above all, a concern to safeguard the rights of the Church *vis-à-vis* the state.

§2 – Local Ordinaries have the right and duty of being vigilant about any schools in their territory less in them something be found or done against faith or good morals.

§3 – In a similar way they have the right of approving teachers and books of religion; likewise, for the sake of religion or morals, they can require that either teachers or books be removed."

⁸⁴ "Can. 1382 – Local Ordinaries either personally or through others can visit any schools, oratories, recreation areas, patronage, and so forth, that are concerned with religious or moral instruction; from such visitation no schools or any religious are exempt, unless it concerns an internal school for professed exempt religious."

⁸⁵ BAILLARGEON, "The Canonical Rights and Duties of Parents in the Education of Their Children," p. 119.

Parental rights in organising the education of their children are considered within the context of the struggle of the Church to reassert her voice in the world of civil power and the modern state's tendency to monopolise education.

1.2.3. Pius XI's Encyclical on Christian Education *Divini illius Magistri* (1929)

A more comprehensive exposition of the doctrine on Christian education in general was undertaken a short time later, in 1929, with Pius XI's encyclical *Divini illius Magistri*. By this time Europe had undergone dramatic political and social changes as a result of the First World War. It was a period of great instability, of rethinking core values, including the role of democracy, nationhood, the meaning of human suffering, and the idea of human progress. The Lateran Treaty (1929)⁸⁶ created, as a state, the City of the Vatican, with the Holy See recognised as exercising full proprietary and exclusive domain and sovereign jurisdiction over it. Fascist regimes in Italy and Germany were gaining popularity and moving towards total control of civil power. On the other side of Europe, the communist regime in the Soviet Union subjected all aspects of social life to state authority. Education under these systems of government was taking an overtly militaristic twist. In view of those dangers, it was necessary to state even more clearly and decisively the nature of education and the Church's responsibility for it.

Two major themes run through Pius XI's encyclical: the nature of Christian education in general, and the role of parents, state and Church in the pursuit of that

⁸⁶ See AAS, 21 (1929), pp. 209-295, English translation in H.E. CARDINALE, *The Holy See and the International Order*, Toronto, McMillan of Canada, 1976, pp. 319-340. The Concordat between the Holy See and Italy was revised on 3 June 1985, see AAS, 77 (1985), pp. 521-578.

education. We will consider the first theme only briefly, and remain with the second at greater length, as it touches on parental responsibility and rights over schools.

In the treatment of the encyclical's first theme regarding the nature of Christian education, Pope Pius XI takes pains to assert that education cannot be reduced to an instrument of power, whether civil or ecclesiastical, but is fundamentally about the development of the human person. This idea would gain momentum throughout the twentieth century in the Church's teaching on education, and can be summarised in the term "integral formation."⁸⁷ In fact, the concept itself was present in the 1917 Code's reference to parental responsibilities regarding religious, moral, physical and civic education (can. 1113), but is given here a fuller formulation in the face of a prevailing "spirit of nationalism which is false and exaggerated" and under whose influence "various excesses are committed in giving a military turn to the so-called physical training of boys."⁸⁸ Due to these excesses, Pius XI found it necessary to recall that "the subject of Christian education is man whole and entire, soul united to body in unity of nature, with all his faculties natural and supernatural...."⁸⁹ The essential nature of Christian education, "to cooperate with divine grace in forming the true and perfect Christian",⁹⁰ means that

Christian education takes in the whole aggregate of human life, physical and spiritual, intellectual and moral, individual, domestic and social, not with a view of

⁸⁷ The 1983 Code states at can. 795 "vera educatio integram persequi debeat personæ humanæ formationem" (true education must strive for complete formation of the human person).

⁸⁸ *Divini illius Magistri*, no. 49, p. 360.

⁸⁹ *Ibid.*, no. 58, p. 362.

⁹⁰ *Ibid.*, no. 93, p. 367.

reducing it in any way, but in order to elevate, regulate and perfect it, in accordance with the example and teaching of Christ.⁹¹

The Church's jurisdiction over education is, therefore, not to be reduced to only religious and moral formation, but includes the development of the human person as such. The religious and moral aspects of human life are not to be separated from the totality of the person, but, in fact, form part of an integrated human life. No educational project can ignore the religious dimension of the human being. This understanding of education distances itself from any concept of Christian education considered as merely "handing on" doctrinal concepts, or as a passive process of acquiring particular knowledge. Pius XI conceives of Christian education as a project of human and personal perfection.⁹² Moreover, it is not sufficient that religious instruction be offered as part of a school's curriculum; in order to respect the rights of parents and the Church, and in order to make a school "a fit place for Catholic students," a Christian spirit must permeate the entire school in all its elements, organisation, staff, curriculum and text-books, and it must remain "under the direction and maternal supervision of the Church...."⁹³ As a result, any

⁹¹ Ibid., no. 94, p. 368.

⁹² Arguably, much contemporary opposition to confessional schools is based on a misunderstanding of the nature of Christian education. An interesting article recently published makes this point: "in our secularised, pluralised and individualised societies these [denominational] schools no longer have their traditional educational function of transmitting faith. ... [T]he accent is not only on transmission of beliefs, values, norms and roles necessary for *social integration*, but, in view of the aspect of *individuation*, emphasis is also placed on individuals' need to develop an authentic personal identity that provides a basis for acting authentically in different and ever changing social circumstances" (P. VERMEER, "Denominational Schools and the [Religious] Socialisation of Youths: A Changing Relationship," in *British Journal of Religious Education*, vol. 31 [September 2009], pp. 201-211 at p. 208 [italics in original]).

⁹³ *Divini illius Magistri*, no. 80, p. 365.

school which excludes religion from its programme (i.e. “neutral” or “lay” schools) “is contrary to the fundamental principles of education.”⁹⁴

The greater part of Pius XI’s encyclical is devoted to explaining the roles of parents, Church and state in the project of integral human formation. Central to his exposition is the assertion that these different actors, while distinct, work together harmoniously. The rights which define their roles are not competing, but complementary. This complementarity is based on the common origin or source of these rights, and on the unique end of education. Underpinning Pius XI’s argument is the notion of the “perfect society.”

The concept of “perfect society” gradually developed in Christian thought after the rediscovery of Aristotle’s works on politics and ethics in the thirteenth century.⁹⁵ It found its full formulation in Leo XIII’s social encyclicals, particularly *Immortale Dei*.⁹⁶ Key to Aristotle’s concept of the state is the idea of “self-sufficiency”, which in turn supposes a particular relation between means and ends.⁹⁷ A state must have within its power all means necessary to achieve its end; this is what is meant by self-sufficiency. The definition of the state is itself teleological: the state exists in order to provide for the

⁹⁴ Ibid., no. 79.

⁹⁵ Robert Grosseteste completed his translation from the full Greek text by 1246 or 1247 and William of Moerbeke completed his full translation in 1265; the latter translation became very influential during the High Middle Ages. Thomas Aquinas wrote his commentaries on the text between 1269 and 1272, but it is now generally considered that Peter of Auvergne completed Aquinas’s fragmentary work. See J. CANNING, *A History of Medieval Political Thought: 300-1450*, New York, Routledge, 1996, pp. 125-126 and 128-129.

⁹⁶ Encyclical on the Christian Constitution of States *Immortale Dei*, 1 November 1885, in ASS, 18 (1885), pp. 161-180, English translation in CARLEN, *Encyclicals 1873-1903*, pp. 109-119.

⁹⁷ “When several villages are united in a single community, perfect and large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life” (B. JOWETT, *The Politics of Aristotle*, vol. 1, Oxford, The Clarendon Press, 1885, p. 3).

“good life,” which is understood as a life of human virtue and happiness.⁹⁸ The common good is related to this fulfillment of human potential. Transposing these concepts to the Christian world view, Thomas Aquinas drew on the distinction between the natural and the supernatural orders, each with a distinct and proper end. The natural order looked to the temporal good of the human being, while the supernatural order looked to his eternal destiny. The common good, in the Christian sense, could not be divorced from eternal beatitude, the enjoyment of God’s eternal presence.⁹⁹ Since eternal destiny was superior to the temporal good, the supernatural order was higher and the natural order subject to the supernatural.¹⁰⁰ Here, of course, was cause for endless disputes about jurisdiction between temporal lords and ecclesiastical prelates.

This vision of the state as a self-sufficient entity ordered to the common good was assumed quickly in the formation of civic rulers.¹⁰¹ It would become the underpinning of Leo XIII’s doctrine on the relation between Church and state:

This society [i.e. the Church] is made up of men, just as civil society is, and yet is supernatural and spiritual, on account of the end for which it was founded, and of the means by which it aims at attaining that end. Hence, it is distinguished and differs from civil society, and, what is of highest moment, it is a society chartered as of right divine, perfect in its nature and in its title, to possess in itself and by itself, through the will and loving kindness of its Founder, all needful provision for

⁹⁸ See CANNING, *A History of Medieval Political Thought*, p. 128.

⁹⁹ See, for example, THOMAS AQUINAS, *De regimine principum*, 1, 14, in *Sancti Thomæ Aquinatis opera omnia ad fidem optimarum editionum accurate recognita*, vol. 16, Parma, Typis P. Fiacadori, 1865, p. 237.

¹⁰⁰ See CANNING, *A History of Medieval Political Thought*, p. 129.

¹⁰¹ A particular literary genre, the “mirror for princes”, developed a vision of princely government and relations with the Church. See for example, John of Paris: “it is necessary that human beings live in a multitude and in such multitude as suffices for life itself, which is not the household or the village community, but the city or kingdom, for in a single house or village, one does not find everything in respect of food and clothing and defence necessary for a full life, as one does find in a city or kingdom” (“On Royal and Papal Power,” English translation in C.J. NEDERMAN and K. LANGDON FORHAN [eds.], *Medieval Political Theory—A Reader: The Quest for the Body Politic, 1100-1400*, New York, Routledge, 1993, p. 161).

its maintenance and action. And just as the end at which the Church aims is by far the noblest of ends, so is its authority the most exalted of all authority, nor can it be looked upon as inferior to the civil power, or in any manner dependent upon it.¹⁰²

Civil and ecclesiastical societies both have God as their author:

(...) who has given the charge of the human race to two powers, the ecclesiastical and the civil, the one being set over divine, and the other over human, things. Each in its kind is supreme, each has fixed limits with which it is contained, limits which are defined by the nature and special object of the province of each....¹⁰³

This coordinated jurisdiction over human beings was also said to be the basis on which “the Church was provided with a civil sovereignty [i.e. the Papal States] as the surest safeguard of her independence.”¹⁰⁴

Pius XI used the theory of the perfect society to ground the Church’s claims over education and schools within the temporal realm. His argumentation begins from a consideration of the family, the state and the Church as societies. Society is the logical place to start, he says, since “[e]ducation is essentially a social and not a mere individual activity,”¹⁰⁵ and since, furthermore, there are three distinct, but harmoniously ordered, societies into which man is born: the family, civil society and the Church.¹⁰⁶ Any consideration of jurisdiction and rights over education cannot ignore this societal dimension. Pius XI analyses the nature of each of those societies from the perspective of self-sufficiency, and this provides him with the basis from which to outline the various

¹⁰² *Immortale Dei*, no. 10, p. 109. This view would find its way into the text-books on moral theology well into the middle of the twentieth century. See, for example, B.H. MERKELBACH, *Summa theologiæ moralis*, 8th ed., vol. 2, Montreal, Desclée de Brouwer et Cie, 1949, p. 266: “Bonum commune seu vitæ sufficientia perfecta obtinetur in societate perfecta. Vita autem cuius sufficientia perfecta est procuranda est duplex: vita æterna quæ per Ecclesiam Christi est procuranda, et vita temporalis debito modo vitæ æternæ subordinata, per civitatem et in civitate educenda....”

¹⁰³ *Immortale Dei*, no. 13, p. 110.

¹⁰⁴ *Ibid.*, no. 11.

¹⁰⁵ *Divini illius Magistri*, no. 11, p. 354.

¹⁰⁶ See *ibid.*

rights of the family, state and Church over education. Again, self-sufficiency is understood in terms of the relation of means to the end of a society, and it is, therefore, this teleological approach to society which produces the various rights and distinct jurisdictions.

“In the first place comes the family....”¹⁰⁷ This is so because one of the ends of marriage is the generation of offspring. In other words, there can be no society without members, and these members come about through marriage and the foundation of families. Thus the family has a “priority of nature” over civil society; this natural priority means that the rights of the family are prior to those of civil society. However, the family does not contain within itself all the means necessary to arrive at its fullness; it is a society, but incomplete and so imperfect. It depends on other societies to supply the want of means to obtain its own end.

The second society is civil society. Its end is the temporal “well-being of the community.”¹⁰⁸ This end is of the natural order. Concerned as it is with the common good and not with more restricted, particular goods, “it [the state] has pre-eminence over the family.” In fact, the family depends on the state to achieve its own “temporal perfection.” Moreover, the state is a perfect society, “having in itself all the means for its peculiar end.”

The third society is the Church, which acquires members through baptism, the conferring of “the divine life of grace.”¹⁰⁹ The end of this society is “the eternal salvation

¹⁰⁷ Ibid., no. 12. The rest of the paragraph is drawn from the same.

¹⁰⁸ Ibid., p. 355. The rest of the paragraph is drawn from the same.

¹⁰⁹ Ibid., no. 13, p. 355. The rest of the paragraph is drawn from the same.

of mankind,” an end which is both supernatural in order and universal in extent. Like civil society, the Church is a perfect society, having at its disposal all means necessary to attain its purpose.

Having recapitulated Leo XIII’s teaching on the perfect society, Pius XI then uses it to explain the relationship of the three societies to education and schooling. He begins by noting that education “necessarily belongs to all these three societies” since it is concerned with the human being taken as a whole (both as an individual and as a member of society), and since the human being stands in relation both to a natural and to a supernatural order.¹¹⁰ This, however, does not mean that each society is in competition with the other, but that each has a particular role to play in education. Each one has a role based on the end of that particular society, and on its ability to achieve that end.

Pius XI, as it was shown earlier, noted that the family is by nature prior to the state, and so its rights are prior to those of the state. He will explain this in greater detail, but he first intervenes with the assertion that education belongs “first of all” and “pre-eminently” to the Church, not to the family.¹¹¹ This is so because the Church has rights over education that arise in the supernatural order, and which are “exclusively” given to her. Consequently, since they are of the supernatural order, they are prior to any rights of the natural order. These rights arise from two titles, both of the supernatural order: the Church’s magisterial office,¹¹² and the Church’s divine motherhood.¹¹³ The magisterial

¹¹⁰ Ibid., no. 14.

¹¹¹ Ibid., no. 15.

¹¹² “The first title is founded upon the express mission and supreme authority to teach, given by her divine Founder...” and Pius XI goes on to quote Mt 28:18-20 (see *ibid.*, no. 16).

office is part of the Church's divine mission and is independent of all temporal power both as regards its origin and exercise, and as regards its proper end (faith and morals) and means to that end. The result of such reasoning is clear: the Church stands as pre-eminent educator, independent of any human control, and this autonomy confers on her an "inherent" and "inviolable" "right to freedom in teaching:"

Hence with regard to every other kind of human learning and instruction, which is the common patrimony of individuals and society, the Church has an independent right to make use of it, and above all to decide what may help or harm Christian education. And this must be so, because the Church as a perfect society has an independent right to the means conducive to its end, and because every form of instruction, no less than every human action, has a necessary connection with man's last end, and therefore cannot be withdrawn from the dictates of the divine law, of which the Church is guardian, interpreter and infallible mistress.¹¹⁴

The discourse regarding education now acquires a more precise vocabulary – "inherent" rights, "inviolable" rights – and a distinct relation to the theory of human rights. This discourse will continue and develop even once the theoretical apparatus of "perfect society" is surpassed.

Another concept, that of "common patrimony" begins to appear in the discussion. It will be developed later in the Church's understanding of education's relation to human culture. This concept grounds the Church's claim to universal jurisdiction over education in general, not just Christian or Catholic education. The universality of the Church's rights over education, in other words, is not to be understood simply as a jurisdiction over all nations, but a jurisdiction over the content of education as the common patrimony of

¹¹³ "[I]n virtue of which the Church, spotless spouse of Christ, generates, nurtures and educates souls in the divine life of grace, with her Sacraments and her doctrine" (ibid., no. 17).

¹¹⁴ Ibid., no. 18.

all humankind.¹¹⁵ This universality is the subject of an “inalienable right” and an “indispensable duty” to be vigilant:

(...) in all institutions, public or private, not merely in regard to the religious instruction there given, but in regard to every other branch of learning and every regulation in so far as religion and morality are concerned.¹¹⁶

The discourse moves forward also in relation to the family. While the Church’s role in education may be “pre-eminent” due to its supernatural origin and self-sufficiency, nevertheless the family’s role is now given a richer theoretical explanation. It flows, initially, from the principle of generation as adopted by Thomas Aquinas¹¹⁷ and already applied by Leo XIII.¹¹⁸ Parents (Thomas Aquinas speaks of the father) together with God, author of life, have a special mission. This mission is given directly by God by virtue of the principle of generation, and the mission entails the right to educate their children. This right is “inalienable” since the obligation to educate is a strict obligation; the right is also “anterior” to the right of the civil society, which cannot violate it.¹¹⁹ Pius XI says that this is the intention behind can. 1113 of the 1917 Code.¹²⁰ The “grave obligation” arises, he continues, because it is an inalienable right, anterior to any rights which civil

¹¹⁵ The Church’s jurisdiction over education does not just “cover the globe” but “plumbs the depths” of education, and extends also to non-Catholics, since such duty of vigilance really belongs to the Church’s saving mission. See *ibid.*, no. 25 and 26, pp. 356-357.

¹¹⁶ *Ibid.*, no. 23, p. 356.

¹¹⁷ *Summa theologiæ*, 2-2, q. 102, a. 1: “Pater est principium et generationis et educationis et disciplinæ, et omnium quæ ad perfectionem humanæ vitæ pertinent” (*Sancti Thomæ de Aquino Summa theologiæ*, Alba, Editiones Paulinæ, 1962, p. 1515).

¹¹⁸ Pius XI quotes from the encyclical letter *Rerum novarum*, of Pope Leo XIII, 15 May 1891, no. 14, in ASS, 23 (1890-1891), pp. 641-670, English translation in CARLEN, *Encyclicals 1873-1903*, p. 244: “Paternal authority can be neither abolished or absorbed by the State; for it has the same source as human life itself.”

¹¹⁹ *Divini illius Magistri*, no. 32, p. 357.

¹²⁰ *Ibid.*, no. 35, p. 357: “The wisdom of the Church in this matter is expressed with precision and clearness in the Codex of Canon Law, Can. 1113....”

society may attempt to arrogate to itself. While “inalienable,” “anterior” and “inviolable,” the rights of parents are not, however, absolute and despotic, but “necessarily subordinated to the last end and to the natural and divine law.”¹²¹

Finally, Pius XI addresses the origin and nature of the state’s rights over education. The state does not stand in relation to the individual as a “father,” so there is no principle of generation in which to ground the rights of the state. The purpose of the state is to promote the common temporal welfare of its members. The pursuit of this common welfare is the source of the state’s rights over all its citizens, including rights over education. Nonetheless, those rights over education are different from those of the Church and the family, and consist in promoting conditions of peace and security so that individual citizens may exercise their rights freely:

The function therefore of the civil authority residing in the state is twofold, to protect and to foster, but by no means to absorb the family and the individual, or to substitute itself for them.¹²²

The state, through legislation, must therefore safeguard the “prior rights” of the family and the “supernatural rights” of the Church, protect the child from negligence or want of duty by its parents, “supply deficiencies” and provide “suitable means” arising from the fact that the family is an imperfect society (i.e. unable to provide all the means necessary to achieve its end), and, in general, remove “public impediments” that hinder the moral

¹²¹ Ibid., p. 358.

¹²² Ibid., no. 43, p. 359.

and religious education of youth.¹²³ The state may also, through education, see to the civic formation of its citizens and promote a certain degree of culture.¹²⁴

From this general analysis of the origin and end of each form of society and from its quality of self-sufficiency appear a clear ordering of roles in the realm of educational responsibilities. The Church is placed first in order, since it is the source and guardian of man's supernatural destiny which is his ultimate and highest good. The family has a sort of dignity of precedence over civil society due to the generative principle. Finally, the state has a supporting role given its merely this-worldly end. Having set out the order in a general way, Church–family–state, Pius XI applies it to the question of schools.

The lack of self-sufficiency of the family means that parents alone do not enjoy adequate means to see to the complete education of their children: “[S]ince the family of itself is unequal to this task, it was necessary to create that social institution, the school.”¹²⁵ It is an indisputable historical fact that the institution of the school was an “initiative” of family and Church, which together formed “one sanctuary of education;” the state only became involved at a later date. It follows, says Pius XI, that, “considered in its historical origin, the school is by its very nature an institution subsidiary and complementary to the family and to the Church.”

Pius XI maintains that a state which promotes a secular approach to schooling (“neutral” or “lay” schools) works “contrary to the fundamental principles of

¹²³ See *ibid.*, nn. 44-46.

¹²⁴ See *ibid.*, nn. 47-50, pp. 359-360.

¹²⁵ *Ibid.*, no. 77, p. 365. The rest of the paragraph is drawn from the same.

education.”¹²⁶ Catholics are forbidden from attending “secular” schools, just as they are forbidden from attending any non-Catholic school (“mixed” or “neutral”). Such participation can be tolerated only with the approval of the Ordinary, having regard to place and time, and having satisfied “special precautions.”¹²⁷ Nor does the state acquit its duty by simply providing time for separate religious instruction divorced from the rest of the school environment, for religious instruction must permeate the entire educational atmosphere.¹²⁸ In a “nation where there are different religious beliefs,”¹²⁹ the duty of the state is “to leave free scope to the initiative of the Church and the family, while giving them such assistance as justice demands, including financial aid.”¹³⁰ Catholic parents who work to obtain from the state the satisfaction of these rights are undertaking “a genuinely religious work;” they are not engaging in party politics but “in a religious enterprise demanded by conscience.”¹³¹

Despite the continued emphasis on the priority of ecclesiastical authority, the discourse is moving clearly towards the idea of a genuine apostolate of the laity, which presupposes a clear understanding of the vocation of parents:

The true Christian does not renounce the activities of this life, he does not stunt his natural faculties; but he develops and perfects them, by coordinating them with the supernatural. He thus ennobles what is merely natural in life and secures for it new strength in the material and temporal order, no less than in the spiritual and eternal.¹³²

¹²⁶ Ibid., no. 79.

¹²⁷ Ibid.

¹²⁸ Ibid., nn. 79-80.

¹²⁹ Ibid., no. 81. The terminology of “pluralist society” was not yet current.

¹³⁰ Ibid., pp. 365-366.

¹³¹ Ibid., nn. 84 and 85, p. 366.

¹³² Ibid., no. 98, p. 368.

Divini illius Magistri, while not providing a new view of Christian education and schooling, nevertheless offers a fresh look at the subject. It intends to state a comprehensive overview of the Catholic doctrine on education after the long struggle by states to marginalise the Church's role. Pius XI draws clearly on the developing legal theory of natural rights,¹³³ and builds on the social theory of the perfect society. One might question whether the assertion of these rights could survive a rejection of the social theory on which Pius XI founded them, and this will be addressed further below.

At the time of Pius XI, the responsibilities over education and schooling had been treated in the context of the Church's teaching office. Despite enjoying prior, inviolable and inalienable rights over the education of their children, in a practical sense parents seemed little more than adjuncts of the Church's authority over education in general. Little consideration was given to any sacramental foundation for parents' rights and duties. Certainly, the grave obligation to see to the Catholic education of one's children is classified as an effect of marriage, but the analysis is not taken any further. In his encyclical on Christian marriage, *Casti connubii*, Pius XI elaborates the three Augustinian "blessings" of marriage: progeny, faithfulness and sacramentality. The first blessing is children, since the end of marriage is generation.¹³⁴ The generative principle stands out again as a natural principle on which parental rights and duties are grounded. The supernatural principles at the origin of the Church's claims to rights over education

¹³³ Leo XIII had already referred to parental rights over education as arising from "nature," encouraging parents "to strive manfully to have and to hold *exclusive* authority to direct the education of their offspring..." (*Sapientiae Christianae*, no. 42, p. 221; Pius XI builds on this foundation).

¹³⁴ See PIUS XI, Encyclical on Christian Marriage *Casti connubii*, 31 December 1930, no. 11, in AAS, 22 (1930), pp. 539-592, English translation in CARLEN, *Encyclicals 1903-1939*, p. 393.

(teaching for salvation and motherhood), and its supernatural end (union with God) mean, however, that ecclesiastical authority guides the exercise of parental rights.¹³⁵ The Church stands in relation to the parents as tutor for the exercise of their proper rights, and the parents, in turn, stand in relation to the Church as defenders of its rights over and against encroachment by the civil authorities. Parents are to raise up children to be members of the Church, “since it is theirs to offer their offspring to the Church” to be baptised.¹³⁶

Sacramentality, the third blessing of marriage,¹³⁷ completes and crowns marriage; it refers to extrinsic indissolubility and to the elevation of the natural bond to an efficacious sign of grace.¹³⁸ The main benefit of sacramentality, then, is stability in the relationship between the spouses, a stability that draws not just upon natural qualities but supernatural assistance. Insofar as sacramentality is related to progeny, it provides a stable relationship for the long and arduous task of rearing and educating children. Furthermore, this stability obtained through the sacrament promotes virtue and integrity, and works also for the happiness and well-being of the entire civil society.¹³⁹ However, in this perspective, the rights of parents over education do not arise from the sacramentality of marriage, but sacramentality provides a useful, even necessary, condition for fulfilling the duty of educating one’s children.

¹³⁵ The Church’s rights do not override parental rights, since parental rights are inalienable.

¹³⁶ *Casti connubii*, nn. 13 and 14, p. 393.

¹³⁷ The second blessing, faithfulness, is not relevant to this analysis.

¹³⁸ *Ibid.*, no. 31, p. 396.

¹³⁹ *Ibid.*, no. 37, p. 397.

Canonists, commenting on the canonical and theological developments, continued during this period to regard parental prerogatives over the education of their children as under the watchful eye of the Church, to whom fell ultimate responsibility for the supernatural destiny of all the baptised. Drawing upon the teachings of Pius XI, Felix M. Cappello, for example, viewed the Church's rights over the education of children as arising from the celebration of the sacrament of marriage. There is no discussion of the sacrament of marriage itself as the framework for the exercise of rights, but only insofar as sacraments are, by their nature, under the exclusive jurisdiction of the Church.¹⁴⁰ The rights of parents are considered to properly and naturally (*proprio et nativo*) inhere in them, but as a "mandate" from supernatural authority as exercised through hierarchical authority in the Church. The distinction between the exercise of ecclesiastical jurisdiction as opposed to civil jurisdiction over education is reduced to a distinction between the mediate or immediate exercise of that jurisdiction (also called direct or indirect). That is to say, the Church asserts an immediate right over education when parents fail in their duty since parents are mandated by the Church to see to the salvation of their children's souls.¹⁴¹ The state, on the other hand, has only a suppletory jurisdiction, devolving from

¹⁴⁰ "Parentes baptizati in procuranda filiis educatione christiana subsunt auctoritate et vigilantia Ecclesiae, a qua per ipsam matrimonium celebrationem (quod inter baptizatos est semper ac necessario sacramentum et qua tale subiicitur exclusivae iurisdictioni Ecclesiae) mandatum accipiunt, ex fine primario eiusdem matrimonii, educandi liberos secundum finem supernaturalem, i.e. secundum principia religionis christianae" (F.M. CAPPELLO, *Summa iuris publici ecclesiastici ad normam Codicis iuris canonici et recentiorum S. Sedis documentorum concinnata*, 5th ed., Rome, Pontifical Gregorian University, 1943, p. 398).

¹⁴¹ See *ibid.* See also J. BRYN, *Juris canonici compendium*, 10th ed., vol. 2, Bruges, Desclée de Brouwer, 1949, p. 176.

the natural right of parents; as such it can be exercised only in a mediate way, as by delegation or commission, but never as a proper right inhering naturally in the state.¹⁴²

Pius XI wrote his encyclicals on education and on Christian marriage at a time when the rise of totalitarian states in Europe posed a dramatic challenge to the Church's claims to primacy over the state in education. While the movement towards state monopoly over education began in the nineteenth century, the totalitarian regimes which emerged in the twentieth century brought this movement to completion. In that historical context, Pius XI tried to respond to the encroachment on the Church's jurisdiction. Arguing from the nature of society in general (the theory of the perfect society), he appealed to the growing theory of natural rights.

1.2.4. The Second World War and International Legal Developments

Pius XII was faced with a new world war, a "total war," which at the time must have seemed like the logical and awful conclusion to the growing militarism that Pius XI had already warned against. One of the aspects of totalitarian regimes is to break down the mediating influence of associations within society, leaving the individual naked before the power of the state. In such a world there is no place for any other society, whether family or Church. Pius XII fought this ideology, warning that "[t]o consider the state as something ultimate to which everything else should be subordinated and directed" harms even the prosperity of the state itself.¹⁴³ It harms, further, the "primary and essential cell of society, the family" when the family is "considered from the narrow

¹⁴² Ibid., p. 399.

¹⁴³ See Encyclical on the Unity of the Human Family *Summi Pontificatus*, 20 October 1939, no. 60, published in English in AAS, 31 (1939), p. 551; also in English in CARLEN, *Encyclicals 1939-1958*, p. 13. Subsequent references are to the Carlen text.

standpoint of national power.”¹⁴⁴ Drawing from the argumentation of Pius XI, Pius XII reaffirmed “that man and the family are by nature anterior to the State;” moreover, they have “powers and rights” that come from God, who has likewise “assigned them a mission and a charge that correspond to undeniable natural requirement.”¹⁴⁵ It is clear, then, that the mission of the family, and so of parents, comes directly from God. It is not conferred by any intermediary, including the Church. Yet the mission, in Pius XII’s view does not seem to arise directly from the sacramental nature of marriage, but rather from some “natural requirement.”

The United Nations, founded in 1946 in the aftermath of the Second World War, adopted and proclaimed, on 10 December 1948, its Declaration on Human Rights. It was an explicit response to the trammeling of rights, including the right of association, by the totalitarian regimes.¹⁴⁶ Article 16 concerns the freedom to marry and the nature of the family: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹⁴⁷ This article corresponds largely to the papal views expressed over the previous hundred years, but it does not make any statement about the “prior” quality of the family with respect to the state, preferring rather the expression “fundamental group unit.” Article 18 guarantees freedom of religion, and art. 26 the right

¹⁴⁴ Ibid., no. 61, p. 13.

¹⁴⁵ Ibid.

¹⁴⁶ See the Prologue to the Declaration: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...” (General Assembly Resolution 217 A [III], 3 UNGAOR 7 at p. 71, also available at [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/217\(II\)&Lang=E&Area=RESOLUTION](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/217(II)&Lang=E&Area=RESOLUTION) [27 February 2013]).

¹⁴⁷ Ibid., p. 74.

to education, which should be offered free of charge. Moreover, the third paragraph of art. 26 affirms the right to parental choice in education, including schooling: “Parents have a prior right to choose the kind of education that shall be given to their children.”¹⁴⁸

In 1962, the United Nations gave a fuller treatment to education in its Convention against Discrimination in Education.¹⁴⁹ Excluded from discrimination are “separate educational systems or institutions” based on religion according to the wishes of parents or legal guardians.¹⁵⁰ Similarly, the right of parents to choose also amongst private schools is expressly upheld.¹⁵¹

The 1966 International Covenant on Civil and Political Rights reaffirmed religious freedom and reiterated parents’ rights “to ensure the religious and moral education of their children in conformity with their own convictions” (art. 23), the quality of the family as the “natural and fundamental group unit of society” deserving protection

¹⁴⁸ Ibid., p. 76.

¹⁴⁹ Adopted by the General Conference of UNESCO, 14 December 1960 (entry into force: 22 May 1962), 429 UNTS 93, also available at http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html (27 February 2013). The United States did not sign this convention.

¹⁵⁰ Art. 2, (b) “The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level” (Convention against Discrimination in Education, pp. 96-97).

¹⁵¹ Art. 5, (b) “It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction...” (Ibid., p. 100).

by the state (art. 23), and the right of each child to protection regardless of religion (art. 24).¹⁵²

During this period canonists such as J. Brys began to insist on parental rights as “inalienable,” that is, a right which parents cannot abdicate. Nevertheless the canonical analysis remained tied to the concept of the Church and society as perfect societies.¹⁵³ Reacting against the claims of the state to a monopoly in education, Brys asserts that parents, acting together, may even found schools in order to achieve the help they need in exercising their responsibility over education, and if they do, those schools, once established, do not somehow become independent of the family for there must always be an intimate relation and unity in the cooperation between school and family.¹⁵⁴

1.3. The Second Vatican Council and the Congregation for Catholic Education’s Catholic Schools

Pius XII, as well as his predecessor, had considered calling an ecumenical council to pursue the work of the Vatican Council which had been suspended during the previous century. The Roman dicasteries had prepared initial schemata of topics to be brought forward and both proposals included the issue of schools. John XXIII’s Preparatory Commission on Studies and Seminaries incorporated into their work a title on Catholic schools after numerous bishops had requested such a topic. The subject of schools was probably included because of concerns about the encroaching state claims over education,

¹⁵² See General Assembly Resolution 2200A (XXI) of 16 December 1966 (entry into force: 23 March 1976), 999 U.N.T.S. 179, also available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (27 February 2013). The United States signed but did not ratify this covenant.

¹⁵³ J. BRYs, *Juris canonici compendium*, pp. 176-177.

¹⁵⁴ *Ibid.*, p. 177.

the resulting lack of state financial support, and the creeping doubt about the apostolic value of Catholic schools in general.¹⁵⁵ The schemata of the Preparatory Commission on Studies and Seminaries had a rather volatile life, going through eight redactions. Nevertheless, it was eventually decided, for reasons of time, to change the nature of the document to a declaration rather than a constitution, or simply to a list of propositions; the Council decided that a special commission of experts be formed after the conclusion of the Council to treat the issue more adequately.¹⁵⁶ Moreover, in light of the promotion that the United Nations was seemingly giving to education, the declaration was broadened to cover not just Catholic schools, but Christian education in general.¹⁵⁷ *Gravissimum educationis* introduces a significant change from the previous discourse on education and brought about an important shift in emphasis.

The change concerns the issue of sending Catholic children to non-Catholic schools: the former condemnations of Catholic parents sending their children to non-Catholic schools are dropped and the requirement to obtain approval from ecclesiastical authority is no longer mentioned. In this regard, the Council Fathers contented themselves with two major remarks. First, they remind parents “of their duty to send their children to Catholic schools wherever this is possible” and the related task of supporting and cooperating with Catholic schools where they exist.¹⁵⁸ Second, the Fathers note, on

¹⁵⁵ See H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, vol. 4, Montreal, Palm Publishers, 1969, pp. 1-2.

¹⁵⁶ See *ibid.*, pp. 2-9. The fruit of that Commission was the document published by the SACRED CONGREGATION FOR CATHOLIC EDUCATION, Catholic Schools. See footnotes 3 and 4, above, p. 8.

¹⁵⁷ See VORGRIMLER, *Commentary on Vatican II*, p. 6 and *GE*, English translation in *FLANNERY1*, p. 575, footnote 3.

¹⁵⁸ *GE*, no. 8, p. 584.

the one hand, the Church's own "grave obligation" to see to the moral and religious education of Catholic students attending non-Catholic schools, and, on the other hand, parents' corresponding "grave obligation" to avail themselves of this formation.¹⁵⁹ This is a significant change in approach, indicating a greater willingness to trust parents with this decision and recognising the growing pluralism of contemporary society.

The Declaration reiterates that the "grave obligation" of parents to educate their family arises from the generative principle, and the document goes on to clarify that the parents' role is such "that it is almost impossible to provide [for it] an adequate substitute;" for this reason "the task of imparting education belongs primarily to the family, but it requires the help of society as a whole."¹⁶⁰ This latter point is an implicit reference to the notion of family as an imperfect society. The Declaration enjoins the state to cooperate with parents through the rights the state properly enjoys over education and which arise from "its function to provide for the common good in temporal matters."¹⁶¹ The text avoids, however, the terminology used earlier that parental rights are "prior" to state rights, although it gives pride of place to the family in human formation (*primi et praeicipui educatores*) and refers to the principle of subsidiarity. This means, concretely, that the state is to promote education, recognise the responsibilities of parents, provide parents with needed assistance, and, "when the efforts of the parents and of other

¹⁵⁹ *GE*, no. 7, p. 582.

¹⁶⁰ *GE*, no. 3, pp. 578-579.

¹⁶¹ See *ibid.*, p. 579.

organisations are inadequate it should itself undertake the duty of education, with due consideration, however, of the wishes of the parents.”¹⁶²

As to the shift in emphasis, it is to be noted that only secondarily does the Declaration address the rights of the Church in education. Previously, education was seen primarily as the joint effort of family and Church, with the state playing only a supporting role. A more nuanced approach moves away from stating that education belongs “in the first place to the Church” to stating that “[e]ducation is, in a very special way, the concern of the Church.” Nevertheless, the two-fold source of the Church’s involvement in education mentioned by Pius XI in *Divini illius Magistri* is retained, namely since the Church is “a human society capable of imparting education” it imparts, above all, the “way of salvation to all” (teaching office), but also nurtures the life of grace through its divine motherhood.¹⁶³ It is interesting to note that the order in which responsibilities are addressed is no longer “Church–family–state,” but “family–state–Church.” This indeed marks an important shift in emphasis from the previous discourse.¹⁶⁴

As regards schools in particular, *Gravissimum educationis* gives fuller treatment to their role in mediating culture, encouraging mutual understanding between students of various backgrounds, and acting as a hub for various cultural, civil and religious associations.¹⁶⁵ There is recognition that a school does more than impart an intellectual or professional formation; it is a community that serves not just the individual, but society

¹⁶² See *ibid.*

¹⁶³ *Ibid.*, pp. 579-580.

¹⁶⁴ The criticism such as that of B. Franck that the theoretical construct of the perfect society resulted in a conception of the Church “from top-down,” as a sort of entity independent of the faithful is thus addressed. See FRANCK, *Vers un nouveau droit canonique?* p. 264.

¹⁶⁵ See *GE*, no. 5, p. 580.

as a whole.¹⁶⁶ State monopoly over schools is again condemned, but now not on the basis of an infringement of the Church's rights over education as a perfect society, but as a violation of the principle of subsidiarity. Such a monopoly "would be prejudicial to the natural rights of the human person," would adversely affect the development of education, harm the peace amongst citizens, and "be inconsistent with the pluralism which exists today in many societies."¹⁶⁷ The question of founding Catholic schools is not treated, nor is the question of their ownership. Admittedly, this opens up greater possibilities to parents to take an initiative in founding schools than was evident in the 1917 Code.

Moreover, the role of sacrament is also brought forward, together with the natural basis for parental rights over education. This is subtle but clear: "It is therefore, above all, in the Christian family, inspired by the grace and the responsibility of the sacrament of matrimony, that children should be taught to know and worship God and to love their neighbor...."¹⁶⁸ In its Pastoral Constitution of the Church in the Modern World *Gaudium et spes*, the Second Vatican Council spoke at some length about the nature, responsibilities and challenges facing parents and their families. Drawing on the theology of marriage outlined in *Casti connubii*, it concludes that couples are "consecrated for the duties and dignity of their state by a special sacrament,"¹⁶⁹ of which education is a

¹⁶⁶ This idea of school as community which mediates culture would be developed in later documents.

¹⁶⁷ See *ibid.*, no. 6, p. 581.

¹⁶⁸ See *GE*, no. 3, pp. 578-579.

¹⁶⁹ *GS*, no. 48, p. 220.

principal responsibility,¹⁷⁰ and, together with the transmission of life, central to their mission.¹⁷¹ In the Dogmatic Constitution on the Church *Lumen gentium*, Christian marriage is said to produce a two-fold relation, conferring rights and duties as members of civil society and as members of the Church.¹⁷² This confers on the spouses the responsibility to work so that the two orders, natural and supernatural, concur harmoniously. Their “special vocation,” however, is “to seek the kingdom of God by engaging in temporal affairs and directing them according to God’s will,” since “[t]o be secular is the special characteristic of the laity.”¹⁷³ This seems somewhat more restrictive than what is stated in the Decree on the Apostolate of Lay People *Apostolicam actuositatem*, which declares unequivocally that, since the apostolate of the entire Church “aims primarily at announcing to the world, by word and action, the message of Christ and communicating to it the grace of Christ,” it follows that even though the clergy have been entrusted “in a special way” with the means of this apostolate (ministry of word and sacrament), nonetheless “the laity also have a highly important part to play, the part namely of ‘helping on the cause of truth’ (3 Jn 8).”¹⁷⁴ As a result, it is for the hierarchy to organise and “systematise” the lay apostolate, thereby avoiding “ruinous rivalries;”¹⁷⁵ on the other hand, it is not for the hierarchy to supplant the proper role of the laity. There is no particular mention of lay initiative in respect to founding schools, but the assertion is

¹⁷⁰ Ibid.

¹⁷¹ Ibid., no. 50, p. 223.

¹⁷² *LG*, no. 36, p. 55.

¹⁷³ *LG*, no. 31, p. 49.

¹⁷⁴ *LG*, no. 6, p. 411.

¹⁷⁵ Ibid., no. 23, p. 431.

made that no work may call itself “Catholic” without the approval of ecclesiastical authority.¹⁷⁶ This restriction makes sense only when lay initiative is encouraged, for such initiative brings to the forefront the question of the relationship between the apostolate and the hierarchy, which varies depending on the “forms and objects” of the work.¹⁷⁷ *Lumen gentium* encourages the hierarchy to promote both the dignity of the laity and their proper ambit of responsibility, including a sense of initiative.¹⁷⁸

This treatment of the apostolate of the laity was generally criticised as not going far enough. In the last half of the twentieth century, the theoretical construct of the perfect society has largely been abandoned in favour of the more theological notion of communion (*communio*). Some, like Eugenio Corecco, have argued that the former construct drew too heavily from secular legal institutions and their preoccupation with competence, while communion provides greater scope for participation.¹⁷⁹ It can be argued that the 1917 Code left little room for independent lay initiative; in practice, there was some room for cooperation, but the starting point was always an initiative coming from the hierarchy. The Council documents opened the door to greater lay initiative and involvement in all aspects of Catholic schooling. This encouragement to lay initiative

¹⁷⁶ Ibid., no. 24, p. 432.

¹⁷⁷ Ibid.

¹⁷⁸ See *LG*, no. 37, p. 57.

¹⁷⁹ E. CORECCO, *Canon Law and Communio: Writings on the Constitutional Law of the Church*, Libreria editrice Vaticana, 1999, p. 284. For Corecco, communion “postulates the *total immanence, and the inseparability, of all the elements that make up the Church*” (p. 290, emphasis in original). Failure to translate fully this idea of *communio* eventually in the 1983 Code, he asserts, is especially evident in overemphasising the secular nature of the lay apostolate without giving adequate place to the value of lay participation within ecclesiastical structures (pp. 295-296).

and involvement is evident in a further document on Catholic schools: the Sacred Congregation for Catholic Education's *Catholic Schools* (1977).

The Congregation limited itself to the study of "Catholic schools," that is, to "the nature and distinctive characteristics of a school which would present itself as Catholic."¹⁸⁰ Accordingly, a Catholic school is not defined by reference to its origin, to a consideration of who founded it, or even who owns it and who runs it, but rather considered as a particular category of school, considered generally. By and large, a school is "a place of integral formation by means of the systematic and critical assimilation of culture."¹⁸¹ The Catholic school must satisfy this general form. But it must also have something distinct, and this distinction is to be found in the person of Christ, "who is the foundation of the whole educational enterprise in a Catholic school;" the school that is distinctively Catholic finds in Christ the origin of "[i]ts duty to cultivate human values in their own legitimate right in accordance with its particular mission to serve all men...."¹⁸² The Catholic school, then, has as its task "a synthesis of culture and faith, and a synthesis of faith and life...."¹⁸³ It has its own mission which is "a critical, systematic transmission of culture in the light of faith and the bringing forth of the power of Christian virtue by the integration of culture with faith and of faith with living."¹⁸⁴ The Congregation does not deal with the question of who founds a school. It simply refers to

¹⁸⁰ See SACRED CONGREGATION FOR CATHOLIC EDUCATION, *Catholic Schools*, no. 2, in *FLANNERY*2, p. 606.

¹⁸¹ See *ibid.*, no. 26, p. 612.

¹⁸² See *ibid.*, no. 35, p. 614.

¹⁸³ See *ibid.*, no. 37.

¹⁸⁴ *Ibid.*, no. 49, p. 617.

the general principles of the Second Vatican Council regarding collaboration between hierarchy and apostolic work, which involves participation and co-responsibility in decision-making, governed by the principle of subsidiarity.¹⁸⁵ The “bishop’s authority” is exercised “to watch over the orthodoxy of religious instruction and the observance of Christian morals in Catholic schools.”¹⁸⁶ But it is not the hierarchy alone which is to see to the distinctive Catholic nature of the school; rather, the “whole educative community” shares this responsibility, and chiefly parents. It is not sufficient that they send their children to a Catholic school, for they must “co-operate actively” with it, support its efforts, and make use of its structures.¹⁸⁷ The role of the ecclesiastical hierarchy in school governance is thus portrayed as secondary; the hierarchy is to intervene only “[w]here difficulties and conflicts arise about the authentic Christian character of the Catholic school...”¹⁸⁸

In 1982, the same Congregation issued *Lay Catholics in Schools: Witnesses to Faith*.¹⁸⁹ While this text deals largely with lay teachers, there are a couple of interesting comments that apply to schools in general. The Congregation addresses the question, what determines the specific character of the Catholic school? At the time of the publication of the document, maintaining this Catholic character was rendered increasingly difficult due to the declining numbers of clergy and religious in schools. As

¹⁸⁵ See *ibid.*, no. 70, p. 622.

¹⁸⁶ *Ibid.*, no. 73, p. 623.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*, p. 624.

¹⁸⁹ SACRED CONGREGATION FOR CATHOLIC EDUCATION, *Lay Catholics in Schools: Witnesses to Faith*, 15 October 1982, in *FLANNERY2*, pp. 630-661. As in the case of the document *Catholic Schools*, no canonical characteristic is indicated for this document by the Congregation.

a result, the lay faithful were encouraged to “try to understand the special characteristics of the school they are working in, and the reasons that have inspired them.”¹⁹⁰ They must identify with those unique characteristics so that the specific Catholic identity can continue. Due to the declining number of priests and religious in schools,

(...) the laity must prepare themselves in such a way that they will be able to maintain Catholic schools on their own whenever this becomes necessary or at least more desirable, in the present or in the future. Historical forces at work in the schools of today lead to the conclusion that, at least for the immediate future, the continued existence of Catholic schools in many traditionally Catholic countries is going to depend largely on the laity, just as it has depended and does depend, to good effect, on lay people in so many of the young Churches.¹⁹¹

Moreover, bishops may choose certain lay persons and “entrust them with complete direction of Catholic schools, thus incorporating them more closely into the apostolic mission of the Church.”¹⁹²

The entire document is a call to greater involvement on the part of the entire educating community: parents, teachers, students, parish and school administration. Sixteen years later, the Congregation for Catholic Education could only insist again on these same themes, remarking that the survival of the Catholic school is not a question of adaptation, “but of missionary thrust, the fundamental duty to evangelise, to go toward men and women wherever they are, so that they may receive the gift of salvation.”¹⁹³

To sum up, the role for parents in Catholic schooling is no longer seen as passive. More and more, the success and future of Catholic schools will depend on them. Their duties are not restricted to seconding initiatives undertaken by the hierarchy, to

¹⁹⁰ Ibid., no. 39, p. 645.

¹⁹¹ Ibid., no. 45, p. 647.

¹⁹² Ibid., no. 46.

¹⁹³ The Catholic School on the Threshold of the New Millennium, 28 December 1997, in *Origins*, 28 (1998-1999), p. 409.

financially supporting schools, to pressing the state for real options in school choices, and to sending their children to Catholic schools where possible. They are also responsible for ensuring the distinctive nature of Catholic schools; they have a right and duty to be actively involved in the running of schools. Hence there is greater scope and need for their initiative in founding Catholic schools and in promoting everything pertaining to them. Indeed, the 2004 Directory for Bishops promotes this development, encouraging bishops to not only found centres for education, but to

hold in high regard educational centres promoted by the faithful themselves, especially by Catholic parents, respecting their legitimate autonomy while at the same time ensuring that the Catholic identity of the formation programme is faithfully maintained....¹⁹⁴

In a certain sense, this new approach to schools is a result of *Gravissimum educationis*'s new conception of the school, no longer the idea of school-as-institution, but school-as-community.¹⁹⁵ This fresh understanding of the reality of the Catholic school emphasises the missionary role of each of the members of the community, including parents. It is a concept based not on a sociological notion of society—whether of the family or of the Church—but on a theological concept of the People of God.¹⁹⁶ If the mission given to the Church is understood as given to all its members, then the role of parents in that same mission must be conceived not as something separate from that of the hierarchy, even if distinct.¹⁹⁷ Rather, the parents' mission must be conceived as

¹⁹⁴ CONGREGATION FOR BISHOPS, *Directory for the Pastoral Ministry of Bishops Apostolorum Successores*, Ottawa, Canadian Catholic Conference of Bishops, 2004, no. 132, p. 147.

¹⁹⁵ See CONGREGATION FOR CATHOLIC EDUCATION, The Religious Dimension of Education in a Catholic School, 7 April 1988, no. 31, in *FLANNERY2*, p. 947.

¹⁹⁶ *Ibid.*

¹⁹⁷ This was stated eloquently by John Paul II: "In the sphere of education the Church has a specific role to play. In the light of tradition and the teaching of the council, it can be said that it is not only a matter of

flowing from their call by Christ, that is to say, conceived as part of their supernatural vocation, and not simply as an adjunct to their natural role as progenitors. That vocation is centred on the sacrament of marriage, understood as “their charism and special gift” which qualifies them to contribute “to the elaboration of an authentic evangelical discernment in their various situations and cultures in which men and women live their marriage and their family life.”¹⁹⁸

1.4. Parental Rights in Catholic Education according to the 1983 Code of Canon Law

Having looked at the discussion leading to the formation of the canons of the 1983 Code, one can now turn to the specific development of the canons themselves; from the descriptive value of that contextual discourse one moves to examine its performative value. It will not be possible to treat all the canons regarding parental rights over education in general. This, again, was very thoroughly done by Baillargeon.¹⁹⁹ Since the focus of this thesis is parental roles in founding and administering schools imparting a Catholic education, after analysing the nature of Catholic education according to the new code (can. 795), an overview of the effects of Christian marriage as regards education (can. 1055) will be presented, followed by a consideration of the norms regarding the right of association of parents (cann. 1136 and 793).

entrusting the Church with the person’s religious and moral education, but of promoting the entire process of the person’s education together with the Church. The family is called to carry out its task of education in the Church, thus sharing in her life and mission” (Letter to Families, 2 February 1994, no. 16, in *Origins*, 23 [1993-1994], p. 651).

¹⁹⁸ *FC*, no. 5, p. 818.

¹⁹⁹ BAILLARGEON, “The Canonical Rights and Duties of Parents in the Education of Their Children,” esp. pp. 283-335.

1.4.1. The Nature of Catholic Education (can. 795)

The nature of Catholic education is succinctly summarised in canon 795:

Can. 795 – Education must pay regard to the formation of the whole person, so that all may attain their eternal destiny and at the same time promote the common good of society. Children and young persons are therefore to be cared for in such a way that their physical, moral and intellectual talents may develop in a harmonious manner, so that they may attain a greater sense of responsibility and a right use of freedom, and be formed to take an active part in social life.²⁰⁰

This canon builds upon the general right of all the faithful to a Christian education, elaborated in the *LEF*, can. 24, §1 (with no significant alteration of its formulation through the various revisions).²⁰¹ The text was assumed into the 1983 Code (can. 217) with one small change:²⁰²

Can. 217 – Since Christ’s faithful are called by baptism to lead a life in harmony with the gospel teaching, they have the right to a Christian education, which genuinely teaches them to strive for the maturity of the human person and at the same time to know and live the mystery of salvation.

This formulation of the canon replaced in its entirety that proposed in the 1977 *Schema de munere docendi* which had elaborated a two-fold reason for the fundamental right to a Christian education, itself qualified as “inviolable.” First, the right arises from the dignity of the human person, and secondly, from baptism. In other words, the original *Schema* asserted both a natural and a supernatural basis for this fundamental right.²⁰³ The

²⁰⁰ See also *CCEO*, can. 629.

²⁰¹ See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Legis Ecclesiae Fundamentalibus cum relatione*, Rome, Typis polyglottis Vaticanis, 1969, p. 16: “Can. 24, §1 – Christifideles, quippe qui baptismo ad vitam doctrinae evangelicae congruentem ducendam destinantur, ius habet ad educationem christianam, qua ad maturitatem humanae personae prosequendam atque simul ad mysterium salutis cognoscendum et vivendum rite instruuntur.”

²⁰² The only change was from the word “destinantur” to “vocentur”: “Christifideles, quippe qui baptismo ad vitam doctrinae evangelicae congruentem ducendam vocentur, ius habent ad educationem christianam, qua ad maturitatem humanae personae prosequendam atque simul ad mysterium salutis cognoscendum et vivendum rite instruuntur.”

²⁰³ See *Communicationes*, 29 (1997), p. 111: “Can. 42 (novus) – Cum omnibus hominibus, ratione dignitatis personae, ius sit inviolabile ad educationem proprio fini respondentem propriaeque indoli

object of the right was the same in both texts, but the reference to the quality of the right as inviolable and the precision as to its dual origin did not survive the change. The 1971 Relatio accompanying the *LEF* proposed canon refers to *Gravissimum educationis*, no. 2 as its source,²⁰⁴ which speaks of the right of “Christians” to education, but refers only to the right originating in baptism. The final canon drawn from the *LEF* is much closer to the text of *Gravissimum educationis* than the proposed 1977 Canon.²⁰⁵

Canon 795, then, takes up and expands upon can. 217, providing a more complete definition of the nature and aims of specifically Catholic education, placed as it is under the title *De educatione catholica*. It states that Christian education in general leads to the maturity of the human person and also to the knowledge of salvation and right living. Moreover, “Catholic education” is not simply about “learning doctrine” but also about developing the full potential of the human being, which necessarily includes a religious dimension integrated to the intellectual, physical and moral being of the person. As was demonstrated earlier, this comprehensive vision of education was elaborated with increasing detail in Church documents in the twentieth century, beginning with *Divini illius Magistri*. Catholic schools, then, are to be imbued with a Christian spirit in all that they undertake. Religion in schools is not reduced to a course in the curriculum, but is to

consentaneam, christifideles, quippe qui per regenerationem ex aqua et Spiritu Sancto nova creatura effecti sint, ius habent ad educationem christianam, qua quidem ad maturitatem humanæ personæ prosequendam adducantur atque insimul in mysterio salutis cognoscendo et vivendo instruantur.” This text was rejected for a number of reasons. First, it was not clearly founded in theological principles but confused them with principles of natural law; secondly, it did not clearly state that all parents of whatever denomination have the right to found schools by principles of natural right; thirdly, it was not truly normative; and finally, it was too far from the wording of *GE*. See *ibid.*, pp. 142-143.

²⁰⁴ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Legis Ecclesiae Fundamentaliss, Textus emendatus cum relatione de ipso schemate deque emendationibus receptis*, Rome, Typis polyglottis Vaticanis, 1971, p. 85.

²⁰⁵ See *GE*, no. 2, p. 577.

be a reality lived by the entire school community and in all its activities. In other words, can. 795, while exhortatory in nature, provides the general orientation for any educational or school project.

1.4.2. The Nature of Marriage and Parental Rights over Education (can. 1055)

Having outlined the general nature of Christian and Catholic education, one can now turn very briefly to the source of parental rights over the education of their own children. This right flows from marriage itself, as is stated clearly in can. 1055, §1:

Can. 1055, §1 – The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing [*educationem*] of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.

It is beyond the scope of this work to examine in detail the complete development of this movement away from “primary” and “secondary” purposes of marriage to the concept of *totius vitæ consortium* which embraces both the *bonum coniugum* and the *prolis generatio et educatio*.²⁰⁶ Nevertheless, what is important to signal here is that parental responsibilities over education are rooted in the institution of marriage, first as a natural institution, and secondly, as an institution raised to the dignity of a sacrament between the baptised. The former source of rights focused on the generative principle of conjugal life that Pius XI highlighted in both *Casti connubii* and *Divini illius Magistri*; the latter focused on the formation of children to become active members of the Church. Education of children was never seen as a duty truly separate from procreation, but the

²⁰⁶ For a brief overview by a canonist, see L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, Collegeville, MN, The Liturgical Press, 1986. For a longer treatment see P. CONNOLLY, “The Nature of Marriage as Proposed in the Codex Iuris Canonici and in the Codex Canonum Ecclesiarum Orientalium,” JCD diss., Ottawa, Saint Paul University, 1995.

current canon follows the development that the two duties are clearly set in the context of the parents' partnership of life. The duty to educate, furthermore, forms part of the mission of the couple to participate in the sanctifying mission of the Church since can. 1055 must be read together with can. 835, §4: it is by their conjugal life lived in a Christian spirit and by seeing to the education of their children that they enjoy their special part in in the Church's sanctifying office. This paragraph did not appear in the 1977 *Schema de sacramentis*, but was inserted after the 1981 Plenaria.²⁰⁷ It was not, however, inserted upon the recommendation of the Plenaria, but *ex officio*.²⁰⁸ This is the face of the parental vocation in the Church and in the world: to raise up citizens who are mature and fully-formed to take a responsible part in human society, and to raise up committed Christians who can carry on the salvific work of Christ in the Church. The right to educate their children must be seen as rooted then in their sacramental life.

1.4.3. The Effects of Marriage and Parental Rights over Education (cann. 1136 and 793)

Having stated generally that procreation and education flow from the nature of marriage itself, the norms strive to make this responsibility more concrete. The newly formed (established on 9 May 1981 after the 1980 General Synod of Bishops meeting to discuss the family) Pontifical Council for the Family had recommended that a new

²⁰⁷ The *LEF* contained something similar, but its object was restricted to the aspect of "mutual sanctification" of the spouses: "Can. 72, §1 – Sacramento matrimonii coniuges christiani, mysterium unitatis et fecundi amoris Christum inter et Ecclesiam significantes et participantem, Spiritu Christi roborantur et veluti consecrantur ut se invicem in vita coniugali necnon in prolis susceptione et educatione ad mutuam sanctificationem adiuvent et ita inter se coniuncti glorificationem Dei persequantur." See *Schema LEF, Textus emendatus cum relatione*, p. 44. This *textus emendatus* differs very little from the *textus prior*.

²⁰⁸ See *Communicationes*, 16 (1984), p. 99.

section on the family be included in the revised Code.²⁰⁹ The idea was rejected by the Commission for two reasons. First, the subject matter was judged to be dealt with in various sections treating of parents, children and marriage, even if the word “family” was not used and, secondly, the term “family” was judged too legally imprecise. Furthermore, phrases like “domestic church,” and “the family is the first and principal school of education promoting ecclesial communion, the exercise of virtue and a sense of cooperation in society,”²¹⁰ even though drawn from the documents of the Second Vatican Council, were judged on the one hand to have no normative value, and on the other, to unduly restrict the parental office.²¹¹ Nevertheless, the *coetus* voted to accept the formulation virtually as it had been proposed by the 1977 *Schema de sacramentis*, omitting only a mention of necessary means:

Parents have the most serious duty and primary right to do all in their power to ensure the physical, social, cultural, moral and religious education of their children.²¹²

²⁰⁹ The full letter from the Council to the Code Commission with the proposed texts is reprinted in footnote 4 of the PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, *Acta et documenta Pontificiae Commissionis Codici iuris canonici recognoscendo: Congregatio Plenaria, diebus 20-29 octobris 1981 habita*, Vatican City, Typis polyglottis Vaticanis, 1991, pp. 480-481.

²¹⁰ Ibid., pp. 481-482: “Familia christiana est prima et præcipua schola educationis ad communionem ecclesialem ad exercitium virtutum et ad sensum cooperationis in societate fovendum.”

²¹¹ For the full discussion of these points by the *coetus*, see *ibid.*, pp. 482-485. The General Synod on the family produced in 1983 a Charter of the Rights of the Family, intended for the international community to help in framing legislation. It introduces nothing new regarding the question of parental rights. For a discussion of the Charter, see BAILLARGEON, “The Canonical Rights and Duties of Parents in the Education of Their Children,” pp. 272-280.

²¹² PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, *Acta et documenta Pontificiae Commissionis Codici iuris canonici recognoscendo*, p. 485: “Parentes officium gravissimum et ius primum habent proles educationem tum physicam et socialem et culturalem tum moralem et religiosam pro viribus curandi.” The 1977 *Schema* had included the phrase “mediisque ad hæc necessariis providendi” at the end, which was eventually thought superfluous (see *Communicationes*, 10 [1978], p. 105). Under its treatment of the sacrament of marriage, the *CCEO*, can. 783, §1, 1° imposes a duty on the pastor to instruct the faithful about the meaning of Christian marriage, the mutual obligations of the spouses, and the primary right and obligation of parents to look to the physical, religious, moral, social and cultural education of their offspring.

This text made its way unchanged into the promulgated can. 1136, which was not a significant departure from the tenor of the 1917 Code's can. 1113.²¹³ Like the 1917 Code, the new norms reinforced the gravity of the parental obligation by attaching a censure when parents hand their children over to be educated in a non-Catholic religion, although the censure or penalty is not specified.²¹⁴

The underlying foundation of the right to education is not explicitly stated in can. 1136 (the effects of marriage), but can. 226, §2 (under the title regarding the obligations and rights of the lay faithful in general) restates the generative principle:

Can. 226, §2 – Because they gave life to their children, parents have the most serious obligation and the right to educate them. It is therefore primarily the responsibility of Christian parents to ensure the Christian education of their children in accordance with the teaching of the Church.²¹⁵

This wording draws upon the *CIC/1917*, can. 1372, §2:

Not only parents according to the norm of Canon 1113, but also all those who take their place, have the right and grave duty of taking care of the Christian education of children.

The former Code did not spell out the origin of this right, but restricted itself to stating the weightiness of the duty. Moreover, whereas the earlier Code speaks of an *officium*, the 1983 Code speaks of *obligatio*. The new norm makes it clear that the right falls primarily and above all (*imprimis*) on parents to hand on a Christian education in line

²¹³ “Parents are bound by the most grave obligation to take care as far as they are able for the education of children, both religious and moral, as well as physical and civil, and of providing them with temporal goods.” See also *CIC/1917*, can. 1372, §§1, 2.

²¹⁴ “Can. 1366 – Parents, and those taking the place of parents, who hand over their children to be baptised or brought up in a non-Catholic religion, are to be punished with a censure or other just penalty.” The equivalent norm in *CIC/1917* is can. 2319, §1, nn. 2, 4. *CCEO*, can. 1439 contains a similar provision.

²¹⁵ *CCEO*, can. 627, §1 is similar in its intent, but treats it under its chapter of Catholic education. It omits any reference to the generative principle: “Care for the education of children belongs primarily to their parents or to those who take their place. Therefore it is for them to educate their children in the context of a Christian family illumined by faith and animated by mutual love, especially in piety toward God and love of neighbour.”

with Church doctrine. This is an indirect appeal to the principle of subsidiarity; Church and state are to exercise their rights over education in service to parents and the family.

In the new norms, then, there is a statement of the parental right and duty under both the title on the sacrament of marriage (Book IV) and under the title on general rights and duties of the Christian faithful (Book II). A third statement of this right and duty is made under the title regarding Catholic education in Book III, the teaching office of the Church:

Can. 793, §1 – Parents, and those who take their place, have both the obligation and the right to educate their children. Catholic parents have also the duty and the right to choose those means and institutes which, in their local circumstances, can best promote the Catholic education of their children.²¹⁶

This is probably the most significant change from the 1917 Code regarding parental rights and schooling. As it was demonstrated, state control over education spread throughout the nineteenth century. Great danger was seen in sending Catholic children to “mixed,” “neutral” and “acatholic” schools. It was a presumption that Catholic children would not attend them, and in fact, severe restrictions were placed on a parent’s choice of school; the ultimate judgment of the opportuneness of sending a child there was left with the local ordinary, who in turn could only act in accord with norms issued by the Apostolic See.²¹⁷ Parents had virtually no role in this decision. On the contrary, the new

²¹⁶ The *CCEO*, can. 627, §2 similarly emphasises the parental right to choose the means, and it adds the helpful clarification that this right arises insofar as parents cannot alone supply for the integral education required: “To the extent that it is beyond their own resources to provide for the overall education of their children, it is also up to them to entrust others with a share of their educational task and to choose those means of education that are necessary or useful.” Interestingly, *CIC/1983*, can. 793, §1 speaks of two different categories of parents: “parents” simply understood, and “catholic parents.” The distinction, however, should not be understood as setting up two separate educational processes; there is only one human educational process, and that process includes the exercise of one’s religious beliefs, which are an integral part of all complete personal formation (see *Exegetical Comm*, vol. 3, pp. 196-197).

²¹⁷ *CIC/1917*, can. 1374.

norm leaves the judgment up to parents themselves in keeping with their primary right to see to the education of their children (can. 226, §2). The original 1977 *Schema de docendi* had originally added the proviso that parents would choose, taking into account the legislation issued by the Conference of Bishops (*attentis normis ab Episcoporum conferentia statutis*), but this was eliminated in March 1980 by unanimous consent, with virtually no discussion by the *coetus*.²¹⁸ *Gravissimum educationis* links the right to choose schools to parents' primary and inalienable *officium*.²¹⁹ John Paul II elaborated on this point in *Familiaris consortio*:

The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others.²²⁰

Pius XI had already declared parental rights to be inalienable as held directly from God, but his emphasis was rather to illustrate that parental rights stand as primary to state control over education: “inviolable on the part of any power on earth.”²²¹ The context of the new norm, however, extends that discourse to include also the Church's own rights over education. The parents, while they have not the means to ensure all that is necessary for their children's education, do not stand in a relation of dependency on the Church or the state in any fundamental sense; their rights always are to be respected in all the practical means by which they cooperate with the Church and state to fulfill their duty. In

²¹⁸ See *Communicationes*, 29 (1997), p. 112.

²¹⁹ See *GE*, no. 6: “Parents, who have a primary and inalienable duty and right in regard to the education of their children, should enjoy the fullest liberty in their choice of school.” The Latin original reads, “Parentes quibus primum et inalienabile officium et ius est filio educandi, in scholis eligendis vera libertate gaudeant oportet” (in *AAS*, 58 [1966], p. 733).

²²⁰ *FC*, no. 36, p. 846.

²²¹ *Divini illius Magistri*, no. 32, p. 357.

other words, the Church's rights over education cannot be used so as to effectively do away with parental rights (they are inviolable and inalienable), although the ecclesiastical authority is to provide direction and assistance to the exercise of parental rights. This norm is in keeping with the new emphasis on the vocation of parents and their cooperation in the mission of the Church as a whole. It is still illicit and punishable by censure or other just penalty for Catholic parents to hand their children over to receive a non-Catholic education (can. 1366); although presumably the condemned intention is not simply to avail oneself of the good quality of education in such an institute, but deliberately to undermine the child's Catholic upbringing. Moreover, can. 798 reinforces this obligation:

Can. 798 – Parents are to send their children to those schools which will provide for their Catholic education. If they cannot do this, they are bound to ensure the proper Catholic education of their children outside the school.²²²

The norm does not say that parents are to send their children to Catholic schools, but to those schools providing a Catholic education, which leaves the door open to schools which do not enjoy explicit ecclesiastical approval, or which were not founded by ecclesiastical authority, but which either seek to offer a curriculum along Catholic guidelines even if sponsored by private entities, or which are not Catholic in name but which do, in fact, provide a Catholic education by the active presence of Catholic parents and students.²²³ The 1980 meeting of the *coetus studiorum* “*De munere docendi*”

²²² The *CCEO*, can. 633, §2 says more succinctly, “Parents should send their children to Catholic schools, all other things being equal.” The preceding paragraph of the same canon reserves to the eparchial bishop the competence to judge if a particular school fulfills the requirements of Christian education, and provides, moreover, that he can, *gravi de causa*, forbid Christian parents for sending their children to a particular school.

²²³ See *Exegetical Comm*, vol. 3, p. 210.

eliminated wording which enjoined observance of norms established by the competent ecclesiastical authority. Obliging parents to send their children only to those schools recognised by the hierarchy was considered “unrealistic” and “inopportune,” since, first, there was an insufficient number of such schools, and, secondly, because it imposed financial hardship.²²⁴ The general observations (*animadversiones generales*) sent to the *coetus* had already remarked that requiring a list of schools recognised by the hierarchy was clearly contradictory to the freedom of the parents to choose their schools. Keeping in mind the subsidiary role of Church and state, several submissions had requested that the proposed norm be reformulated to reflect the fundamental right of parents to choose a school, others noting that the original formulation was impractical and would lead only to conflict.²²⁵ This does not mean, however, that the norm is reduced to a simple recommendation to send children to a suitable school; *concredant* involves a true duty, reinforced again by the penalty for the delict mentioned in can. 1366.²²⁶

An echo of the long struggle against state monopoly over education is heard in can. 793, §2:

Can. 793, §2 – Parents have moreover the right to avail themselves of that assistance from civil society which they need to provide a Catholic education for their children.²²⁷

²²⁴ See *Communicationes*, 29 (1997), pp. 116-117.

²²⁵ See *ibid.*, pp. 149-150. Furthermore, a proposed norm (*De muneri docendi*, can. 50, §3) to have the Conference of Bishops or the local bishop define under what circumstances a parent can send their child to a non-Catholic school was said to represent “una eccessiva limitazione del diritto dei genitori di scegliere liberamente la scuola. La L.G. [*Lumen gentium*] art. 8, 3 non ha proibito la frequenza a scuole non cattoliche...” (*ibid.*, p. 151).

²²⁶ See *Exegetical Comm*, vol. 3, p. 209.

²²⁷ The CCEO makes the same point in can. 627, §3.

The *coetus* discussing the norm as originally proposed had touched on a number of points: the pluralistic notion of the school, the UN Declaration on Human Rights, and the principle of distributive justice. It was decided finally to keep the text relatively restrained and focused on the rights of the parents since the canons are concerned specifically with the Church and not with civil society.²²⁸

In all references to the relations between Church and state, the general observations introducing the chapter on schools had already noted that the discourse must be very nuanced, moving away from language referring to “perfect society” and grounding the norms rather on the demands of freedom of religion.²²⁹ There is here, then, the recognition of the need to find a new theoretical base for rights regarding schools. The effect of these remarks is well illustrated in the new norm regarding the freedom of parents to choose a school and to receive state subsidies:

Can. 797 – Parents must have a real freedom in their choice of schools. For this reason Christ’s faithful must be watchful that the civil society acknowledges this freedom of parents and, in accordance with the requirements of distributive justice, even provides them with assistance.²³⁰

The norm then is not directed at the state as such, but at parents and all the faithful, and it grounds the right not in the Church’s claim to be a perfect society, but in the principles of natural justice. This right is rooted in the Declaration of Vatican II on religious liberty.²³¹

²²⁸ See *Communicationes*, 29 (1997), pp. 112-113.

²²⁹ See *ibid.*, pp. 147-148.

²³⁰ See also can. 799, and *CCEO*, can. 627, §3.

²³¹ See *DH*, no. 5, English translation in *FLANNERY1*, p. 556.

1.4.4. The Right of Association and Parental Rights over Education (can. 796)

The general rights to freedom of association extend also to rights exercised as parents over the education of their children. A complete treatment of the Church's law regarding the right of association is beyond the scope of this work,²³² but it is significant to note that one of the few instances where this general right is expressed in a concrete canonical norm is within the title regarding schools, in can. 796:

Can. 796, §1 – Among the means of advancing education, Christ's faithful are to consider schools as of great importance, since they are the principal means of helping parents to fulfil their role in education.

§2 – There must be the closest cooperation between parents and the teachers to whom they entrust their children to be educated. In fulfilling their task, teachers are to collaborate closely with the parents and willingly listen to them; associations and meetings of parents are to be set up and held in high esteem.²³³

The *coetus* decided to retain this norm despite the fact that it was not, strictly speaking, dealing with Catholic education as such, but rather with “pedagogical collaboration.”²³⁴ The *CCEO* does not contain a provision similar to the second paragraph regarding parent associations, although it states that teachers are to collaborate with parents and other schools,²³⁵ and parents are enjoined to support Church initiatives in promoting education.²³⁶ The general tenor of the canons in both the *CCEO* and the *CIC* is clear: parents are not passive actors in the education of their children, and their involvement does not stop at the school's threshold. Because freedom of association is a fundamental

²³² For a full treatment of the norms on associations of Christ's faithful, see L. MARTÍNEZ SISTACH, *Associations of Christ's Faithful*, Montreal, Wilson & Lafleur Ltée, 2008.

²³³ This specific norm is a particular application of the general right to association and to hold meetings in can. 215.

²³⁴ See *Communicationes*, 29 (1997), pp. 115-116.

²³⁵ See *CCEO*, can. 639.

²³⁶ See *CCEO*, can. 630, §2.

right, it is inalienable. Consequently parents, while they entrust their children to a school, do not thereby renounce their duty over education; teachers and staff do not replace the primary, inviolable right of parents over their child's upbringing.²³⁷ But, as parents do not themselves normally have available all the resources necessary to complete the entire project of education, schools exist as a means placed at their service.²³⁸ In order, then, to pursue their right and duty in relation to a school education, parental associations are to be fostered and respected. Furthermore, already in 1966, the bishops of the United States had noted that there is more at stake in this collaborative role than just the negative protection of parental rights:

The participation of the laity in the administration of schools is to be encouraged. This would implement the conciliar directives on the cooperation and involvement of the laity in the works of the Church.²³⁹

This right of association is linked to the exercise of the mission of parents in the Church. It is not exclusively directed at civil society, but at ecclesiastical society as well. Pius XI, as mentioned above, had already emphasised that parental rights over education involve a mission that comes directly from God. John Paul II elaborated later in *Familiaris consortio* that this mission to educate “calls upon [parents] to share in the very authority and love of God the Father and Christ the Shepherd, and in the motherly love of the

²³⁷ This was the reason why an initial clause in the proposed canon stating that teachers *locum teneant parentum* was eliminated. See *Communicationes*, 29 (1997), p. 149.

²³⁸ “For parents by themselves are not capable of satisfying every requirement of the whole process of raising children, especially in matters concerning their schooling and the entire gamut of socialisation. Subsidiarity thus complements paternal and maternal love, and confirms its fundamental nature, inasmuch as all other participants in the process of education are only able to carry out their responsibilities in the name of the parents, with their consent and, to a certain degree, with their authorisation” (JOHN PAUL II, Letter to Families, no. 16, p. 650).

²³⁹ NATIONAL CONFERENCE OF CATHOLIC BISHOPS (USA), *A Correlation of the Suggestions of the Bishops of the United States for the Revision of the Code of Canon Law*, Washington, DC, National Conference of Catholic Bishops, 1966, p. 83.

Church....”²⁴⁰ This harkens back to the double source of the Church’s own rights over education founded on Mt 28:19-20 and on the Church’s spiritual motherhood. Through the concrete means of school associations, parents share in the Church’s own mission and respond to their proper vocation. It seems from the canon itself that schools are required (*instaurentur*) to foster such parental associations, which are not just optional, but integral elements of the school community. It means, too, that parents are obliged to support them.²⁴¹ Such associations are favoured as a means by which schools cooperate in the primary duty of parents. This form of participation reflects the notion that schools harbour a “sacred trust” conveyed to them by parents and families.²⁴² Interestingly, can. 796 does not, on the face of its wording, apply only to Catholic schools as defined by the Code. The right to form associations and the duty of parents to collaborate with school administration and teachers extends beyond the ambit of the Catholic school.

1.5. The Rights and Duties of Ecclesiastical Authority over Education (can. 794)

According to the new order of treatment, parents–state–Church, one turns finally to the ambit of ecclesiastical responsibility over education, and schools in particular. The principal norm is contained in can. 794:

Can. 794, §1 – The Church has in a special way the duty and the right of educating, for it has a divine mission of helping all to arrive at the fullness of Christian life.

²⁴⁰ *FC*, no. 38, p. 847. See also JOHN PAUL II, post-synodal apostolic exhortation *Christifideles laici*, 30 December 1988, no. 62, in *AAS*, 81 (1989), pp. 393-521, English translation *On the Vocation and the Mission of the Lay Faithful in the Church and in the World*, Rome, Libreria editrice Vaticana, 1988, pp. 185-186.

²⁴¹ See *FC*, no. 40, p. 849.

²⁴² The term was used by John Paul II: “The task of the teacher and the school is indeed a sacred trust conveyed to them by parents and families. As Catholic educators you have accepted a special responsibility given by parents” (JOHN PAUL II, address to Canadian Catholic educators “Support Asked for Catholic Schools,” 12 September 1984, in *Origins*, 14 [1984-1985], p. 225).

§2 – Pastors of souls have the duty of making all possible arrangements so that all the faithful may avail themselves of a Catholic education.

These general provisions are then elaborated in subsequent canons regarding the right to establish and govern schools (cann. 800, 802 and 803), the authority over Catholic instruction, including authority to supervise religion teachers (can. 804 and 805), and the right to inspect and visit Catholic schools (can. 806). The Code of Canons of the Eastern Churches also makes this same general claim, basing the Church's responsibility over education on regeneration through baptism (i.e. divine motherhood). The *CCEO* makes the specific point that the Church's rights are not exercised alone, but with the right of parents:

Can. 628, §1 – The Church, since it has generated new creatures through baptism, is to care for their Catholic education together with parents.

In the 1917 Code there was no equivalent canon to can. 794 which states the reasons for the Church's claims over education. In drafting this new canon, it was questioned from the beginning what exactly was meant by the term "Church" and whether its meaning here is restrained to the hierarchy.²⁴³ It would seem that it refers more generally to the entire People of God, since all members of the Church share in its divine mission.

The Church claims for itself a duty and a right to educate, which it attaches to its divine mission. Gone is the wording of Pius XI in *Divini illius Magistri* that "first of all education belongs preeminently to the Church" (no. 15), in favour of the more restrained "in a special way" (*singulari ratione*). This wording is taken from *Gravissimum*

²⁴³ See *Communicationes*, 29 (1997), p. 145.

educationis, no. 3 and signals a more subtle relation with parental rights and duties; it is also more easily reconcilable with the principle of subsidiarity.

Canon 794 only mentions the supernatural origin of the Church's claim to rights over education, and omits the first claim of *Gravissimum educationis* based on the notion of the Church as also a human society (no. 3). However, the Church's claim to rights over education is not restricted to simply religious education, but encompasses education in general, which certainly implies a natural basis to the Church's rights even if it is not explicitly mentioned in the canon. This is reinforced in can. 800, which is a slight reworking, without significant change, of the 1917 Code's can. 1375.²⁴⁴

Can. 800, §1 – The Church has the right to establish and to direct schools for any field of study or of any kind and grade.²⁴⁵

Certain Congregations, in their general observations, referred to Pius XI's *Divini illius Magistri*, stating that it was not fitting for the Church to found schools of any kind; this belongs to parents and is not within the ambit of the Church's Magisterium.²⁴⁶ This remark, however, was not picked up by the *coetus* itself.

The second paragraph of can. 794 is new and constitutes a significant departure from the provisions of the 1917 Code.²⁴⁷ Putting the two canons side by side helps to highlight the development:

²⁴⁴ “Can. 1375 – The Church has the right to found schools of any type, not only at the elementary level, but at intermediate and superior levels as well.”

²⁴⁵ “Can. 800, §1 – Ecclesiae ius est scholas cuiusvis disciplinae, generis et gradus condendi ac moderandi. See also *CCEO*, can. 631, §2.”

²⁴⁶ “Non probatur ius Ecclesiae condendi scholas cuiusvis disciplinae: pertinet ad parentes et non Ecclesiae Magisterium” (*Communicationes*, 29 [1997], p. 152; see also p. 146 for a similar remark). Pius XI had mentioned that the state could, for example, reserve to itself the founding and direction of schools that prepare for particular civic duties and for military service. See *Divini illius Magistri*, no. 49, p. 360.

²⁴⁷ See also *CCEO*, can. 628, §2.

<i>CIC/1917</i>	<i>CIC/1983</i>
Can. 1373, §2 – Youths who attend middle and advanced schools should be afforded a fuller religious doctrine, and local Ordinaries shall take care that this is provided by priests outstanding for their doctrinal zeal.	Can. 794, §2 – Pastors of souls have the duty of making all possible arrangements so that all the faithful may avail themselves of a Catholic education.

Whereas formerly it was mandated that priests were to teach religion classes in secondary schools, now the obligation is much broader; it binds pastors of souls and not the local ordinary, and refrains from mandating direct involvement on the school's teaching staff. Nevertheless, it implies that the parish is to be an integral part of the educating community. It is no longer practicable in many countries that priests provide religious instruction in middle and high schools, and this is necessarily filled in many parts of the world by lay teachers or catechists. Can. 804, §2 reflects this reality, while leaving the primary duty with the local ordinary:

Can. 804, §2 – The local Ordinary is to be careful that those who are appointed as teachers of religion in schools, even non-Catholic ones, are outstanding in true doctrine, in the witness of their Christian life, and in their teaching ability.²⁴⁸

In any event, as can. 804, §1 makes clear, Catholic religious instruction is subject to the authority of the Church; it is for the Conferences of Bishops to issue general norms, and for the diocesan bishop to regulate and watch over it.²⁴⁹ These norms apply whether the school is a Catholic school or not.

²⁴⁸ See also *CCEO*, cann. 639 and 636, §2 which together impose a similar duty, but restrict the ambit of the eparchial bishop to teachers of *Catholic* religion in *Catholic schools*, although vigilance over catechetical instruction is extended to all schools, even non-Catholic ones (can. 636, §1).

²⁴⁹ “Can. 804, §1 – The formation and education in the Catholic religion provided in any school, and through various means of social communication, is subject to the authority of the Church. It is for the Bishops’ Conference to issue general norms concerning this field of activity and for the diocesan Bishop to regulate and watch over it.”

The intervention of ecclesiastical authority is much stronger for what are called “Catholic” schools.²⁵⁰ While in 1977, the Sacred Congregation for Catholic Education formulated a general definition for education and for Catholic education in particular, can. 803, §1 gives a canonical definition of the Catholic school:

Can. 803, §1 – A Catholic school is understood to be one which is under the control of the competent ecclesiastical authority or of a public ecclesiastical juridical person, or one which in a written document is acknowledged as Catholic by the ecclesiastical authority.²⁵¹

The key element is control, not ownership or practical administration;²⁵² presumably if there is a question of a written acknowledgment, the ecclesiastical authority would want to spell out the nature of its control. A public ecclesiastical juridical person is mentioned since, by virtue of can. 313,²⁵³ its link with ecclesiastical authority is clear; it is constituted either by the Holy See, the Conference of Bishops, or the diocesan bishop, and commissioned to act in the name of the Church for its approved ends. Public associations of the faithful are also public juridical persons, and it is the association itself

²⁵⁰ It should first be noted that the diocesan bishop has a duty to found a Christian school where these are lacking in his diocese. In such circumstances, it is his duty to look after the entire Christian community and not just the Catholic community (can. 802, §1). There is need for a truly ecumenical spirit in these circumstances (see *GE*, no. 2). The same is true for specialised schools that provide a technical or professional formation, or which address students with special needs (can. 802, §2). The bishop’s solicitude extends beyond the bounds of Church membership (can. 383, §4), and even beyond the merely spiritual good of the citizens.

²⁵¹ The *CCEO* has similar provisions in can. 632, but requires a stronger connection with hierarchical authority, without mention of public juridical persons or the requirement that recognition be in writing: “A school is not juridically considered ‘Catholic’ unless it was established as such by the eparchial bishop or a higher ecclesiastical authority or has been recognised as such by them.”

²⁵² See F.G. MORRISEY, “What Makes an Institution ‘Catholic?’” in *The Jurist*, 47 (1987), p. 540. He argues that “official recognition” is the most significant element in determining if an institution is Catholic.

²⁵³ “Can. 313 – A public association or a confederation of public associations is constituted a juridical person by the very decree by which it is established by the authority competent in accordance with can. 312. Moreover, in so far as is required, it thereby receives its mission to pursue, in the name of the Church, those ends which it proposes for itself.”

which exercises the mission through its members.²⁵⁴ Even religious institutes dedicated to the mission of education are required to obtain consent of the diocesan bishop when founding a school.²⁵⁵

Canon 803, §1 defines the Catholic school, drawing on the Sacred Congregation of Education's Catholic Schools:

Moreover, lay involvement in Catholic schools is an invitation "to cooperate more closely with the apostolate of the bishops," both in the field of religious instruction and in a more general religious education which they endeavour to promote by assisting the pupils to a personal integration of culture and faith and of faith and living. The Catholic school in this sense, therefore, receives from the bishops in some manner the "mandate" of an apostolic undertaking.²⁵⁶

In fact, during the revision process leading to the 1983 Code, there were two competing views of the legal nature of a Catholic school, one identified by its internal character, the other identified by its link with ecclesiastical authority.²⁵⁷ The *coetus* sought a definition that would cover any kind of school foundation, whether established by a bishop, a religious institute or a private person. Canon 803, §1 reflects that view which ties the definition of a Catholic school to the link with ecclesiastical authority. The alternative view was given canonical expression, after "long and lively discussion," in can. 804, §2 (see above) regarding control over teachers who, it was noted, are largely responsible for the Catholic spirit of a school.²⁵⁸ The latter is reflected also in can. 803,

²⁵⁴ See can. 313.

²⁵⁵ "Can. 801 – Religious institutes which have education as their mission are to keep faithfully to this mission and earnestly strive to devote themselves to Catholic education, providing this also through their own schools which, with the consent of the diocesan Bishop, they have established."

²⁵⁶ SACRED CONGREGATION FOR CATHOLIC EDUCATION, Catholic Schools, no. 71, p. 623.

²⁵⁷ See R. CASTILLO LARA, "Le Livre III du CIC de 1983. Histoire et principes," in *L'Année canonique*, 31 (1988), pp. 23-25. See also *Communicationes*, 29 (1997), p. 250, and *Communicationes*, 20 (1988), pp. 171-172.

²⁵⁸ *Communicationes*, 29 (1997), pp. 249-250.

§2 which stresses that all education in a Catholic school be based on principles of Catholic doctrine, and that its teachers be outstanding in that doctrine and probity of life.²⁵⁹

The use of the name “Catholic” in a school’s title is likewise controlled by hierarchical authority:²⁶⁰

Can. 803, §3 – No school, even if it is in fact Catholic, may bear the title “Catholic school” except by the consent of the competent ecclesiastical authority.²⁶¹

It is not required that this consent be in writing. Canon 803, §3 is thus a particular application of the general norm contained in can. 216:

Can. 216 – Since they share the Church’s mission, all Christ’s faithful have the right to promote and support apostolic action, by their own initiative, undertaken according to their state and condition. No initiative, however, can lay claim to the title “Catholic” without the consent of the competent ecclesiastical authority.

Since, as the Sacred Congregation for Catholic Education stated, the school is a true apostolic work in which lay persons cooperate, it falls under the general provision of can. 216; can. 803, §3 simply makes that clear. The text of can. 803, §3 was added while the *cætus* was grappling with the criteria for a Catholic school, looking for something that would provide “a minimum of juridical certainty.”²⁶² The *cætus*, in this discussion about norms regarding the use of the word “Catholic” in the school’s title, was also concerned not to unduly restrict the bishop’s right to visit all schools imparting a Catholic education. A concern was expressed that the proposed norm restricting the use of the name

²⁵⁹ “Can. 803, §2 – Formation and education in a Catholic school must be based on the principles of Catholic doctrine, and the teachers must be outstanding in true doctrine and uprightness of life.”

²⁶⁰ See MORRISEY, “What Makes an Institution ‘Catholic?’” p. 540.

²⁶¹ “Can. 803, §3 – No school, even if it is in fact Catholic, may bear the title ‘Catholic school’ except by the consent of the competent ecclesiastical authority.” See also *CCEO*, can. 632.

²⁶² See *Communicationes*, 29 (1997), p. 249.

“Catholic” might somehow also restrict the bishop’s rights of vigilance over and visitation of schools.²⁶³ In this regard, can. 806, §1 safeguards the diocesan bishop’s rights of vigilance and visitation: it extends it to all Catholic schools in his territory, and it grounds the diocesan bishop’s prerogative to issue directives regarding the general regulation of Catholic schools whether or not they bear the name “Catholic”, extending this prerogative even to schools founded or run by a religious institute.²⁶⁴

When it concerns Catholic schools, whether they are formally bearing the title “Catholic” or not, and whether run by the diocese, religious or lay persons, the bishop’s role is much more in evidence. The 1973 Directory for Bishops reaffirmed that the school apostolate is an integral part of the diocesan organisation for which, as with all forms of the apostolate, the diocesan bishop has a role to collaborate, coordinate and encourage in his diocese.²⁶⁵ Similarly, the 2004 Directory for Bishops reaffirms the bishop’s responsibility over religious formation in all schools, whether canonically established as Catholic schools or not, while respecting the initiatives of lay persons:

On the other hand, the Bishop should hold in high regard educational centres promoted by the faithful themselves, especially by Catholic parents, respecting their legitimate autonomy while at the same time ensuring that the Catholic identity of the formation programme is faithfully maintained, perhaps by means of

²⁶³ Ibid.

²⁶⁴ “Can. 806, §1 – The diocesan Bishop has the right to watch over and inspect the Catholic schools situated in his territory, even those established or directed by members of religious institutes. He has also the right to issue directives concerning the general regulation of Catholic schools; these directives apply also to schools conducted by members of a religious institute, although they retain their autonomy in the internal management of their schools.” See also *CCEO*, can. 638, §§1, 2.

²⁶⁵ See SACRED CONGREGATION FOR BISHOPS, *Directory for the Pastoral Ministry of Bishops Ecclesiae imago*, 22 February 1973, Rome, Typis polyglottis Vaticanis, 1973, no. 66, pp. 37-38. Cf. *CD*, no. 17, English translation in *FLANNERY1*, p. 294. See also can. 394, §1 and *Apostolorum successores*, no. 133, pp. 147-148.

agreements with Church institutions able to guarantee this Catholic identity and to furnish pastoral assistance to the educational community.²⁶⁶

The Directory recognises that the running of any school is a collaborative effort between parents, the hierarchy and ecclesiastical institutions. It is a complex task that requires the contribution of many.

Conclusion

By following the legal discourse from the mid-nineteenth century through the drafting of the two Codes, a clear line of development appears: from a vigorous assertion of the Church's rights over education in the face of a growing tide of state monopoly over education, to an unequivocal statement of the priority, inviolability and inalienability of parental rights and duties. Parents' rights and duties were at first subordinated in the drive to reassert Church rights against the state. This subordination was justified theoretically by appealing to the theory of the perfect state. In that historical context, parental rights were viewed largely as arising from the natural, generative principle of marriage. Reflection on the supernatural vocation of parents and a consideration of their rights and duties over education as something flowing from the sacrament of marriage were not, in the circumstances, further developed.

The Second World War renewed interest around the world to define, safeguard and promote human rights. At the same time, the Church developed a new, more theological framework for understanding the exercise of the fundamental rights of the baptised, the framework of *communio*. Secular rights theory and this theological development worked towards a richer understanding of the vocation and mission of all

²⁶⁶ *Apostolorum successores*, no. 132, p. 147.

the baptised, and helped elaborate a fresh understanding of the relation between hierarchy and the People of God. The descriptive value of these developments was translated into performative value through the formulation of new legal norms promoting, among other rights, the rights of parents over the education of their children. In the treatment of these rights, the order Church–family–state was altered to family–Church–state. A new emphasis was given to the supernatural origin of parental rights in the sacrament of marriage and to parents’ particular vocation and mission. Consequently, it was affirmed that their rights over education flow from their particular participation in the sanctifying office of the Church. As a result, Church and state rights are at the service of parents’ primary rights and duties. The hierarchy retains its prerogatives to establish norms regarding the imparting of a Christian and Catholic education, especially in Catholic schools, since these are joined to the Church’s teaching office and divine motherhood. Nevertheless, the promotion and vigilance over a school’s Catholic identity is the responsibility of the entire educating community. This creates much greater scope for parental initiatives in founding their own schools. Far from being merely passive elements in the totality of the Church’s educational programme, parents are truly actors who share a responsibility for the success of that programme, and who have corresponding rights and duties to initiate and to participate in apostolic works so as to fulfill their supernatural vocation and their divine mission within the Church.

Having reformulated its understanding of parental rights over the education of their children, it remained necessary to encourage parents to exercise their role as primary educators. Here, however, circumstances in North America have made this difficult despite certain favourable developments. The complexity of directing and running

schools in the current North American context has increased dramatically since the Second World War. The Church itself has been hard pressed in recent times to meet these complexities, which arise from social and political as well as ecclesiastical developments. If the theoretical basis for the primacy and inviolability of parental rights over the education of their children has been clarified within the Church, demands on schools by civil governments, including Catholic schools, have served in many cases to diminish the practical exercise of these rights within existing educational structures. It is to the current complexities of the educational environment in North America that consideration is now given.

CHAPTER 2

2 THE CURRENT SOCIAL AND ECCLESIAL CONTEXT OF CATHOLIC SCHOOLING IN NORTH AMERICA

Having established that parents enjoy a primary, inalienable right within the Church to educate their children, one has to appreciate the current social and ecclesial context within which these rights are exercised. The decision of parents to found a school for the Catholic education of their children must be understood in the larger context of schooling in North America, and particularly, in the context of current pressures upon already established Catholic schools. The objective in this chapter is not to provide a complete sociological description of the context, but rather to paint a picture, in very broad strokes, of the current social and ecclesial context of Catholic schooling in North America, with particular emphasis on the situation in Canada. Six areas will be surveyed, focusing on the rising costs of education, secularisation, state control of curriculum, the demographic developments of religious institutes dedicated to the education of youth, the growth of the home-schooling movement, and some current initiatives by parents to found schools.

2.1 Financial Constraints in the Catholic Schooling Systems

Among the most challenging aspects of Catholic schooling today is balancing financing and affordability.¹ In certain provinces in Canada this question is less acute

¹ Among other factors causing “stress” on Catholic schools today, the following have been cited by American authors: diminishing numbers of priests and religious and their new apostolic challenges, changing societal values, changes in the family structure, diminished discrimination against Catholics generally, and increased acceptance by Catholics of cultural pluralism and ecumenical cooperation. See W. BYRON, “Catholic Education in a Pluralistic Society,” in *Origins*, 19 (1989-1990), p. 671. See also, G.M.

than in the United States, as several provinces have fully funded public Catholic school systems (Alberta, Saskatchewan and Ontario), while some provincial governments provide direct subsidies to private schools, including Catholic diocesan and Catholic independent schools (British Columbia, Alberta, Saskatchewan, Manitoba and Quebec). In the United States there is no direct public funding for Catholic or for any faith-based schools,² and at least one author has remarked that, “[i]n reality, it should be kept in mind that Catholic schools [in the United States] are not as much a system as a loosely coupled collection of independent schools.”³

2.1.1 The Rising Costs of Operating Diocesan Schools in the United States and the Challenge of Funding

For any private school, tuition cannot be the sole means of financial support. Without attempting to be exhaustive, one can quickly point to several factors causing the increased financial burden schools now must face: the dwindling numbers of consecrated persons teaching full-time and the consequent increase in the number of paid lay teachers, the rise in salary and benefits expectations with the advent of collective bargaining, the costs associated with fulfilling government regulations on everything from public health to building safety and the protection of children, the financial investment in maintaining

CATTARO and B.S. COOPER, “Developments in Catholic Schools in the USA: Politics, Policy, and Prophecy,” in G. GRACE and J. O’KEEFE (eds.), *International Handbook of Catholic Education: Challenges for School Systems in the 21st Century*, vol. 2, Dordrecht, Springer, 2007, pp. 64-65.

² For the sake of consistency I will use the term “confessional” for schools which are Christian in nature, and “faith-based” for religious schools in general, whether Christian, Jewish, Muslim or some other faith. In the United States the general term “sectarian” is frequently used for “faith-based,” and in Canada the terms “confessional” and “denominational” are both used to describe Christian schools, depending on the province.

³ CATTARO and COOPER, “Developments in Catholic Schools in the USA,” p. 60.

and adapting aging buildings, funding structures for parental involvement, and providing competitive educational resources.

In the United States an additional financial challenge has been keeping urban and inner-city schools open. The development of suburban areas in the 1950s and the flight of urban populations, including Catholic families, to these new areas has left the local Church with school buildings in neighbourhoods that have been radically transformed since the days when immigrant populations nestled in the urban centres. The strain to provide new buildings in the suburbs while subsidising existing urban and inner-city schools serving those who could not afford to move out to the new housing developments has proved to be a daunting task for practically every urban diocese in the United States. A number of creative solutions have been found, but the challenges remain. By 2011, 43 percent of all Catholic schools in the United States were in urban and inner-city areas, while 35.9 percent were in suburbs, the remainder in rural areas.⁴ Furthermore, of the 1,775 Catholic schools that closed or were consolidated between 2000 and 2011 (21.5 percent), 634 came from the largest twelve urban dioceses, showing a loss of 23.2 percent of the total number of elementary schools since 2003.⁵ Catholic elementary school enrolment in the same urban dioceses has declined by 35.4 percent, as compared to 22.7 percent in the rest of the country.⁶

Another challenge posed by changing demographics is the increasingly ethnic mix of Catholic urban schools in the United States. From 10.8 percent in 1970, the percentage

⁴ See D. McDONALD and M.M. SCHULTZ, *United States Catholic Elementary and Secondary Schools 2010-2011: The Annual Statistical Report on Schools, Enrollment and Staffing*, Arlington, VA, National Catholic Educational Association, 2011 (=U.S. *Annual Statistical Report on Schools 2010-2011*), p. 9.

⁵ See *ibid.*, p. 16.

⁶ See *ibid.*, pp. 16-17.

of visible minorities in Catholic schools reached 30.3 percent in 2011, with Hispanics comprising 13.1 percent of that portion.⁷ Moreover, the number of non-Catholics is also increasing, from 2.7 percent in 1970 to 14.9 percent in 2011.⁸ Catholic schools, more than ever before, are reaching out to a greater diversity of families and students, but this also puts a strain on financial and human resources. The average elementary school tuition charged in the United States in 2011 was \$3,383 as against an average real per student cost of \$5,436; this compares with \$8,787 and \$10,808 for the Catholic high school (freshman) tuition and costs.⁹

Dioceses have made great efforts to keep their schools open, but declining active parish membership has also taken a toll on school finances. In 1969 parishes subsidized 63 percent of Catholic school costs in the United States; by 2000 this had been reduced to 38 percent.¹⁰ Between 2002 and 2005 alone, donations to the Catholic Church had decreased by 10 percent.¹¹

Various attempts that could withstand a First Amendment court challenge have been made in the United States to provide state-funding for private Catholic schools. The First Amendment of the American Constitution reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of

⁷ See *ibid.*, pp. 20-21. In the mid-nineteenth century most immigrants were of Irish, Italian and Polish background who sent their children to Catholic schools; by the mid 1980s most Catholic immigrants were Hispanic, but only a small percentage of their children attend Catholic schools. See CATTARO and COOPER, "Developments in Catholic Schools in the USA," p. 77.

⁸ See *U.S. Annual Statistical Report on Schools 2010-2011*, p. 22.

⁹ See *ibid.*, p. 18.

¹⁰ See G. GRACE and J. O'KEEFE, "Catholic Schools Facing the Challenges of the 21st Century: An Overview," in *International Handbook of Catholic Education*, p. 29, drawing on statistical studies published in 2001 and 2006.

¹¹ See *ibid.*

the people peaceably to assemble, and to petition the Government for a redress of grievances.¹²

There are two aspects to this legislation: a “disestablishment clause” and a “free exercise clause.” Most funding questions run afoul of the disestablishment aspect of the First Amendment.¹³ At the minimum, both funding for bussing children to Catholic schools¹⁴ and loaning state-owned textbooks to children in Catholic schools¹⁵ have been upheld since they directly benefit the child and not the school itself, and since these services are provided regardless of the type of school. Providing a special service to a child in need (for example an interpreter for a deaf child registered in a Catholic school) under a state-funded programme has likewise been upheld.¹⁶ Subsidies to faith-based schools for the costs of keeping records required by the state have passed legal scrutiny.¹⁷ Although reimbursement of private school tuition from public funds did not survive a disestablishment challenge,¹⁸ tax deductions for tuition, transportation and school supplies (if applicable to *parents* and not to the schools themselves) of all children

¹² *US Const.*, amend. 1 (1791). The accepted style in Canada and the United States for citing civil law cases and legislation is used, also omitting “p.” or “pp.” before the appropriate page(s), and in a general reference to a case, citing only the first page where it can be found in the corresponding volume; however, “p.” or “pp.” will be used to indicate the location of a particular citation or reference within the case itself, omitting the preceding “at” as often found in the accepted style.

¹³ For a summary of the law and cases, see R.D. ROTUNDA and J.E. NOWAK, “Freedom of Religion,” in *Treatise on Constitutional Law: Substance and Procedure*, 4th ed., vol. 6, Eagan, MN, Thomson/West, 2008, esp. pp. 60-101.

¹⁴ See *Everson v. Board of Education*, 330 U.S. 1 (1947).

¹⁵ See *Board of Education v. Allen*, 392 U.S. 236 (1968).

¹⁶ See *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).

¹⁷ See *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980). The legislation concerned record-keeping for exams prepared by the state and contained provisions against using the tests for religious purposes. The court found that, if there was a religious “effect” to the legislation, it was incidental to the primary secular effect.

¹⁸ See *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789-798 (1973) (New York); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania). In both statutes, no attempt was made to distinguish between benefits in such a way as to avoid promoting religion.

whether attending public or private schools,¹⁹ and educational tax credits to individuals and corporations that fund aid to schools through scholarships and bursaries have passed legal scrutiny.²⁰ Conversely, the provision of vouchers to families that could be “redeemed” at a school of their choice has generally met with political opposition, and so vouchers have not been an effective means to financially support Catholic schools.²¹ Similarly, direct funding for faith-based primary and secondary schools has generally not been allowed on the basis that there is too much “entanglement” of state and Church, whether for teachers’ salaries, tuition reimbursement, or building costs.

In order to meet rising costs, even elementary schools are turning to new sources to supplement tuition revenues: paid development officers dedicated to fund-raising initiatives, the regional and cluster organisation of schools, offering pre-kindergarten and day programmes, and partnering with other Catholic institutions such as social service agencies, colleges and universities.²² Networks of schools are also developing, such as the Cristo Rey and Nativity Miguel Networks. These school networks, sponsored in part by institutes of consecrated life or Catholic institutes of higher learning, target economically disadvantaged families, introducing, in the former case, work-study

¹⁹ See *Mueller v. Allen*, 3 U.S. 388 (1983).

²⁰ For a summary of the effect of tax credits, see V. SCHMALZ, “Paying for Catholic Schools,” in *The Priest*, vol. 63, no. 9 (2009), pp. 87.

²¹ See *ibid.*, pp. 14, 86, and CATTARO and COOPER, “Developments in Catholic Schools in the USA,” p. 77.

²² See GRACE and O’KEEFE, “Catholic Schools Facing the Challenges of the 21st Century,” p. 20. The University of Notre Dame’s ACE Programme (Alliance for Catholic Education), for example, helps provide teachers to poorer Catholic parishes, and in Los Angeles a similar project is undertaken by PLACE (Partners in Los Angeles Catholic Education), a collaborative venture between the archdiocese and Loyola Marymount University (see M.P. CARUSO, *When the Sisters Said Farewell: The Transition of Leadership in Catholic Elementary Schools*, Lanham, MD, Rowman & Littlefield Education, 2012, pp. 108-111).

programmes to help pay for tuition.²³ Jubilee Schools aim at the re-opening of closed inner-city schools in low-income neighbourhoods with the financial assistance of major benefactors; they are Catholic schools run by Catholics and under the stewardship of a diocese, but most of the students are not Catholic. Finally, the option of founding charter schools²⁴ as alternatives to diocesan schools has recently been considered. On the one hand, this idea was dismissed by the National Catholic Educational Association: “A question frequently posed to the National Catholic Educational Association asks whether a charter school is a possibility. The short answer is no.”²⁵ The reason is because the schools cannot be faith-based:

When Catholic parents surmise that charter schools provide an environment that is similar to Catholic schools, this perception needs to be dispelled. When some Catholic leaders are willing to shutter a Catholic school to make way for a charter, this practice must be forcefully discouraged.²⁶

On the other hand, despite the fact that charter schools may not be confessional, some dioceses have looked to them as a feasible option for some of their financially challenged schools. A recent example is the Archdiocese of Washington which reconfigured many of its schools in order to find a way to keep them open and operating. While previously half of their schools served predominantly non-Catholic and low-income families, their 2007

²³ For a current, brief summary of the nature and extent of these two “networks” of schools, see SCHMALZ, “Paying for Catholic Schools,” p. 14.

²⁴ The definition of a charter school varies according to the state legislation governing it. Generally, charter schools are public schools that receive public funding. They are most often founded by parents or teachers and they are accountable to the local school board. They are governed by their own charter, which can allow for such things as a greater diversity of pedagogical approaches and the targeting of special needs children, but they may not charge tuition. They are subject to all civil rights legislation, and so charter schools may not be faith-based schools. Currently only ten states in the United States have not passed legislation permitting charter schools, and in Canada only Alberta has legislation allowing them.

²⁵ NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, press release “National Catholic Educational Association President Asserts Charter Schools Are Not the Salvation of Catholic Education,” 19 October 2009, http://www.ncea.org/news/pressrelease/article.asp?ARTICLE_ID=266& (13 January 2010).

²⁶ Ibid.

school reorganisation converted seven schools to charter schools, restored one school as a parochial school, and organised four schools as a consortium of academies.²⁷

Financing diocesan schools remains a pressing issue in the United States, and no definitive, “one-size-fits-all” solution is on the horizon. In January 2009, the Archdiocese of New York announced that its ten high schools would have to run independently without counting on diocesan support.²⁸ The previous year the same archdiocese listed five contributing factors in its decision to close six elementary schools:

As major reasons for this action the Archdiocese cited continuing challenges to the schools’ future including escalating operating costs and declining enrolment, all set within the larger context of increased economic pressures on Catholic school families throughout the region, and the lack of both tax relief for those parents and government support for religious and independent schools.²⁹

In any school, financing and affordability are difficult demands to reconcile. In the United States, a diocesan school, like any faith-based private school, has very significant hurdles to overcome, and the difficulties are mounting. Initiatives by parents to found their own schools have even more difficulties as such schools cannot usually rely on subsidies from ecclesiastical entities, nor can they spread costs over a broad school system or network of schools.

²⁷ See D. WUERL, pastoral letter “Catholic Education: Looking to the Future with Confidence,” 14 September 2008, in *Origins*, 38 (2008-2009), p. 399.

²⁸ See P. VITELLO, “Archdiocese to Make Its 10 High Schools Self-Sufficient,” in *The New York Times*, 26 January 2009, p. 20. Around the same time *The New York Times* carried an article stating that the Brooklyn Diocese announced a proposal to close fourteen elementary schools (see P. VITELLO and W. HU, “Brooklyn Diocese Moves to Shut 14 Schools,” 13 January 2009, p. 1).

²⁹ ARCHDIOCESE OF NEW YORK, press release “Archdiocese of New York Announces Elementary School Closures and Mergers,” 7 March 2008, <http://www.archny.org/news-events/news-press-releases/?search=school+closures&C=647&I=7605&Y=2008> (15 January 2009).

2.1.2 Secularisation and Restrictions on Public Funding: The Canadian Experience

Public schools in the United States, by virtue of the First Amendment, are required to be secular. Private schools can be confessional, but this means that state monies cannot be used to support them directly. As we have seen, this does not prevent some limited indirect support from public funds if programmes can be designed for the general benefit of the child or for child welfare in general, if they are aimed at assisting parents with their obligation to educate their children regardless of their religious affiliation, or if the programme does not unduly “entangle” the government in faith-based education. These are not easy tests to apply, but they do, nevertheless, carve out an ambit for publicly-funded initiatives to help Catholic schools (amongst others) meet the growing financial strain. The disestablishment of religion in the United States is a given; not so in Canada.³⁰

Canada is a federal state and education falls exclusively under provincial jurisdiction.³¹ Certain provinces have or have had constitutionally enshrined education and school rights for Catholic and Protestant minorities,³² but the fact that Canadian society has been moving away from its historical compromise between the English Protestant and French Catholic populations of the founding colonies to a more diverse

³⁰ See P. HOGG, *Constitutional Law of Canada*, 5th ed., supplemented (loose leaf edition), vol. 2, Toronto, Carswell, 2007 p. 42.3.

³¹ The *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93 (R.S.C. 1985, Appendix II, n. 5) states “In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions....” (in subsequent references a footnote will be omitted where it is clear that the Act is being cited).

³² For a more comprehensive treatment, see J.-P. PROULX and J. WOEHLING, “La restructuration du système scolaire québécois et la modification de l’article 93 de la Loi constitutionnelle de 1867,” in *Revue juridique Thémis*, 31 (1997), pp. 408-418, and D. ZINGA, “Ontario’s Challenge: Denominational Rights in Public Education,” in *Canadian Journal of Educational Administration and Policy*, issue 80, 19 August 2008, http://www.umanitoba.ca/publications/cjeap/pdf_files/Zinga2.pdf (27 October 2009), pp. 3-30.

“mosaic” of religious and cultural minorities is sometimes cited as a primary motive for furthering secularisation. The last twenty years have seen a concerted movement towards a more secular approach to education in several Canadian provinces, namely Newfoundland and Labrador, Ontario, and Quebec. In a more general sense, there has been a push for school reform across the country since the 1980s. The reform is driven by economic constraints, but, arguably, really reflects a more general breakdown of the public consensus regarding education that had prevailed after the Second World War; conflict and political policies have characterised this reform process.³³

The decisive legal move towards secularised public education came with the introduction of the *Canadian Charter of Rights and Freedoms* in 1982 and its provisions regarding freedom of religion (s. 2) and the right to equality before and under the law (s. 15).³⁴ Since then there has been a determined effort to eliminate public funding in several provinces for minority Roman Catholic and Protestant schools by altering the original Constitutional guarantees. A very brief historical survey should help explain the current context of faith-based education in Canada.³⁵

The political union between the founding four colonies that formed the Dominion of Canada in 1867 included a critical compromise guaranteeing minority (Christian) religious education rights. The existing rights of the Catholic or Protestant minority in

³³ See J. YOUNG and B. LEVIN, “The Origins of Educational Reform: A Comparative Perspective,” in *Canadian Journal of Educational Administration and Policy*, issue 12, 19 January 1999, <http://www.umanitoba.ca/publications/cjeap/articles/younglevin.html> (7 July 2009). This is a general statement that the authors apply not only to Canada, but to the United States, England and New Zealand.

³⁴ See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (R.S.C. 1985, Appendix II, no. 44; hereafter simply called the *Canadian Charter*, without further reference in the footnotes).

³⁵ For a fuller treatment of the status of Catholic schools in the various Canadian provinces, see J.J. FLYNN (ed.), *Catholic Schools across Canada: Into the New Millennium*, Toronto, The Canadian Catholic School Trustees’ Association, 2003.

Quebec, Ontario, Nova Scotia and New Brunswick were “constitutionalised” at the moment of Confederation, provided they were embodied in pre-existing legislation:

93(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union....

However, no such rights in New Brunswick and Nova Scotia existed at that time, so the provision was effectively restricted in its application to Quebec and Ontario. As regards these latter two, further precision was given, extending to the Quebec Protestant minority the same schooling rights enjoyed by the Catholic minority in Ontario:

93(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada [i.e. Ontario] on the Separate Schools and School Trustees of the Queen’s Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec....

New provinces that subsequently joined the Dominion were accorded similar confessional schooling rights: Manitoba in 1870, British Columbia in 1871, Prince Edward Island in 1873, Alberta and Saskatchewan in 1905. In these provinces, confessional schooling rights included three things: the right of a Christian minority to establish its own schools (called “separate schools”), the right to administer these schools (in some cases by means of “separate” school boards), and the right to full public funding. In these cases, the minority Catholic or Protestant schools were part of the public school system, so that the term “public school” in Canada is not synonymous with the idea of a “secular” school.

The Province of Manitoba lost public funding for Catholic schools after a restructuring of its educational system by the 1890 *Public Schools Act*;³⁶ challenges to that legislation affirmed that the right of the Roman Catholic minority in that province to

³⁶ See *Public Schools Act* (Manitoba), 53 Vict. c. 38, 1890.

separate schools was not constitutionally protected.³⁷ British Columbia is in the same position as New Brunswick and Nova Scotia, namely that there were no pre-existing confessional rights at the moment of their entry into Confederation. Alberta and Saskatchewan retain separate (i.e. Catholic or Protestant) school boards within a public school district wherever that is supported by a majority vote of the minority Christian group. Three territories are governed by the federal government and enjoy provisions for confessional denominational schools,³⁸ but this could be changed unilaterally by the federal government without the need to pursue a constitutional amendment. The last territory to be created (in 1999) was Nunavut and its constitution provides for the establishment of confessional schools.³⁹

Newfoundland joined Confederation in 1949 and retained a unique schooling regime that, until recently, constitutionally protected four distinct confessional school systems (Roman Catholic, Anglican, Salvation Army and United Church of Canada), which was extended to Pentecostal Assemblies in 1987. After an acrimonious struggle and two referenda, the province eliminated confessional schools by obtaining an amendment to the Constitution in 1997.⁴⁰ A single, common, secular educational system was substituted, and public funding for confessional schools was ended.

³⁷ See *Barrett v. The City of Winnipeg* (1891), 19 S.C.R. 374.

³⁸ For the Northwest Territories, see *Education Act*, S.N.W.T. 1995, c. 28, s. 97 (1); for the Yukon Territory, see *Education Act*, RSY 2002, c. 61, s. 57.

³⁹ See *Education Act*, S.Nu. 2008, c. 15, s. 197 (2).

⁴⁰ *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25, *Canada Gazette*, Part II, 1998-01-14, vol. 132, no. 1, published as an Extra, 14 January 1998.

Like Newfoundland, Quebec obtained a constitutional amendment⁴¹ suppressing in its entirety (as regards Quebec only) article 93 of the *Constitution Act, 1867* and thereafter eliminating all confessional schools in favour of a purely linguistic division between French and English schools. Whereas in Newfoundland the suppression of confessional schools was couched in terms of economic efficiency and rationalisation of educational services,⁴² it is in Quebec that the question of secularisation of schools was addressed directly as an express political policy.

A first conclusion is clear from this very brief overview of the complex development of schooling in Canada. The Canadian Constitution contains no “disestablishment clause” similar to the First Amendment in the United States prohibiting the state from promoting any particular religion. From the foundation of the Canadian Confederation in 1867, the minority rights of Roman Catholics and Protestants played a central role in the fundamental law governing education and schools. Public school systems were expressly to provide for religious minority schools, at least for Christian minorities. Section 93 represents a fundamental compromise without which the Dominion of Canada would not have been formed in 1867; this view has been adopted by the Supreme Court of Canada:

The protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation because of the perceived danger of leaving the

⁴¹ *Constitution Amendment, 1997 (Quebec)*, SI/97-141, *Canada Gazette*, Part II, 1998-01-21, vol. 132, no. 2, published as an Extra, 22 December 1997.

⁴² See C. LESSARD and A. BRASSARD, “Education Governance in Canada: Trends and Significance,” in C. LEVINE-RASKY (ed.), *Canadian Perspectives on the Sociology of Education*, Don Mills, Oxford University Press, 2008, p. 13, <http://www2.crifpe.ca/html/chaire/lessard/pdf/AERAgouvernanceang3.pdf> (7 February 2010), p. 13. See also A. WRIGHT, V. BRUNET, and M.-J. MONETTE, “Policy Narrative for Newfoundland and Labrador,” in A. CHAN, D. FISHER, and K. RUBENSON (eds.), *The Evolution of Professionalism: Educational Policy in the Provinces and Territories of Canada*, Vancouver, University of British Columbia, Centre for Policy Studies in Higher Education and Training, 2007, pp. 169-172.

religious minorities in both Canada East [Quebec] and Canada West [Ontario] at the mercy of overwhelming majorities. Given the importance of denominational educational rights at the time of Confederation, it seems unbelievable that the draftsmen of the section would not have made provision for future legislation conferring rights and privileges on religious minorities in response to new conditions.⁴³

The consequences of this compromise remain normative even today:

While due regard must be paid not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the Court to breathe life into a compromise that is clearly expressed. The contextual background of s. 93 is being reviewed in these reasons not for the purpose of enlarging upon the compromise but in order to confirm its precise content. The contextual background suggests that part of the compromise was that future legislation on the part of the province with respect to separate denominational schools was permissible. The province was to be able to grant new rights and privileges to denominational schools after Union in response to new conditions but that subsequent repeal of those post-Union rights or privileges would be subject to an appeal to the Governor General in Council.⁴⁴

The societal value we now call pluralism was present in the Constitutional compromise of 1867, albeit a pluralism of a particular type. Broadly speaking, pluralism as a normative concept describes a particular model of how a society “ought” to regulate relations between cultural groups. It has two forms, “liberal” pluralism and “corporate” pluralism.⁴⁵ “Liberal” pluralism, which focuses on the individual and prohibits distinctions, follows a model of individual rights asserted to prevent discrimination; groups as such have no legal standing. “Corporate” pluralism, on the other hand, focuses rather on the various groups within a society, granting them legal status and allocating social and economic benefits between the recognised groups; it is founded on distinctions. One can interpret the Confederation compromise as a form of corporate

⁴³ Judge Wilson writing for the majority of the court in the principal part of her reasoning, *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, p. 1173.

⁴⁴ *Reference Re Bill 30*, p. 1176. Appeal to the Governor General in Council is specifically provided for by article 93(3) and (4) of the *Constitution Act, 1867*; these two subsections provide for an appeal which, strictly speaking, is not judicial, but political (see PROULX and WOEHLING, “Restructuration du système scolaire québécois,” p. 413). In fact these two provisions have never been invoked.

⁴⁵ The analysis is that of G.M. DICKINSON and W.R. DOLMAGE, “Education, Religion, and the Courts in Ontario,” in *Canadian Journal of Education*, 21 (1996), pp. 365-366.

pluralism moderating relations between the competing groups, Protestant and Catholic,⁴⁶ and centred on the questions of education and schools. While not endorsing a state religion as such, no secular approach to schools was enshrined in the Canadian Constitution.

Even before Confederation, nevertheless, there had been at different times, in the various colonies, some attempts to suppress public confessional schools in favour of a single, common school system. This continued after Confederation. In 1871 New Brunswick passed the *Common Schools Act*⁴⁷ which stated explicitly that all public schools would be non-confessional; the previous legislation dated from 1858, the *Parish Schools Act*.⁴⁸ Confessional public schools had developed *de facto* in New Brunswick over time and they existed in 1871, but it had been settled already that the Roman Catholic minority did not have a constitutional right to confessional schools since these had not existed *by law* at the time of Confederation.⁴⁹ The provincial government was free to suppress the confessional public schools and substitute a secular public system, and this is what it did in 1871. Nevertheless, a political compromise was reached through the offices of the premier of the Province, and Catholic schools were permitted at the discretion of the local school board.⁵⁰ Amongst other factors, a 1967 amalgamation of

⁴⁶ A second fundamental distinction is found in the *Constitution Act, 1867*, that based on language. A third is that based on race, with particular constitutional provisions for First Nations. The federal government had a unique role to play in the education and schooling of the First Nations.

⁴⁷ *An Act Relating to Common Schools* (New Brunswick), 34th Vict. c. 21, 1871.

⁴⁸ *An Act Relating to Parish Schools 1858*, 21st Vict. c. 9. Subsequent amendments were made, *An Act in Amendment of an Act Relating to Parish Schools 1863*, 26th Vict. c. 7, and *An Act Relating to Grammar, Superior and Common Schools 1867*, 30th Vict. c. 27.

⁴⁹ See *Ex parte Renaud and others* (1873), N.B.R. (1 Pugsley) 14, p. 273 (New Brunswick Supreme Court); for a commentary, see ZINGA, "Ontario's Challenge: Denominational Rights in Public Education," p. 12.

⁵⁰ See FLYNN (ed.), *Catholic Schools across Canada*, p. 46.

school boards made it increasingly difficult for Catholic schools to survive in New Brunswick.⁵¹

The distinction between the right to “separate” (Christian minority) schools and the right to confessional religious instruction in public schools became more significant as secularism gained ground as an express educational policy. Even in public non-confessional schools in Canada it was often possible to receive religious confessional instruction. The passage of the *Canadian Charter of Rights and Freedoms* in 1982 dealt a blow to this state of affairs.

Article 2 of the *Charter* states:

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion....

Article 15 of the *Charter* states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on...religion....

(2) Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of...religion....

Further relevant provisions of the *Charter* are articles 27 and 29:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

The *Canadian Charter* seems to steer a new path towards a more “liberal” normative pluralistic model, but preserves in s. 29 the original Constitutional compromise regarding minority Christian schools. If there is an uneasy tension in the *Charter* between

⁵¹ See *ibid.*

the rights of the individual and the rights of a Christian religious minority group this is because no consistent model of pluralism is endorsed by the *Charter*. The tension would not take long to express itself through court challenges.

As regards confessional religious instruction and funding for faith-based schools, the court challenges opened by the *Charter* address two basic questions:

1. Does the right to freedom of religion preclude confessional religious instruction in public non-confessional schools?
2. Does the right to equality before and under the law preclude the exclusive special treatment accorded to minority Roman Catholic or Protestant schools in certain provinces (i.e. special legal status for separate schools and access to public funding), or mandate the extension of those rights to other faiths?

The way the courts answered these two questions highlights the growth of secularism in the public school system and affects the availability of public funding for private confessional schools in Canada. The experience in Ontario schools, where Roman Catholic separate schools enjoy separate administration and full public funding, will be considered briefly as an example of the developing schooling context in Canada.

Ontario has constitutionally protected, publicly funded Roman Catholic schools from kindergarten to grade twelve. Separate school boards govern the Catholic schools in the province. There is no question that these schools, under the Canadian Constitution, can provide a specifically Catholic education. But in Ontario's non-confessional public schools it was also possible to receive a confessional religious instruction, with an option to opt out of religious education classes by those who did not wish to participate.

A first challenge after the adoption of the *Canadian Charter* concerned not confessional religious instruction as such but the requirement in Ontario public schools to begin the day with the Lord's Prayer, scripture readings or hymns.⁵² In *Zylberberg et al. v. Sudbury Board of Education* (1988)⁵³ non-Christian and atheistic parents challenged the regulation and won. The Ontario Court of Appeal found that the regulation constituted an infringement of the freedom of religion since it did not impair as little as possible the rights of the minority. Furthermore, the fact that students could opt out did not sufficiently eliminate discrimination, since the very fact of requesting a dispensation introduced a coercive aspect, forcing one to declare one's beliefs and thus potentially stigmatising those who do not conform; this creates indirect pressure, the court found, to conform to the religious practices of the majority. In Canada, the court argued, freedom of religion has two aspects: a positive freedom to hold religious convictions and to profess them publicly; and a negative freedom not to be coerced, whether directly or indirectly, to adhere to religious practices contrary to one's own convictions or conscience.⁵⁴

A second *Charter* challenge two years later (*Elgin County case*)⁵⁵ successfully argued against obligatory confessional religious instruction in public schools.⁵⁶

⁵² See section 28(1) of *Regulation 262* (1980) under the former *Education Act* (1980), R.R.O. 1980.

⁵³ See 65 O.R. (2d) 641 (Court of Appeal).

⁵⁴ See the analysis of J. WOERLING, "La place de la religion dans les écoles publiques du Québec," in *Revue juridique Thémis*, 41 (2007), pp. 657. The distinction was first made by the Supreme Court of Canada in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 336.

⁵⁵ *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, [1990] 71 O.R. (2d), 341 (Court of Appeal), authorisation to appeal to the Supreme Court of Canada denied (often referred to as the *Elgin County case*).

⁵⁶ See *Education Act*, R.S.O. 1980, c. 129, s. 50; s. 28(4) of *Regulation 262* mandated two periods of one-half hour each per week for religious education in each Ontario public school.

Regarding the purpose of the challenged regulation, the Court determined that the content was intended to be confessional in nature. The School Board had argued that religious instruction was simply being used as a vehicle for general moral and ethical education, but the Court of Appeal disagreed. Furthermore, the Court found that even if the purpose was not directly to promote a confessional religious education by the majority, nevertheless it had this effect and that was sufficient to find a violation of the *Charter* right.⁵⁷ An important distinction was made between “religious education” and “education about religion.” The latter was not discriminatory whereas the former was. Following the decision, the Ministry of Education changed its practice and prohibited the confessional instruction of religion in all public schools, although it permits the teaching “about” religion and about world religions.⁵⁸ The regulations had permitted students and teachers to opt out of the courses, but again the Ontario Court of Appeal, following a precedent of the Supreme Court of Canada, found that the opting out provisions contained a coercive element that infringed an individual’s right to freedom of religion as per section 2(a) of the *Charter*.

With the *Zylberberg* and *Elgin County* cases, public schools in Ontario (excepting the Roman Catholic separate schools) became, in fact, secular. Religious practices and confessional religious instruction are no longer permitted. Inspirational readings and “instruction about religion” are permitted. The answer to the first question above was,

⁵⁷ Because the Court determined that the primary purpose of the statute was discriminatory, this is technically *obiter dicta*.

⁵⁸ See *Policy Memorandum 112/1991, Education about Religion in the Public Elementary and Secondary Schools*, and R.R.O. 1990, Regulation 298, ss. 28 and 29.

therefore, declared in the negative: freedom of religion prohibits the confessional instruction of religion in public schools.

Once confessional religious instruction was removed from public schools and the instruction about religion was restricted to a secular (non-confessional) approach, challenges to the Ontario government's refusal to provide public funding for faith-based schools began to arise. A first challenge came from parents who wished to carve out faith-based schools within the public school system, thereby also benefiting from full public funding. This was a direct challenge to the new secular orientation of Ontario schools. Mr. Justice Winkler (Ontario Supreme Court) in *Bal v. Ontario (Attorney General)* first summarised the secularising development of Ontario schools:

The Elgin County decision and the ensuing policy memorandum and regulations signify the end of an era of majoritarian Christian influence, and mark the beginning of a period of secularism in education, based on an awareness of a changing societal fabric and Charter protection for minority rights to freedom of religion.⁵⁹

The crux of the problem was that certain of the applicants in the *Bal v. Ontario* case had been sending their children to “alternative” schools, namely faith-based schools within the public school system established to accommodate religious minorities in some areas; the new secular approach essentially emptied their schools of confessional and faith-based religious instruction, and so the *raison d'être* of these “alternative” schools suddenly vanished. An initial argument that secular schools are not neutral but coercive was rejected out of hand by Mr. Justice Winkler: “Secularism is not coercive, it is

⁵⁹ *Bal v. Ontario (Attorney General)* (1994), 21 O.R. (3d) 681, p. 684 (Ontario Superior Court). The Ontario Court of Appeal dismissed the appeal and endorsed Mr. Justice Winkler's reasons, “while we sympathise with the concerns of the appellants about the positive and negative influences of the educational experience on their children, their plight is no different from that of the majority of Canadians who cannot afford, or do not wish, to send their children to privately funded religious schools. Although it was repeatedly denied before us, we agree with Winkler J. that this case primarily involves funding. No freedoms have been violated.” The judgment was subsequently affirmed at the Court of Appeal (34 O.R. [3d] 484 [1997]); leave to appeal to S.C.C. denied (49 C.R.R. (2d) 188 [1998]).

neutral.”⁶⁰ Furthermore, given that the changes effected by the *Zylberberg* and *Elgin County* cases were designed to produce a secular educational environment in Ontario public schools but not to restrict religious expression, the judge concluded that minority rights were preserved.⁶¹ The stated purpose of the new Regulations was to prevent the confessional teaching of religion, not to curb religious practice as such.⁶² The court found no infringement of the freedom of religion as guaranteed under s. 2(a) of the *Charter*.

Mr. Justice Winkler also went on to address the argument of unequal treatment since those who cannot in conscience send their children to a secular school must pay extra to send them to a private faith-based school:

The applicants’ argument overlooks the fact that there are those of the majority, in circumstances like *Elgin County*, who are now denied access to their religious exercises and instruction. As stated the public school system is secular. No one religion is favoured. Fundamental to the educational system is teaching without religious indoctrination.⁶³

To emphasise that the Ontario public schools moved from one where religious confessional instruction could find a place to one where such “indoctrination” was not permitted, Mr. Justice Winkler stated,

[I]t is not the policy memorandum and regulations which impose obligations, penalties, restrictive conditions on the applicants, and not on others. Instead, it is the applicants’ choice of education for their children. The public school system is secular, it does not present the opportunity for education in any particular denomination or faith. The objective is to provide non-denominational education. Should parents desire that their

⁶⁰ *Bal v. Ontario*, p. 705. One should note that the argumentation was whether *secular* schools are coercive, not whether *humanist* principles are coercive.

⁶¹ “In my opinion, the purpose of Policy Memorandum 112 and the regulations is to secularise the public school system, not to restrict protected expression. Their effect is to promote secularism in the public schools and not to restrict expressive activities which promote the interests or values underlying the freedom of expression. The stated objective is the protection of minority rights” (*ibid.*, p. 711).

⁶² “A student is not prevented from speaking his or her beliefs. *Indoctrination is limited but not expression*. Teachers are not parties to this application but, in any event, there is nothing to preclude a teacher from expressing his or her beliefs outside of the school curriculum. The only limitation is that teachers, and the school, are not to indoctrinate or give primacy to any religion” (*ibid.*, italics added).

⁶³ *Ibid.*, p. 713.

children have a religious education they must assume the cost. This does not mean that there is adverse effect discrimination. The government prohibition is just, fair and constitutional.⁶⁴

At the time the *Bal v. Ontario* case was decided, another court challenge was working its way through the court system, *Adler v. Ontario (Minister of Education)*.⁶⁵ It had already been decided at the Ontario Court of Appeal level, and so the judge in *Bal v. Ontario* was bound by precedent to follow it. The case was subsequently accepted on appeal to the Supreme Court of Canada.

Unlike the *Bal v. Ontario* case where parents were seeking to find accommodation for a faith-based school within the ambit of the public system in order to benefit from public funding, in *Adler v. Ontario (Minister of Education)* the parents sought public funding for private schools completely outside the public system (whether secular or Roman Catholic). Due to personal religious conviction, parents argued that they could not send their children either to public (now secular) schools or to Catholic schools (also publicly funded). The question centred less on freedom of religion (article 2(a) of the *Charter*) than on the right to equal treatment before and under the law (article 15 of the *Charter*). The majority found that s. 93(1) of the *Constitution Act, 1867* is a “comprehensive code with respect to denominational school rights” and that “s. 93(1) entrenches certain rights with respect to public funding of religious education. However,

⁶⁴ Ibid., p. 714. “Adverse effect discrimination” is a legal concept defined by the Supreme Court of Canada as indirect discrimination even if unintentional: “It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force” (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, p. 551).

⁶⁵ [1996] 3 S.C.R., p. 609.

these rights are limited to those which were enjoyed at the time of Confederation.”⁶⁶ In other words, Roman Catholic separate schools are fully funded by state revenues and this cannot be challenged as it represents a fundamental compromise at the heart of the Canadian Confederation.⁶⁷ In Ontario, at the moment Canada was established as a Dominion, other Christian denominations and other religions did not enjoy this same constitutional status and so cannot “access” the same rights. Therefore, the Supreme Court argued, section 2(a) of the *Charter* guaranteeing freedom of religion “cannot be used to enlarge this comprehensive code” to extend the rights enjoyed by Catholic schools to those of other religious communities; the latter cannot bring themselves under s. 93(1) and, as a result, they enjoy no constitutional right to publicly funded religious schools.⁶⁸

So then, if public funding for faith-based schools other than Catholic schools is not available by means of an appeal to “freedom of religion,” can it not be argued that there is unequal treatment of religious groups, contrary to s. 15 of the *Charter*? The majority decision of the Court responded to this charge of discrimination with two arguments. First, s. 29 of the *Charter* explicitly preserves the existing denominational rights to schooling.⁶⁹ And second, the Ontario government’s decision to fully fund Catholic schools is a legitimate exercise of its plenary power over education within the parameters of minority religious rights constitutionally protected under s. 93 (1) of the *Constitution Act, 1867*. The fact that the government chooses not to fund private

⁶⁶ Ibid., para. 35, p. 642.

⁶⁷ The court follows its previous arguments in *Reference Re Bill 30*. See above, note 44.

⁶⁸ See *Adler v. Ontario*, para. 35, p. 642.

⁶⁹ See above, p. 105.

faith-based schools does not create inequality. Similarly to the reasoning of Justice Winkler in *Bal v. Ontario*, the minority decision in *Adler* focused on the *cause* that gives rise to the unequal treatment. The fact that parents choose not to send their children to a public school does not give rise to discrimination, since the underlying cause for unequal treatment in such cases is not government legislation but their own convictions.⁷⁰

While it is true that the appellants feel compelled to send their children to private school because of a personal characteristic, namely their religion, and therefore are unable to benefit from publicly-funded schooling, I fail to see how this is an effect arising from the statute. The reason why the public school system is not acceptable to the appellants lies in its secular nature. This secular nature is itself mandated by s. 2(a) of the Charter as held by several courts in this country.⁷¹

Disagreeing with this reasoning from the cause or origin of the discrimination, Justice McLaughlin refutes this argument in her partially dissenting opinion:

By definition the effect of a discriminatory measure will always be attributable to the religion, gender, disability and so on of the person who is affected by the measure. If a charge of religious discrimination could be rebutted by the allegation that the person discriminated against chose the religion and hence must accept the adverse consequences of its dictates, there would be no such thing as discrimination.⁷²

Two of the dissenting Justices concluded that the lack of public funding to faith-based schools offended against equality of treatment before and under the law. They arrived at this decision by focusing on the distinction between a school system open to all and a school system accessible to all. Ontario schools are not accessible to all since a

⁷⁰ The legislation itself does not differentiate treatment based on religion or any other personal quality, but only between “public” and “private” schools; this is not a ground for discrimination, says Sopinka for the minority judgment: “the only ground of distinction in this case is between ‘public’ institutions, which are funded by the government, and ‘private/independent’ institutions, which do not receive funding from the government. No private schools receive funding whether they are religious or secular. No religion is given preferential treatment within the system. The distinction between ‘private’ and ‘public’ institutions is neither an enumerated nor an analogous ground in s. 15 of the Charter” (*Adler v. Ontario*, para. 188, p. 708).

⁷¹ *Ibid.*, para. 181, p. 705. Judges Sopinka and Major in this minority judgment refer to the *Zylerberg* and *Civil Liberties Association* cases cited above for their description of the nature of the public school system as secular.

⁷² *Ibid.*, para. 208, p. 716. A second dissenting opinion by Justice L’Heureux-Dubé concurs with this opinion (para. 70, p. 657).

minority of parents cannot send their children there for reasons of religious conviction. Nevertheless, one of those Justices esteemed that such a restriction was saved under s. 1 of the *Charter* as justifiable in a free and democratic society.⁷³

If the combined effect of the *Zylberberg* and *Civil Liberties Association* cases is that the Ontario public educational system (excluding the protected place of Roman Catholic schools) is necessarily secular, the effect of the *Bal* and *Adler* decisions is that the Ontario government *may* provide funding for faith-based schools; nevertheless these schools cannot operate within the ambit of the public school system. Public funding for private faith-based (or even secular humanist) schools, therefore, is permissible, but not obligatory.⁷⁴ However, if the provincial government should decide to enact such legislation, it would be governed by s. 15 (1) of the *Charter* (equality before and under the law)⁷⁵ and have to fund all such schools equally. This would not mean, however, that

⁷³ The *Canadian Charter of Rights and Freedoms*, s. 1 reads: “1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Madame Justice McLaughlin thought the denial of public funding to private faith-based schools was justifiable (see her reasoning in *Adler v. Ontario*, para. 210-225, pp. 717-723). Madame Justice L’Heureux-Dubé did not find that the refusal was justified under s. 1: “Partial funding would actually further the objective of providing a universally accessible education system and promote the value of religious tolerance in this context where some religious communities cannot be accommodated in the secular system” (ibid., para. 106, p. 672).

⁷⁴ The minority decision in *Adler* makes this explicit: the Ontario government is “free to exercise its plenary power with respect to education in whatever way it sees fit, subject to restrictions relating to separate schools imposed by s. 93 (1).” And the reasoning continues: “[N]othing in these reasons should be taken to mean that the province’s legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93 (1). ... However, an *ability* to pass such legislation does not amount to an *obligation* to do so” (ibid., para. 48, pp. 648-649, italics in original).

⁷⁵ See the separate decision of Sopinka, concurring with the conclusion of the majority decision, in ibid., para. 175, p. 703.

anyone anywhere could claim such funding; the government could still require certain educational standards and numbers warranting the extension of public financing.⁷⁶

If Canada, unlike the United States, has no specific equivalent to the First Amendment, nevertheless the case law regarding religious instruction in schools concludes that a strict neutrality be observed by the government. This neutrality does not mean that the state abstain from all forms of aid to faith-based schools, but rather that the exercise of government jurisdiction over education and schools be exercised without prejudice to one or the other religion. In Canada, state neutrality, as such, implies no strict “principe de laïcité” (principle of secularism)⁷⁷ as in France, for example, even if some might conclude that the courts’ decisions show clearly this tendency.⁷⁸ While the public schools are now to be secular in nature because of the *Charter*, this does not mean that provinces can fund secular schools only. It is possible for the state to fund confessional and other faith-based schools so long as it is done equally and equitably. Those provinces that undertake such funding (British Columbia, Alberta, Saskatchewan, Manitoba and Quebec) do so as a policy of maximising parental school choice.⁷⁹ In any

⁷⁶ See J. WOEHRLING, *Étude sur le rapport entre les droits fondamentaux de la personne et les droits des parents en matière d’éducation religieuse* (Étude no. 6), Quebec, Ministry of Education, Government of Québec, 1999, p. 64.

⁷⁷ “Secularism represents the denial of the validity of the sacred and of its associated culture. It works to replace this by developing logical, rational, empirical, and scientific intellectual cultures in which the notion of the transcendent has no place. It affects the world view of many individuals so that religious concepts, religious discourse, and religious sensitivities are regarded as simply irrelevant to the everyday business of life” (GRACE and O’KEEFE, “Introduction: Catholic Schools Facing the Challenges of the 21st Century,” p. 2).

⁷⁸ In the article “La place de la religion dans les écoles publiques du Québec” Woehrling concludes that state neutrality in Canada plays a similar role to the disestablishment clause in the United States and the principle of secularism in France (pp. 658-659). See also J. PATRICK, “Church, State, and Charter: Canada’s Hidden Establishment Clause,” in *Tulsa Journal of Comparative and International Law*, 14 (2006-2007), pp. 25-51.

⁷⁹ See A.F. BAYEFSKY and A. WALDMAN, *State Support of Religious Education: Canada versus the United Nations*, Lieden, Martinus Nijhoff Publishers, 2007, p. 3.

case, establishing criteria to determine when private religious schools might receive funding, to what degree and in what manner is a thorny question, and implies a political and financial commitment from the province. In Ontario, where the majority of voters seem relatively satisfied with the status quo, it is perhaps not surprising that there is little political will in this regard.⁸⁰

In a further drive towards a completely secular school system, two provinces, Quebec⁸¹ together with Newfoundland and Labrador,⁸² have eliminated special status for minority religious schools. This was obtained by means of constitutional amendments eliminating the schooling and educational provisions regarding Roman Catholic and dissentient minorities.⁸³ Again, however, this does not mean that the province is barred

⁸⁰ In Ontario, a short-lived tax credit for parents who send their children to private schools was introduced in 2003 by the provincial Conservative party and cancelled before it was fully implemented after they lost the election to the Liberal party. Public opinion polls indicate a satisfaction with the status quo, with about a third favouring a single public system. See D. HART and D.W. LIVINGSTONE, *Public Attitudes towards Education in Ontario 2007: The 16th OISE Survey*, Toronto, University of Toronto, Ontario Institute for Studies in Education, 2007, pp. 11-12.

⁸¹ The public debate in Quebec was much more reserved than in Newfoundland, see PROULX and WOEHLING, "Restructuration du système scolaire québécois," pp. 446-449. The religious denominations, by and large, were not opposed to the shift to a non-denominational unitary school system (see pp. 441-444 of the same article). The controversy would come later, with the implementation of an obligatory course on the cultural phenomenon of religions, a controversy addressed later in this chapter. A funding controversy arose recently when a former student of a private Catholic high school in Montreal, who later became CEO of Hydro-Québec, gave a donation to the school in the name of this public company. The donation had to be withdrawn but the event occasioned an interesting reaction from J.-P. Proulx, former professor of the Faculty of Education at Montreal University, and one of the leading personalities pushing for the elimination of minority denominational schools in Quebec. He pleads for, as he terms it, the "democratisation" of private schools. See J.-P. PROULX, "Démocratiser l'enseignement privé," in *Le Devoir*, August 31, 2009, p. A7 (<http://www.ledevoir.com/2009/08/31/264859.html> [1 October 2009]).

⁸² The public debate in Newfoundland and Labrador was quite acrimonious with strong opposition from the Roman Catholic Church and the Pentecostal Assemblies; nevertheless the referenda held to settle the matter gave a clear majority in favour of eliminating the exclusively confessional-based school system. See S.J. CLARKE, "The Dynamics of Catholic Voting Behaviour Surrounding Denominational Education Reform in Newfoundland," M.A. thesis, St. John's, Memorial University, Department of Political Science, 2000.

⁸³ See footnotes 40 and 41, above.

from providing funding to non-public, faith-based schools, so long as the right to equality before the law (s. 15 (1) *Charter*) is not offended.

A final comment should be made concerning pressure under international law to change Canada's constitutional regime over education and schooling. Canada is signatory to several international covenants, declarations and pacts that affect education and parents' and children's rights over education;⁸⁴ moreover the drafters of the *Canadian Charter of Rights and Freedoms* drew not only upon some of these documents, but also upon others to which Canada is not a signatory.⁸⁵ Based on these international commitments, a number of legal challenges were brought before various international bodies. One in particular will be considered here, the *Waldman* case, begun in 1996 before the United Nations Human Rights Committee (UNHRC).

The *Waldman* case concerned parents who sent their children to a private Hebrew day school in Ontario. The arguments centred on the Canadian government's obligations under the *International Covenant on Civil and Political Rights*, specifically the demand

⁸⁴ *International Covenant on Civil and Political Rights*, binding on Canada since 19 August 1976 (United Nations General Assembly, 16 December 1966, 999 UNTS, p. 171); *United Nations Convention against Discrimination in Education* (14 December 1960, 429 UNTS 32), and *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms* (UNESCO, General Conference, 19 November 1974, UN Doc. ST/HR/1/Rev.5, vol.I/Part 2 (1994), pp. 599-610); the Convention was not adopted by Canada, since education is a matter of exclusively provincial jurisdiction, but the Recommendation was); *American Declaration of Human Rights and Duties* (Organisation of American States, 2 May 1948, OAS Res. XXX, adopted at the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II.82 doc.6 rev.1, p. 17 [1992]), binding on Canada since 8 January 1990; United Nations *Convention on the Rights of the Child*, adopted by Canada on 13 December 1991 (UN GENERAL ASSEMBLY, 20 November 1989, UNTS, vol. 1577, p. 3).

⁸⁵ Such as the COUNCIL OF EUROPE, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols nos. 11 and 14, 4 November 1950, 213 UNTS 221, entry into force 3 September 1953), and the *American Convention on Human Rights*, 22 November 1969 (1144 UNTS 123, entry into force 18 July 1978, reprinted in *Basic Documents Pertaining to Human Rights*, OEA/Ser.L/V/II.82 doc.6 rev.1 [1992]).

by the complainant parents for full funding equivalent to that provided to Ontario's Roman Catholic separate schools.⁸⁶

The UNHRC published its findings in the *Waldman* case in November 1999. It concluded that there was a violation against non-discrimination on the basis of religion by the fact of unequal treatment before the law and equal protection of the law (article 26 of the *Covenant*). The Final View of the UNHRC (noting Canada's adherence to the Optional Protocol whereby the competence of the UNHRC is recognised in determining if a violation has occurred) required the Canadian government to provide "an effective and enforceable remedy."⁸⁷ The Canadian government, relying on the *Constitution Act, 1867*, article 93 (1), has responded by saying that education in the Canadian federal state is an exclusively provincial matter. The Ontario provincial government, for its part, has repeatedly indicated that it will not change the current constitutional provisions regarding education and schooling.⁸⁸

⁸⁶ A summary of the case as well as all relevant documents are provided by the complainant parent and her legal counsel in BAYEFSKY and WALDMAN, *State Support of Religious Education*, pp. 21-32, and 843-1071.

⁸⁷ UNHRC, 3 November 1999, Final Views: *Waldman v. Canada*, Communication No. 694/1996 A/55/40 vol. II, Annex IX.H (2000) 86 (3 November 1999), in the Annual Report of the Human Rights Committee, reproduced in its entirety in BAYEFSKY and WALDMAN, *State Support of Religious Education*, pp. 1013-1029, see esp. p. 1027.

⁸⁸ It has not changed its stance since its first response on 13 January 2000, when the Minister of Education informed the Canadian Minister of Foreign Affairs and International Trade: "I wish to inform you that our position on this matter remains unchanged. The Government of Ontario is not prepared to adopt the alternatives suggested by the UNHRC for complying with the decision, namely, 1) to provide direct funding to private religious schools; 2) to eliminate funding separate schools; or 3) to provide religious instruction in the public schools. We believe that our commitment and resources must continue to focus on preserving and improving the quality of our publicly funded system. While the Government of Ontario recognises the right of parents to choose alternative forms of education for their children, it continues to have no plans to provide funding to private religious schools or to parents of children that attend such schools. As was set out in the submission to the UNHRC, extending funding to religious private schools would result in fragmentation of the education system in Ontario and undermine the goal of universal access to education" (BAYEFSKY and WALDMAN, *State Support of Religious Education*, pp. 1031-1032).

Of particular note in the UNHRC's Final View is the following statement:

10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of non-discrimination laid down in the Covenant. The Committee does not take issue with the argument but notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools. It has also noted the author's submission that the public school system in Ontario would have greater resources if the Government would cease funding any religious schools. In this context, the Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.⁸⁹

It is clear that the Canadian courts have followed an approach similar to that of the UNHRC when applying the *Canadian Charter* provisions regarding equality and non-discrimination as regards public funding for faith-based schools. Nevertheless, the Canadian courts will not go so far as to override the special constitutional protections given to Roman Catholic or Protestant "separate" schools by s. 93 of the *Constitution Act, 1867*.

2.2 State Control of Curriculum, Including Religious Instruction

With the secularisation of public, non-confessional schools comes the related thorny question: how to treat questions touching on religion in schools? Examining one particular issue which has arisen recently as a direct result of the secularisation of formerly confessional schools is instructive. It is the situation in Quebec where the government has instituted a mandatory course in all schools, public and private, entitled "Ethics and Religious Culture." The government sought to address the issue of the place

⁸⁹ Ibid., pp. 1026-1027.

of religion in public, secular schools. If society is characterised by pluralism and openness, it is nevertheless beyond question that religion and other “deep-seated values” exercise a very strong influence on the life of its citizens. How, then, are individuals to coexist peacefully in a public space that must provide room for this diversity of values? Moreover, if a society is historically linked to a particular religion, as in Quebec, how are citizens to understand and appreciate the nature of their society which still contains visible marks of that religious history, whether it be street names, the choice of public festivals, or the richness of architectural forms, music, literature and art? What is the role of secular schools in promoting this diversity and pluralism in the public space while respecting the centrality of religion and other “deep-seated values” in the formation of its citizens? These were the types of questions the Quebec government sought to address in shaping its programme.

The issue is obviously not unique to Quebec. For example, following the secularisation of non-confessional public schools in Ontario, the province passed regulations regarding religious instruction in public schools (with exceptions granted for constitutionally protected public Catholic and Protestant schools):⁹⁰

- 28. (2) A programme of education about religion shall,
 - (a) promote respect for the freedom of conscience and religion guaranteed by the Canadian Charter of Rights and Freedoms; and
 - (b) provide for the study of different religions and religious beliefs in Canada and the world, without giving primacy to, and without indoctrination in, any particular religion or religious belief.

This regulation does not seem to have elicited a great deal of comment or recourse to the courts. This may be because the provincial Ministry of Education has not

⁹⁰ O. Reg. 298/00, made under the *Education Act* (Ontario), R.R.O. 1990, last amended to O. Reg. 206/09, s. 28 (2).

developed a mandatory programme, and has preserved its separate Catholic and Protestant school boards which are exempt from this regulation.⁹¹ The situation is different in Quebec where the government chose to design and implement its own standardised course on religious culture and ethics and to make it mandatory.⁹² The programme was implemented in the fall of 2008 and described by the Quebec Ministry for Education, Leisure and Sport as “the culmination of a long process during which the Quebec school system has shifted away from essentially confessional structures and orientations – both Catholic and Protestant – to entirely non-religious structures.”⁹³ The development of a secular programme of religious instruction designed and implemented by the state is therefore seen, from the perspective of the Quebec authorities, as a “culmination” of the government’s decision “to assume full responsibility for its mission regarding public education.”⁹⁴ While in no way diminishing an appreciation of Quebec’s religious heritage, and while giving “particular prominence” to the “historical and cultural importance of Catholicism and Protestantism,” nevertheless, “[t]he goal is neither to accompany students on a spiritual quest, nor to present the history of doctrines and religions, nor to promote some new common religious doctrine aimed at replacing specific beliefs.”⁹⁵ The focus of the programme, then, is not to transmit the content of

⁹¹ See *ibid.*, s. 27.

⁹² See *Education Act*, L.R.Q., c. I-13.3, r. 8, *Basic School Regulation for Preschool, Elementary and Secondary Education*, ss. 22, 23 and 23.1. Private schools must also provide the basic compulsory curriculum, including the Ethics and Religious Culture Programme. See *An Act Respecting Private Education*, L.R.Q., c. E-9.1, ss. 25 and 32.

⁹³ GOVERNMENT OF QUEBEC, *Québec Education Programme: Elementary Education. Update May 2008*, Quebec, Ministry of Education, Leisure and Sports (=MELS), 2008, Preamble, p. 292). The same wording of this preamble was reproduced for the parallel update regarding secondary education.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, p. 293.

religious beliefs, but rather “to grasp the field of religion by means of its various forms of expression in time and space” and to allow “for understanding the signs in which the religious experiences of individuals and groups are conveyed that contribute to shaping society.”⁹⁶ In other words, religion is looked at “from the outside,” by focusing on external expressions of faith (“forms” and “signs”), rather than by delving into belief structures and value systems themselves.

A great deal of time, expense and expertise were spent on designing this programme. It is clear, first of all, that the Quebec government did *not* consider state neutrality as an “emancipatory mission directed against religion.”⁹⁷ Secularism, in the end, is an ambiguous term⁹⁸ and does not, as such, preclude all reference to religion.⁹⁹

⁹⁶ Ibid.

⁹⁷ The phrase is used in the context of the secularisation of Quebec’s public schools and comes from G. BOUCHARD and C. TAYLOR, *Building the Future: A Time for Reconciliation. Abridged Report*, Quebec, Government of Quebec, Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles, 2008, p. 46. The *Report* further notes that state neutrality, since it is to foster freedom of conscience and religion, ought “to foster, not hinder” religious expression (p. 46).

⁹⁸ “As for secularism, which everyone proclaims or demands, it proves to be highly controversial as soon as an attempt is made to clarify the terms of the desired regime” (ibid., p. 5). It should be noted that “secularity” (French, *laïcité*; Italian, *laicità*) is a term often used synonymously with “secularism.”

⁹⁹ Benedict XVI has indicated that there is a healthy secularism (*sana laicità*), when the term is not used as a philosophy which banishes all transcendent reference from the public sphere, relegated entirely to the domain of individual sentiment and the private sphere: “[S]ince religion is also organised in visible structures, as is the case with the Church, it should be recognised as a form of public community presence. This also implies that every religious denomination (provided it is neither in opposition to the moral order nor a threat to public order) be guaranteed the free exercise of the activities of worship—spiritual, cultural, educational and charitable—of the believing community” (address to the participants of the 56th National Study Congress organised by the Union of Italian Catholic Jurists, 9 December 2006, in *Insegnamenti di Benedetto XVI*, vol. 2, no. 2 (2006), p. 790, Rome, Libreria editrice Vaticana, 2007, English translation available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/december/documents/hf_ben_xvi_spe_20061209_giuristi-cattolici_en.html [28 October 2013]). Cf. I.T. BENSON, “Notes towards a (Re)Definition of the ‘Secular,’” in *University of British Columbia Law Review*, 33 (2000), pp. 519-549. The Supreme Court of Canada has stated that “Religion is an integral aspect of people’s lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. The requirement of secularism...does not preclude decisions motivated in whole or in part by religious considerations, provided they are otherwise within the [School] Board’s powers. It simply signals the need for educational decisions and policies, whatever their motivation, to respect the multiplicity of

Quebec's drive towards the secularisation of schools would be profoundly misunderstood if it is reduced to a narrow view of the separation of church and state. Religion is essential to understanding Quebec's culture and history:

Those who want to eliminate all religion-related matters from the schools fail to understand that to do so would be to risk creating a major cultural deficit in a society whose culture and very landscape are imbued with religious references, and in a world where religion and civilisation are intertwined.¹⁰⁰

In fact, the Quebec *Education Act* is silent regarding state neutrality towards religion,¹⁰¹ but the entire movement and promotion of secularism in Quebec society seeks to reorient civic identity away from the Catholic Church towards new points of social cohesion which express the emerging common values, namely the Quebec *Charter of Human Rights and Freedoms*¹⁰² and the French language.¹⁰³ The Ethics and Religious Culture Programme offered in 2008 is intended to promote this movement to secularism. Persisting with confessional instruction of religion in public schools is interpreted by

religious and moral views that are held by families in the school community" (*Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, pp. 744-745).

¹⁰⁰ GOVERNMENT OF QUEBEC, *Secular Schools in Québec: A Necessary Change in Institutional Culture. Brief to the Minister of Education, Leisure and Sports*, Quebec, MELS, Comité sur les affaires religieuses, October 2006, p. 45.

¹⁰¹ A point noted at *ibid.*, p. 30.

¹⁰² R.S.Q., chapter C-12 (referred to subsequently in the text as the *Quebec Charter of Rights*). The *Quebec Charter of Rights*, passed in 1975, is seen as a symbol of common values by the Government of Quebec's Counsel on intercultural relations in the memorandum presented to the Education Commission of the Quebec National Assembly (CONSEIL DES RELATIONS INTERCULTURELLES, *La place de la religion dans l'école commune: Intégrer la diversité religieuse dans un Québec démocratique et pluraliste*, Quebec, Government of Quebec, 1999, p. 7).

¹⁰³ The Act making French the common language in Quebec opens with the following words: "Whereas the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity..." (*Charter of the French Language*, R.S.Q., c. C-11). The claim has been made that by the passing of this language Charter in 1977 making French the common language of all Quebecers, the state effectively replaced the Church as a point of reference for Quebec identity (see CONSEIL DES RELATIONS INTERCULTURELLES, *Place de la religion dans l'école commune*, p. 6).

some as almost an offence against the emerging Quebec society, as a threat to civic nationalism:

Such a multi-confessional approach would be diametrically opposed to the mission of integration, social cohesion and education for solidarity confided to public, common schools. In effect, instead of gathering together all students around the common values of our society, the school would then follow a segregationalist logic of partitioning and fractioning which, rather, would incline each community of faith, as well as non-believers and agnostics, to fold in upon themselves and to distrust others.¹⁰⁴

Public schools in Quebec are to reject expressly this segregationalist model and they are expected rather “to reflect the diversity of the institutional cultures they exemplify;” in this way, it is thought, “the Québec model of secular schools will constitute a structuring feature of these cultures....”¹⁰⁵ For this model to work, it is argued, amongst the other essential elements there must be “a single ethics and religious culture programme.”¹⁰⁶

The Ethics and Religious Culture programme, while controversial, has attracted perhaps less opposition due to its secular orientation, or at least fewer legal challenges, than to its mandatory nature even in private schools. From the inception of the programme, Quebec government bodies studying the issue tended to assume that it would form part of the mandatory curriculum. The Ministry of Education’s committee examining the practical implementation of the programme admitted that,

While the committee can identify no constraining principle making attendance obligatory for the cultural teaching of religions, the particular responsibility of the state in the matter

¹⁰⁴ “Une telle approche multiconfessionnelle irait diamétralement à l’encontre de la mission d’intégration, de cohésion sociale et d’éducation à la solidarité, confiée à l’école publique commune. En effet, au lieu de **rassembler tous les élèves autour des valeurs communes de notre société**, l’école suivrait alors une logique ségrégationniste de cloisonnement et de fractionnement qui, au contraire, inclinerait chaque communauté de foi, de même que les non-croyants et les agnostiques, au repli sur soi et à la méfiance à l’égard des autres” (CONSEIL DES RELATIONS INTERCULTURELLES, *Place de la religion dans l’école commune*, p. 9). Bold text is in the original.

¹⁰⁵ GOVERNMENT OF QUEBEC, *Secular Schools in Québec*, p. 13.

¹⁰⁶ Ibid., p. 25.

of offering public services militates, in our opinion, in favour of arranging a cultural teaching of religions that is obligatory for all students.¹⁰⁷

It is really due to the programme's mandatory nature that court challenges arose. In fact, as regards the aspect of secular moral instruction, the Quebec government's legal expert himself indicated that, in order to avoid constitutional challenges, students could be given the option to be dispensed from the course, or the course itself could be optional.¹⁰⁸ Already, it was foreseen that secular moral instruction could lead to a paradoxical situation: to avoid promoting one or other religious moral values, the school would have to provide a neutral presentation and emphasise the plurality of opinions. But parents might then object to this neutrality, arguing that such a course leads to a moral relativism incompatible with their religious convictions and so violates their religious liberty. Similarly, parents might object that the instruction actually promotes a secular humanism which is, in itself, a form of religion in the broad sense of the word.¹⁰⁹ The Congregation for Catholic Education, in a Circular Letter to the Presidents of Bishops' Conferences on Religious Education in Schools, dated 9 May 2009, picks up this very objection as regards religious education (as opposed to ethical or moral education): "if religious education is limited to a presentation of the different religions, in a comparative and

¹⁰⁷ "Bien que le comité ne puisse identifier aucun principe contraignant pour rendre obligatoire la fréquentation d'un *enseignement* culturel des religions, la responsabilité spécifique de l'État en matière d'offre de services publics milite, selon nous, en faveur de l'aménagement d'un enseignement culturel des religions qui soit obligatoire pour tous les élèves" (GOVERNMENT OF QUEBEC, *L'enseignement culturel des religions: Principes directeurs et conditions d'implantation*, Quebec, MELS, Comité sur l'éducation au phénomène religieux, Groupe de travail sur la place de la religion à l'école, Étude no. 1, 1999, p. 16).

¹⁰⁸ See WOEHRLING, *Étude sur le rapport entre les droits fondamentaux*, p. 56. This was also his recommendation, having surveyed international law on this question (see p. 158, conclusion 2).

¹⁰⁹ See C.A. STEPHENSON, "Religious Exercises and Instruction in Ontario Public Schools," in *University of Toronto Faculty Law Review*, vol. 49, no. 1 (1991), pp. 99-103, relied upon in WOEHRLING, *Étude sur le rapport entre les droits fondamentaux*, p. 56.

‘neutral’ way, it creates confusion or generates religious relativism or indifferentism.”¹¹⁰ For that reason, the Congregation asserts that it is for the Catholic Church alone “to establish the authentic contents of Catholic religious education in schools.”¹¹¹ However, before the document was issued and could be entered in evidence, the Quebec Superior Court found, as a question of fact based on the combined testimony of the parent of a child who had requested a dispensation from the newly implemented Ethics and Religious Culture Programme and the testimony of an expert witness, Gilles Routhier, a priest and professor at Laval University, that there was no infringement of religious freedom by offering the compulsory programme.¹¹² Such a conclusion had already been reached in *obiter dicta* by the Ontario Court of Appeal.¹¹³ The United Nations Committee on Human Rights has also upheld the cultural teaching of religion as in conformity with freedom of religion.¹¹⁴

As mentioned, it is more the mandatory nature of the programme of Ethics and Religious Culture than the content which has elicited court challenges. Two different

¹¹⁰ CONGREGATION FOR CATHOLIC EDUCATION, Circular Letter to the Presidents of Bishops Conferences on Religious Education in Schools, 9 May 2009, prot. no. 520/2009, no. 13, available at http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20090505_circ-insegn-relig_en.html (26 October 2013).

¹¹¹ Ibid., no. 13.

¹¹² See *S.L. v. Commission scolaire des Chênes*, S.C. (Quebec), 2009 QCCS 3875. The case was appealed to the Supreme Court of Canada and dismissed for lack of proof of infringement of freedom of religion (*S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235). The Superior Court judge, Jean-Guy Dubois, stated that he failed to see how a Catholic student could be negatively affected by the course, reminding parents and religious authorities that it is up to them to see that the children understand that the religious principles to which they adhere can be put in place in a free and in an enlightened manner, while at the same time recognising the existence of other religions. He rejected the notion that the course was coercive even if obligatory (see paragraphs 64-68 of his decision).

¹¹³ See p. 108, above.

¹¹⁴ UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, General Comment no. 22, *The Right to Freedom of Thought, Conscience and Religion*, International Covenant on Civil and Political Rights (30 July 1993), CCPR/C/21/Rev.1/add.4 (1994), para. 6.

challenges were brought before the Quebec courts: 1) the right of the student or his or her parent in the public school system to obtain a dispensation from the course; and 2) the right of a private Catholic school to substitute a programme of its own design for the government programme. The first challenge was made in the case cited above, *S.L. v. Commission scolaire des Chênes*.¹¹⁵ Because the Superior Court dismissed the claim based on infringement of freedom of religion for lack of evidence, the statements regarding the right of dispensation are *obiter dicta*. Quebec legislation provides that the School Board can dispense a student from the general education programme “[f]or humanitarian reasons or to avoid serious harm to a student.”¹¹⁶ The claimant requested a dispensation from the course on the basis of infringement of freedom of religion, a request which was refused. The court considered that a “humanitarian reason” in the *Act* means a motive intended to improve the human condition of a student.¹¹⁷ “Serious harm” was interpreted as a significant attack on, a serious wrong to the rights or interests of the student.¹¹⁸ The judge found no proof of either, since he found that the religious rights had not been infringed¹¹⁹ and upheld the refusal of a dispensation from the course. The Supreme Court of Canada dismissed the appeal by the parents, all judges finding, on the facts, that the parents had not proved the presence of an objective infringement of their rights. The majority decision noted, first that it is the *child’s* rights, not the parents’ rights that are to be considered:

¹¹⁵ See footnote 112.

¹¹⁶ *Education Act* (Quebec), s. 222.

¹¹⁷ See *S.L. v. Commission scolaire des Chênes*, no. 80: “un motif visant à améliorer la condition humaine d’un élève.”

¹¹⁸ See *ibid.*, no. 86: “une atteinte importante, un tort sérieux aux droits ou aux intérêts d’un élève.”

¹¹⁹ See *ibid.*, no. 121 and no. 122.

The principal argument that emerges from the reasons given by the appellants in their requests for an exemption is that the obligation they believe they have, namely to pass on their faith to their children, has been interfered with. In this regard, the freedom of religion asserted by the appellants is their own freedom, not that of the children.¹²⁰

The same majority, discussing the nature of a neutral course, admitted that strict neutrality by the state is impossible but always involves the weighing of competing values:

We must also accept that, from a philosophical standpoint, absolute neutrality does not exist. Be that as it may, absolutes hardly have any place in the law....

Therefore, following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the affected individuals affected.¹²¹

Finally, the majority decision rejects the argument that exposing children to the variety of religious practices entails an infringement of parental rights. The Supreme Court of Canada refused to see the neutral course as promoting a “relativistic” philosophy:

The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government’s obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the Canadian Charter and of s. 3 of the Quebec Charter.¹²²

The second challenge to the mandatory nature of the course concerned not an individual seeking a personal dispensation, but a private Catholic high school seeking recognition that its own course satisfied all the requirements of the state-implemented course, and so should be considered equivalent to the official one. Loyola High School in Montreal sought an exemption to offering the required course. The school, in requesting

¹²⁰ *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R., para. 29, p. 251.

¹²¹ *Ibid.*, para. 31, 32, pp. 252-253.

¹²² *Ibid.*, para. 40, p. 255. The minority decision, also rejecting the appeal, follows this same line of reasoning: “Despite being sincerely held, their [i.e. the parents’] opinion that basic moral relativism was the program’s essential characteristic was not sufficient to establish a violation of the Canadian Charter or the Quebec Charter” (para. 52, pp. 259-260).

an exemption, specifically refused to invoke arguments about the constitutionality of the official programme, preferring to remain with the argument that they provided an equivalent course to that mandated by the ministry. The requested exemption was refused, and Loyola High School sued. Its pleadings include the argument that “the failure by the Defendant minister to grant the exemption has the effect of imposing on Loyola the propagation of a world view which is incompatible with its Catholic mission. This runs afoul of its constitutionally protected freedom of religion....”¹²³ This world view, the pleadings state, is “normative pluralism” which is incompatible with the very nature of the high school’s Catholic identity.¹²⁴ The move towards a secular school system in Quebec “in no way paved the way for the State to arrogate to itself the role formerly played by Catholic and Protestant public schools, in order to pursue the indoctrination of Quebec youth into a new, single, state-sanctioned ideological paradigm.”¹²⁵ Furthermore, the refusal to grant equivalency, “even goes so far as to make explicit the imposition on a religious institution of the ministerial view on such critical matters as the common good and the recognition of others”¹²⁶ and “demands that Loyola teach the subjects of ethics and of religious culture in a manner that violates the school’s

¹²³ *Loyola High School v. Courschesne (Minister of Education)*, Superior Court (Quebec), Amended Motion to Institute Proceedings, no. 63. All documents relating to this case can be found at the High School website, <http://www.loyola.ca/index.php/news-and-calendar/149-ethics-and-religious-culture-in-court> (20 January 2009).

¹²⁴ “Far from being a neutral philosophical position, normative pluralism is as infused with philosophical and ideological content as any other religion or philosophy. It is part of a well-established school of relativistic thought, being represented by academics and thinkers. Its fundamental tenets entail the denial of any claims to truth beyond the subjective experience of each individual and the reduction of all religious beliefs and traditions to the level of purely human manifestations, stripping them of all transcendent dimensions. Normative pluralism effectively trivialises and implicitly negates religious belief and experience” (*Loyola High School v. Courschesne*, no. 31).

¹²⁵ *Ibid.*, no. 73.

¹²⁶ *Ibid.*, no. 77.13.

mission and the fundamental pedagogical commitments that govern all of its teaching.”¹²⁷ In its final pleadings, the high school argued that the refusal of exemption was based specifically on the Catholic orientation of the school’s programme rather than on the stated objectives of the official programme, namely the recognition of others and the pursuit of the common good.¹²⁸ It was argued that these latter objectives – not “neutrality” or “confessionality” as such – provide the correct criteria for determining equivalency. In essence, the school said, the official programme requires that Catholics must pretend not to be who they are,¹²⁹ and that the platform of dialogue promoted by the legislation requires that the intervenor, to dialogue properly, renounce who he is.¹³⁰ The Quebec Superior Court found in favour of Loyola High School, basing itself on administrative law principles regarding the ambit of discretion exercised by the minister in determining equivalency. The court found that the course was equivalent to that mandated by the provincial government and so they had the right to an exemption.¹³¹ The Quebec Court of Appeal reversed that decision and decided in favour of the Minister of Education. The unanimous decision turned also on the legitimate ambit of discretionary power exercised by the minister; having found that the discretion was used reasonably, the court refused to examine the particulars of the minister’s refusal to grant

¹²⁷ Ibid., no. 77.15.

¹²⁸ See GOVERNMENT OF QUEBEC, *Quebec Education Program: Secondary Education, Update May 2008*, Quebec, MELS, 2008, p. 462.

¹²⁹ See *Loyola High School v. Courschesne*, Notes et autorités des demandeurs, no. 56: “Et c’est là qu’il faut reposer la question qui est au cœur du litige: est-ce qu’on peut dire à des Catholiques: *faites comme si vous n’étiez pas catholiques?*” (italics in original).

¹³⁰ See *ibid.*, no. 58 (c).

¹³¹ *Loyola High School v. Courschesne*, 2010 QCCS 2631 (Quebec Superior Court), para. 332.

equivalency.¹³² The judgment, drawing upon the Supreme Court of Canada decision in *Deschênes* also did not think that the neutral presentation of religions constituted an infringement of religious rights, or if it did, it constituted a negligible infringement.¹³³

The issues of dispensation from a mandated culture of religions course or exemption for equivalency represent the concerns of many Catholic parents about the effect of state-designed and implemented religious culture programmes. The pleadings on behalf of Loyola High School purport to represent the concerns of many parents.¹³⁴ In the push for the secularisation of the Quebec public school system, the *Quebec Charter of Rights* was recently amended, altering the rights of parents to demand a religious or moral instruction according to their conviction *within schools*. The right is no longer a right vis-à-vis the school, but a right which reposes entirely on parents to carry out:

41. Parents or the persons acting in their stead have a right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children's rights and interests.¹³⁵

¹³² “Je suis d’avis que la décision de la Ministre de refuser la demande d’exemption fait partie des issues possibles acceptables pouvant se justifier au regard des faits et du droit. Les motifs donnés ne sont pas de ‘simples prétextes.’ Ils sont transparents et intelligibles et ne sont pas étrangers aux objectifs poursuivis par le législateur” (*Québec [Procurer General] v. Loyola High School*, 2012 QCCA 2139 [Quebec Court of Appeal], para. 123, <http://www.jugements.qc.ca/php/decision.php?liste=66568179&doc=998A9A5497EB16303BB84134F99E813E40833309C8A563B1F7845082F2FAE25B> [6 February 2013]).

¹³³ “En l’espèce, je ne crois pas qu’obliger Loyola à enseigner les croyances religieuses d’une manière globale et l’éthique, sans qu’il soit question d’y adhérer, constitue une réelle atteinte. Le ‘relativisme’ demandé à l’enseignant ne brime pas la liberté d’enseigner la religion catholique de l’école. Comme Loyola l’indique dans son mémoire, il s’agit de mettre de côté, le temps d’un cours, la perspective catholique” (ibid., para. 171).

“En effet, s’il y a atteinte, elle est négligeable.... [citing another Supreme Court of Canada decision:] ‘Une atteinte ‘négligeable ou insignifiante’ est une atteinte qui ne menace pas véritablement une croyance ou un comportement religieux’” (ibid., para. 172, 173).

¹³⁴ *Loyola High School v. Courschesne*, Amended Motion to Institute Proceedings, nos. 65, 68. No. 64 of the Amended Motion states, “Loyola’s request for an exemption aims not only at preserving its integrity and character as a Catholic educational institution, but also at allowing Catholic parents to exercise their right to educate their children according to their religious convictions.”

¹³⁵ Bill 95, *Loi modifiant diverses dispositions législatives de nature confessionnelle dans le domaine de l’éducation*, s. 13, in *Gazette Officielle de Québec*, Part II, 13-07-2005, vol. 137, no. 28, p. 3352.

The Quebec Conseil de relations interculturelles adopted the view of its legal expert that this change would bring the *Quebec Charter of Rights* in line with international law by limiting parental rights to a right to send their children to private confessional schools or to seek a dispensation from religious or moral education in public schools.¹³⁶

Underpinning the whole debate in Quebec about “the place of religion in schools” is a questioning of the interrelation between the role of parents and the role of the state in educational choices. The Quebec Comité sur les affaires religieuses, in its brief to the Minister of Education, summed up the conflict and proposed a solution:

Should we be surprised then that, in the schools as well as among the population as a whole, a number of people have opted for simplistic and deceptive short cuts? Many have come to feel that religion has been excluded from the schools and that the Catholic majority has been encouraged to keep quiet about its beliefs. The idea of the students’ “spiritual development” remains vague and indeed suspect, and the concept of secularity, as applied to schools, is often misunderstood and poorly framed. We must now work to create a new institutional culture so that government decisions redefining the place of religion in the schools can become a reality.¹³⁷

The controversy, in the view of the Comité, is the result of a misunderstanding. Legal action, and other actions “in support of the right of freedom of conscience and religion in school,” have created a lot of “negative” reaction: “This has shown that school staff and indeed the population as a whole are not well informed about, and have a poor understanding of, the Quebec model of open and secular public schools.”¹³⁸ The underlying assumption is that redefining the place of religion in schools would be universally and peacefully accepted if parents and other actors were simply better

¹³⁶ See CONSEIL DE RELATIONS INTERCULTURELLES, *Place de la religion dans l’école commune*, p. 10, approving verbatim the opinion expressed in WOEHLING, *Étude sur le rapport entre les droits fondamentaux*, p. 142.

¹³⁷ GOVERNMENT OF QUEBEC, *Secular Schools in Québec*, p. 24.

¹³⁸ *Ibid.*, p. 51.

informed. This assumption is subject to critique; perhaps not all parents, even when properly informed, would agree that the government decisions safeguard parental rights, and surely this is the very heart of the controversy. The fact that the Quebec government has made its ethics and religious culture programme mandatory even in private confessional schools is a powerful testimony to its conviction that the programme is truly neutral. Nevertheless, this conviction is not universally and peacefully shared by all concerned citizens, and represents another aspect of the current context pushing some parents to review options for the education of their children. For its part, the Catholic Church views parental rights over education as primary and the state's rights as subsidiary.¹³⁹ But just where "primary" ends and "subsidiary" begins will always be a point of controversy.

2.3. Parental Responses to Government Organised Education

In addition to challenges arising from financial constraints and secularism, the number of schooling options outside established Catholic schools is increasing in North America. Amongst the options chosen one sees two broad responses: home-schooling, which has been changing over the years as many forms of distance education become more sophisticated with the use of new technologies that permit "virtual" classrooms, and the foundation of local private schools through the cooperative efforts of parents, as parents themselves, in some cases, feel confident undertaking such initiatives.

¹³⁹ This was recently restated again in CONGREGATION FOR CATHOLIC EDUCATION, Circular Letter to the Presidents of Bishops Conferences on Religious Education in Schools, no. 2.

2.3.1. The Home-Schooling “Movement”

The latest figures for children schooled outside of a public or private school in the United States published by the National Center for Education Statistics provide comparisons between 1999, 2003 and 2007.¹⁴⁰ An increase of some 400,000 students was noted from 2003, from 1.1 million to 1.5 million. Moreover, the percentage of all school-aged children schooled at home also rose: from 1.7 percent in 1999, to 2.2 percent in 2003 and to 2.9 percent in 2007. The rate of homeschooling, therefore, is calculated as growing 74 percent from 1999 to 2007 (36 percent from 2003 to 2007). This represents a significant trend in parental educational choice.

The same survey also covers the primary reasons for parents choosing to school at home.¹⁴¹ Eighty-three percent responded, in 2007, that they chose home-schooling to provide religious or moral instruction; this was an increase of 72 percent over 2003. Moreover, when asked what the *primary* reason for home-schooling was, the greatest number (36 percent) stated that it was to provide religious or moral instruction. The other two primary reasons stated in the survey were concern about the school environment (21 percent) and dissatisfaction with academic instruction offered in schools (17 percent).

National statistics and studies are harder to come by in Canada where each province has exclusive jurisdiction over education and where there is no national ministry of education. As regards home-schooling, the difficulties in collecting accurate data are formidable. For example, the Quebec Ministry of Education does not collect data on

¹⁴⁰ See U.S. GOVERNMENT, *1.5 Million Homeschooled Students in the United States in 2007*, Issue Brief, Jessup, MD, ED Pubs, U.S. Department of Education, National Center for Education Statistics, Institute of Education Sciences, 2008, pp. 1-2.

¹⁴¹ See *ibid.*, pp. 2-3.

home schooling at all. Other provinces require some form of registration either with the local school board or with the ministry of education, but many home-schooling families admit that they do not register.¹⁴² There is a significant divergence between statistics published by provincial ministries of education and those published by organisations of the home-schooling movement itself. In 1996 the provincial ministries of education (excluding Quebec) estimated that there were 17,523 children schooled at home, representing 0.4 percent of all school-aged children.¹⁴³ The Canadian home-schooling organisations claimed at the same date to have between 30,000 and 40,000 students, and in 1999, over 80,000.¹⁴⁴

As for parents' motivations for home-schooling, the Canadian research is rather thin, but points to differences from those in the United States. Fewer Canadian home-schooling parents than in the United States cite negative experiences in the public system than in the United States or the right to determine their children's education. The appeal of home-schooling seems very broad, partially resulting from the increased publicity given to this option rather than to the search for a "radical alternative to contemporary public schooling."¹⁴⁵ This conclusion tends to reinforce a 1999 study concerning general

¹⁴² See STATISTICS CANADA, "A Profile of Home Schooling in Canada," in *Education Quarterly Review*, vol. 4, no. 4 (1997), pp. 37-38.

¹⁴³ See P. BASHAM, J. MERRIFIELD, AND C.R. HEPBURN, *Home Schooling: From the Extreme to the Mainstream*, 2nd ed., Vancouver, Fraser Institute, Studies in Education Policy, 2007, available at http://www.fraserinstitute.org/commerce_web/product_files/Homeschooling2007.pdf (7 July 2009), p. 9.

¹⁴⁴ See *ibid.* The authors suggest that the reason for the discrepancy may be that there is no incentive for families to register (see note 7 of the article).

¹⁴⁵ A.B. ARAI, "Reasons for Home Schooling in Canada," in *Canadian Journal of Education*, vol. 25, no. 3 (2000), pp. 214-215. This study only samples families in British Columbia and Ontario, but its conclusions are confirmed in a study undertaken by national home schooling associations in Canada: "For most parents, the initial motivation to keep their children at home is based more on achievement than avoidance. That is, most parents do not choose to homeschool [sic] in response to a negative situation, but rather to proactively achieve some combination of moral, social, familial, and academic goals..."

confidence levels in the Canadian public education system.¹⁴⁶ It is suggested that the increase in alternative schooling options, as witnessed by the growth of private schools, home-schooling, charter schools and long-distance education, is not so much the result of solid evidence of declining student performance in public schools, as it is symptomatic of a growing gap between expectations put on public schools and the reality of what schools deliver: “Greater uncertainty in society coupled with a more knowledgeable public” has generated “greater public cynicism about core institutions” including public schools.¹⁴⁷ A more recent study, however, indicates that confidence levels have been growing in the last few years.¹⁴⁸ Furthermore, for those seeking alternatives to public education, home-schooling provides a significantly cheaper option than a private school; home-schooling families in Canada in 2003 spent on average \$700 per year per child on education.¹⁴⁹ Two-thirds of home-schooling families in Canada have only one income-earner in the family; of those with two, 67 percent of second income-earners work fewer than 15 hours per week.¹⁵⁰ This indicates that for the home-schooling option to be viable, parents must make some choice to accept lower household income.

Some very broad conclusions about home-schooling may be seen also to underlie parents’ willingness to start their own school. Many parents today are more confident in

(CANADIAN CENTRE FOR HOME EDUCATION and HOME SCHOOL LEGAL DEFENCE ASSOCIATION, *Home Education in Canada: A Summary of the Pan-Canadian Study on Home Education 2003* (=Pan-Canadian Study on Home Education 2003), http://www.hslda.ca/cche_research/SummaryFinal.pdf (7 January 2009), p. 3.

¹⁴⁶ See N. GUPPY and S. DAVIES, “Understanding Canadians’ Declining Confidence in Public Education,” in *Canadian Journal of Education*, vol. 24, no. 3 (1999), pp. 265-280.

¹⁴⁷ *Ibid.*, p. 277.

¹⁴⁸ See HART and LIVINGSTONE, *Public Attitudes towards Education in Ontario 2007*, pp. 8-9.

¹⁴⁹ See Pan-Canadian Study on Home Education 2003, p. 6.

¹⁵⁰ See *ibid.*, p. 3. Most home schooling parents have above average education levels, but 70 percent have yearly household incomes of less than \$65,000.

their own abilities to be directly involved in their children's education and to launch new initiatives. They are more educated than ever before, and yet are willing to forego household income in favour of educational opportunities for their children.

2.3.2 Initiatives by Parents to Found Schools for the Catholic Education of Their Children

Historically, in North America, Catholic parents relied heavily on religious institutes to found, govern and staff schools. This pool of expertise has dwindled since the 1960s. In the United States, for the school year 2010-2011, the percentage of religious (brothers and sisters) and priests teaching full-time in Catholic schools diminished to 3.7 percent from fifteen percent a decade before.¹⁵¹ From 2000 to 2012, the total number of men and women in religious institutes decreased 29.5 percent.¹⁵² The percentage of women religious involved in full-time teaching from within all female congregations in the same period of time went from 11.4 percent to 7.3 percent.¹⁵³ Not only is the total absolute number of sisters teaching full time decreasing, but the ratio of sisters engaged in full-time teaching is also declining. The decreased ratio may result from several factors, whether due to age, a decrease in the number of institutes dedicated to the education of youth, a realignment of human resources within the institutes themselves, a redirection of apostolic activity away from full-time teaching, or a combination of all of these.¹⁵⁴ If one compares the recent percentage with the year 1960, which was around the

¹⁵¹ See *U.S. Annual Statistical Report on Schools 2010-2011*, p. 23.

¹⁵² Based on the figures given in the general statistical summaries for the corresponding year of *The Official Catholic Directory*, Berkeley Heights, NJ, P.J. Kennedy & Sons; for 2000 see "2000 General Summary," p. 2093 and for 2012, see "2012 General Summary," p. 2057;

¹⁵³ See *ibid.*

¹⁵⁴ See *U.S. Annual Statistical Report, 2010-2011*, p. 3. Three factors are suggested: 1) the decline in the number of persons entering institutes of consecrated life, 2) the numbers of consecrated persons who

high-water mark of Catholic schools in the United States, the results are even more dramatic. In 1960, 73.8 percent of teachers were priests and religious¹⁵⁵ and of all the women in consecrated life 58.4 percent were teaching full-time; the equivalent ratio was 45.6 for consecrated men.¹⁵⁶

In Canada the corresponding national statistics are very hard to come by.¹⁵⁷ The Canadian Religious Conference published a report in 2008 stating that their organisation no longer publishes detailed statistics on their members. Between 1975 and 2004 total membership in institutes of consecrated life decreased in Canada by 40.7 percent, and a further 6 percent from 2004 to 2007.¹⁵⁸

The fact that three Canadian provinces have fully-funded public Catholic school systems and that five provinces provide some form of support from public funds to private Catholic schools might be considered to have a significant impact on the involvement of consecrated persons in Catholic schools, but unfortunately no systematic studies exist to analyse this aspect of the Catholic school system in Canada. The one anecdotal indication perhaps reflects in some way the larger situation. In Ontario, when the provincial government extended full funding to all Catholic high schools in 1984,

have left their institutes, and 3) the change of “ministry directions” from schools to other apostolic activities.

¹⁵⁵ See *ibid.*

¹⁵⁶ See *The Official Catholic Directory 1960*, fold-out entitled General Summary located after Part 2, “The Catholic Church in the United States,” p. 2 of fold-out.

¹⁵⁷ The national Centre for Education Statistics at Statistics Canada does not generally collect data on private schools, and the data it retains on public schools is provided by provincial ministries of education. They last published a report on private schools in 2001 which covered statistics gathered from 1987 to 1999. See STATISTICS CANADA, “Trends in the Use of Private Education: 1987/88 to 1998/99,” in *The Daily*, 4 July, 2001, <http://www.statcan.gc.ca/daily-quotidien/010704/dq010704b-eng.htm> (26 January 2009).

¹⁵⁸ See CANADIAN RELIGIOUS CONFERENCE, “CRC Statistics – As of January 1st 2007,” http://www.crc-canada.org/bd/fichierNouveaute/482_2.pdf (11 January 2009).

those schools run by a religious congregation had to choose whether to remain independent or to fold into the public system. Only the Basilian Fathers in Toronto opted at that time to retain their independent status.¹⁵⁹ In Newfoundland and Labrador, following the reorganisation of the school system and the elimination of public confessional schools, one Catholic school in the capital, St. John's, remained independent and the administration, at first given over to the Society of Jesus, has since been transferred to a lay-dominated board. Two other schools remained independent, but one of those closed in 2008 due to small enrollment.

In 2003 the Canadian Association of Catholic School Trustees published figures for the number of consecrated persons engaged in teaching in Canada.¹⁶⁰ The statistics cover only the year 2002 and were drawn solely from the five provinces and two territories where full or partial funding of Catholic schools is provided by the government. Of a total of 2,069 Catholic schools, 337 were secondary and 1,732 were primary. Total enrollment was 750,536, with 237,130 in secondary and 513,433 in primary schools, comprising about 40% of the total school-aged population in the provinces considered. As regards teachers who are members of institutes of consecrated life, their involvement in Catholic schooling is very limited. Of a total of 43,222 teachers only 80 (0.19 percent) were religious (28 in high schools and 52 in elementary schools). Of the 2,069 Catholic schools, only seven school principals were drawn from institutes of

¹⁵⁹ See BORDONARO, "Separate Schools in Ontario," pp. 144-45. Since that time, as far as the author can determine, only the Legionaries of Christ have established a school in the province of Ontario, in Cornwall. Other independent schools with a Catholic orientation are not run by institutes of consecrated life.

¹⁶⁰ See FLYNN (ed.), *Catholic Schools across Canada*, pp. 73-75.

consecrated life (0.33 percent), and usually only in those schools actually run by an institute.

Whatever the causes of the decline in the number of clergy and religious dedicated full-time to teaching in schools in the United States and Canada,¹⁶¹ one consequence is that parents who wish to begin their own school will not have these persons to draw upon for administrative or teaching tasks. Not only will it be difficult to turn to an institute of consecrated life for the expertise needed in founding and running a school, but teaching staff will not be available, by and large, from religious institutes. Lay teachers will have to be hired, which means competing with salaries and benefits offered in the public and diocesan school system. Paying adequate teachers' salaries is the greatest challenge to any parent initiative to found a school, and such schools often rely on teachers who identify closely with the aims of the initiative, undertaking their commitment in the spirit of true apostolic sacrifice.

More than just providing a financial challenge and a significant impoverishment of valuable expertise, the absence of consecrated persons in schools represents a particular loss since "religious consecration has much to say to every culture in that it helps to reveal the truth of the human being."¹⁶² Consecrated persons make manifest that the "project" of the search for holiness is not only common to all, but represents the

¹⁶¹ The Sacred Congregation for Catholic Education noted three reasons: lack of vocations, the urgency of other apostolic needs, and the opinion that schools are no longer appropriate places for pastoral activity, see *Lay Catholics in Schools: Witnesses to Faith*, no. 3, in *FLANNERY2*, p. 631.

¹⁶² CONGREGATION FOR CATHOLIC EDUCATION, *Educating Together in Catholic Schools: A Shared Mission between Consecrated Persons and the Lay Faithful*, Libreria editrice Vaticana, 2007, no. 47, p. 23.

“highest humanising proposal of man and of history.”¹⁶³ Religious are needed in schools together with lay persons in order to achieve an integral education.¹⁶⁴

With the financial strains experienced by existing diocesan schools, the declining availability of consecrated persons, concerns about a relativist, humanistic ideology invading public secular schools, and a growing confidence by parents to educate their own children, it is perhaps not so surprising to find a number of relatively recent parent-initiated schools in North America. But this is not exclusively a North American phenomenon. In France the association *Créer son école* was created in 2004 to help parents found their own schools. It consists of directors of independent schools and experts who provide advice.¹⁶⁵ This association founded a second association in 2008, *Fondation pour l'école*, which counts over 556 “new schools” serving over 48,000 students: schools which are said to be “entirely free” and which receive no state financial support.¹⁶⁶ This latter association was launched with the intention of providing three areas of support: assistance with obtaining teacher qualification, providing advice and aid with the numerous financial difficulties of independent schools, and building public awareness of independent schools in France.¹⁶⁷

In the United States an association of independent Catholic schools has existed since 1995, the National Association of Private Catholic and Independent Schools

¹⁶³ CONGREGATION FOR CATHOLIC EDUCATION, *Consecrated Persons and Their Mission in Schools: Reflections and Guidelines*, 28 October 2002, no. 12, English translation in *Origins*, 32 (2002-2003), p. 524.

¹⁶⁴ See SACRED CONGREGATION FOR CATHOLIC EDUCATION, *Lay Catholics in Schools*, p. 631.

¹⁶⁵ See website *Créer son école*, <http://www.creer-son-ecole.com/index.php?page=17> (15 January 2009).

¹⁶⁶ See website *Fondation pour l'école*, <http://www.fondationpourlecole.org/fr/articles/les-coles-indpendantes.html> (17 November 2012).

¹⁶⁷ See *Créer son école*, note 165 (15 January 2009).

(NAPCIS). From four member schools, by 2009 it has increased to over 60 schools in 29 states. Like Fondation pour l'école, NAPCIS is dedicated to helping those who wish to start a new school by providing school accreditation, teacher certification, general resources to those founding a school, and support for directors and teachers "in the application of Roman Catholic teaching and sound academic principles."¹⁶⁸ Both NAPCIS and Créer son école indicate that they are concerned with *small* schools; their intention is not to undertake large ventures.

Canada has no national association of private Catholic schools. Nevertheless, there have been initiatives by parents to found their own schools, both in those provinces where there are public separate schools, and in those where there are none. No studies exist regarding these schools, the reasons why parents undertake to start their own school, the numbers of students involved, the quality of instruction, the state of facilities, etc. Whatever evidence exists is anecdotal. By and large, like the schools in France and the United States, parent-founded independent schools in Canada are very small with limited resources to pursue their aims.

Conclusion

The current social and ecclesial context for Catholic schooling in North America is varied and diverse. The most significant challenges faced by existing Catholic schools are financing and secularisation, which have consequences for a school's existence and identity. At the same time, the resources of religious institutes dedicated to the education of children are, generally speaking, less available now than in times previous. Some

¹⁶⁸ See the NAPCIS website, <http://www.napcis.org/what.html> (15 January 2010).

parents are looking for options, whether it be home-schooling or some form of private education, and many parents have confidence in their abilities to launch an initiative of their own. Slowly, support is developing for such initiatives but the underlying financial burdens remain. For those parents who wish to found their own school for the Catholic formation of their children, an additional issue remains outstanding: what is the school's relation to ecclesiastical authority? How close is it to be to the diocesan authorities, how much independence is it to have? Before addressing those particular issues, it is useful to examine in the next chapter, from a canonical point of view, how Catholic schools have organised themselves and established their place in the broader educational context in North America. Catholic schools have remained resilient in the face of many challenges and this capacity to adapt has been their great strength.

CHAPTER 3

3. EXERCISING PARENTAL RIGHTS OVER EDUCATION WITHIN THE FRAMEWORK OF EXISTING CATHOLIC SCHOOLS: A CANONICAL OVERVIEW

The analysis of the development of the canons on Catholic identity in schools undertaken in the first chapter points to two aspects of this identity: namely an internal character permeating all the schools' activities, and an external relationship to the Catholic hierarchy. The second chapter examined the current social and ecclesial context in which parental rights are exercised, pointing to significant challenges to all faith-based schools whether arising from financial concerns, the growing push for secularisation and curriculum control, the diminishing numbers of consecrated persons actively involved in the education of youth, or the growing trend to opt out of established schooling options through the rise of home-schooling or other parent initiatives. The present chapter narrows the examination to Catholic schools in the United States and Canada. In particular, the goal is to understand, in broad lines, how Catholic identity has been achieved and maintained in the practical administration of existing schools facing significant sociological and ecclesial challenges.¹ It is understood that these two elements, namely, the realisation of Catholic identity and the organisational structure of Catholic schools, are not unrelated in the practical sphere. Identity and structure are interconnected insofar as identity can be given performative value through the manner in which schools are legally set up and organised.² It is not the abstract notion of identity

¹ The present chapter examines, therefore, parish, interparish and diocesan schools as well as schools related in some way to a religious institute or similar ecclesiastical structures.

² This is perhaps the place to reinforce a semantic point too often ignored. In pursuing the Church's educative mission and its fulfillment through the establishment of Catholic schools, one needs to keep in

which is of concern here, then, but the way in which schools pursue what they consider to be a constitutive element which gives them their *raison d'être* and, in a pragmatic sense, a determined “market:” their Catholic identity.

Both the great divergence of approaches to Catholic schools in North America, as well as the wide choice of organisational structures, illustrate the breadth of solutions to common problems. These solutions have been achieved by several practical means: a lively adaptation to regional needs, a diversity of approaches to relations between state and Church, the rich influence of committed personalities, and a dogged political persistence and determination. To take just one example already considered, the constitutional status of Catholic schools in civil jurisdictions differs enormously between Canada (where Catholic schooling is constitutionally protected) and the United States (where Catholic schooling is outside the domain of the state), and even between the different provinces within Canada itself. Given the diversity of approaches and the ample room for local solutions, it is beyond the scope of this chapter to give a comprehensive analysis of the developments of Catholic identity and legal personality surrounding Catholic schools in North America. Admittedly, Catholic schools are under great social and financial strain. There is a lot of “soul-searching” in our time about “how to do the Catholic school,” both as regards the essence of Catholic identity, and as regards the legal organisational structure best adapted to current challenges. The analysis in this chapter

mind that the general tenor of the Church’s approach to schools is to provide “distinctive” as opposed to “elitist” schools. Charges of elitism arise because, in the duty of providing a distinctive “Catholic” education, tuition often must be charged to cover costs. This easily plays into the hands of those who link the need to charge tuition with elitism. Ecclesiastical authorities have always asserted the government’s obligation to provide financial support for parents’ right to choose a distinctive education for their children. This is given normative value in can. 793, §2 and can. 799. See T. WALCH, *The Parish School: American Catholic Parochial Education from Colonial Times to the Present*, New York, Crossroad Publishing Company, 1996, pp. 203-204.

will, nevertheless, show up the spectrum of liberty that local ecclesiastical and school authorities have in working towards their own solutions to problems.

The various forms of Catholic schools in the United States and Canada will be analysed as to how they have sought to achieve Catholic identity in a practical sense and how they have organised themselves legally to pursue their educative goals. This analysis of the interrelation between notions of identity and organisational structure in the history of Catholic schooling in North America will lead to some practical implications for the exercise of parental rights and responsibilities over the education of their children in the current context.

3.1 Parochial Schools: The Experience in the United States

The Sacred Congregation for the Propagation of the Faith in its 1875 instruction to the bishops of the United States³ encouraged them to expend their resources to found exclusively Catholic schools. The Third Plenary Council of Baltimore, meeting in 1884, mandated “That near every church a parish school... is to be built and maintained *in perpetuum* within two years... unless the bishop should decide that because of serious difficulties a delay may be granted.”⁴ While this goal was never realised and parishes were never able to provide “one desk for one Catholic student”, nevertheless the truth is that parishes had been establishing schools since the 1840s even before mandated to do so. This growth was uneven across the country, but where the bishop was a proponent, parish schools were founded. Beginning especially in the 1840s, a great number of

³ *De scholis publicis*, p. 94. See chapter 1, p. 27, footnote 66.

⁴ Decree 199, I, in *Acta et decreta Concilii Plenarii Baltimorensis tertii*, Baltimore, MA, John Murphy and Associates, 1886, p. 104 (available online at <http://books.google.com/books?id=f7Ey-IOvkQ4C&oe=UTF-8>).

“teaching sisters” arrived in the United States and new orders were founded.⁵ To a great extent these sisters were brought in to teach in parish schools. The material conditions of these schools and their own living conditions were, to say the least, less than ideal. Often the sisters were expected to provide instruction in over-crowded classrooms, receiving less than half the pay of a lay teacher. Many found it difficult to satisfy their own living needs from the salaries received and so they turned to other fund-raising initiatives to make ends meet. Among the various means used to raise these funds, the foundation of “academies,” that is, private non-parochial schools which catered to the wealthier, were a favoured option, permitting the religious orders to charge steeper tuitions.⁶ In some cases the foundation of an academy was the only way the sisters could survive and assure their presence in parish schools.

3.1.1. Catholic Identity in Parochial Schools

The question of the Catholic identity of parish schools and academies run by religious was never addressed directly. The whole enterprise of founding parish schools and academies was so evidently to provide a Catholic education and to prevent children of Catholic parents from receiving education in neutral, secular or mixed schools that the question of identity did not have to be addressed directly; it was, in fact, the very reason for the schools’ foundation.⁷ The Catholic character of the school was assured not just

⁵ For a useful summary of the origins of teaching sisters and brothers in the United States during this formative period of the American parochial school, see J.A. BURNS, *The Growth and Development of the Catholic School System in the United States*, New York, Benziger Brothers, 1912.

⁶ See C.K. COBURN and M. SMITH, *Spirited Lives: How Nuns Shaped Catholic Culture and American Life, 1836-1920*, Chapel Hill, NC, The University of North Carolina Press, 1999, p. 147.

⁷ The Third Council of Baltimore stated that “the school, which principally gives the knowledge fitting for practical life, ought to be preeminently under the holy influence of religion” (Pastoral Letter, in *Acta et decreta Concilii Plenarii Baltimorensis tertii*, p. lxxxv). The teaching sisters saw their role in the early parochial school in a similar way: “Parish schools often taught a variety of students at different skill

formally by its hierarchical connection with the parish or the religious order, but by the quasi-exclusive admission of Catholic students, the use of specifically Catholic textbooks,⁸ the very spirit of its administration, and its curriculum which, in many cases, was adapted from existing Catholic curricula in France or Germany from where the orders originated.⁹ Where centralised diocesan school boards and/or the office of superintendent of schools were established, Catholic identity could be reinforced by means of general educational norms and uniform standards for school visitations.¹⁰ National organisations were also established for teachers and school administrators on the one hand, and as an instrument for the exercise of episcopal responsibilities over education on the other. The Catholic Educational Association was founded in 1904 for teachers (later the National Catholic Educational Association, or NCEA), and in 1919 the Education Department of the National Catholic Welfare Conference was established for the bishops. These organisations permitted a better integration of pedagogical advances and sought to imbue American culture with a Catholic vision of schools and education.

By the 1980s these organisations remained in various forms, but the prevailing presence of religious in classrooms had dwindled and the number of Catholic students

levels, but their main purpose was to educate children regardless of socioeconomic standing, in the tenets of the Catholic faith and provide a basic education similar to that of the public school of the time period. Fearing the Protestant and secular influences of the public schools, Catholics wanted the parish schools to imbue children with a Catholic identity, immerse them in Catholic culture, and save their souls while educating them in the basic skills necessary to survive in American society” (COBURN and SMITH, *Spirited Lives*, p. 136).

⁸ Regarding the growth and development of Catholic textbook publishers towards the end of the nineteenth century, see WALCH, *The Parish School*, pp. 73-75.

⁹ This was the case for the Sisters of St. Joseph (after 1860 called the Sisters of St. Joseph of Carondelet as a result of their separate American foundation). See COBURN and SMITH, *Spirited Lives*, pp. 137-138.

¹⁰ The first diocesan as opposed to parish school board was established in Philadelphia in 1852 under Bishop John Neumann; by 1930 over 60% of American dioceses had diocesan school boards. See WALCH, *The Parish School*, pp. 48 and 104. There was little lay influence in these offices, and parents were not consulted (see *ibid.*, p. 102).

had fallen dramatically since its high-water point in the mid 1960s. Catholic schools, especially in inner-city neighbourhoods, were accepting more and more non-Catholic students.¹¹ Moreover, American Catholicism had undergone significant transformation after the Second World War and most especially during the 1960s; the parochial school was not immune from this transformation. The issue of the Catholic identity of the parish school came more to the fore than in the previous century as Catholics entered the mainstream of American society. Now it was asked explicitly, what makes a Catholic school different in the changing society? The President of the NCEA offered a response pointing to two factors: good academics and schools where values of the home are respected. But, some queried, does this answer actually reflect *Catholic* values?¹² In the growing confusion the NCEA executive director proposed revisions to the religious education curriculum.¹³

A summary of the more recent studies regarding Catholic identity indicates that the parish school has been a good conduit for transmitting general Catholic *culture*, while performing less well in transmitting the Catholic *faith*.¹⁴ This assessment is based on an analysis of four general characteristics of Catholic schools: a humanistic aim to education, communal organisation, decentralised governance and an “inspirational ideology” (i.e. Christian personalism). These characteristics permeate all school

¹¹ See chapter 2, pp. 92-93.

¹² See WALCH, *The Parish School*, p. 232. Some parents remarked that there was then such a vast pool of divergent opinion as to what constituted a solid Catholic religious education that no parent could obtain a clear response (see *ibid.*, p. 233).

¹³ See *ibid.*, pp. 235-236.

¹⁴ See R.M. JACOBS, “U.S. Catholic Schools and the Religious Who Served in Them: The Struggle to Continue the Tradition in the Post-Vatican II Era,” in *Catholic Education: A Journal of Inquiry and Practice*, 2 (1998), pp. 164-170 (available online at <http://ejournals.bc.edu/ojs/index.php/catholic/article/view/79/77> [16 November 2012]).

structures and they are effectively supported by communal activity, reaching to all levels of the governance structure. They inform behaviour and words with shared symbols, values and meanings. Nevertheless this inculcation of *culture*, the findings conclude, does not translate into an effective handing on of the *faith* to the next generation in any better way than religious education programmes organised outside the Catholic school.

J. Michael Miller, when Secretary to the Congregation for Catholic Education listed five marks of the Catholic school. A Catholic school is one inspired by a supernatural vision, founded on a Christian anthropology, animated by communion and community, imbued with a Catholic worldview throughout its curriculum, and sustained by Gospel witness.¹⁵

3.1.2. Juridical Personality of Parochial Schools

During this same period of school development in the United States, the literature does not speak to any concern for the juridical status of the parish school.¹⁶ If it was an issue, there seems to be little or no documentary trace. The parish school mandated by the Third Plenary Council of Baltimore was considered simply a work of the parish, not distinct from it. It enjoyed no separate juridical status apart from the parish. The parish priest sat on its board and shared in its governance. Funds from parish collections were used to support the school and to supplement what was lacking from whatever tuition

¹⁵ See J.M. MILLER, *The Holy See's Teaching on Catholic Schools*, Manchester, NH, Sophia Institute Press, 2006, pp. 14-28.

¹⁶ The focus of this study is on juridical persons. More generally, one could consider the development of governance structures of Catholic schools. As this thesis was being completed, an article introducing this development of governance structures and summarising recent school restructuring in the United States was published: see P.R. LAGGES and M.P. MCCAUGHEY, "New Models of Parish Schools," in *CLSA Proceedings*, 74 (2012), pp. 221-248.

could be charged. The juridical status of the school and its board was simply subsumed under that of the parish.

It will be useful at this point to recall, briefly, the development of the law regarding juridical persons. At the same time a consideration of the canons relating to associations of the faithful will help prepare the ground for further developments analysed in the next chapter.

Juridical persons and associations of the Christian faithful are two distinct legal institutes, but, it has been said, they are not unrelated:

Always the primary focus of an apostolic activity *qua* association is the *work* to be undertaken, not the legal or corporate structure which undergirds that work. Structure is the bailiwick of the juridical person: a group's identity as *association* reveals it to be a collaborative or cooperative exercise of a task or ministry; its separate identity as a type of *juridical person* determines its governance, fiscal, and relational structures. Associations and juridical persons are not two parallel and equally-plausible structures, but instead the juridical person is an optional structure to be added, one might suggest as an overlay, atop an association.¹⁷

The twentieth century saw a development of the canonical notion of juridical person. First, a clearer distinction was drawn between moral person on the one hand and juridical person on the other. The provisions of the 1917 Code were influenced by nineteenth developments in Europe that led to the adoption of civil codes in many states. In the 1917 Code, the term “moral person” is largely interchangeable with “juridical person.”¹⁸ The 1983 Code introduced a development in terminology, clearly distinguishing

¹⁷ W. KING, “Public and Private Juridic Personality: A Comparative Legal Analysis,” JCD diss., Rome, Pontifical Gregorian University, 2000 (published privately in Harrisburg, PA), p. 65. Italics in original. The same author, at p. 64, provides the following distinction: “...the seminal juridical person had an *institutional* focus to it—a means of providing structure and clarifying ownership. The evolving association of the faithful...had a more *charismatic* focus: it was concerned with mission, ministry, and holiness, and not with structure or temporal necessities.” See also J. HOWARTH, “Juridic Person or Private Association: Choosing a Canonical Structure,” in *Health Progress*, vol. 67, no. 7 (1986), p. 51.

¹⁸ See GAUTHIER, “Juridical Persons in the *Code of Canon Law*,” in *Studia canonica*, 25 (1991), p. 80. The term “moral person”, however, proved to be difficult to define by canonists. A brief history of the jurisprudence developed after 1917 and the various interpretations is given in J.A. DOYLE, “Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective,” JCD diss., Ottawa, St. Paul

between “juridical person” and “moral person.” Interestingly, it was not the *cœtus* studying the Code revision that introduced this distinction. The expression “moral person” was re-introduced and applied directly to the Church after the final revision was presented to the pope. It seems then, that the legislator intended to use the expression “moral person” in distinction not only to “physical person” but also to “juridical person” as a way to express the divine origin of the Church.¹⁹ More broadly, however, some canonists have proposed that the entity of the moral person should be considered as transcending the canonical order altogether, whereas a juridical person arises from the legal order itself.²⁰ The relevant norm of the 1983 Code establishing this distinction is canon 113:

Can. 113, §1 – The Catholic Church and the Apostolic See have the status of a moral person by divine disposition.

§2 – In the Church, besides physical persons, there are also juridical persons, that is, in canon law subjects of obligations and rights which accord with their nature.

For the purposes of this study, the other important developments regarding juridical personality in the twentieth century were the introduction of the distinction between private and public juridical persons and the distinction between aggregates of

University, 1989, pp. 8-14. See also BAILLERGEON, “The Canonical Rights and Duties of Parents in the Education of Their Children,” pp. 8-14. The distinction in *CIC/1917* is introduced in cann. 99 and 100. Can. 99 *CIC/1917* states: “In the Church, besides physical persons, there are also moral persons, established by public authority, that are distinguished as collegial moral persons and non-collegial ones, such as churches, seminaries, benefices, and so on.” Can. 100 *CIC/1917* stipulates: “§1. The Catholic Church and the Apostolic See have moral personality by reason of divine ordinance; other inferior moral persons in the Church arise in her either by prescription of the law itself or by special concession of the competent ecclesiastical Superior granted by formal decree for a religious or charitable purpose.”

¹⁹ See GAUTHIER, “Juridical Persons in the *Code of Canon Law*,” p. 82.

²⁰ See G. LO CASTRO, “Chapter II: Juridic Persons,” in *Exegetical Comm*, vol. 1, p. 750: “In conclusion, *moral person* should now indicate natural phenomena or those in any way transcending the juridical system, which the latter must recognise.... *Juridical person* should designate, however, only complete and formal realities, dependent on the positive law regarding governance and its own being. The institution of juridical personality represents in that conception the formal instrument in the hands of the legislator to give life to new subjects by law” (italics in original). Cf. GAUTHIER, “Juridical Persons in the *Code of Canon Law*,” pp. 81-82.

things and aggregates of persons.²¹ Certain types of aggregates of either persons or of things are, by the nature of their aims, public juridical persons:

Can. 116, §1 – Public juridical persons are aggregates of persons or of things which are established by the competent ecclesiastical authority so that, within the limits allotted to them, they might in the name of the Church and in accordance with the provisions of law, fulfil the specific task entrusted to them in view of the public good. Other juridical persons are private.

§2 – Public juridical persons are given this personality either by the law itself or by a special decree of the competent authority expressly granting it. Private juridical persons are given this personality only by a special decree of the competent authority expressly granting it.

Of course, it is not only physical and juridical persons that enjoy rights and obligations; associations of the faithful are recognised as integral to the ecclesiastical order.²² In addition to public²³ and private²⁴ associations of the faithful, there are what are known as *de facto* associations of the faithful, that is, those which are not recognised by competent authority.²⁵ The right to association is an inherent right of each baptised person,²⁶ and for an association to exist and so also to have some relation to the canonical order,²⁷ no intervention of the Catholic hierarchy is required.²⁸

²¹ See can. 115.

²² See can. 298, §1. Nevertheless, can. 310 makes clear that a private association of the faithful which has not been constituted a juridical person is not the subject of rights and duties. Rights and duties may be exercised, not on behalf of the association, but jointly by its members. This is discussed more fully in the following next paragraphs of this thesis.

²³ See can. 301, §3.

²⁴ See cann. 299, §§1, 2.

²⁵ See can. 299, §3. See also M.-A. NOBEL, “The Responsibility of a Diocesan Bishop towards Diocesan Associations,” in *Studies in Church Law*, 6 (2010), pp. 129-169.

²⁶ The basic right is stated in can. 215: “Christ’s faithful may freely establish and direct associations which serve charitable or pious purposes or which foster the Christian vocation in the world, and they may hold meetings to pursue these purposes by common effort.”

²⁷ Howarth describes the distinction between “private” and “public” as regards both associations of the faithful and juridical persons in the following way: “The designation of the association as public or private identifies the structure’s proximate relationship to the Church’s apostolic life and mission. It thereby determines how and to what degree an association of the Christian faithful or a juridical person is

De facto associations of the faithful arise by the common agreement of members and not by the intervention of ecclesiastical authority. The law does not create them, but they arise by an exercise of the will of those physical persons who come together for a common purpose.²⁹ Canonists such as R.T. Kennedy and J.A. Doyle consider these *de facto* associations to be moral persons.³⁰ If they are considered moral persons, it is possible to conclude that “[b]ecause such moral persons have an existence based on the new unified intention which brings them into being, they will have certain rights as acknowledged by other persons. These natural rights can have juridical effects when they are accepted by authority and integrated into the legal order.”³¹ One can think of many concrete examples. One such example might be the association of Catholic school teachers in a diocese which has never been established as a private or public association of the faithful. This *de facto* association, in addition, may not enjoy juridical personality

accountable to and dependent on competent ecclesiastical authority” (“Juridic Person or Private Association, p. 51).

²⁸ Can. 299, §1 highlights the aspect of individual agreement as the means by which associations arise: “By private agreement among themselves, Christ’s faithful have the right to constitute associations.” While associations of the faithful in general can aim at a wide range of activities such as fostering a more perfect life, public worship, Christian teaching as well as evangelisation, works of piety or charity and works that animate the temporal order with the Christian spirit (can. 298, §1), hierarchical authority retains the right to constitute associations which impart Christian teaching in the name of the Church, promote public worship, “or which are directed to other ends whose pursuit is of its nature reserved to the same ecclesiastical authority” (can. 301, §1). Furthermore, a supervisory role is reserved to ecclesiastical authority whatever the form of association: “All associations of Christ’s faithful are subject to the supervision of the competent ecclesiastical authority...” (can. 305, §1).

²⁹ See R.T. KENNEDY’s commentary on juridical persons in *CLSA Comm2*, p. 154: “A moral person is a group or succession of natural persons who are united by a common purpose and, hence, who have a particular relationship to each other and who, because of that relationship, may be conceived of as a single entity. A moral person is what we refer to when we speak of a team, a university class, an association. It is a mental construct, a collectivity thought of as a single entity, but an entity which does not exist, and cannot be conceived of, apart from the people who compose it. One can speak of a moral person having rights and obligations, but they are the cumulative rights and obligations of the members of the group.”

³⁰ Ibid.

³¹ DOYLE, “Civil Incorporation of Ecclesiastical Institutions,” p. 24.

granted by the diocesan bishop, nevertheless the diocese treats with the association as a unit and not just with its membership individually. The whole dynamic relationship between the diocese and the association indicates that, through its delegate or proxy,³² it enjoys rights to speak on behalf of all teachers, to present grievances and to represent the teachers as a body. While the association would be precluded from claiming, for example, damages in its own name (since it does not have legal personality as such), nonetheless, one would be hard pressed to deny its corporate nature, even if not granted juridical personality at law. Although their rights may not be enforceable on behalf of a unified, corporate entity but only through the individual members (physical persons)³³ or even through some juridical persons having a legitimate interest in a given case, nevertheless certain rights are recognised.³⁴ The important legal consequence is that while it is not the association itself which is the subject of those rights and obligations, nevertheless members of such groups enjoy their rights as individuals, even conjointly.

This is particularly clear in the case of private associations of the faithful:

Can. 310 – A private association which has not been constituted a juridical person cannot, as such, be the subject of duties and rights. However, Christ's faithful who are joined together in it can jointly contract obligations. As joint owners and joint possessors they can acquire and possess rights and goods. They can exercise these rights and obligations through a delegate or a proxy.

³² See can. 310.

³³ This was the subject matter of an authentic interpretation, promulgated on 12 December 1988, regarding groups of faithful lacking juridical personality or even recognition as provided in c. 299, §3, making recourse against a decree of a diocesan bishop. See AAS, 80 (1988), p. 1818, English translation in *Code of Canon Law Annotated*, p. 1634. See also GAUTHIER, "Juridical Persons in the *Code of Canon Law*," pp. 83-84

³⁴ See GAUTHIER, "Juridical Persons in the *Code of Canon Law*," pp. 83-84 and his consideration of the case of a group of parishioners challenging the decree of a diocesan bishop, in AAS, 80 (1988), p. 1818. Gauthier argues that Catholic schools often find themselves in this category, not having been granted juridical personality explicitly either by the law itself or by a lawgiver, but exercising activity through some juridical person such as a parish or religious institute (GAUTHIER, "Juridical Persons in the *Code of Canon Law*," pp. 82-83).

It should be noted that no matter how much Church authority may extol the virtues and benefits of a *de facto* or a private association, such praise or recommendation by the hierarchy cannot be construed as granting an implicit recognition as a *public* nature of the association:

Can. 299, §2 – Associations of this kind [arising by private agreement amongst the faithful], even though they may be praised or commended by ecclesiastical authority, are called private associations.

The public quality of an association is important because public associations of the faithful have juridical personality and can act in the name of the Church:

Can. 313 – A public association or a confederation of public associations is constituted a juridical person by the very decree by which it is established by the authority competent in accordance with can. 312. Moreover, insofar as is required, it thereby receives its mission to pursue, in the name of the Church, those ends which it proposes for itself.³⁵

The formal aspect by which public associations of the faithful are erected or constituted is to be respected under the 1983 Code, and even *recognitio* of a private association's statutes cannot have such extensive legal effects that it confers public juridical personality implicitly.

As regards the formalities by which an aggregate of persons or things seeking juridical personality can acquire it, canon 117 is clear that competent authority must “approve” the statutes:

Can. 117—Nulla personarum vel rerum universitas personalitatem iuridicam obtinere intendens, eandem consequi valet nisi ipsius statuta a competenti auctoritate sint probata.

Can. 117—No aggregate of persons or of things seeking juridical personality can acquire it unless its statutes are approved by the competent authority.

³⁵ The same canonical effect is found in the *CCEO*, can. 573, §1: “Associations which are erected by competent ecclesiastical authority, or approved by the decree of the same authority, are juridic persons in the Church and are called public associations.”

The *probatio* required for private juridical personality seems to imply a greater involvement than the *recognitio* required for private associations of the faithful in can. 299, §3. The seemingly stronger word is explained by the fact that can. 117 applies to both private and public juridical persons, the latter acting in the name of the Church, and by the fact that the aims of the proposed juridical person must be judged genuinely useful, and the means sufficient.³⁶ Whatever the nuance, in the case of a private juridical person, the intervention of authority must still respect the nature of private initiative in the inspiration of the work.

The Eastern Code contains a more simplified approach to juridical persons and makes no distinction between public and private juridical persons.³⁷ Since there are no private juridical persons in the Eastern Code, all juridical persons are “constituted” either by prescription of the law or by “special concession of the competent authority granted by decree” (can. 921). No mention is made of moral persons.

On the other hand, the distinction between public and private associations of the faithful is included in the Eastern Code in a similar way to that in the 1983 Latin Code, with a similar provision for *recognitio* of private associations.³⁸

³⁶ “The competent ecclesiastical authority is not to confer juridical personality except on those aggregates of persons or of things which aim at a genuinely useful purpose and which, all things considered, have the means which are foreseen to be sufficient to achieve the purpose in view” (can. 114, §3). It may also be explained by the fact that the faithful have a right to form themselves, by private agreement, into associations; there is no right to be constituted a private juridical person (see can. 299, §1).

³⁷ “Besides physical persons, there are also in the Church juridic persons, either aggregates of persons or aggregates of things, that are subjects in canon law to the rights and obligations which correspond to their nature” (CCEO, can. 920).

³⁸ CCEO, can. 573: “§1 – Associations which are erected by competent ecclesiastical authority, or approved by the decree of the same authority, are juridic persons in the Church and are called public associations. §2 – Other associations, even if praised or recommended by ecclesiastical authority, are called private associations; these associations are not recognized in the Church, unless their statutes are reviewed

Having briefly recalled the development of law regarding juridical persons and associations of Christ's faithful up to the 1983 Code, it is useful to examine that development as applied to Catholic schools.

First, since the history of Catholic schooling in North America was closely associated with parish life, it should be noted that the 1917 Code made no specific mention of the juridical status of parishes, although it implicitly seems to recognise parishes as non-collegial moral persons.³⁹ At this time the notion of *cura animarum* was more or less restricted to things touching on the internal forum and concerned above all the sacrament of penance.⁴⁰ Therefore, the duty of the pastor over the religious education of his parishioners is included under the administration of divine things (*divina*).

Similarly to parishes, the 1917 Code does not address the canonical status of Catholic schools. Some commentators concluded that it fell to the parish priest to administer all institutes established from parish property, including parish schools; this conclusion assumes that the school has no juridical personality (i.e. a parish school is not a distinct "moral person" in the canonical vocabulary of that time) apart from the

by competent authority but otherwise they are regulated only by particular law with due regard for can. 577."

³⁹ "Can. 99 – In the Church, besides physical persons, there are also moral persons, established by public authority, that are distinguished as collegial moral persons and non-collegial ones, such as churches, seminaries, benefices, and so on" and "Can. 216: "§1 – The territory of every diocese is to be divided up into distinct territorial parts; to each part a specific church and determined population are assigned, with its own rector as its pastor, who is over it for the necessary care of souls.... §3. – The parts of the diocese mentioned in §1 are *parishes*...." See commentary of F.M. CAPPELLO, *Summa iuris canonici in usum scholarum concinnata*, 4th ed., vol. 1, Rome, Pontifical Gregorian University, 1945, p. 173. The 1983 Code, on the other hand, specifically defines parishes as public juridical persons in can. 515, § 3; they are non-collegial (see can. 115, § 2) : "Cette norme [CIC/83, can. 515, § 3] remplit heureusement une lacune du Code de 1917 qui n'affirmait qu'implicitement la personnalité juridique de la paroisse" (J.-C. PERISSET, *La paroisse: Commentaire des canons 515–572*, Paris, Tardy, 1989, p. 37).

⁴⁰ See T.L. BOUSCAREN, A.C. ELLIS, and F.N. KORTH, *Canon Law: A Text and Commentary*, 4th ed., Milwaukee, WI, The Bruce Publishing Company, 1966, p. 192.

parish.⁴¹ Moral persons, other than the Catholic Church and the Apostolic See, which are such by divine ordinance, “arise in [the Church] either by prescription of the law itself or by special concession of the competent ecclesiastical Superior granted by formal decree for a religious or charitable purpose.”⁴² In any case, the relationship between parish and school is implied rather than stated in the norms.

Under the 1917 Code it fell chiefly to the local ordinary to establish elementary and middle schools (can. 1375), but this duty did not fall exclusively to him; it was a duty shared also by the parents and the parish.⁴³ Again, no specific mention is made of the juridical status (moral personality) of the parish school and it must be assumed that it was indistinct from the moral personality of the parish. Theoretically at least, parish schools could be established by ecclesiastical authority and so be given independent legal personality,⁴⁴ but this, it seems, was not done. The great expansion of the parish school system in the United States after the waves of immigration after the First World War and continuing until the 1960s does not seem to have provoked a need to re-evaluate the juridical status of parish schools.

⁴¹ See J.D. HANNAN, “The Local Ordinary’s Guardianship of Church Property,” in *The Jurist*, 1 (1941), p. 321: “But even where the parochial church is independent of the benefice, and in any event, where schools, lyceums, asylums, and other institutions have been established with parochial property, it seems beyond question that the pastor is the administrator appointed by law. It is true that one looks in vain for such a duty among the obligations imposed explicitly on the pastor in Chapter IX, Title VIII, Book II. It is implied, nevertheless, in Chapter X, of the same Title, where the Code deals with the duties of vicars, and especially in Canon 473, where in § 2 it is prescribed that the vicar economus shall render to the incoming pastor an account of receipts and expenditures.” Similarly, the author sees this authority implied in can. 2147, §2, 5°, which governs the causes for removal of the pastor for incompetent administration of ecclesiastical property adversely affecting the church or benefice.

⁴² *CIC/17*, can. 100, §1.

⁴³ See the commentary in L.I. FANFANI, *De iure parochorum ad normam Codicis iuris canonici*, 3rd ed., Rovigo, Istituto Padano di Arti Grafiche, 1954, p. 214.

⁴⁴ See *CIC/17*, can. 100, §1.

The expansion of centralised diocesan school boards likewise brought no consideration of their juridical status. Prior to the 1983 Code, centralised school boards might have been established as collegiate moral persons. This seems never to have happened. The reason is, no doubt, partly practical. The Third Council of Baltimore directed dioceses to establish two types of centralised boards: a board responsible for visitations of schools, and a board responsible for teacher examinations.⁴⁵ These were staffed exclusively by clergy. The role of the boards was defined in terms of academic administration and supervision, and in practice clergy did not have either the expertise or the time to fulfill these tasks adequately. Very quickly the tasks were assigned to a professional, a “school superintendent,” and the boards fell into disuse although they continued to exist by and large in the lists of diocesan offices. The 1917 Code said nothing with regard to these bodies, and they were maintained, at least as an outward conformity with the norms of the Council of Baltimore.⁴⁶ In many dioceses, these central boards ceased to function, yielding up their tasks to a professional. By the 1960s some innovations were finding their way into the boards through the practice of appointing lay persons and through a cautious redefinition of their function away from technical administrative tasks to that of policy development.⁴⁷

⁴⁵ See Decrees 203 and 204 in *Acta et decreta Concilii Plenarii Baltimorensis tertii*, pp. 108 and 109-110, respectively.

⁴⁶ See W.G. SCANLON, “The Development of the American Catholic Diocesan Board of Education, 1884-1966,” Ed.D. diss., New York, School of Education, New York University, 1967, p. 99.

⁴⁷ See *ibid.*, p. 100. Nevertheless, certain ambiguities appeared in this developing role for policy development. The bishop retained ultimate authority for creating and implementing diocesan policy, and it seems that where boards were reinvigorated with new life and purpose they yet remained strictly advisory in nature. See *ibid.*, p. 142.

In summary, prior to 1983, parochial and diocesan schools as well as centralised diocesan school boards continued to be viewed as indistinct from the juridical entities (i.e. moral persons) of parish and diocese.

The promulgation of the 1983 Code did not alter the view that parish schools were “extensions” of the parish.⁴⁸ Indeed, the shift during the 1970s to the idea of the school *community* embracing parents, parish, teachers, administration and students may well have blurred further the distinction between school and parish. Parish pastoral councils established committees on education which, among other terms of reference, were endowed with the task of coordinating the parochial school’s activities with the norms established by the diocesan school board.⁴⁹

Centralised diocesan school boards themselves saw a transformation in their role beginning in the 1960s. Moving to the present, we find that diocesan school boards have continued to develop and now count amongst their purposes: the promotion of lay ministry, the promotion of ownership and stability, the provision of financial advice, the development and defence of policy, assistance in public relations endeavours, support for principals as educational leaders, provision of a voice for parents, and encouragement for strategic planning.⁵⁰ Despite the broadening of tasks assigned to centralised school boards, diocesan bishops retain primary responsibility for education policy and

⁴⁸ See can. 803, §1: “In order for the school to be considered a Catholic school it is sufficient that the school be under the control of a public ecclesiastical juridical person or acknowledged as such in writing by ecclesiastical authority.” Since the *CCEO* does not distinguish between public and private juridical persons, a school’s Catholic status is tied to recognition by ecclesiastical authority alone: “A school is not juridically considered ‘Catholic’ unless it was established as such by the eparchial bishop or a higher ecclesiastical authority or has been recognised as such by them” (can. 632).

⁴⁹ See M.S. MEALEY, “The Parish Pastoral Council in the United States of America: Applications of Can. 538,” JCD diss., Ottawa, Saint Paul University, 1989, p. 198.

⁵⁰ See L. SHEEHAN, *Building Better Boards: A Handbook for Board Members in Catholic Education*, Washington, DC, National Catholic Educational Association, 2008, pp. ix-x.

supervision.⁵¹ Certainly a bishop would be capable of delegating certain tasks to boards pursuant to can. 137, §1, or favour participation of lay persons in governance according to can. 129, §2. It may be, however, that establishing centralised boards as separate juridical persons might blur the final responsibility that resides with the bishop. In any case, it does not seem to be an initiative that has been taken up.

There is an additional factor which may explain why the entities of parish and school have not been legally separated. The Catholic Church in the United States had long fought to obtain some form of public funding for its schools. The disestablishment of the state from religion (the “First Amendment”) was an obstacle to obtaining state funds. As shown previously, the Church in the USA had only limited success obtaining public funds to pursue its educational programme.⁵² The obstacles to state funding no doubt played a key role in maintaining the status quo with regard to the juridical status of the parish school. A significant level of financial support for diocesan schools comes through the diocesan tax on parish revenues. Although tuition cannot be channelled through Sunday collections, and although Catholic schools can, themselves, receive an exemption from corporate income tax, nevertheless, general contributions for schools are not necessarily distinct from general parish contributions, and parishioners may still obtain a tax receipt for the global amount. There was (and still is) a financial advantage to not separating Catholic schools from the parish entity in the civil domain, and so perhaps no real drive to establish them as separate also in the canonical domain.

⁵¹ This is clearly stated in can. 806, §1 which was considered in chapter 1.

⁵² See chapter 2, pp. 93-95.

Recent developments may provide some incentive to separate the two entities of parish school and parish. The clerical sexual abuse scandals that have had such public notoriety in the USA in the last decade have provided a catalyst to re-examine the legal structure of American dioceses. Without going into all the details, it is enough to say that the former “corporation sole” model, whereby the bishop was the proprietor of all diocesan property in civil law, has proved to be not just contrary to canon law,⁵³ but a distinct disadvantage in civil law, giving rise to concern that all diocesan property may be exigible to settle claims. There is now an attempt by canon lawyers to examine how to establish parishes as distinct legal entities in civil law, and so conform also to the demands of canon law. It may be worthwhile considering at the same time the juridical personality of parochial and diocesan schools. While, in some dioceses, statutes based on canonical norms are being considered for each parish, it remains to be seen if parish statutes will by and large embrace schools as works of the parish or leave them to be established as separate juridical persons.⁵⁴

As regards schools not linked with a particular but rather with several parishes, such multi-parish schools enjoy a great diversity in their governance structure. In 1987 the Diocese of Lansing established all “interparish” schools as public ecclesiastical

⁵³ “A lawfully established parish has juridical personality by virtue of the law itself” (can. 515, §3). For a brief discussion of the historical development and ecclesiastical pronouncements on the corporation sole model in dioceses in the United States and Canada, see J.A. RENKEN, “The Statutes of a Parish,” in *Studia canonica*, 44 (2010), pp. 102-103, footnote 8.

⁵⁴ In Renken’s recent study offering a general model for parish statutes, provision is made to include articles governing ownership, operation and financing; it is not envisioned that the schools would be considered distinct juridical persons. See *ibid.*, p. 122.

juridical persons, operating independently of any particular parish.⁵⁵ Nevertheless this option does not seem yet to have been followed widely in the United States.

3.2. Catholic and “Separate” Schools: The Canadian Experience

Catholic schools have been constitutionally protected in Canada. The general result of this constitutional recognition and protection is that public funds are, at least potentially, available to run Catholic schools. On a practical level full funding is currently available in only three of the eleven provinces and two territories. Nevertheless, even where Catholic schools are not fully funded from the public purse, several provinces have generous partial funding provisions. In addition, in Canada schooling is exclusively a matter of provincial jurisdiction, and so the federal government is not involved at all in schools of any sort, except in the territories directly under its governance. These three factors, namely constitutional protection, public funding and provincial jurisdiction, mean that there is a great diversity in the approach to Catholic schools across the country and it is impossible to give a complete picture of Catholic schools using only one model. Nevertheless, some broad generalisations are possible.

3.2.1. Separate Schools: Provinces that Provide Full Public Funding for Catholic Schools

In those provinces where Catholic schools are completely funded from provincial revenues, often referred to as “separate schools,”⁵⁶ dioceses have little direct involvement

⁵⁵ See SHEEHAN, *Building Better Boards*, pp. 128-131.

⁵⁶ Because Protestant minorities also share the same constitutional protection for their religious-based schools as Catholic minorities, the designation “separate” can apply to both Catholic and Protestant schools. See chapter 2, pp. 99-100.

in administration.⁵⁷ School trustees are publicly elected officials, but school boards do not enjoy juridical personality under canon law. Nevertheless, one canonist, J.K. Murphy, studying the particularities of Catholic schooling in Ontario, has suggested that a decree from ecclesiastical authority is not essential to a determination of juridical personality. He concludes that, while a decree erecting a juridical person is proof, “it does not seem sufficient to deny juridical personality to an institution which was funded by a public juridic person of the Church and has always been understood as a means of exercising the Church’s apostolate.”⁵⁸ Drawing on the accumulated facts and the actual relationship between dioceses and these “separate” Catholic schools, and while not going so far as to conclude that these Ontario schools enjoy the status of public juridical persons, another canonist, L. Bordonaro has asserted that they are subject to ecclesiastical authority under the 1983 Code through the norms regarding Catholic identity.⁵⁹ Under the Ontario *Education Act*, the Province’s Minister of Education is prohibited from interfering with or controlling any of the “denominational aspects” of a Roman Catholic school board, and the Act enjoins the Minister to exercise his or her powers “in a manner that is consistent with... the denominational aspects of a Roman Catholic board.”⁶⁰ Diocesan control can be exercised essentially through participation in areas such as the formulation of general hiring policies and participation in curriculum review. However, it falls to the jurisdiction of the Provincial Minister of Education and not the jurisdiction of the bishop

⁵⁷ It is rare to find a link on a diocesan website to Catholic schools where such schools are essentially public schools.

⁵⁸ MURPHY, “The Governance of Church Institutions and Protection of Catholic Identity with Particular Reference to Ontario, Canada,” p. 129.

⁵⁹ BORDONARO, “Separate Schools in Ontario,” p. 158.

⁶⁰ R.S.O. 1990, ch. E-2, s. 230.19.

to legislate and oversee such things as curriculum development, rules for “alternative” and “equivalent” programmes, and to determine which textbooks shall be used.⁶¹ In other words, the *Education Act* (Ontario) does not provide a legislated role for ecclesiastical authority on these issues. As regards religious instruction in Catholic schools, no student can be obliged to follow the course, and so Catholic schools cannot make religious education courses mandatory.⁶² Moreover, it is for the Roman Catholic school board, composed of members elected during municipal elections, to determine the curriculum of religious education.⁶³ There is no direct conduit legislated for bishops allowing them to exercise their responsibilities over Catholic schools according to the norms of canon law, but bishops participate with boards in developing curriculum. When controversies arise touching Catholic doctrine, as they have recently in Ontario over the Ministry of Education’s proposed Equality and Inclusive Education Strategy,⁶⁴ issues are resolved by negotiation between the Ministry, the Separate School Boards and the bishops.

Recent loss of constitutional status for Catholic schools in two provinces (Newfoundland and Quebec) has pushed the question of Catholic identity to the forefront. Unable convincingly to make their case for continued constitutional protection of and public funding for distinctive Catholic schools in the political landscape of those provinces, Catholic school boards in other provinces that have constitutionally protected Catholic schools, like Ontario, have undertaken a review of their commitment to Catholic identity. This review is an effort to reinforce publicly the value of their distinctive

⁶¹ See *ibid.*, s. 8, “Powers of Minister.”

⁶² See *ibid.*, s. 51(2).

⁶³ See *ibid.*, s. 52.

⁶⁴ See GOVERNMENT OF ONTARIO, *Ontario’s Equity and Inclusive Education Strategy: Realising the Promise of Diversity*, Toronto, Ministry of Education, 2009.

contribution in the public education field. This has also spurred a movement to greater involvement by the local Catholic school with the diocese and with local parishes, as parishes in some areas have had little connection with the Catholic schools in their territory, and little input in, for example, sacramental preparation undertaken in the school.

The public nature of separate schools means that the schools must be open to non-Catholic students,⁶⁵ and this raises questions of Catholic identity. Since the schools are fully funded from tax revenues no tuition is charged. Any Catholic may send their child to the school. Since some parents may measure Catholic identity by the capacity of the students to understand, practice and hand on the faith, separate schools are sometimes subject to criticism that the faith is not truly practiced by many of the students in any regular or meaningful way. The schools repeatedly answer that the regular practice of the faith is more dependent upon family and parents than on the school. The public nature of the schools means that many Catholic families who identify themselves as Catholic but only practice the faith irregularly are admitted.

⁶⁵ This is the case in Ontario's Catholic Separate High Schools, although not for their elementary schools. See R.S.O. 1990, ch. E.2, s. 42. (1): "A person who is qualified to be a resident pupil of an English-language public board and to receive instruction in a secondary school grade is entitled to receive instruction provided in a secondary school operated by an English-language Roman Catholic board if the area of jurisdiction of the public board is in whole or in part the same as the area of jurisdiction of the Roman Catholic board." This "open admission" policy is regardless of space available after Catholic students have been enrolled. A similar provision for open admission is provided for in the other provinces where Catholic schools enjoy constitutional protection, namely Saskatchewan and Alberta. See *Statutes of Saskatchewan, 1995*, ch. E-0.2, s. 145 (1), and *Revised Statutes of Alberta, 2000*, ch. S-3, s. 45 (3), a provision which is maintained in the proposed new *Alberta Education Act, Statutes of Alberta, 2012*, ch. E-0.3 (received Royal Assent on 21 December 2012, but not yet proclaimed in effect). Interestingly, the new *Alberta Act* explicitly describes parents as having the "prior right to choose the kind of education that shall be provided to the parent's child," and "the responsibility to (a) act as the primary guide and decision-maker with respect to the child's education... [and] (g) engage in the child's school community" (s. 32). This is the first Canadian education legislation enshrining parental primacy over schooling choices. The *Act* also makes provision for parental options including private schools (Division 3), home education (s. 20[1]) and charter schools (Division 2). The Alberta government also provides subsidies under certain conditions to private schools, enhancing parental choice.

3.2.2. Provinces without Full Funding to Catholic Schools

Among provinces where full public funding is not available for Catholic schools, some will partially subsidise independent Catholic schools.⁶⁶ The particular structure of the Catholic school system in these provinces varies from diocese to diocese. A comprehensive approach is used, for example, in British Columbia where all Catholic schools run by a diocese are incorporated provincially under the *Society Act*,⁶⁷ each administered distinctly but similarly in each diocese. There is no Catholic school board and there are no trustees as such, but the school system is governed by the provincial legislation for non-profit societies. This common approach allows all dioceses in the province to act in a coordinated manner to satisfy municipal and provincial laws regarding property taxation exemption and subsidies of up to 50 per cent for independent schools. Juridical status has not been given to the diocesan school organisation.

3.3. Schools Related to Particular Ecclesiastical Institutes

In addition to Catholic schools moderated by or related in some way with a diocese, there were, of course, many that were founded and moderated by religious institutes. Since the 1960s, the relationship between school and religious institute has changed dramatically in North America. In addition, new relationships have been forged between schools offering a Catholic programme and other forms of ecclesiastical institutes, such as Opus Dei. An interesting study would also be the relationship between

⁶⁶ British Columbia, Manitoba and Quebec provide some public funding. Although Alberta has fully funded separate schools, the provincial government will also provide some measure of funding to private schools. New Brunswick permits Catholic religion classes within the framework of their public school system.

⁶⁷ *Society Act* (British Columbia), RSBC 1996, ch. 433.

schools and the new ecclesiastical movements, but currently no data is available on which to base an analysis.

3.3.1 Schools Associated with Religious Institutes

In the United States, parochial schools were very often staffed and run by religious institutes (the “teaching sisters”), but these religious institutes also opened their own schools independently of diocesan or parochial initiative. Like the experience with parochial schools, it does not seem that these religious saw the need to establish their schools as canonical entities distinct from their own institute. In fact, the 1917 Code expressly included the right to exercise pious works proper to the religious whenever permission was given by the ordinary to constitute a new house of the institute (can. 497, §2). Obviously, if the order was founded to teach, then the pious work included the right to found a school, although the written permission of the ordinary to found a school was necessary (can. 497, §3).⁶⁸ The 1983 Code makes no substantial alteration to these norms, although it requires the consent not just of an ordinary, but of the diocesan bishop:

Can. 611 – The consent of the diocesan bishop for the establishment of a religious house carries with it the right: ...

2° to engage in the works which are proper to the institute, in accordance with the law, and subject to any conditions attached to the consent.

As regards schools established by a religious institute, the consent of the diocesan bishop (not just the ordinary⁶⁹) is required, although it is no longer specified that it be in writing:

Can. 801 – Religious institutes which have education as their mission are to keep faithfully to this mission and earnestly to strive to devote themselves to Catholic

⁶⁸ See HANNAN, “The Local Ordinary’s Guardianship of Church Property,” p. 326: “Colleges, hospitals, sanatoriums, and other non-collegiate corporations may often be built and maintained with funds that are the property of religious communities. Often, too, they are not established as canonical corporations but are merely approved by the diocesan authority and conducted by the religious community without independent incorporation.”

⁶⁹ See can. 134, §§ 1,2 for the definitions of “ordinary” and “local ordinary.”

education, providing this also through their own schools which, with the consent of the diocesan Bishop, they have established.

There is, therefore, no particular canonical reason for a religious institute to establish its school as a separate juridical person. This is a prudential decision based on local circumstances.

Whereas the arrival of the “teaching sisters” into the field of American education was through the parish school, in general, the male religious orders founded educational institutions distinct from individual parishes.

3.3.1.1 The Jesuits in Newfoundland, Canada

Shortly after its foundation, the Society of Jesus became involved in schools, having first received an invitation to found a school in Messina, Sicily in 1548. Other schools were soon opened, and at the time of their suppression in 1773 the Jesuits were running some eight hundred educational institutions throughout the world.⁷⁰ The Jesuits’ distinct approach to running schools was unique at the time, differing from the previous monastic and cathedral schools in three respects: staffing and administering the school was considered a true ministry in itself, the institute deliberately undertook new foundations and assumed responsibility for their continuance, and these educational endeavours had as their end the formation of boys and young men destined for a worldly, not a clerical, career.⁷¹ These schools were identified as a work of the religious institute itself. They were intended to be free and admission was not limited to any particular

⁷⁰ See G.W. TRAUB (ed.), *A Jesuit Education Reader: Contemporary Writings on the Jesuit Mission in Education, Principles, the Issue of Catholic Identity, Practical Applications of the Ignatian Way, and More*, Chicago, IL, Loyola Press, 2008, p. 44.

⁷¹ See *ibid.*

social class.⁷² Nevertheless the programme of studies was deliberately built upon the humanistic education developed in Renaissance Italy during the fifteenth century.⁷³ It was also influenced by the Counter Reformation, which gave the curriculum its particular Catholic identity. Despite the religious and intellectual context in which the Jesuit *ratio studiorum* had developed by 1599, the “core motivation” of the education was not confessional, that is, directed against the Reformation, but rather humanistic, to promote human improvement. For this reason, it is claimed that the Jesuit educational programme developed a special relation to culture and emphasised the common good, while retaining its basic Catholic orientation developed in the process of what may be called the confessionalisation of Europe.⁷⁴ The Society was suppressed in 1773,⁷⁵ and then re-established in 1814.⁷⁶ It was during the period after re-establishment that the Jesuits began to expand into North America, while yet retaining the fundamental principles of their educational programme developed in the earlier period.⁷⁷

One of the more recent initiatives by the Jesuits in school foundations is at St. John's, Newfoundland. Following the demise of the confessional schooling system in that

⁷² See *ibid.*, p. 54.

⁷³ See *ibid.*, p. 46

⁷⁴ See *ibid.*, pp. 53-54, and p. 60.

⁷⁵ The complex history of the suppression of the Jesuits is the subject of a recent article. See R.E. SCULLY, “Suppression of the Society of Jesus: A Perfect Storm in the Age of the ‘Enlightenment,’” in *Studies in the Spirituality of Jesuits*, vol. 45, no. 2 (2013), pp. 1-41. For the papal instrument suppressing the order, see CLEMENT XIV, papal brief *Dominus ac Redemptor*, 21 July 1773, in A.A. BARBERI and A. SPETIA (eds.), *Bullarii Romani continuatio Summorum Pontificum Clementis XIII, Clementis XIV, Pii VI, Pii VII, Leonis XII et Pii VIII*, vol. 3, Rome, Ex typographia Reverendæ Cameræ Apostolicæ, 1838, pp. 607-618, reproduced by Akademische Druck – u. Verlagsantalt, Graz Austria, 1963.

⁷⁶ PIUS VII, papal bull *Sollicitudo omnium ecclesiarum*, 7 August 1814, in BARBERI and SEGRETI (eds.), *Bullarii Romani continuatio*, vol. 13, Rome, Ex typographia Reverendæ Cameræ Apostolicæ, 1847, pp. 323-325, reproduced by Akademische Druck – u. Verlagsantalt, Graz Austria, 1964.

⁷⁷ See *ibid.*, pp. 39-40. See also G. MCKEVITT, “Jesuit Schools in the USA, 1814-c.1970,” in T. WORCESTER (ed.), *The Cambridge Companion to the Jesuits*, Cambridge, Cambridge University Press, 2008, pp. 278-297.

province⁷⁸ a number of Catholics devised a plan to operate an independent Catholic school, a plan which came to fruition in 1999 with the aid of the Jesuits. Originally the Jesuits were responsible for the administration of St. Bonaventure College, as it is known, while ownership was vested in a board. Saint Bonaventure's College has recently revised its governance structure. The school still considers itself a school "in the Jesuit tradition" but administration has passed from the Jesuit Fathers to lay persons. In addition to the Archbishop of St. John's and the superior of the local Jesuit community, two Jesuits are appointed to sit on the Board of Governors to assure conformity with Jesuit educational policies, and a number of them are teachers in the school.⁷⁹ The school is, therefore, not a work of the order, but the order continues to support the school. Catholic identity is assured through efforts to imbue the school with the Jesuit tradition of education, and by the participation of Jesuits in the school governance structures.⁸⁰

3.3.1.2 The Christian Brothers in Newfoundland, Canada

Prior to the recent Jesuit's involvement in St. Bonaventure's College, the Franciscans and the Christian Brothers had shared its history. In 1884, the Christian Brothers assumed governance over St. Bonaventure's College from the Franciscan order. Through that initial involvement in Canadian education, the Christian Brothers spread across the country, establishing schools or administering them in various capacities, according to the local needs. In 1962, by special Act of the Canadian Parliament, the

⁷⁸ See chapter 2, p. 101.

⁷⁹ See St. Bonaventure College, Inc., Amended and Restated By-Law No. 1, Preamble, ss. 5.3 and 5.4, <http://www.stbonaventurescollege.ca/images/stories/Memos/Board%20Of%20Gov%20Docs/Amended%20and%20Restated%20Bylaw%20No%201.pdf> (26 August 2011). The Board of Governors owns the school.

⁸⁰ The issue of sponsorship of institutional apostolates by religious institutes will be analysed in chapter 4.

Brothers were incorporated as the Christian Brothers of Ireland in Canada (CBIC).⁸¹ A series of claims against some of the Brothers for sexual, physical and emotional abuse occurring in the 1960s, 1970s and 1980s at Mount Cashel Orphanage in Newfoundland led to the winding up of the corporation in an attempt to liquidate assets in order to satisfy the claims. The determination of the exact assets of the order became a complex issue due precisely to the variety of ways in which the Brothers were involved in school governance structures. In particular, not all the schools could easily be classified as “works of the institute.” Nor did the CBIC own outright all the properties where the Brothers operated. Various arrangements had been negotiated over time with the different dioceses. This variety in organisational structures meant that it was difficult to determine which properties actually belonged to the CBIC (either legally or beneficially) and were, therefore, available to settle claims. Two court challenges sought to determine the nature of ownership and the exigibility of particular assets.

An action brought before the Ontario courts had to determine, first, if properties held by the CBIC or its individual members for a specific purpose charitable trust were exigible at law. In the cases reviewed by the courts, the Brothers were not the legal owners of the properties, nor were they beneficial owners; rather they operated the properties as trustees for the educational purposes of the individual schools which were the beneficial and/or legal owners of the properties. The case broke ground regarding trust law and the exigibility of specific purpose charitable trusts in Canada. Essentially, the courts put at the disposition of the claimants all properties held on a specific purpose charitable trust by the CBIC, even if the negligence did not occur in the ambit of that

⁸¹ See S.C. 1962-63, c. 22.

particular trust.⁸² This meant that even though the abuse occurred in Newfoundland, properties not actually beneficially owned by the CBIC but held as a charitable trust (for furthering Catholic schooling in the Vancouver Archdiocese, for example) could be made available to settle claims. Secondly, having determined that all properties held in trust by the CBIC could be available to settle claims in Newfoundland, a British Columbia case had to determine the exact nature of the ownership by the Brothers of the two most significant assets potentially available to the claimants in Newfoundland, namely St. Thomas More Collegiate and Vancouver College, both in Vancouver, British Columbia. The courts determined that, although the Brothers did not enjoy beneficial title to the properties, they nevertheless held them in trust for the specific charitable purposes of schooling in the Vancouver archdiocese.⁸³ While the history and circumstances of the Brothers' involvement in the two Vancouver schools was not identical, nevertheless, it was determined that a specific purpose charitable trust was present in both and so the properties were exigible even for liability outside the ambit of the specific purpose. In July 2002 these two schools reached an agreement with the liquidators to pay out \$19 million, thus preserving the assets and allowing the schools to continue in existence. The rather convoluted process described by the court by which the Brothers came to administer the schools would seem to indicate that they were not, in fact, considered works of the order strictly speaking. Particularly in the case of Thomas More Collegiate, the involvement of the diocese and local parishes indicated that it was more in line with a

⁸² See *Christian Brothers of Ireland in Canada (Re)*, 37 O.R. (3rd) 367 (Ontario Court, General Division), 184 D.L.R. (4th) 445 (Ontario Court of Appeal). Leave to appeal to the Supreme Court of Canada was denied, [2000] S.C.C.A. No. 277.

⁸³ See *Rowland v. Vancouver College*, [2000] B.C.L.R. (3rd) 87 (British Columbia Supreme Court), 94 B.C.L.R. (3rd) 249 (British Columbia Court of Appeal). Leave to appeal to the Supreme Court of Canada was denied, [2001] S.C.C.A. No. 652.

diocesan school than a school of the religious order. Whatever the exact determination, the current status of the schools has changed significantly. Thomas More Collegiate falls under the Vancouver Independent Catholic Schools Society, while Vancouver College describes the current legal arrangement between the Christian Brothers and the school in the following way: “Vancouver College is served by the Congregation of Christian Brothers and held in trust and operated by Vancouver College Limited” with the mission “to educate boys and young men from diverse backgrounds in the tradition of Blessed Edmund Rice.”⁸⁴ It is neither a school of the diocese (Archdiocese of Vancouver) nor a school of the religious order (the Christian Brothers). In 2005 the Christian Brothers restructured their international organisation, creating one province for the whole of North America, called Edmund Rice Christian Brothers North America. In April 2011 the newly created province filed for Chapter 11 Insolvency⁸⁵ in New York State (where the provincial office of their North American Province is located) in order to satisfy continuing claims arising from their involvement in Newfoundland, and more recent claims arising from the north-western United States.⁸⁶

3.3.1.3 The Sisters of St. Ann in Vancouver, Canada

Catholic schools began in British Columbia, in fact, by the Sisters of Saint Ann in the mid-1800’s.⁸⁷ In 1995, the Sisters of Saint Ann restructured the Vancouver school

⁸⁴ <http://www.vc.bc.ca/Vancouver-College/About-Us> (15 April 2011).

⁸⁵ 11 U.S.C. ch. 11 provides for a declaration of insolvency in order to reorganise a company in view of making it solvent again.

⁸⁶ The Jesuit Oregon Province did so for similar reasons only a short time before, on 17 February 2009.

⁸⁷ See CATHOLIC INDEPENDENT SCHOOLS OF VANCOUVER ARCHDIOCESE, History, http://www.cisva.bc.ca/general_info/history/ (15 April 2011). Similarly, the website of Little Flower Academy (Vancouver), founded by the Sisters of St. Ann states, “The Sisters of St. Ann are the pioneer

associated with their order. A separate civil society called the Jane Rowan Society was incorporated to run Little Flower Academy.⁸⁸ While the Sisters are no longer involved directly in the school administration or on its staff, the Congregation of St. Ann is the sponsor of the school, and as such, the Congregation sees the school as a “work” of the order. Furthermore, the Jane Rowan Society is not a juridical person under canon law distinct from the Congregation.⁸⁹ Under the Society’s civil by-laws, the Congregation appoints members of the Society, and “[t]he role of the Members is to continue the mission of the Sisters of Saint Ann in the operation of the School....”⁹⁰ The Board of Directors is responsible for managing, administering and operating the Society, and one director is to be a member of the clergy appointed after consulting the Archbishop of Vancouver.⁹¹ No sisters are appointed directors.⁹² The new civil structure reflects the sponsorship role of the Congregation and is designed to maintain the Catholic identity of the school despite the fact that no Sisters of Saint Ann are any longer present in the school. The members of the Society are charged with continuing the original mission of the Congregation in the school, and through their power to appoint directors to oversee

congregation of Catholic educators in British Columbia,” <http://www.lfabc.org/podium/default.aspx?t=124058> (26 August 2011).

⁸⁸ The Constitution filed under the British Columbia *Society Act* gives, *inter alia*, as the purposes of the Jane Rowan Society: “to continue and maintain as a non-profit Catholic secondary private school for girls... Little Flower Academy;” “to govern the operation of the school to ensure that its students will be provided with quality educational programs with emphasis on the principles and teachings of the Roman Catholic church and to foster and promote intellectual, spiritual, physical, social and emotional development...” (The Constitutions were provided to the author by the Province Leader of the Sisters of St. Ann).

⁸⁹ See M. ZAROWNY [Province Leader], <mzarowny@ssabc.ca> “RE: Inquiry of Philip Creurer,” 5 August 2011, personal e-mail.

⁹⁰ Art. 2.1 and 2.4 of the By-laws of The Jane Rowan Society (provided to the author by the Province Leader). The power to appoint members has been delegated by the Congregation to the St. Joseph Province, confirmed in the e-mail mentioned in footnote 89.

⁹¹ See *ibid.*, art. 4.1 and 4.3.

⁹² Confirmed in the e-mail mentioned in footnote 89.

the operations of the school, they assure its Catholic identity. The provision to have one member of the clergy on the Board of Directors seems to be also aimed at the same purpose and to provide a conduit through which the bishop's canonical responsibilities over Catholic schools can be safeguarded.

3.3.1.4 The Basilian Fathers in Ontario, Canada

In Ontario, although Catholic schools enjoyed constitutional protection and full public funding, in practice this was only provided up to grade ten. In 1985 the Ontario government decided to extend this treatment to cover the entire high school programme.⁹³ With the advent of the new legislation, existing schools run by religious institutes were given the choice to fold into the new funding provisions or remain independent. Only the Basilian Fathers, running St. Michael's College School in Toronto, opted out of the system. As a result of their decision St. Michael's became the only independent Catholic school in the province.⁹⁴ Currently, the Board of Directors is drawn from members of the religious institute and a number of Basilian Fathers still teach in the school. Catholic identity remains a central element of the school's mission.⁹⁵ All students are required to follow a theology class each year, and there is daily common prayer; in addition, Mass is offered each day and, amongst other spiritual activities, spiritual retreats for students and

⁹³ See *Act to Amend the Education Act*, S.O., 1986, c. 21.

⁹⁴ Other schools offer a Catholic programme, but none is, strictly speaking, a "Catholic school" within the meaning of the 1983 Code. More recently, in 1995, the Legionaries of Christ opened a minor seminary (called an "apostolic school") and a novitiate in Cornwall, Ontario. They received accreditation from the provincial government, but the author has been advised that the school closed in 2013.

⁹⁵ On the school's website, mission statement reads: "St. Michael's College School is a community of students, teachers, staff, parents and alumni dedicated to excellence in Catholic education under the leadership of the Basilian Fathers" (http://www.stmichaelscollegeschool.com/Mission_Statement-p138379 [30 August 2011]).

staff are organised. The school is a work of the institute, but does not enjoy separate juridical status under canon law.

3.3.1.5 The Congregation of Sisters of St. Joan of Arc, Ottawa, Canada

In Ottawa, the Congregation of the Sisters of the Joan of Arc established Maison Ste-Jeanne d'Arc as a residence for young women, especially young unwed mothers. The Sisters also taught in local schools, although they did not own these schools themselves. By the late 1980's when the Sisters became unable to continue with their apostolic work due to the dwindling numbers of members, a group of parents, drawing upon the reputation of the Sisters, founded in 1991 L'Académie Ste-Jeanne-d'Arc, a school for girls. This was a completely new initiative, and the Sisters did not participate in any way in the running of the school. Strictly speaking, there was no sponsorship involved. The original group of parents desired to retain a Catholic identity in the foundation, and this was made explicit in the Letters Patent applying for incorporation, in which the objects of the corporation include the intention "to establish and maintain one or more pre-school, elementary and secondary day schools... to develop in a Catholic setting the minds and characters of pupils therefore while following a bilingual curriculum...."⁹⁶ The school is in no way a work of the Congregation of the Sisters of the Joan of Arc, and is in fact completely independent both of the religious institute and of the diocese itself. There is no explicit transmission of the Catholic faith, but merely the favouring of a "Catholic setting" in the wider educative project. In fact, a recent study by the Academy turned up the result that only 5.3 percent of families listed religious instruction and formation as a

⁹⁶ Letters Patent issued by the Ontario Ministry of Consumer and Commercial Relations on 15 March 1991. Letters Patent were provided to the author by the school's Director.

significant reason for sending their child to the school.⁹⁷ Catholic identity, therefore, enjoys only a very secondary aspect in the school's values, and, given its distance both from the religious institute and the ecclesiastical hierarchy, there would be no reason for juridical personality to be considered.

3.3.2 Schools Operated by Catholics: The Case of Opus Dei

A distinct approach to the relationship between an ecclesiastical institute and schools is that of the Personal Prelature of Opus Dei. At the centre of Opus Dei's mission is the principle of secularity, that men and women not called to the religious life find their sanctification in the secular world. While most activities of members of the Prelature are considered personal apostolates and not works of the institute itself, in some cases members of the Prelature, together with non-members, run corporate works of the apostolate, amongst which are counted universities and schools. The ownership and governance of such works falls not to the Prelature itself; rather, these works are established as distinct secular entities to which the doctrinal and spiritual aspects are entrusted to members of the Prelature.⁹⁸ Members of the Prelature sit on the governance structures, but membership in these structures contains also persons who are not members

⁹⁷ Interview with the Headmaster, Claude Severin, by the author on 16 June 2011.

⁹⁸ The Opus Dei website describes their relationship to the works in the following way: "The faithful of the Prelature, with the assistance of the cooperators of Opus Dei and many others, sometimes undertake charitable or educational initiatives that entrust their spiritual and doctrinal orientation to the Prelature. These initiatives are called 'corporate' apostolates to distinguish them from the personal apostolate of members, which is Opus Dei's primary apostolate" (<http://www.opusdei.ca/art.php?p=10878> [27 August 2011]). The Heights School's website describes the affiliation with Opus Dei in the following way: "Q. What is Opus Dei's involvement with The Heights? A. Opus Dei, a personal prelature of the Catholic Church, ensures that The Heights stays true to the teachings of the Catholic Church. In addition, Opus Dei provides the School with our chaplains, who administer the sacraments on a daily basis" (<http://www.heights.edu/admissions /26faqs.php> [27 August 2011]). An example of the "personal apostolate" would be Hawthorne School for girls in Toronto. The relationship with Opus Dei is more distant, described in the school's "operating characteristics" as follows: "At the Board's request, the Prelature of Opus Dei provides a priest to give spiritual assistance to the school" (<http://www.hawthorneschool.com/msgp.asp> [27 August 2011]).

of the Prelature. No canonical association with the hierarchy is sought, and the question of juridical personality under canon law is not pursued. In these schools, the emphasis is on the primary parental role in the education of children. At The Heights School in Washington, DC a unique “Advisory Program” has been developed as “the trademark of The Heights School.”⁹⁹ It is “a tutorial in Christian manhood” designed to individualise and personalise the mission of the school for each student by means of assisting parents in the integral formation and education of their children.¹⁰⁰ It consists of regular meetings with the student and mandatory meetings with parents. It is designed as the means by which partnership between parent as primary educator and school is carried out. While not explicitly stated, the Advisory Programme seems designed to be the means, too, by which a Catholic identity is favoured, although the school is not intended to be a Catholic school within the definition of can. 803, §3. The curriculum for upper grades provides “a full programme of Catholic practice and doctrine for Catholic students (and non-Catholics who freely choose to participate) at every grade level. ... All religion teachers at The Heights School strive to provide solid doctrinal formation in full agreement with the Catechism of the Catholic Church and magisterial teachings. In addition, the Religion Department teaches basic prayers and sacramental practices.”¹⁰¹ The school is not intended, then, to be a Catholic school within the definition of the 1983 Code even if it is a corporate work of the Prelature. Catholic identity, nevertheless, is pursued through the active participation of members of the Prelature in the governance structure and on the

⁹⁹ THE HEIGHTS SCHOOL, Advisory, p. 15, <http://www.heights.edu/about/advisory.php> (27 August 2011).

¹⁰⁰ Ibid., p. 4.

¹⁰¹ THE HEIGHTS SCHOOL, The Heights Upper School Curriculum Guide, p. 15, <http://www.heights.edu/parents/uscg.php> (27 August 2011).

administrative and teaching staff of the school, although non-members had also been involved in the school's foundation and continue to be involved in the governance and on the teaching staff.

3.4. The Parental Roles in Existing Catholic Schools: Exercising the Parental Vocation

The present chapter presents a general overview of Catholic schools in the North American context, considering Catholic identity as a practical goal and surveying the rich variety and complexity of organisational structures in existing Catholic schools as a performative value of that identity. An additional question can be asked, that about the role of parents in these organisational structures. How do parents effectively exercise their parental rights within existing structures? The broad lines of the development of these specific rights, as presented in the first chapter, contributed greatly to the current situation whereby canonical norms now acknowledge parents as the primary educators of their children, enjoying rights that arise from their vocation as parents, and which are inviolable and inalienable.

It is interesting to note, first of all, that at the origin of Catholic schooling in the United States, parents played a central role, especially prior to the Civil War.¹⁰² Lay trustees governed the schools, a state of affairs which led to frequent friction with the hierarchy. With the development of the parish school, ecclesiastical law gave responsibility of the school to the parish priest by virtue of his responsibility over “divine things.” Such a structuring of the parish school might be interpreted as having wrested away lay initiative. On the broader level of lay participation, some have argued that the

¹⁰² See WALCH, *The Parish School*, p. 16.

Third Council of Baltimore's "one parish, one school" requirement actually favoured a shift away from lay teachers due largely to the financial strains this demand placed on parishes, but also because teaching sisters brought with them their own history of teaching and continuity with European traditions of education.¹⁰³ As mentioned, the Council of Baltimore mandated also two types of school boards, an examining board for teacher qualifications and a board to oversee visitations, both boards acting under the aegis of the diocesan bishop. The membership of these boards was drawn exclusively from the clergy.

The 1917 Code recognised the right and grave duty of parents to see to the Christian education of their children.¹⁰⁴ However, the decision as to whether a Catholic child could attend a non-Catholic school was left as a prerogative of the local ordinary.¹⁰⁵ Furthermore, struggling against restrictions imposed by civil authorities, the former Code asserted the right of "the Church" to found schools of any type.¹⁰⁶ Nevertheless cooperation with parents and lay persons was essential to the success of any school. A vocational school, for example, could be founded in which the initiative of the hierarchy might be less predominant and its responsibility more limited to the religious and moral training concomitant with the vocational aim of the school.¹⁰⁷ The cooperative role granted to parents as regards Catholic schools is clearly set out in the 1917 Code's canon

¹⁰³ See COBURN and SMITH, *Spirited Lives*, pp. 143-144.

¹⁰⁴ See *CIC/1917*, can. 1372, §2.

¹⁰⁵ See *CIC/1917*, can. 1374.

¹⁰⁶ See *CIC/1917*, can. 1375.

¹⁰⁷ See BOUSCAREN, ELLIS and KORTH, *Canon Law*, pp. 746-747.

1379, §3: “The faithful shall not fail to support to the best of their ability the founding and support of Catholic schools.”

As was shown, between 1917 and 1983 there was a development in the understanding of parental vocation and mission, and a corresponding development of parental rights over education during this same period. In a general way, one might categorise the development as a reconfiguration away from the descending order of Church-parent-state to that of parent-Church-state; this movement is reinforced in the vocabulary which describes the key qualities of parental rights over education as primary, inalienable and inviolable.

The first implication of this changed order is the respect due to a parent’s choice of school, and the 1983 Code makes it clear that it is not the ecclesiastical hierarchy that decides whether or not it is opportune for a child to attend a non-Catholic school, but the parent: “Catholic parents have also the duty and the right to choose those means and institutes which, in their local circumstances, can best promote the Catholic education of their children.”¹⁰⁸

As regards the founding of schools, the 1983 Code, reasserts the right of “the Church” to found schools of any type, and, in the case of Catholic schools, inveighs parents to expend their resources to help establish and maintain them.¹⁰⁹ The initiative of founding schools is not the quasi exclusive domain of the hierarchy, even if, in the case of founding Catholic schools, a close cooperation is implied. On the other hand, the Code

¹⁰⁸ Can. 793, §1. Canon 798 obliges parents to send their children to schools which will see to the Catholic education of their children, but “if they cannot do this” it is up to the parents to see to their Catholic formation; again the responsibility lies clearly with parents.

¹⁰⁹ Can. 800, §§1, 2.

clearly places the responsibility on the diocesan bishop to establish schools “imbued with a Christian spirit” in those places where there are no such schools.¹¹⁰

The Eastern Code, while also recognising the primary place accorded to parents in their children’s education, gives stronger place to hierarchical initiative in the foundation of Catholic schools:

Can. 635 – The eparchial bishop is to see to it that Catholic schools are established especially in those places where other schools are lacking or are inadequate....

In both the Latin and Eastern Codes, school governance is seen as a shared responsibility. The Eastern Code more clearly makes reference to the three “stakeholders”, namely parents, teachers and the wider ecclesiastical community, while the Latin Code restrains itself to exhorting cooperation between parents and teachers:

CCEO, can. 631, §1. – Among the various means of education, the Catholic school is to be fostered with special care and should be the focus of the concern of parents, teachers, and the ecclesiastical community.

CIC/1983, can. 796, §2. – There must be the closest cooperation between parents and the teachers to whom they entrust their children to be educated. In fulfilling their task, teachers are to collaborate closely with the parents and willingly listen to them; associations and meetings of parents are to be set up and held in high esteem.

Not much more is said about parental roles in governance of Catholic schools in the norms. The specific parental role, it would seem, depends on the organisational structure chosen for local Catholic schools.

In those dioceses in the United States where there are central diocesan school boards, recent development towards lay participation in policy formulation was noted. Central school board activities provide the highest level and most general mode of involvement for parents in Catholic schools. In those Canadian provinces where Catholic

¹¹⁰ Can. 802, §1.

schools are constitutionally protected, parents are able to run in local elections, held at the same time as municipal elections, for school board membership. There is ample scope here for parents to influence general policies that would be applied to all Catholic schools under board supervision. The factors which might make parental involvement difficult at this level are the time commitment, the level of expertise one might expect of a board member and the level of remuneration. Busy parents might find it difficult to devote the time needed and, in the case of elections, the effort required, to participate in this way. The Ontario *Education Act* provides for an “Ontario Parent Council” which is composed of no more than twenty eligible persons appointed by the Minister of Education, who are granted a general advisory function regarding “issues related to elementary and secondary school education,” and “methods of increasing parental involvement in elementary and secondary school education.”¹¹¹

Smaller school boards, such as those established for a particular school, whether a parish school, an interparish school or other form of independent Catholic school, provide a more limited, but also more direct form of parental participation. The time commitment might be less onerous, and the parent will usually be closer to policy implementation as well as policy development. It would be rare for a board of this type, however, to provide any remuneration. The exact form of responsibility exercised by a parent who is a member of this type of board will, of course, depend on the nature of the powers of the board itself. The nature of responsibility will be determined by the jurisdiction of the board and the extent to which it is consultative, regulatory or legislative.¹¹² The precise

¹¹¹ R.S.O. 1990, ch. E-2, s. 17.1 (10).

¹¹² For a good summary of the differences between these, see SHEEHAN, *Building Better Boards*, pp. 2-3.

nature of the board's jurisdiction will be determined by the scope of activity provided in the by-laws, which, in the case of Catholic school boards, will have been worked out with the diocesan bishop. It may involve matters such as the choice of school principal, levels of teacher compensation and approval of collective agreements, the development of tuition models and rates, non-tuition funding, overall budgetary review, extraordinary financial transactions, teacher qualifications, disciplinary norms and professional evaluation for staff, student behavioural codes and policies, curriculum review, Catholic ethos and identity, and admission policies and procedures. Through these local school boards, there is the greatest scope for parents to directly participate in the financial, administrative, religious, academic and disciplinary aspects of the school.

For most parents, however, participation in the Catholic schools their children attend will likely be through parent advisory committees. A quick look at the schools examined above shows that these schools all make an effort to invite parental involvement through these types of committees. Generally, however, the scope of activity is quite restrained. Parent advisory councils are intended as a vehicle for communication between parents, teachers and administration, and they also promote parents in support roles to faculty and staff, confined to things like mandatory volunteer hours and organising various fund-raising events.¹¹³ There is no explicit role for governance by parents through a parent advisory council. The schools operating under the aegis of Opus

¹¹³ Vancouver College, for example, lists the "primary role" of the parent's association as: encouraging participation in school activities by all families, facilitating communication amongst all members of the school community, organising fund-raising projects, promoting external charitable activities as a means of Catholic faith-in-action. See <http://www.vc.bc.ca/VC-Parents-Association/Parents-Association/Parents-Association> (2 September 2011).

Dei provide, however, an additional opportunity for the formation of parents both on the spiritual level and on the level of parental skills and responsibilities.¹¹⁴

Conclusion

Formulating any general conclusion to the present chapter warrants a preliminary observation. Catholic schools retain significant local initiative in carrying out their educative programme. It is this decentralised approach which makes a comprehensive study of Catholic schools an interesting challenge. But this decentralisation, notably evident in approach to governance and control, is one of the factors responsible for the success of Catholic schools over time. They have proven capable of adapting quickly to local needs and changed circumstances, showing the flexibility which has been their strength.

The first conclusion we can draw from our survey is that, as society continues to change, Catholic identity is increasingly a concern among Catholic educators. This identity is the “marketing tool” for a Catholic school justifying its role in the increasingly crowded landscape of parental choices for their children. This Catholic identity was originally taken for granted in nineteenth century America and Canada, where Catholics under hierarchical initiative circled their wagons against the influx of secular and Protestant influences. In Canada there was success in preserving constitutional protections for Catholic schools. In both countries, Catholic identity, at that time, was part and parcel of the organisation of the schools themselves. This organisation of Catholic schools was fostered by a particularly close link to the parish in the United

¹¹⁴ Hawthorn School for Girls in Toronto offers services like “parent seminar series,” “parent enrichment evenings,” and parent discussion groups. See <http://www.hawthornschool.com/parents/asp> (2 September 2011).

States through the “one parish, one school” model mandated by the Third Council of Baltimore, and through the close association with religious institutes dedicated to the education of youth. These religious institutes brought with them teaching methods and a curriculum based on their European experience. In their new North American foundations they were quick to build on this pedagogical patrimony through the development of new textbooks, which a budding Catholic press was only too willing to supply. In the United States, centralised Catholic school boards, where they existed, exercised the administrative tasks of official visitations and teacher examinations and were the exclusive domain of clergy. They had the potential to provide a conduit for the exercise of the bishop’s overarching responsibility for Catholic education. Such boards, however, quickly fell into desuetude since the administrative expertise and time necessary was often beyond the general reach of the clergy. A school superintendent tended to supplant the activity of the board; in some places he too was a cleric, again assuring a fluid conduit for the bishop’s responsibilities. In Canada, the Catholic separate school boards also exist in those provinces fully funded through public monies (they are optional in other jurisdictions), but their elected nature means that they are beyond the direct influence of the hierarchy, which can, nevertheless, influence schools through policy development and approval of religious curricula, hiring guidelines and negotiation with provincial ministries of education. The legislative context in which the boards must operate in these jurisdictions is very complex.

In the nineteenth and early twentieth century, the close relationship between school and parish, religious institute and Church hierarchy made an explicit concern for Catholic identity quite unnecessary. On the other hand, as American and Canadian

society changed dramatically after the Second World War, Catholic identity became increasingly the subject of direct study. By the end of the twentieth century, while success was maintained in preserving a general Catholic atmosphere and culture in schools, there were new worries. If Catholic identity is defined by success in handing on the faith to the younger generations, this remains a goal achieved, admittedly, with little success. It is, in fact, this failure, pointed out by the NCEA itself, which has led some parents to opt out of the Catholic school system and to venture into the foundation of their own schools. It is not just a Catholic culture which they wish to provide for their children, but an institution which will better aid them in transmitting the faith. It is, perhaps ironically, this search for a stronger Catholic identity that has led them in this direction to opt out of the established ecclesial structure for their schooling initiative.

A second conclusion follows. The closeness between the ecclesiastical actors in nineteenth century Catholic schools meant not only that Catholic identity was not a direct concern, but that the question of the legal status of schools was also not an issue. Schools were works of the religious institute itself, or of the parish. They were not considered legal persons distinct from the canonical entities that governed them. The single canonical category of “moral person” prior to the 1983 Code may also have rendered relatively unnecessary any deeper reflection on the relationship between school/parish, school/religious institute or school/diocese. The twentieth century canonical development of “juridical person” as distinct from “moral person” has not really found its way into the current structure of Catholic schools, nor generated any significant re-conceptualising of relationships as far as schools are concerned. The increasing complexity of schooling, the emphasis on school “communities” as opposed to school “institutions,” the challenges to

provide funding (through tax advantages) have all strained resources and possibly provided a disincentive to reconsider the canonical organisation of schools and to separate them from their “parent” entity, whether parish, diocese or religious institute. Where religious institutes have undertaken to create a new constellation of relationships between themselves and their schools, this has arisen from other pressures, such as the dwindling numbers of religious to staff, operate and own schools, and a re-examination of their original charism in the wake of the Second Vatican Council. These circumstances have led religious institutes to seek less direct involvement in schools, and to search for new ways of doing old business, often through various models of sponsorship.

Finally, one can conclude from this survey of existing Catholic schools that parental involvement has changed significantly since the nineteenth century. At the very least, the theological underpinnings of parental initiative in the founding of schools have seen some evolution. On the other hand, the legal norms are thin as regards parental involvement in school governance. This is understandable since the norms must apply to extremely divergent conditions around the world. Nevertheless, the parental role in school governance can be implied from their vocation as parent, and the inalienable and inviolable nature of their rights over the education of their children. It seems from this survey, however, that parental involvement in school governance in the North American context has not really been exploited in practice. Parent involvement in Catholic schools is largely confined to a support role in the communications network amongst the various members of the school community, and in organising fund-raising events.¹¹⁵

¹¹⁵ Some suggestions for more significant parental responsibilities are listed in the Appendix.

A certain dissatisfaction with current schooling models has led some Catholic parents to consider founding their own schools. Given the current North American context, this is an ambitious undertaking, and one which should not ignore pertinent lessons learned from the experience of Catholic health care and higher education. A consideration of these experiences is considered next, drawing out some practical conclusions and applications for parent initiatives to found schools.

CHAPTER 4

4. EXERCISING PARENTAL RIGHTS OVER EDUCATION BY PARENT-FOUNDED SCHOOLS

In the first chapter we examined the canonical aspects of the development of parental rights over the education of offspring flowing from the parental vocation. In the second chapter we considered current social and institutional pressures upon Catholic schools, and in the third we looked at the various structural forms these schools have taken in their attempts to respond and adapt to new demands. Before turning to propose a particular canonical solution for parent-founded schools in this chapter, it is instructive to draw upon the experience of Catholic higher education institutions and Catholic health care institutions striving to maintain their Catholic identity while restructuring to meet contemporary social and political circumstances.

4.1. The Experience of Catholic Health Care and Catholic Higher Education in the United States

Beginning in the 1960s, Catholic health care and higher education institutions initiated new governance structures in the face of two principal forces: (1) the need to compete for government funding to maintain viable operations as the population expanded rapidly after the Second World War and demand outstripped institutional capacities, and, (2) the desire to give effective apostolic roles to lay persons in the light of

Vatican Council II's call to universal holiness.¹ As a result, the new governance structures altered the established relationship between apostolic works and the institutes which had initiated and maintained them. From "ownership" one moved to "sponsorship," a non-canonical category that nevertheless had implications for many canonical issues, such as, for instance, the alienation of ecclesiastical goods. The immediate object of this restructuring of relationships had as its purpose, then, a response to new social and ecclesiological circumstances. But it quickly became apparent that the new governance structures also led to reflection on the self-identity of the apostolic work, now viewed as clearly distinct from the founding institute. Issues were raised about the Catholic identity of institutional apostolates and their fidelity to the charism of the founding religious congregation. Indeed, the question of Catholic identity and mission, especially in the health care field, quickly became the dominant issue surrounding sponsorship.² As will be shown, the development of "lay sponsorship" in particular provides a useful frame of reference for parents wishing to found schools, even if not directly applied to such schools.

For parent-founded schools, there is no "founding institute" and yet there is a clear intent by the parents to establish truly Catholic schools. Catholic identity is in the forefront of the initiative, but little consideration has yet been given to a canonical

¹ See can. 210 and *LG*, nn. 39-42.

² "Canon law was not originally designed to apply to the restructuring situations Catholic health care organisations face today. And insofar as canon law did deal with organisational restructuring, it focused on the alienation of stable property. Today the focus tends to be much more on safeguarding the Catholic identity of the work and its mission" (F.G. MORRISEY, "Catholic Identity in a Challenging Environment," in *Health Progress*, vol. 80, no. 6 [1999], p. 38).

structure in which to ground that identity. It is useful then, to analyse, first, the issues of catholicity as they developed in the context of Catholic health care and universities, and then, second, to analyse the changing forms of sponsorship of Catholic apostolic works to see how these developments open a path for the structuring of parent-founded schools.

4.1.1. Catholic Identity of Institutional Apostolates

It has been shown that, in the case of Catholic schools in North America, the Catholic nature and identity was not originally the subject of direct scrutiny. By the very fact of having been founded by a religious institute or under diocesan auspices in a social context sometimes hostile to the Catholic faith, these schools were considered Catholic in their inspiration and in their governing structures. A school was considered Catholic first of all by the personal commitment of what, in the 1960s, came to be called the educating community. It was, in the first place, the personal Catholic identity of the teaching sisters and brothers who often founded and governed the school that imbued the institution with its religious identity. In the nineteenth century North American context, establishing a Catholic school was an endeavour aimed expressly to protect children from the perceived nefarious influences present in mixed, neutral or lay schools. The administration, staff and volunteers were all committed to this common effort. It is true that in the United States the question of integrating immigrant Catholic children into the wider American society became quickly a significant and controversial issue. It remains, however, that this personal commitment to the Catholic faith by religious, priests, parents, administrators, volunteers and students was the main motivating cause for the foundation of Catholic schools in Canada and the United States in the last 150 years, and it was this

personal commitment of the members of the educating community that first and foremost stamped the schools as Catholic. The public in general also identified these schools as Catholic; that is to say, the outside observer recognised an institutional commitment to catholicity by the school itself. Nevertheless, for those founding, running and frequenting Catholic schools, the issue of institutional commitment was not the focus of engagement. The analysis of institutional commitment arose later as the presence of religious and clergy in the schools diminished, as a professional lay administrative cadre developed, and as schools, particularly in inner city neighbourhoods, opened up enrolment to a non-Catholic constituency.

The experience of Catholic hospitals and health care institutes in both the United States and Canada, and that of institutes of higher learning in the United States is similar to that of Catholic schools. Catholicity was assured by the tight control exercised by the founding congregation, by the values underpinning the apostolic work, and by the norms governing, for example, student campus life. As in the case of schools, there was no perceived need to structure the apostolic work apart from the work of the founding institute itself; the hospital was known publicly as the hospital of the Grey Nuns, or the university was known as a “Franciscan” university. There was no confusion about the identity of the institution, even if it was known by reference first of all to the religious congregation rather than by reference to the more generic term “Catholic”.

4.1.1.1. Catholic Health Care Institutions

Until relatively recently a typical Catholic health care facility defined its catholicity by the manner in which it was perceived from the outside: it was owned and

run by a Catholic religious institute, Catholic symbols were everywhere present, the building had a chapel at which Mass was celebrated, and certain medical procedures were not performed.³ Indeed, in 1993 the Catholic Health Association of the United States defined a Catholic health care institute as one perceived as connected or associated with the Catholic Church.⁴ While this definition is important in so far as public recognition is concerned, it does not directly address the question of self-perception, a question that would be posed with more and more insistence over time.

By reflecting on a Catholic institution's self-perception, authors such as R. Wilson and T.F. Schindler writing in the 1990s on the subject of Catholic health care grounded the search for institutional Catholic identity in the understanding of mission. They wrote, "A Catholic hospital, like any other Catholic organisation, seeks to continue the Church's mission to be a sacrament of Christ's redeeming presence," with the conclusion that "the distinctiveness of Catholic identity must make a difference within society, a difference that is redemptive."⁵

Francis G. Morrissey lists mission among the four critical "Catholic ingredients" of Catholic health care institutions, in addition to sponsorship, holistic care and ethics. He asserts that the aspect of mission necessarily creates a link with hierarchical structures in the person of the bishop.⁶ Nevertheless, in grappling with the practical application of

³ See R. WILSON and T.F. SCHINDLER, "Tradition in Transition: What It Means to Be a Catholic Health Care Facility Today," in *Health Progress*, vol. 71, no. 8 (1990), p. 26.

⁴ See CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES (=CHAUS), *The Search for Identity: Canonical Sponsorship of Catholic Health Care*, St. Louis, MO, CHAUS, 1993, p. 21.

⁵ WILSON and SCHINDLER, "Tradition in Transition," p. 27.

⁶ See MORRISSEY, "Catholic Identity in a Challenging Environment," p. 40.

mission to institutional structures, the Catholic Health Association of the United States remarked, that “[n]o explicit canon creates any standard for mission that is easily translated into a governance structure.”⁷ Other authors, drawing upon their experience in Catholic institutes of higher education questioned whether Catholic institutions were even possible in our age. Charles E. Curran emphasised that “Catholic identity has never defined itself in sectarian terms as over against all other human or secular reality.”⁸ Curran’s remarks, it seems, were intended provocatively to spark discussion about the institutional apostolates that had developed over time to fulfill the Church’s mission, and whether they should still be considered the best way for the Church to pursue that end. It is an important issue, for it indirectly asks the question who commissions for mission. Morrissey brings that question back to one of communion with the bishop; a missionary work or apostolic endeavour does not operate independently from the hierarchy. One might say that it is the respect for ecclesiastical communion that guarantees the authenticity of the mission.⁹

Applying this experience to the subject of parent-founded schools, one can conclude that parental rights regarding the education of their children, while primary and

⁷ CHAUS, “The Search for Identity,” p. 45.

⁸ C.E. CURRAN, “The Catholic Identity of Catholic Institutions,” in *Theological Studies*, 58 (1992), p. 92.

⁹ Several canonists have proposed diverse approaches and models for determining or examining the notion of catholicity. They identify communion with ecclesiastical hierarchy as one of the key elements. For a summary of the approaches of three canonists, F. Morrissey, L. Örsy and P. Valdrini, see J.H. PROVOST, “The Canonical Aspects of Catholic Identity in the Light of *Ex corde Ecclesiae*,” in *Studia canonica*, 25 (1991), pp. 166-168.

inalienable, are not absolute but must be exercised within the scope of the larger mission of the Church and the *communio* which it entails.

An institution's self-perception of its Catholic identity is evidenced by such elements as its mission statement, its policy orientations and its decision-making processes. The mission statement identifies how the institution perceives its role in the wider society and its connection with Gospel values. Mission statements try, therefore, to define "who we are" and "what we offer." Policy orientations address the mode of operations and the deployment of resources, while decision-making processes are intended to reflect basic values that guide and inspire the institution's priorities. The Catholic Health Association of the United States has drawn up a document entitled "A Shared Statement of Identity for the Catholic Health Ministry" which attempts to define the diverse roles played by any health care institute in relation to society as a whole, to the Church, and to its own staff and patients, rooting all these relationships in a connection with the Gospel:

We are the people of Catholic health care, a ministry of the Church continuing Jesus' mission of love and healing today. As provider, employer, advocate, citizen — bringing together people of diverse faiths and backgrounds — our ministry is an enduring sign of health care rooted in our belief that every person is a treasure, every life a sacred gift, every human being a unity of body, mind, and spirit.

We work to bring alive the Gospel vision of justice and peace. We answer God's call to foster healing, act with compassion, and promote wellness for all persons and communities, with special attention to our neighbours who are poor, underserved, and most vulnerable. By our service, we strive to transform hurt into hope.¹⁰

¹⁰ CHAUS, A Shared Statement of Identity for the Catholic Health Ministry, http://www.chausa.org/Pages/Our_Work/Mission/Mission_Resources/A_Shared_Statement_of_Identity/ (8 February 2012).

Analysing this identity statement we find the following. The Catholic self-identity is evident by the corporate “we”: “who are we?” The aspect of Christian mission is enunciated by imbuing the entire work with an apostolic purpose while binding it to the Church as a whole, including the hierarchy: “a ministry *of the Church*.” That ministry is a work oriented both to the wider community (“enduring sign” to all of society) and to the individual in need of healing. The individual care is holistic (“unity of body, mind, and spirit”), with a particular insistence on the sacredness of life. The second paragraph of the mission statement addresses the ethics of the institution and its correspondence with Gospel values (justice and peace) in the provision of service, by emphasising compassion to those who suffer and by special attention to those who are weak and in need. No reference is made to operating the work within the ambit or under the control or influence of a canonical entity such as a juridical person. However, this may be explained by the fact that the Shared Statement is intended for the whole Catholic health care ministry regardless of how each individual institution chooses to structure its organisation.

The Conference of Bishops of the United States addressed issues touching the identity of Catholic health care institutions through the publication of its Ethical and Religious Directives for Catholic Health Care Services.¹¹ Each hospital or other institute

¹¹ USCCB, Ethical and Religious Directives for Catholic Health Care Services, 5th ed., <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf> (8 February 2012).

will evidence its Catholic identity by adherence to these ethical values. In Canada the equivalent document is the Health Ethics Guide.¹²

Since health care provision and delivery is a very complex work, cooperation across the industry is needed. On the one hand, this gives the Catholic health care institution an opportunity to witness to Gospel values within the wider community of health care providers, but on the other hand, often places it at risk of losing its autonomy and so affecting adversely its institutional Catholic identity. The Ethical and Religious Directives specifically addresses the issue of cooperation with non-Catholic health care providers and gives a leading role to the local bishop in mediating and authenticating such cooperative endeavours. The very first directive under the heading “Forming New Partnerships with Health Care Organisations and Providers” states:

Decisions that may lead to serious consequences for the identity or reputation of Catholic health care services, or entail the high risk of scandal, should be made in consultation with the diocesan bishop or his health care liaison.¹³

As Morrissey notes, “The Code of Canon Law does not specify criteria for Catholic identity. We must therefore proceed by analogy (c. 19). In addition, we must recognise that there are different ways of approaching the issue of Catholic identity.”¹⁴ He identifies three “approaches:” legal, doctrinal and value-oriented.¹⁵ Wilson and Schindler, on the other hand, speak of identity in broader, more sociological terms as “a

¹² See CATHOLIC HEALTH ALLIANCE OF CANADA, Health Ethics Guide, http://www.chac.ca/resources/ethics/ethicsguide_e.php (7 August 2012).

¹³ USCCB, Ethical and Religious Directives, p. 36.

¹⁴ MORRISEY, “Catholic Identity in a Challenging Environment,” pp. 38-39.

¹⁵ Ibid., p. 39.

vision rooted in our past that speaks to the realities of the present and calls us forward to a future where greater justice will reign.”¹⁶ Whatever the approach, the experience of Catholic health care in North America points to the need to have concrete indicators that serve to reinforce the personal religious commitment of those engaged in the institutional apostolate at whatever level, and which also serve to witness to a Catholic missionary zeal in society at large. This witness function requires, at a minimum, that an institution be sufficiently recognised from the outside as a Catholic endeavour, and this witness can only be effective when the institution itself, through its mission statements, policy orientations, and decision-making processes perceives itself as Catholic.

The history of American Catholic health institutions grappling with their Catholic identity in a pluralistic environment should provide some general guidance for schools which, while not Catholic in name, nevertheless seek to present themselves as offering a Catholic education. The personal conviction of those engaged in the school, that is to say the Catholic witness of the governing board, the administration and teachers, the parents, students and volunteers, each have an important role to play in ensuring that the school has a Catholic identity. For parents who venture to found their own schools, this personal conviction is often particularly strong and very much at the forefront of their initiative. Nevertheless, the personal conviction of those in the educating community, while essential, is not sufficient. There must be present an institutional identity that is Catholic, not only as something recognised by those who look upon the school from the outside, but as a formally embedded characteristic which informs all the activities proposed by the

¹⁶ WILSON and SCHINDLER, “Tradition in Transition,” p. 31.

institution itself. This self-perception includes a definition and understanding of its own particular mission in conformity with the mission of the Church, a link with hierarchical authority, and an ethical foundation conforming to Gospel values and the social teaching of the Church in its dealings with all persons and groups.

4.1.1.2. Catholic Higher Education Institutions

At the same time that Catholic health care institutions were reflecting on their Catholic identity as a result of pressures bearing down on their governing structures from growing demand and a desire for greater lay presence in decision-making structures, Catholic institutions of higher education were following a similar path. However, as Charles Curran reflected in 1992, after the long debate within the American higher education community and its interactions with the Vatican authorities, the question of defining catholicity for a university was evidently more difficult than for a hospital. Health care provision lends itself easily to Gospel values summarised in the corporal work of mercy, but a Catholic university or college, in Curran's view, "does not see itself as directly involved in the pastoral mission of the Church under the direction of the Church hierarchy."¹⁷ Curran's perspective postulated a more autonomous place for universities in the life of the Church. Of course, not all agreed with his assumption, since teaching is, with sanctifying and governing, one of the three *munera* of the Church. This is what G. Cardinal Danneels stressed when asserting that "a Catholic university cannot

¹⁷ CURRAN, "Catholic Identity," p. 103.

position itself outside the orbit of the mission of the Church.”¹⁸ At the heart of the difference of opinion is the question of a university’s legitimate autonomy, which autonomy, as Curran rightly noted, produced an identity crisis since there was no general consensus about a Catholic university’s role and mission.¹⁹

4.1.1.2.1. Developments leading up to *Ex corde Ecclesiae*

In 1955 the Sacred Congregation of Seminaries and Universities began to urge all Catholic universities to seek formal, canonical pontifical recognition. The reason for this initiative was to protect Catholic institutions of higher learning from certain threats from the state, a reality in many parts of the world at that time. In the United States, believing they were protected by the constitutional principle of the disestablishment of religion and the state (the First Amendment), the governing bodies of these institutes saw no need to comply.²⁰ The American universities and colleges considered themselves Catholic based on two factors, one internal to the university and one external: the purposes of their founding religious institutes and the fact that they were generally recognised as such both by the Catholic community and by the hierarchy.²¹ Due to the specific circumstances of the Church in the United States, Curran argued, the hierarchy was prevented from control or interference in governance of Catholic colleges and universities. In his view, the

¹⁸ G. DANNEELS, “The Catholic University,” in *Current Issues in Catholic Higher Education*, vol. 10, no. 2 (2001), p. 12.

¹⁹ See CURRAN, “Catholic Identity,” p. 107.

²⁰ See A. GALLIN, *Negotiating Identity*, Notre Dame, IN, University of Notre Dame Press, 2000, p. 17.

²¹ Ibid.

demands of professionalism (independent inquiry), the need to tap government funding (and so avoid a “pervasive sectarianism”), and the historical circumstances of these educational institutes precluded such control or intervention.²²

Catholic university enrolment after the Second World War grew to strain the ability of the institutions to meet the demand, both in terms of physical capacity and in terms of academic staff.²³ Government funding was available for such things as building construction but, at the same time, religious institutes were re-examining their commitment to apostolic works such as universities. Lay professors were needed to match enrolment levels and replace a diminishing number of religious academics in the teaching profession. Until the end of the 1960s, one might characterise the approach to Catholic identity in Catholic universities as a “permeation model;”²⁴ all structures were permeated with the presence of the religious founding order and the religious members themselves played an active part at all levels: research, teaching, campus life and governance. The university was Catholic because it was founded, organised, staffed and run in large measure by members of a religious institute. By the 1970s the question of catholicity became the subject of debate as structures began to accommodate greater lay

²² See CURRAN, “Catholic Identity,” p. 103.

²³ The *Serviceman’s Readjustment Act of 1944* (58 Stat. 284) commonly known as the G.I. Bill, which provided returning war veterans’ with educational benefits, was broadened throughout the 1960s to help all students. Such initiatives fuelled the growing demand for university education. Simultaneously, the United States federal government entered university funding with such legislation as the *Higher Education Facilities Act of 1963* (77 Stat. 363). These funds were available, the courts ruled, if institutions were not disqualified by a pervasive sectarianism. Catholic Universities were advised to retain a certain distance from religion in their faculties and governance structures if they wished to qualify for funds. For a brief account of these pressures, see GALLIN, *Negotiating Identity*, pp. 33-39.

²⁴ The expression is from D. HOLTSCHNEIDER and M. MOREY, “Relationships Revisited: Changing Relationships between U.S. Catholic Colleges and Universities and Founding Religious Congregations,” in *Current Issues in Catholic Higher Education*, vol. 21, no. 1 (2000), p. 6.

participation, the presence of religious dwindled, campuses eased codes of conduct, non-Catholic enrolment increased, and theology classes moved from apologetics to religious culture and science. The permeation model as a basis for Catholic identity was surpassed.

Alice Gallin traces the long, sometimes strained relations between the International Federation of Catholic Universities, the American Association of Catholic Colleges and the American Association of University Professors, on the one hand, and, on the other hand, the Congregation for Catholic Education²⁵ throughout the 1960s up until 2000.²⁶ In 1990 John Paul II issued the apostolic constitution *Ex corde Ecclesiae* which, among other things, addressed the issue of the Catholic identity of Catholic universities.²⁷

As was shown earlier in this chapter, Catholic health care institutions approached Catholic identity from legal, doctrinal and value-oriented criteria. Some in the Catholic higher education field proposed other approaches. Anthony J. Dosen summarised three approaches to Catholic identity that grew out of the American experience of 1960s Catholic higher education. The *pistic* approach emphasised faithfulness and clear boundaries: a “who’s in and who’s out” approach. The *charismatic* approach rejected

²⁵ It was called the Congregation of Seminaries and Universities (Congregatio de Seminariis et Studiorum Universitatibus) from 1915 to 1967, and the Sacred Congregation for Catholic Education (Sacra Congregatio pro Institutione Catholica) from 1967 to 1988. In 1988, art. 112 of the apostolic constitution *Pastor Bonus* renamed it the Congregation for Catholic Education in Seminaries and Institutes of Study (Congregatio de Institutione Catholica de Seminariis atque Studiorum Institutis), however, this title was never used and was modified by a letter of the Secretariat of State dated 26 February 1989 (prot. no. 236.026) to “Congregation for Catholic Education (for Seminaries and Educational Institutions).” See editor’s note, *Code of Canon Law Annotated*, p. 1493.

²⁶ This is the subject of an entire book, see GALLIN, *Negotiating Identity*.

²⁷ JOHN PAUL II, apostolic constitution *Ex corde Ecclesiae*, 15 August 1990, in AAS 82 (1990), pp. 1475-1509, English translation in *Origins*, 20 (1989-1990), pp. 265, 267-276.

clear boundaries, emphasising a personal, not institutional ministry and viewed traditions more as a burden than a treasure: an “experience rather than authority” approach. The *mystical* approach emphasised the eschatological, future-oriented perspective, preferring a more global attitude: focus on worship and witness.²⁸

The *mystical* approach to Catholic identity is represented by Morey and Holtschneider’s rather provocative analysis of changing governance structures:

The largest loss Catholic Colleges experience as congregation members disappear is the loss of witness. The most critical question for the future of the unique cultural identity of most Catholic colleges in the United States, therefore, is how to create witnesses without religious congregations.²⁹

The charismatic approach might correspond to Charles Curran’s analysis. What was necessary for Catholic identity in the context of a university community was offering the possibility for students to engage in the Catholic intellectual tradition, both in its historical and its contemporary developments, which included also the opportunity to participate in its liturgical life and its service to the wider community.³⁰ This approach warned against a too legalistic definition to catholicity:

The whole process of clarifying and strengthening Catholic identity can be easily undermined by the intervention of nonacademic ecclesiastical authorities. Catholic identity simply cannot be imposed or assured by fiat. It must be implanted by persuasion and sustained, ultimately, by love.³¹

²⁸ See A.J. DOSEN, *Catholic Higher Education in the 1960s: Issues of Identity, Issues of Governance*, Charlotte, NC, Information Age Publishing Inc., 2009, pp. 16-20.

²⁹ HOLTSCHNEIDER and MOREY, “Relationship Revisited, p. 36.

³⁰ See CURAN, “Catholic Identity,” p. 107.

³¹ P. STEINFELS, “Catholic Identity: Emerging Consensus,” in *Occasional Papers on Catholic Higher Education*, St. Paul, MN, Association of Catholic Colleges and Universities, 1995, p. 16.

This last statement may be interpreted as a reaction against the efforts of the Holy See to encourage American Catholic universities and colleges to forge stronger canonical links with the local bishops. Tensions increased throughout the 1970s and 1980s as first *Sapientia christiana* was issued to govern ecclesiastical faculties,³² and then *Ex corde Ecclesiae* to govern Catholic universities. Cardinal Danneels tried to find a path between an overemphasis on institutional link on the one hand and a too vague institutional commitment on the other:

There is a clear distinction between an institutional link and a substantial commitment. Affiliation can dissolve into just a trail out of the past and therefore say nothing about the future.... Conviction is more important than affiliation, but affiliation can help sustain conviction.³³

Canonists involved in the debate that erupted over Catholic identity in Catholic universities tended to remain close to the triple approach worked out in the Catholic health care experience in the United States: hierarchical, doctrinal, value-oriented. John P. Beal found in each of these three approaches an element of what he termed the “bonds of communion:” 1) establishing and maintaining mutually recognised relationships with the hierarchy; 2) adhering to Church teachings in operations and activities; 3) embedding the founding charism in the institution’s daily life.³⁴ Nevertheless, as regards the first bond, Beal advocates for a change of perspective. It is no longer sufficient for the

³² JOHN PAUL II, apostolic constitution *Sapientia christiana*, 29 April 1979, in AAS, 71 (1979), pp. 500-521.

³³ DANNEELS, “The Catholic University,” p. 11.

³⁴ See J. BEAL, “From the Heart of the Church to the Heart of the World: Ownership, Control and Catholic Identity of Institutional Apostolates in the United States,” in R. SMITH, W. BROWN, and N. REYNOLDS (eds.), *Sponsorship in the United States Context: Theory and Praxis*, Alexandria, VA, CLSA, 2006, pp. 40-48.

hierarchy to spend energy and resources to simply “maintain” an institutional commitment by intervention and regulation when relations between the institute and the hierarchy have become strained. In his opinion, a more positive stance by the hierarchy is needed, a stance that takes an active role in fostering and promoting institutional apostolic works.³⁵ Indeed, this is the role of the bishop foreseen by c. 394, §1:

The Bishop is to foster various forms of the apostolate in his diocese and is to ensure that throughout the entire diocese, or in its particular districts, all works of the apostolate are coordinated under his direction, with due regard for the character of each apostolate.

The same canon, in the second paragraph, stresses the bishop’s role in encouraging the lay faithful to take up their responsibilities in apostolic works:

... he is to insist on the faithful’s obligation to exercise the apostolate according to the condition and talents of each. He is to urge them to take part in or assist various works of the apostolate, according to the needs of place and time.

Charles Curran follows a somewhat similar line of argument to that of Beal, although from a different perspective. Curran had already criticised the hierarchy for its too-distant involvement in institutional apostolates such as health care, higher education and social services. Noting that the hierarchy invests few or no resources in these apostolates and expends little effort to establish priorities and weigh costs associated with them, he warned, “there is a downside to this.... The Church as such, as the People of God, does not have any real sense of ownership with regard to these institutions or

³⁵ See *ibid.*, p. 40.

functions.”³⁶ He sees the institutional commitment not simply in terms of the hierarchy’s involvement, but in the involvement of the entire Catholic community.

Following the long debate between Catholic universities and the Holy See, the apostolic constitution *Ex corde Ecclesiae* sought, amongst other things, to establish the outline of Catholic identity in universities, and to give concrete norms regarding the relationship between universities and the hierarchy.

4.1.1.2.2. *Ex corde Ecclesiae*

Ex corde Ecclesiae adopts a four-fold schema of “essential characteristics” for a Catholic university:

- 1) Christian inspiration of persons and the community as a whole;
- 2) The role of Catholic faith in the increase in human knowledge;
- 3) Fidelity to the Christian message as transmitted through the Church;
- 4) Institutional commitment to service of the People of God.³⁷

Interestingly, none of the four characteristics mentions a specific canonical link with the hierarchy. Identity is proposed in terms of values and doctrine. These values and the doctrinal adherence are seen as forming a pervasive bond which unites individuals in the educating community to the university community as a whole, and to the wider Church community. In this perspective, Catholic identity has the following critical aspects: the personal and the institutional aspects arising from “Christian inspiration,” the

³⁶ CURRAN, “Catholic Identity”, p. 93.

³⁷ See *Ex corde Ecclesiae*, no. 13, pp. 268-269. The Constitution here adopts verbatim the conclusions of the Congress on Catholic Universities held in November 1972. The conclusions of the Congress are reprinted in A. GALLIN (ed.), *American Catholic Higher Education: Essential Documents, 1967-1990*, Notre Dame, IN, University of Notre Dame Press, 1992, pp. 37-57.

cultural aspect as contribution to human knowledge, the ecclesial aspect summarised as “fidelity,” and the social aspect characterised as “service.”

As Cardinal Danneels emphasised, *Ex corde Ecclesiae* affirms that the university, as a Catholic institution, participates in the wider mission of the Church:

The primary mission of the Church is to preach the Gospel in such a way that a relationship between faith and life is established in each individual and in the socio-cultural context in which individuals live and act and communicate with one another.³⁸

By its very nature, each Catholic University makes an important contribution to the Church’s work of evangelisation. It is a living institutional witness to Christ and his message, so vitally important in cultures marked by secularism or where Christ and his message are still virtually unknown.³⁹

The particular ecclesial mission of the university is made *qua* university, and not simply through the individual participation of members of the university community. Individual persons in the educating community, of course, retain their personal responsibility vis-à-vis the Church’s mission, but the mission of the university is proper to the institution – the institution is not simply a medium or conduit for the exercise of individual participation in the Church’s mission.

James Provost described *Ex corde Ecclesiae*’s summary of the Catholic university’s identity as the internal dimension of Catholic identity.⁴⁰ This internal dimension is complemented by an external dimension that includes more formal, canonical aspects contained in the Constitution’s second part entitled “General Norms,”

³⁸ Ibid., no. 48, p. 273.

³⁹ Ibid., no. 49, p. 273.

⁴⁰ See PROVOST, “Canonical Aspects of Catholic Identity,” pp. 161-164.

which “are based on, and are a further development of, the Code of Canon Law and the complementary Church legislation, without prejudice to the right of the Holy See to intervene should this become necessary.”⁴¹ The norms “are valid for all Catholic Universities and other Catholic Institutes of Higher Studies throughout the world.”⁴² Of course, as has been shown, what constitutes a “Catholic university” is not always clear and has been the subject of theological and canonical reflection.⁴³

The internal dimension is not absent in these general norms, but it is joined to the external dimension:

A Catholic University, as Catholic, informs and carries out its research, teaching, and all other activities with Catholic ideals, principles and attitudes. It is linked with the Church either by a formal, constitutive and statutory bond or by reason of an institutional commitment made by those responsible for it.⁴⁴

There is a distinction here (either/or) between a “formal, constitutive and statutory bond” on the one hand, and “institutional commitment” on the other. Not all Catholic universities are such simply because of a canonical link with the hierarchy; universities which are, in fact, Catholic also fall under the norms. This calls to mind the distinction in can. 808 between Catholic universities in law and in fact (*reapse*), both of which require the consent of competent ecclesiastical authority to bear the title “Catholic.” The

⁴¹ *Ex corde Ecclesiae*, Part II, art. 1, §1, p. 274.

⁴² *Ibid.*

⁴³ Provost relates the three categories of Catholic universities distinguished in *Ex corde Ecclesiae*, art. 3 (i.e. established or approved by hierarchical authority, established by a religious institute or other public juridical person, and established by other ecclesiastical or lay persons) to the various approaches to Catholic identity offered by canonists (see PROVOST, “Canonical Aspects of Catholic Identity,” pp. 183-185).

⁴⁴ *Ex corde Ecclesiae*, art. 2, §2, p. 274.

Apostolic Constitution makes clear that the bond with the Church is not an exclusively formal and legal matter, but is also a question of fact, namely the institutional commitment *qua* university.

Each Catholic university must spell out its Catholic identity in its mission statement.⁴⁵ In other words, it is not sufficient that a university *be perceived* as Catholic; it must expressly present itself as such.⁴⁶ The primary responsibility for this identity falls to the university itself and to its own constituted authority, but it is a responsibility shared also by all members of its community; the hierarchy's role is one of watching over the quality of its teachers and respect for Catholic doctrine, the two pillars of its institutional identity.⁴⁷ "Catholic theologians, aware that they fulfil a mandate received from the

⁴⁵ See *ibid.*, art. 2, §3, p. 274. Art. 3, §3 expressly provides that a Catholic university may be founded at the initiative of the Christian faithful, and not necessarily by any ecclesiastical person or authority. In such cases, its statutes need not be approved by competent ecclesiastical authority (see art. 3, §4, p. 274). However, such a lay-founded university is restricted in how it may present itself: "such a University may refer to itself as a Catholic University only with the consent of the competent ecclesiastical authority, in accordance with the conditions upon which both parties shall agree" (art. 3, §3, p. 274). The Latin reads: "Eiusmodi Universitas poterit Universitas Catholica haberi solummodo competenti Auctoritate ecclesiastica probante, secundum condiciones, quas partes pactae erunt." This must be read with can. 808 which restricts only the use of "Catholic" in the "title" or "name" of the university: "Nulla studiorum universitas, etsi reapse catholica, titulum seu nomen universitatis catholicae gerat, nisi de consensu competentis auctoritatis ecclesiasticae." It does not preclude self-representation as Catholic in brochures, for example (see PROVOST, "Canonical Aspects of Catholic Identity," pp. 176-178; cf. R. PAGÉ, "From the University Which Is Really Catholic to the University Which Is Legally Catholic," in *Concilium*, no. 5 [1994], pp. 96-97). The scope of self-reference should be spelled out in the conditions agreed to by the parties.

⁴⁶ R.B. Young undertook a study of Catholic college and university mission statements nine years after *Ex corde Ecclesiae*, relating the values found in them to the four-fold essential characteristics of a Catholic university embraced by the Constitution. See R.B. YOUNG, "Colleges on the Cross Roads: A Study of the Mission Statements of Catholic Colleges and Universities," in *Current Issues in Catholic Higher Education*, vol. 21, no. 2 (2001), pp. 65-81, esp. pp. 77-79.

⁴⁷ See *Ex corde Ecclesiae*, Part II, art. 4, §1, p. 274. See also art. 5, §2 (p. 274-275) which outlines the hierarchy's responsibilities to intervene and work with university authorities to address problems concerning the institute's Catholic character. See also art. 5, §1 which stipulates that the university must "maintain communion with the universal Church and the Holy See" and remain "in close communion with

Church, are to be faithful to the magisterium of the Church as the authentic interpreter of sacred Scripture and sacred tradition.”⁴⁸ This requirement is based on can. 812:

Can. 812 — Those who teach theological subjects in any institute of higher studies must have a mandate from the competent ecclesiastical authority.

Numerically, the numbers of non-Catholic teachers on staff is not to exceed more than half the number of total teachers, which would otherwise constitute a danger to the Catholic identity.⁴⁹ And, finally, the curriculum is to contain courses on Catholic doctrine.⁵⁰ Presumably these courses are not general “religious studies” courses, but are clearly doctrinal in their content.

As in the case of health care institutes, Catholic universities are to foster cooperation with other Catholic universities and with other universities in general, as well as other research and educational institutions, cooperating also with government programmes and national and international organisations, “in accord with Catholic principles and doctrine.”⁵¹ Given the nature of a university, this cooperation is undertaken in the broader context of fostering the progress of human knowledge, but, for a Catholic university, cooperation with non-Catholic institutes and organisations serves also a “witness” function, bringing Catholic values and worldview to contemporary culture

the local Church and in particular with the diocesan bishops of the region or nation in which it is located” (p. 274).

⁴⁸ Ibid., art. 4, §3, p. 274. The issue of mandates proved to be a very controversial one, but it is beyond the scope of this thesis to enter into that discussion. For a documentary history of the debates, see A. GALLIN, *Ex corde Ecclesiae: Documents Concerning Reception and Implementation*, Notre Dame, IN, University of Notre Dame Press, 2006.

⁴⁹ *Ex corde Ecclesiae*, Part II, art. 4, §4, p. 274.

⁵⁰ Ibid., §5, p. 274.

⁵¹ See art. 7, §§1 and 2, p. 275.

through solidarity in efforts to support social justice. This parallels the role of health care institutes in the wider domain of general health care, whose mission is to bring a Catholic influence in areas of concern to all humankind. Such a witness function through cooperative endeavours demands a clear self-identity that is capable of acting as a leaven.

The apostolic constitution *Ex corde Ecclesiae* did not end the debate over Catholic identity in higher education. Nevertheless, it intended to provide clear guidelines so as to better insert the university into the broader mission of the Church, reinforce the institutional nature of the apostolate, and provide norms to protect the “essential characteristics” of its Catholic identity. It was the fruit of a long discussion amongst the governing members of Catholic universities, theologians, other academics, and ecclesiastical authority. The very fact of the debate shows the development from “permeation model” to, as Alice Gallin has suggested in the title of her work, “negotiated identity.” Catholic identity is no longer considered a “given,” but a value to be refined, maintained, protected and promoted. It is not something that can be imposed, but is the fruit of mature reflection in a context of lively social interaction. Nevertheless, in the end, the same three aspects that one finds in the health care experience find their place in the area of Catholic higher education, and Catholic universities in particular: values, doctrine and law. These aspects of identity are not mutually exclusive, but, as the experience of Catholic universities suggests, they converge. Whether an apostolic institute is founded, governed and staffed by religious, or whether it is founded, governed and staffed by lay persons, if it wishes to be Catholic it must unite these three aspects. The experience of Catholic universities shows that a canonical bond that is formal, constitutive and legitimate is not the sole path to Catholic identity. The personal faith commitment of the

various members of the educating community is necessary to safeguard the institutional identity, but the institute itself must have a clear self-understanding as Catholic. Further, where the institution is not established by hierarchical authority or by a public juridical person but rather by private initiative of the Christian faithful, it must come to some understanding with the competent ecclesiastical authority regarding the parameters within which it may present that self-understanding to the broader public. In this way, it may be of service first of all to the People of God, but also serve as a Christian witness within the larger society where it operates.

4.2. Sponsorship in the Context of Institutional Apostolates

As governance structures were gradually staffed with increasing numbers of lay persons, the question of maintaining the identity and mission of a “Providence” hospital or a “Franciscan” university, gradually came to the fore. Further, the question of the relationship of the founding religious congregation itself to the apostolic work was posed. Previously, as has been shown, it was not uncommon for the religious congregation to own the property, and so exercise a level of control through ownership. Administrative decisions were also made at the highest level by the religious congregation’s own governing body. The control of the apostolate by the congregation was mediated through structures of property ownership and congregational decision-making. With increasing numbers of lay persons on hospital and university boards, the decision-making prerogative of the institute began to be shared with persons who were not members of the founding religious congregation. Increasingly throughout the 1960s and afterwards, the institutional apostolates began to be incorporated civilly as entities distinct from the

religious congregation. Legal title to the property was conveyed to the civil corporation. The structure of ownership in some cases ceased, therefore, to be a mediator of control by the congregation. How, then, in these new circumstances, was control by the congregation to be exercised? This new context provoked a reflection on the sponsorship of institutional apostolates by a Church body.

4.2.1. Sponsorship in Canonical Discourse

Canonical commentators are quick to point out that sponsorship is not a term found in the Code of Canon Law or the Code of Canons of the Eastern Churches. The idea of sponsorship, though evidently present in canonical discourse, is not, however, understood by all in the same way. For American canonists gathered in 2005 for a symposium on sponsorship, a working definition was agreed to:

Sponsorship of an apostolate or ministry is a formal relationship between a recognised Catholic organisation and a legally formed entity, entered into for the sake of promoting and sustaining the Church's mission in the world.⁵²

In canonical terms then, sponsorship is first and foremost a formal relationship. That relationship joins a recognised Catholic organisation with a legally formed entity. The purpose of the relationship is to further the Church's mission. Canonists understood this "formal relationship" as a legal relationship binding the apostolic work to an established canonical entity: parish, diocese, religious institute or other public juridical person or public association of the faithful.

⁵² "Foreword," in SMITH, BROWN, and REYNOLDS (eds.), *Sponsorship in the United States Context*, p. ii.

It may be possible, however, to have a more informal relationship between sponsors, institutional apostolate and ecclesiastical authority. *Ex corde Ecclesiae* (art. 2, §2) describes two types of bonds with the Church, one formal, constitutive and statutory, the other by means of an institutional commitment made by its sponsors:

A Catholic University, as Catholic, informs and carries out its research, teaching, and all other activities with Catholic ideals, principles and attitudes. It is linked with the Church either by a formal, constitutive and statutory bond or by reason of an institutional commitment made by those responsible for it.⁵³

Provost distinguishes these two bonds in the following way:

The difference between the two seems to be that the first type of linkage entails a commitment by both Church authorities and the institution to maintain a formal linkage, recognised legally, and constitutive of the institution as such. This may be expressed in several ways (statutes of the institution, laws or the country, etc.). The second type of linkage entails a commitment by the institution but no formal commitment by Church authorities in return.⁵⁴

The formal, constitutive and statutory linkage then is a more “two-sided” or bilateral commitment; the second type, more of a “one-sided” or unilateral linkage.⁵⁵ There seems to be room for a legitimate and sufficient link between sponsoring body and apostolic work which is not necessarily statutory, at least for Catholic universities. The question is whether this bond or link is to be considered unique to universities by the very nature of a university, or can be extended to, for example, health care institutions and schools.

⁵³ *Ex corde Ecclesiae*, art. 2, §2, p. 274. The Latin original employs the term “sponsors” when describing the second type of bond: “Universitas Catholica, qua catholica, suam pervestigationem, institutionem ceteraque opera propositis, principiis et moribus catholicis perfundit et exsequitur. Est Ecclesiae coniuncta aut certo vinculo constitutivo et legitimo, aut ex officio institutionali ab eius sponsoribus sumpto.”

⁵⁴ PROVOST, “Canonical Aspects of Catholic Identity,” p. 173.

⁵⁵ It remains open to discussion whether this second type of more informal bond may yet be considered a type of sponsorship. Certainly *Ex corde Ecclesiae* speaks of “sponsors” in regard to this relationship, although the English translation does not bring this out. See footnote 53 above.

Morrisey, reflecting on his experience with Catholic health care institutes, summarises six criteria for institutional commitment:

- 1) There is a general apostolic purpose — “to help others.” This purpose is based on the personal commitment of those involved in the work.
- 2) The results are appropriate and proportionate to the activity. Thus, they are cost-effective as regards persons, time, and financial resources.
- 3) The faithful perceive the work as “Catholic,” that is, as operating under the auspices of a bishop or a Catholic group, etc., and consequently as being trustworthy.
- 4) There is a form of catholicity permeating the establishment, although such is not legislated or contractual (for instance, a general relation to “Rome,” Catholic traditions, religious signs, the name of the institution, and so forth).
- 5) The work corresponds to a need that is perceived as being in harmony with the purposes of the Church.
- 6) Government authorities have granted the work certain exemptions that are usually reserved to religious organisations.⁵⁶

Morrisey offers this as a possible approach “where there is less direct involvement of Church authorities as such, but where there has been a concerted effort to retain catholicity,”⁵⁷ which seems to correspond with Provost’s “one-sided” linkage in cases of institutional commitment.

A second important element of the working canonical definition of sponsorship offered above is that the purpose of sponsorship is related directly to mission; it is sponsorship *for* mission. Sponsorship is not simply about “putting one’s house in order” through a structural reorganisation, but about refining one’s structure in order to more effectively foster the Church’s mission.

⁵⁶ MORRISEY, “Implications of Canon Law,” p. 9.

⁵⁷ Ibid.

The element of the working definition referring to a “recognised Catholic organisation” is vague. It obviously includes the institutes of consecrated life that originally founded the apostolate or ministry, the hospital or university. But a sponsoring organisation can take many forms. Nevertheless, it is important that it be an organisation that is *recognised* as Catholic. A “recognised Catholic organisation” however can be understood in two ways, based on the question “who” recognises: recognised by competent ecclesiastical authority, or recognised by the general public as Catholic. Both of those understandings of “recognised Catholic organisation” have been present in the discourse on Catholic identity. The former is really the important understanding as far as canonical analysis is concerned. The latter is important, but cannot be regulated by law; it is tied to the doctrinal and values aspects of identity rather than to legal structures as such.

The element in the definition referring to a “legally formed entity” implies something more than persons simply acting in concert for a particular purpose. It must be an activity that is more than the sum of individual efforts, but rather the work of an entity in its own right enjoying some formal, legal status. The definition does not answer the question whether civil legal status is sufficient, or if legal status means a status formally conferred by some provision of canon law: presumably the latter, since it is presented as a working definition for canonists.

The working definition for sponsorship, then, while helpful, remains ambiguous. Sponsorship is an elastic term that can be “stretched” to cover a wide range of relationships, from former relationships of control through ownership, to newer relationships of influence on mission. As the concrete situation of institutional apostolates

changes, sponsorship can be expected to develop to meet new needs and forge new relationships. There have been many varieties of sponsorship, and the forms continue to develop. In a conference given to the Catholic Health Association of British Columbia on 11 January 2012, entitled “Implications of Canon Law for Catholic Leaders and Organisations,” Morrissey, drawing on his wide experience with Catholic health care institutions, enumerated fourteen models of sponsorship that have been applied to institutional apostolates.⁵⁸ Over time, religious institutes moved through several forms of sponsorship as circumstances changed, necessitating modifications to governance structures and to the exercise of control in decision-making.

4.2.2. Sponsorship in Catholic Higher Education: Overview of the Development of Lay Boards

In the domain of Catholic higher education in the United States, it has been mentioned that from the mid-1960s onward there were significant external pressures on colleges and universities:

- 1) increased enrolment beginning after the Second World War which strained facilities, staff and teachers;
- 2) the drive to enter mainstream American academic life with the consequent demand for professionalism and curriculum development; and,

⁵⁸ A copy of the conference was given to the author by Fr. Morrissey. In 2000 a study of governance structures in Catholic colleges and universities founded by a religious congregation revealed that over half of those surveyed (representing 85% of Catholic colleges and universities in the United States) intended to change their sponsorship relationships in the near future, 20% having done so already since 1995. The main reason for restructuring was the declining numbers of religious. See HOLTSCHEIDER and MOREY, “Relationship Revisited,” p. 11.

- 3) the need for government funds to meet these goals with a corresponding requirement to avoid undue entanglement with a religious body in the method of its governance or pervasive sectarianism in its academic life.⁵⁹

In the face of these external pressures, encouraged also by the Second Vatican Council's emphasis on the vocation of all the baptised, Catholic universities invited lay persons onto their boards. This is not the place to go into detail about how these new boards were structured, nevertheless, it is sufficient to say that two main models developed: a one-tier system, and a two-tier system. The former ensured that a certain percentage of board members were from the sponsoring congregation;⁶⁰ the latter created a separate body consisting usually exclusively of members of the sponsoring congregation to which a variety of key powers were reserved.⁶¹ At the initial stage of lay participation in governance, lay board members⁶² contributed professional competence to foster contacts with funding bodies and the local civic community, to provide legal advice and, generally, to contribute to improving the university's image as a valuable asset in

⁵⁹ See GALLIN, *Negotiating Identity*, pp. 42-47 and DOSEN, *Catholic Higher Education in the 1960s*, pp. 225-226.

⁶⁰ In 2000, the majority of Catholic colleges insisted upon a certain number or proportion of congregational members on the board of directors, while 13% of the colleges studied required, on certain issues, at least some favourable votes of those members if a motion was to pass. See HOLTSCHNEIDER and MOREY, "Relationship Revisited," pp. 18-19.

⁶¹ The Holtschneider and Morey study found the most commonly reserved powers of Catholic colleges to be (in order of frequency): powers over amending governing documents, purchase and sale of property, dissolution of the corporation, mission and identity, merger and consolidation, assumption of debt, appointment and removal of trustees, appointment of presidents, approval of leases and budgets. Interestingly, congregational members favoured shoring up control reserved powers, while presidents of colleges favoured a model of congregational influence rather than control. See *ibid.*, pp. 16-18.

⁶² These positions are called by various names depending on the incorporating documents: trustees, governors, directors, members of the board. For the sake of uniformity, they will be referred to as lay board members.

mainstream American life.⁶³ The single-tier structure depended upon the ability of the religious congregation to find competent and willing members to fill these governance functions; in a way, it continued the “permeation model” but removed it from the campus and classroom to the boardroom. The two-tier model depended upon the willing cooperation and collaboration of lay board members to guarantee the long-term identity and mission of the university as given and protected through the powers reserved to religious.⁶⁴ In both cases, lay participation on boards extended the role of lay persons beyond advisory to decision-making, and in so doing moved the general mode of university governance “from an internal administrative function to an external function that focused upon the oversight of the institution’s administration.”⁶⁵ This lay participation in governance occurred as Catholic universities began to be incorporated civilly apart from the founding religious institute. Ownership no longer was the vehicle through which control by the founding institute was exercised, and sponsorship moved from structures of ownership to structures of power-sharing.

The power-sharing structures endured without major modification for some thirty years. But by the year 2000 circumstances were demanding significant modifications and universities were undertaking a revision of their power-sharing structures, or at least contemplating a revision in the near future. In the same year, D.H. Holtschneider and M.M. Morey published the results of their study on the changes taking place in the

⁶³ See GALLIN, *Negotiating Identity*, p. 120.

⁶⁴ See DOSEN, *Catholic Higher Education in the 1960s*, p. 238.

⁶⁵ *Ibid.*, pp. 238-239.

relationship between Catholic universities and colleges and their founding religious institutes. The controversial conclusions drawn from their study begin as follows:

The precise details of the formalised, shared-governance relationships that developed in the late 1960s varied considerably, but once established, they remained relatively stable until now. As this study will demonstrate, a new wave of change has begun with profound implications for the approximately 230 Catholic colleges and universities educating over 670,000 students in the United States each year. These shifts are most apparent in a widespread re-negotiation of the roles, responsibilities, attitudes, and most particularly, governance structures that shape college sponsorship. The “new day” of “shared governance” now appears to have been simply a transition stage for Catholic colleges in the United States.⁶⁶

The factor driving change was the aging and contracting membership of the founding religious institutes.⁶⁷ This demographic shift resulted in a distancing of the relationship between congregation and university. If sponsorship is fundamentally about relationship, then that distancing necessarily had an impact on sponsorship. To cope with the distancing, various tools were developed over time. We have seen the first: tiered governance and reserved powers. Morrissey has noted in the health care field that early on in the development of this structure reserved powers were fairly extensive, but by 2012 these powers were gradually reduced, and today include typically control over mission statements, corporate documents and by-laws (“paper”), some form of control over appointments of the CEO and board members (“persons”), and control over important financial transactions such as alienation and the incurring of debt through mortgages and bonds (“property”).⁶⁸

⁶⁶ HOLTSCHEIDER and MOREY, “Relationship Revisited,” p. 4.

⁶⁷ See *ibid.*, p. 11.

⁶⁸ See MORRISSEY, “Implications of Canon Law,” pp. 18-19.

Other tools have been developed to cope with the distancing of founding religious institutes from the university: block voting provisions,⁶⁹ sponsorship contracts,⁷⁰ sponsorship offices,⁷¹ and mission corporations.⁷² Finally, financial ties between the sponsoring religious institute and the institutional apostolate were being transformed. Very often today, the religious institute is still a major donor to the university or college. Nevertheless there is significant interest in severing at least some of these ties, such as, for example, the leasing of the religious institute's land to the university. Such lease agreements, it is true, allow the university to avoid large capital investments, but decisions about land use and sale leave the university vulnerable to the internal priorities of the religious.⁷³

To summarise, sponsorship developed from a model based on ownership as a vehicle for control by the founding religious institute, to one based on power-sharing. At first issues about property dominated,⁷⁴ but by the 1980s and 1990s the question of

⁶⁹ See HOLTSCHEIDER and MOREY, p. 17. Structured in various ways, a block of religious on a board enables the religious members to brake or stop decisions by lay board members.

⁷⁰ See *ibid.*, p. 18-19. These are documents outside the letters patent and by-laws which regulate relationships and cover such items as preferential hiring practices for members of the religious institute, residence agreements, shared land and building usage, pooled insurance, reserved positions and so on.

⁷¹ See *ibid.*, pp. 20-21. An office is established on campus to oversee mission, identity and sponsorship. Some religious institutes also establish internal offices of sponsored ministry to oversee mission and congregational identity in their institutional apostolates.

⁷² See *ibid.*, pp. 21-22. Independently incorporated entities (e.g. a public juridical person) are formed to oversee a religious institute's several institutional apostolates.

⁷³ See *ibid.*, pp. 23-26.

⁷⁴ It is in this context that the McGrath-Maida debate developed about the nature of canonical ownership over an institutional apostolate's property, particularly regarding the question of alienation of ecclesiastical goods. This is not the place to go into detail, but for a summary see R.T. KENNEDY, "McGrath, Maida, Michiels: Introduction to the Study of the Canonical and Civil-Law Status of Church-Related Institutions in the United States," in *The Jurist*, 50 (1990), pp. 351-401.

congregational and Catholic identity and mission had come to the fore as “permeation” of religious on campus declined.⁷⁵ After the year 2000 the nature of sponsorship began to shift again. Attention began to focus on influence rather than control. The question of “lay formation” rather than “partnership” (i.e. shared governance) as a form of sponsorship came to be espoused by some.⁷⁶ Behind this shift is an implicit recognition that the involvement of members of religious institutes in direct governance will continue to diminish.

The rise of lay boards in Catholic universities in the United States brought with it changes in the patterns of governance by founding religious institutes and the active participation of their members in the governance structures of their institutional apostolates. The relationship has changed over time and one can expect that it will continue to change. To what extent can a lay person transmit the charism of the founding religious institute? The answer is not easy to give. In the circumstances, however, the answer is urgent:

If these [founding religious] institutes want a non-secular future, they must construct serious and sustained formative experiences for the lay people who take over. They must also create an environment that disposes lay people to desire this end *for themselves*.⁷⁷

⁷⁵ See MORRISEY, “Catholic Identity in a Challenging Environment,” p. 38. See also H.M. BURNS, “Reflections on Sponsorship: One Congregation’s Perspective,” in SMITH, BROWN, and REYNOLDS (eds.), *Sponsorship in the United States Context*, p. 8.

⁷⁶ See, for example, in response to the Holtschneider and Morey study, the article by D. REINHART, “One Visit, As Good as It Might Be, Calls for Others,” in *Current Issues in Catholic Higher Education*, vol. 21, no. 1 (2000), p. 55.

⁷⁷ HOLTSCHNEIDER and MOREY, “Relationship Revisited,” p. 35 (*italics in original*).

The focus on sponsorship has thus moved beyond questions of control and power-sharing into the areas of formation and influence:

Given the changing circumstances affecting health care delivery, it is most likely that sponsorship, as we presently know it — operating in the name of and under the authority of a given Church entity, such as a canonical “juridical person” — will change its focus from control to influence. There might even come the day when we will no longer be able to influence certain decisions directly. If such occurs, the sponsorship role might even be reduced to one of advocacy: a voice crying in the wilderness.⁷⁸

What is the role of canon law in this new arena of sponsorship? Are there canonical structures that meet the need? These are questions which, as yet, have no answer. Recent discussions in health care regarding lay sponsorship indicate a new development in relationships between founding religious congregations and institutional apostolates. These developments may test the limits of sponsorship itself, but they also provide an interesting frame of reference for seeking a possible canonical solution for parent-founded schools.

4.2.3. From Reserved Powers to Lay Sponsorship in Catholic Health care

Whereas in Catholic universities and colleges the preoccupation in the literature has been with “lay governance,” in the area of Catholic health care, much of the recent literature deals with “lay sponsorship.” The terminology represents a new perspective in sponsorship.

No definition of lay sponsorship is found in the literature, but the term is applied with increasing regularity throughout the 1980s and 1990s, and it reflects an ever-

⁷⁸ MORRISEY, “Implications of Canon Law,” p. 11.

widening distance between the founding religious institute and the institutional apostolate. The development marks a move away from control as the end sought in the sponsor relationship, to that of leadership and influence on the institute's mission.⁷⁹ But, as already pointed out, in 1993 the Catholic Health Association of the United States recognised a difficulty: "No explicit canon creates any standard for mission that is easily translated into a governance structure."⁸⁰ On a practical level, this lack of canonical provision creates a serious problem:

It is simply a pragmatic reality that without access to the capital, and a proper structural vehicle to exercise direction over assets and significant decisions of the corporation, members of religious communities or diocesan bishops have difficulty influencing the corporation. Corporations will cease to be an instrument of service in the Catholic tradition without planning for the continuity of values provided by persons knowledgeable about and committed to the Catholic vision of mission.⁸¹

Corporate structures are instruments in pursuing the Church's mission. But these instruments are inefficacious without knowledgeable and committed persons to fill them. Just who these knowledgeable and committed persons might be was seen as the key issue entering the 21st century:

The U.S. Catholic Church, along with many other national and international entities may need to learn new ways of organising and new ways of relating. Institutions organised in the name of the Church's mission must be clear in their witness to Christian values, their commitment to be inclusive communities of service, their willingness to stand against personal and corporate patterns which impede life and occasion death, their openness to conservation of limited resources within natural

⁷⁹ The distinction between control and leadership was advocated by T.J. Harvey in relation to the bishop's role in lay sponsorship. See T.J. HARVEY, "Alternative Sponsorship — A Test for the Church," in *Health Progress*, vol. 67, no. 7 (1986), p. 60.

⁸⁰ CHAUS, "The Search for Identity," p. 45.

⁸¹ *Ibid.*, p. 46.

and financial systems. How and by whom the U.S. Church will carry its energy of service into the next millennium remains a most pressing concern.⁸²

In the face of declining ability or willingness by religious institutes to fill governance offices in their institutional apostolates, health care facilities started analysing other possibilities and other vehicles to help drive the mission of the apostolate. Public and private juridical persons as well as private associations of the faithful were offered as promising alternatives for lay sponsorship. This is not the place for a detailed analysis of these canonical entities, but an overview of certain aspects as applied to the Catholic health care experience is instructive.

4.2.4. Vehicles of Lay Sponsorship: Juridical Persons and Associations of the Christian Faithful

The favoured development in health care sponsorship from the mid-1980s was the erection of public juridical persons as a means, on the one hand, to conserve limited resources and, on the other hand, to maintain the charism and Catholic identity in the institutional apostolates of religious institutes.⁸³ Public juridical persons are seen to serve two purposes in the health care field: “the continuation of Catholic health care into the future, without depending entirely on the presence of religious of the institute which founded the institutions and services” and responding to the Church’s teaching that all the

⁸² BURNS, “Reflections on Sponsorship,” p. 7.

⁸³ Petitions for establishing 19 public juridical persons and one for erecting a private juridical person were made to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life by health care institutes between 1991 and 2011 (see J. HITE, S. HOLLAND, and F.G. MORRISSEY, *A Guide to Understanding Public Juridical Persons in the Catholic Health Ministry*, Washington, DC, CHAUS, 2012, p. 79). For an early case study involving the Grey Nuns, see N. MULVIHILL, “Public Juridical Person Ensures Catholic Presence,” in *Health Progress*, vol. 77, no. 1 (1996), pp. 25-27. In 2005 the Sister of St. Joseph of Orange pursued a similar solution in the face of dwindling numbers of sisters. See K. GRAY, “New Sponsorship Model Responds to Needs,” in *Health Progress*, vol. 86, no. 1 (2005), pp. 51-52.

baptised participate in Christ's mission.⁸⁴ The formation of a public juridical person also permitted a canonical structure by which several different religious institutes could cooperate for the purposes of preserving mission and identity. In such cases of co-sponsorship, the individual charism of the founding religious institutes was subordinated to a broader notion of Catholic identity and mission.⁸⁵ Similarly, such a legal structure proved to be flexible enough to facilitate co-sponsorship between several religious institutes and a diocese or even several dioceses.⁸⁶ Since public juridical persons act in the name of the Church⁸⁷ it was important to delineate a clear relationship with the diocesan bishop, under whose direction all apostolic works are undertaken.⁸⁸

Private juridical persons were also presented as a promising avenue for lay sponsorship in health care. They were judged to provide great flexibility in their statutes

⁸⁴ See HITE, HOLLAND, and MORRISEY, *Guide to Understanding Public Juridical Persons in the Catholic Health Ministry*, p. 79.

⁸⁵ This point is made in F.G. MORRISEY, "Toward Juridic Personality," in *Health Progress*, vol. 82, no. 4 (2001), p. 29.

⁸⁶ The public juridical person was considered "an alternative sponsorship arrangement useful in a time of dwindling numbers of women religious and dwindling diocesan resources. Through this canonical vehicle, various Church entities can share resources" (J.R. AMOS, "Public Juridical Person Offers Flexibility," in *Health Progress*, vol. 77, no. 1 [1996], p. 31). This has occurred in several parts of Canada (see MORRISEY, "Toward Juridic Personality," p. 31). One practical advantage in using a public juridical person in these co-sponsorship circumstances is that its goods are considered ecclesiastical goods according to Book V of the Code, and subject to ecclesiastical law.

⁸⁷ "Public juridical persons are aggregates of persons or of things which are established by the competent ecclesiastical authority so that, within the limits allotted to them, they might in the name of the Church and in accordance with the provisions of law, fulfil the specific task entrusted to them in view of the public good. Other juridical persons are private" (can. 116, §1).

⁸⁸ "The Bishop is to foster various forms of the apostolate in his diocese and is to ensure that throughout the entire diocese, or in its particular districts, all works of the apostolate are coordinated under his direction, with due regard for the character of each apostolate" (can. 394, §1).

and independence in the administration of their goods.⁸⁹ However, a note of caution was sounded. Perhaps it was the more distant relationship between apostolic work and hierarchy implied in a private juridical person that led the Catholic Health Association of the United States to recommend that initiatives formed as a private juridical person should be closely monitored “to determine trends and to note problems and ambiguities.”⁹⁰ A study was published in 1996 under the auspices of the Health Association which attempted to formulate the problems that arose from the experience of both private associations of the faithful and private juridical persons acting as lay sponsors in Catholic health care. The results pointed to weaknesses and disappointments. At the heart of the issue was the ambiguous relationship to ecclesiastical authority. Their disappointing performance was determined to arise from the fact that, as canonical vehicles, private juridical persons did not provide “self-executing” models of lay sponsorship. In other words, the wide latitude and independence given by canon law to organise the governance, goals and means in these structures belies a greater need for clear mechanisms of responsibility and accountability. Care must be taken in the drafting of statutes to state clearly the formal links of accountability to diocesan authority, and

⁸⁹ Canon 1257 limits the definition of goods subject to Book V to be those belonging to the universal Church, the Apostolic See or to other public juridical persons. However, this does not mean that the goods of private juridical persons are completely outside the purview of ecclesiastical norms. Examples of norms that would apply even to a private juridical person are the following: offerings made to administrators even of private juridical persons are deemed made to the juridical person (can. 1267, §1); offerings made by the faithful for a specific purpose must be applied to the purpose (can. 1267, §2), prescription and its exceptions (can. 1268); the use of sacred objects acquired by prescription by a private person (can. 1269).

⁹⁰ CHAUS, “The Search for Identity,” p. 51.

rigorous efforts are needed to educate and form lay board members.⁹¹ The study pointed out three main weaknesses to the private juridical person as a vehicle for lay sponsorship: a sense of isolation, a lack of clarity and defective reporting mechanisms with the diocese, a lack of education of new board members.

The study concluded that these weaknesses generated a significant amount of confusion regarding supervision, communication and relationship with the diocese. In particular, it was noted that statutes were not drafted with sufficient clarity to address these weaknesses.⁹²

Private associations of the faithful as vehicles for sponsorship in the health care ministry seem not to have been a favoured option.⁹³ The question of sponsorship, until recently, focused on how to foster the charism of the religious institute in the apostolic work, and not how to substitute another association distinct from the religious community as sponsor. One documented example of lay sponsorship through a private association of the faithful was the sponsorship of St. Francis Hospital, Memphis, Tennessee through the St. Francis Association of the Faithful. The association was intended “through its relationship with the bishop...[to] contribute to the Church’s apostolic activity in the Diocese of Memphis and stand as the hospital’s canonical ‘sponsor;’” in turn, the bishop

⁹¹ See B. MCMULLEN, “A Closer Look at Lay Sponsorship,” in *Health Progress*, vol. 77, no. 1 (1996), p. 30.

⁹² See *ibid.*, pp. 29-30.

⁹³ In the literature, public associations of the faithful were not considered as vehicles for sponsorship in the health care field. This was perhaps because they concern, above all, apostolic works less related to health care service and delivery, specifically, works designed to impart Christian teaching in the name of the Church, to foster public worship, other ends which are reserved to ecclesiastical authority, and “other spiritual ends” which have not been otherwise adequately provided for through private initiative. See can. 301, §§1, 2.

was to assist the association to live out its own particular mission.⁹⁴ In this model, the relationship to the bishop is central both to the association's mission and to its role as sponsor of the hospital. This link with the bishop was already signaled in *Apostolicam actuositatem* as a structural element of lay associations, although its formality was not specified: "While preserving intact the necessary link with ecclesiastical authority, the laity have the right to establish and direct associations, and to join existing ones."⁹⁵ The Code specifies the formal link for private associations:

Can. 299, §3 — Nulla christifidelium consociatio privata in Ecclesia agnoscitur, nisi eius statuta ab auctoritate competenti recognoscantur.

Can. 299, §3 — No private association of Christ's faithful is recognised in the Church unless its statutes have been reviewed by the competent authority.

The legal effect of the recognition is not spelled out, and the consequence of the review of the statutes does not seem to indicate any positive control by ecclesiastical authority.⁹⁶

Regardless of its public or private nature, every association is subject to the supervision of competent ecclesiastical authority, which is to ensure both the integrity of faith and morals and to see that abuses in ecclesiastical discipline are avoided. As a result, that same authority has both the duty and right to visit these associations in accordance with their own law and statutes, as well as in accordance with the norms of

⁹⁴ M.I. SCHROEDER and J.I. MANSFIELD, "Creating a Private Association: The St. Francis Experience," in *Health Progress*, vol. 67, no. 7 (1986), p. 54. Currently the hospital is a for-profit venture whose "Catholic roots continue to influence the way it provides services, as evidenced in its Mission Statement" (Message from the CEO, at <http://www.saintfrancishosp.com/en-us/aboutus/pages/messagefromthecao.aspx> [29 February 2012]).

⁹⁵ AA, no. 19, p. 428.

⁹⁶ See J.R. AMOS, "Associations of the Faithful in the 1983 *Code of Canon Law*: A Canonical Analysis and Evaluation," JCD Diss., Washington, DC, Catholic University of America, 1986, pp. 205-208.

canon law.⁹⁷ It is presumed then, that the link with the bishop will be at least one of “watching over,” and so the particular statutes should provide for this.

The distinction between public and private associations is not itself found in the Second Vatican Council’s decree on the apostolate of lay people, *Apostolicam actuositatem*, and is new to the 1983 Code. Diverse canonical structures may fittingly respond to diverse vocations. The key distinction between public and private association is the different relationship with hierarchical authority:

The designation of the association as public or private identifies the structure’s proximate relationship to the Church’s apostolic life and mission. It thereby determines how and to what degree an association of the Christian faithful or a juridical person is accountable to and dependent on competent ecclesiastical authority.⁹⁸

Juridical persons may be either aggregates of persons or aggregates of things. Public juridical persons established as sponsors in health care have been recognised as aggregates of things.⁹⁹ This would seem to be the form adapted for schooling as well, since one is dealing with a type of ministry where goods and funds are involved. While one is concerned with the whole educating community (i.e. persons and groupings of persons), it is the school as such which is the object of most of the canonical norms. Nevertheless, a private juridical person, as an aggregate of things, is a canonical tool

⁹⁷ See can. 305, §§1, 2. See also MURPHY, “Governance of Church Institutions,” pp. 11-16, and AMOS, “Associations of the Faithful in the 1983 *Code of Canon Law*,” pp. 209-219.

⁹⁸ HOWARTH, “Juridic Person or Private Association,” p. 51. J.K. Murphy, speaking about the distinction between private and public associations of the faithful, draws a conclusion: “The primary characteristic of the ‘private’ association which differentiates it from the ‘public’ association is the major autonomy which the former enjoys before ecclesiastical authority. It must be noted, however, that such autonomy is always limited by the common good of the Church and the superior good of ecclesial communion [can. 223]” (MURPHY, “Governance of Church Institutions,” p. 20).

⁹⁹ HITE, HOLLAND, and MORRISEY, *Guide to Understanding Public Juridical Persons in the Catholic Health Ministry*, p. 32.

which needs careful application. It seems to hold promise for parent-founded schools if clarity can be given in the statutes to the relationship with the bishop, reporting mechanisms with the diocese, formation of board members, and due participation by all levels of the educating community. As with all apostolic endeavours, isolation from the wider ecclesial community should not be seen as the price of authentic independent initiative.

4.3. Application of Experiences of Lay Sponsorship and Institutional Catholic Identity to Parent-Founded Schools

Having examined the development of sponsorship in general, one can conclude that there has been a movement towards lay sponsorship to carry forward the founding inspiration and charism; that is, from partnership with an existing recognised ecclesiastical body (typically a juridical person such as a religious institute) to a more autonomous lay responsibility not only in governance but in assuring the continued identity and ecclesial mission of the apostolic institution. However, lay sponsorship in health care has not yet been extended to that situation where no formally recognised Catholic institution has initiated and founded the apostolic endeavour. One can hypothesise a foundation where perhaps a cleric or a professed religious is part of a group that initiates the institutional apostolate, but the venture remains a new work organised independently of any recognised Catholic organisation.¹⁰⁰ As noted above, this was expressly envisaged in *Ex corde Ecclesiae*.

¹⁰⁰ The example of St. Joan of Arc Academy, mentioned in chapter 3 may provide an example and a caution. See pp. 178-179.

4.3.1. Lay Sponsorship Model for a Parent-Founded School: Private Association of the Faithful

In this hypothetical development of lay sponsorship, a problem arises. If sponsorship is defined as a “relationship”, then this evolution from past models of lay sponsorship begs the question: relationship between the institutional apostolate and whom? An attempt to address this departure from existing sponsorship models must be made.

It is, perhaps, hard to see this form of lay sponsorship arising in complex institutional apostolates like modern hospitals. But in a modest retirement community of perhaps a dozen elderly persons, or in the domain of Catholic education, it is possible to imagine such initiatives, usually on a small scale. Sometimes the persons who join their efforts may find a common vision or approach through their individual involvement in an ecclesial movement like the charismatic movement, although the work is conceived as a work outside the movement itself. Such a development of lay sponsorship, if it is to be stable and viable and find its place within the Church’s mission, will need to respond to certain challenges, not the least of which is the relationship with the local bishop, who coordinates all apostolic works in his diocese. It is here that the experience of health care apostolates as private juridical persons and private associations of the faithful is very helpful. Structures designed to aid the lay faithful initiating an apostolic work historically undertaken by a religious institute or diocese will need to take account of the weaknesses already experienced and studied in the area of health care apostolates. The type and complexity of apostolic work will have a significant bearing on the nature of the challenges. A small retirement community may foster a domestic Catholic culture

through the presence of Catholic symbols in rooms, like crucifixes and statues, by the presence of a small oratory, or by a common devotional life, without there being the need for a strong institutional identity or rigorous faith formation of the governance team. The relationship with the hierarchy in such a circumstance might be sufficiently maintained by the personal commitment of the director without the need to pursue a formal institutional commitment. If a network of such small homes grows over time, one can imagine the need then for stronger institutional commitments by the governing body itself and more formal links with the diocesan bishop.

The experience of both Catholic health care and higher education provides some helpful insights for parents who are interested in founding their own school for the Catholic education and formation of their children. The challenges are great since the apostolic work of the school, as we have seen, is very difficult and complex in the current North American context, but also because the ecclesiastical hierarchy has a defined responsibility over Catholic education and its prerogatives must be respected.

Even in a small school, the educating community is diverse and complex: students, parents, teachers, staff, administration, board members, and the wider Church and society. Faith formation in any school is not just a matter for the students, but for the parents, teachers, staff and administrators as well, since the Catholic identity of the school depends on all members of that community. All members of the educating community will need support in their own personal faith formation, as the health care experience has shown.

Furthermore, the experience of Catholic higher education has shown that something more than just the personal commitment of the members of the educating

community would be needed in even a small school striving to provide a Catholic formation; there is a need for an institutional commitment to Catholic identity. This means that the school must clearly present itself as offering a Catholic formation.

The entire community, then, and the institution as a whole, must have a clear sense of its mission. The first commitment is the personal conviction of those who send their children to the school, who staff the halls and offices, who teach in the classrooms, and who meet together as a board. Secondly, there must be an institutional commitment to Catholic education, with a clear link with the local bishop, with due respect and appreciation for the vocation of parents as primary educators. Canon law has tools available to help foster an institutional commitment. Having examined the experience in Catholic higher education and health care, the significant societal, political and financial pressures upon all schools in the current North American context, and the trends within the broader ecclesiastical community itself, two canonical structures, above all, present themselves as promising tools to help parents who wish to found schools for the education of their children: private associations of the faithful and private juridical persons.

Establishing associations of the faithful dedicated to imparting Christian teaching in the name of the Church is reserved to the competent ecclesiastical authority.¹⁰¹ They are public associations of the faithful.¹⁰² But what of the case of a school that is oriented

¹⁰¹ See can. 301, §1.

¹⁰² See can. 301, §3. Catechetical institutes are similarly established; can. 785, §2 specifies, in the context of missionary activity, that “catechists are to receive their formation in schools founded for this

to the broad aim of forming youth from a Catholic perspective, perhaps adhering to a particular pedagogical method or curriculum, but which does not claim to teach “in the name of the Church?” It has been shown that “education” is not understood in the Church solely as the transmission of doctrine or the imparting Christian teaching, but as formation of the whole person.¹⁰³ Such an initiative might well be suited to a private association of the faithful. Nevertheless, given that associations of the faithful, while tied to an apostolic work, seem to have a purpose closely directed to the benefit of their own members, it may be that they are not always suited as a vehicle for parent-founded schools. One could imagine their suitability if the parents, for example, united by some particular bond of spirituality and/or as members of an ecclesiastical movement, wish to found a school which fosters the specific values of that spirituality or movement. In such a case their own faith formation would benefit from such a canonical form and the institutional identity would draw on elements common to the movement as a whole. But more often than not parents are not so united, and consequently, forming a private association of the faithful, or any association in general, would seem to be of limited application as a canonical vehicle for parents wishing to found a school for the Catholic education of their children.

purpose. If there are no such schools, they are to be formed under the direction of the missionaries.” Missionaries are defined in the Code as being sent by competent ecclesiastical authority (can. 784).

¹⁰³ See can. 795, and chapter 1, p. 67.

4.3.2. Juridical Personality and Parent-Founded Schools

Private juridical persons, then, are proposed here as the canonical option most adequately suited to parents founding schools that promote the Catholic education of their children. As noted, the recent experience of Catholic health care institutes has favoured the use of public juridical persons rather than associations of the faithful as a means to respond to developments in lay sponsorship. Behind the solution is the recognition that the religious institute remains at the foundation of the apostolic work but is no longer able to undertake governance directly. The difference with parent-founded schools lies in the fact that there is no diocese, religious institute or other public juridical person at the school's foundation. It is the initiative of parents, directly exercising their rights over the education of their children. Public juridical persons undertake their work "in the name of the Church" and are established by competent ecclesiastical authority (can. 116, §1). Parents who found their own school, typically, are not concerned to exercise their right to pursue the schooling of their children "in the name of the Church." Moreover, for a variety of reasons, the parents may desire a more distant relationship with ecclesiastical hierarchy. This should not be interpreted necessarily as a stance opposed to the Church or its teaching. In any case, parents, as all the Christian faithful, have the duty to preserve communion with the Church (can. 209, §1). For his part, the bishop always retains the right and duty to coordinate all works of the apostolate in his diocese, having due regard for the character of each apostolate (can. 394, §1). In the case of parent-founded schools, part of the character of the apostolate is its independent initiative, a direct exercise of parental rights over education without any delegation by ecclesiastical authority. The

parents may wish to opt out of the established Catholic school system in order to preserve flexibility or independence over such things as pedagogical approaches, curriculum development and the choice of textbooks. For example, a Montessori pedagogical model may be desired or a classical curriculum. In such circumstances, the public juridical person used as a model in health care may not respond to the particular wishes of the parents.

Furthermore, the goods of a public juridical person are considered ecclesiastical goods and are governed by Book V of the Latin Code.¹⁰⁴ It is likely that parents founding schools on their own initiative would prefer to regulate the administration of their own goods. This is different from the situation of Catholic health care institutes. As noted previously, there is a distinct advantage to having the goods of health care institutes regulated by the norms in Book V. Especially where amalgamations and mergers of institutes are considered, being governed by the same norms facilitates transfers of property between them. The case is different with parent-founded schools, which are typically modest endeavours with few financial resources. The norms governing ecclesiastical goods would seem to be rather burdensome to such a small undertaking.

While parent-founded schools will seek a model that preserves the independent nature of their initiative, that model must also foster an institutional identity. This institutional identity, which goes beyond the particular faith commitments of the various members of the educating community, has been shown to be an essential element in

¹⁰⁴ “Can. 1257, §1 – All temporal goods belonging to the universal Church, to the Apostolic See or to other public juridical persons in the Church, are ecclesiastical goods and are regulated by the canons which follow, as well as by their own statutes.”

Catholic higher education institutions, and a difficult goal to achieve. It is not a given, but a value that must be defined, fostered and preserved. Discussion must be undertaken with the diocesan bishop on the parameters within which the school may present itself as Catholic, even if it does not apply to have the name “Catholic” in its title (can. 803, §3). Nevertheless, any canonical solution must take into account the need to establish and promote an institutional identity to the school as a whole.

Parents founding their own schools, in short, will desire to reserve to themselves a flexibility and an independence of initiative in the founding and operation of their school. This translates into a certain distance from ecclesiastical control which a public juridical person cannot provide. Private juridical persons, then, provide a canonical solution to parents founding their own schools for the catholic education of their children. Catholic health care institutes have had limited experience with private juridical persons, but their experience indicates that a fundamental weakness must be overcome if this canonical solution is to work. The weakness, as discussed above, is the ambiguous relationship to ecclesiastical authority. The statutes will have to be drafted so that a sense of isolation is avoided, a clear line of accountability to diocesan authority is drawn, and efforts to form lay board members are undertaken. While diocesan schools in recent years have, in some cases, been established as public juridical persons, it seems that no private school has been established as a private juridical person. This canonical solution, then, is a new development, but one which can draw upon the rich experiences of Catholic health care and Catholic institutes of higher learning.

The Eastern Code, it has been noted, makes no provision for private juridical persons. Nevertheless, there is no reason why the parents responsible for founding a

school may not enter into a private agreement with the competent ecclesiastical authority. The parents may form a civil entity and tailor the by-laws to accommodate both the legitimate initiative of the parents and the responsibilities of the eparchial bishop. Other provisions, not directly relevant to the civil by-laws, can be contained in directories approved by the school's governing body and the competent ecclesiastical authority. While this solution does not provide the same stability and other advantages which are outlined below and associated with the canonical solution of a private juridical person, it may, nevertheless, go a significant way to satisfying the rights of both the parents and ecclesiastical authority, and establish the basis for harmonious cooperation between the lay administration and the eparchial bishop. The draft by-laws in the appendix can serve a guide also to the issues which can be addressed by private agreement.

For parents subject to the Latin Code, there are several ways in which a private juridical person might respond to the needs of parents. First, the private juridical person, as an aggregate of things, has the potential to reinforce the bond between all members of the educating community, ensuring that personnel and resources are effectively and efficaciously marshalled for the mission of running a school. The juridical person need not be identified with the school itself, but have as its goal the promotion of lay sponsorship which is behind the initiative of parents to found a school. The school itself may be incorporated civilly to take advantage of certain tax advantages available in some jurisdictions. Nevertheless, without trying to stretch the concept of lay sponsorship too far at this time, conclusions reached regarding lay sponsorship and institutional identity may still be applied to the drafting of statutes for a juridical person identified with the school itself.

Second, since the parental vocation and mission is founded upon a primary and inalienable right of parents to educate their children, a certain autonomy is fitting for parents who wish to establish their own school. These parents are not wishing to direct the administration of the school itself, but they wish to have a significant level of control and they expect to have a continuing voice in policy and programme development. Often they have experience in home-schooling, and as has been shown with home-schooling parents, they frequently tend to have university education and feel comfortable exerting a significant influence over the education their children will receive. They also have a certain confidence in personally initiating a project like a school and the commitment to see it through. In addition, the parents themselves are regularly practicing their faith and are actively involved in parishes and Catholic works, and they seek an educational environment with other families who do the same. They are willing to forego many of the desirable elements of established Catholic schools, such as a developed sports programme, optional courses and well-adapted facilities, in order to achieve a more coherent educating community with a strong faith focus. The element of parental influence and control within the school is an important factor in their choice of school. For all of these reasons, the parents seek a level of autonomy in exercising their parental vocation, joining their efforts with like-minded parents.

The weakness of such an approach, however, should be apparent. A very high personal level of commitment does not immediately translate into an institutional commitment. Furthermore, long-term collaboration remains problematical since parental commitment to the school typically endures only as long as their own children are enrolled. There is, thus, a problem of continuity. One of the advantages of the private

juridical person as a canonical institution is that it is perpetual,¹⁰⁵ which may help overcome the weakness inherent in an overly personal endeavour. A private juridical personality offers a level of institutional autonomy while at the same time favouring a collaborative work. It can give objective recognition to a corporative identity which is distinct from the individual conviction of the parents who collaborate.

The goods of the private juridical person are not ecclesiastical goods, and while this is rarely a great concern for those founding a school, since they often do so with few financial resources and little property, nevertheless the practical consequence is to reinforce the aspect of institutional autonomy.

A private juridical person, then, provides a promising canonical vehicle for the exercise of the parental vocation to see to the Catholic education of their children. While fostering a desired autonomy, it respects the exercise of that vocation and may reasonably be hoped to respond to a specific need.

Consideration, on the other hand, needs to be given to respect for the jurisdiction of ecclesiastical authority over Catholic education and formation.¹⁰⁶ While the general lines of this jurisdiction have been considered already, their application to an independent school initiative is considered below. It is clear that the parents founding their own school do not envisage founding a Catholic school within the definition of the Code. Catholic schools are defined as those under the control of the competent ecclesiastical authority, or

¹⁰⁵ “A juridical person is by its nature perpetual.... A private juridical person also ceases to exist if the association itself is dissolved in accordance with the statutes, or if, in the judgement of the competent authority, the foundation itself has, in accordance with the statutes, ceased to exist” (can. 120, §1).

¹⁰⁶ For general considerations, see ÁLVAREZ AVELLO, *La educación católica en las escuelas*, pp. 282-302.

a public ecclesiastical person, or are acknowledged as Catholic by a written document by ecclesiastical authority.¹⁰⁷ But, even if the school is not under the moderation of ecclesiastical authority, this does not mean there is no role for the bishop¹⁰⁸ and that he does not exercise certain rights over it. In such an autonomous apostolate, nevertheless, the bishop may want to make sure that he is not overly implicated in the governance and administration of the school so that civil liability does not attach to him for any act posed by the school personnel or students.

The use of “Catholic” in the school’s title requires the consent of the competent ecclesiastical authority.¹⁰⁹ Nevertheless, the school might present itself in its own literature as Catholic in a more general way. It would be acceptable, for example, to describe itself as a school “offering a classical Catholic formation” without the need for the bishop’s approval. However, ecclesiastical authority has a very clear role in “the formation and education in the Catholic religion provided in any school”, and the conference of bishops can issue general norms governing it; where such norms exist, the diocesan bishop is to regulate and watch over the application of those norms.¹¹⁰

¹⁰⁷ See can. 803, §1.

¹⁰⁸ For the sake of simplicity, instead of the phrase “competent authority” the word “bishop” will be used.

¹⁰⁹ See can. 803, §3.

¹¹⁰ See can. 804, §1. The USCCB has issued no complementary norms. The CCCB has issued a general norm, Decree no. 29: “In accordance with the prescriptions of c. 804, the Canadian Conference of Catholic Bishops hereby decrees that, taking into account the competence and activities of the Episcopal commissions for Christian education and the various catechetical offices, all of which constantly monitor Catholic religious education and advise the Conference and regional assemblies of bishops accordingly, the general norms presently in force remain operative and new norms may be issued if necessary” (CAPPAROS et al. [eds.], *Code of Canon Law Annotated*, p. 1663). An attempt to locate in the archives of the CCCB the “norms presently in force,” dating most likely to January 1966, proved fruitless.

Furthermore, “formation in the Catholic religion” ought not to be restricted in its application to religion classes alone, since Catholic formation is much broader than simply the provision of a religion class.¹¹¹ Moreover, as previously noted, the bishop is to take care that those who teach religion even in non-Catholic schools are “outstanding in true doctrine, in the witness of their Christian life, and in their teaching ability.”¹¹² He has the right to appoint or approve (*ius est nominandi aut approbandi*) religion teachers and to remove them “if religious or moral considerations require it.”¹¹³ Canon 806, §1 restricts the bishop’s right to visitation to Catholic schools as defined in the Code,¹¹⁴ but, if desired, a right to visitation can be spelled out in the statutes to ensure at least integrity of faith and morals similar to that provided for associations of the faithful.¹¹⁵ In general, then, the statutes of a private juridical person should provide for these due rights and prerogatives of the bishop, and, as the experience of Catholic health care has shown, they should supply some concrete mechanism for the exercise of the bishop’s jurisdiction.

Another point needs to be addressed before turning to some practical applications. So far, this last section has attempted to apply some of the lessons learned regarding lay sponsorship and institutional identity to parent-founded schools established as a private

¹¹¹ “Without entering into the whole problem of teaching religion in schools, it must be emphasised that, while such teaching is not merely confined to ‘religion classes’ within the school curriculum, it must, nevertheless, also be imparted explicitly and in a systematic manner to prevent a distortion in the child’s mind between general and religious culture” (S.C.C.E., Catholic Schools, no. 50, p. 617).

¹¹² Can. 804, §2.

¹¹³ Can. 805.

¹¹⁴ See can. 806, §1.

¹¹⁵ See can. 305, §1.

juridical person. As stated, this canonical solution must respect the vocation of parents, but also find a due place for the involvement of the bishop. The rights and duties of a diocesan bishop and of the conference of bishops over formation in the Catholic religion and regarding religious teachers signal that this lay sponsorship is not exercised alone. In some way, the diocesan bishop, through his legal duties and responsibilities, is also a sponsor of the work initiated by lay persons, and it cannot disregard his canonical role in Catholic education. A due respect for autonomous initiatives, even those based on primary and inalienable rights such as the rights of parents to educate their children, does not displace the bishop's responsibility over all apostolic works in his diocese. As already noted, the Sacred Congregation for Catholic Education in its document *Catholic Schools* states that lay involvement in Catholic schools is considered a form of cooperation with the apostolate of bishops.¹¹⁶ While parent-founded schools are not Catholic schools within the meaning of the Code and so are not the direct subject of that document, nevertheless, the canonical responsibilities of the bishop over apostolic works in his diocese are sufficiently broad to include any school which expressly claims to impart a Catholic education.

Erecting the school as private juridical person, then, provides a promising canonical link between the lay faithful initiating the school and the bishop. The statutes can provide adequate mechanisms to satisfy both the rights of parents and the jurisdiction of the bishop. At the very least, the approbation of the statutes required by can. 117 will

¹¹⁶ See chapter 1, pp. 61-62.

involve the determination by the bishop that the statutory goals of the school's formation are in line with the Church's understanding of Catholic formation in general or correspond to applicable general norms issued by the conference of bishops, and represent a "useful" initiative. The statutes of the private juridical person should make some reference to the vocation of parents and their primary and inalienable right to see to the education of their children, but also to the school's relationship to the bishop and to society at large. Since these are rather general statements, it is fitting that they be inserted into a preamble or in the accompanying decree conferring juridical personality so as to give a context for the concrete norms which follow in the statutes. A decree erecting a school as a private juridical person should, therefore, recall both the primary place accorded in the Church's law to the parental right, and the hierarchy's duty of vigilance.

Since the law gives primary place to parents, the statutes should define their place in the educating community and clearly enunciate their responsibilities. It is not necessary, however, that a parent canonically represent the school, except perhaps as a member of the governance body.¹¹⁷

As school authorities are cooperators with parents in accomplishing the duty to educate their children, it would be appropriate to include provisions for the establishment of a parental association. The aims of the association should not be reduced to fund-raising and "support," but ought to be more. The parental association is to provide an instrument of mutual support for parents, a voice for their collective concerns, and an

¹¹⁷ See can. 118.

effective help to the entire school community.¹¹⁸ As a mechanism for mutual support, the parental association should also be seen as a means to address the spiritual needs of parents and foster their ecclesial vocation. One should keep in mind the monition of the Sacred Congregation for Catholic Education that laity are to prepare themselves so as to maintain Catholic schools on their own.¹¹⁹ As was shown, one of the great weaknesses of using a private juridical person as a vehicle for lay sponsorship (in the health care field) was the dearth of formation of the lay board members. If the parent-founded school is to work, it must address the need to form all the members of its community.

Lack of clarity in the relationship between hospital and bishop was also signaled as a significant weakness in using the private juridical person as a medium of lay sponsorship. The statutes of a parent-founded school need to clarify this relationship. Unfortunately, parents sometimes desire to exercise their rights over the education of their children without significant reference to the bishop. Inviting the bishop merely to visit the school on an informal basis, for example, or to attend major fund-raising events does not satisfy the bishop's jurisdiction over schools. Again, such informal links confirm a personal commitment of members of the school community to the Catholic identity of the school, but there also needs to be some formal link which testifies to an institutional commitment. On the other hand, one has to be careful not to create links which would raise a claim of civil liability of the bishop for the governance of the school, since the intention is that a due autonomy of governance be in the hands of lay persons. For clarity

¹¹⁸ See can. 796, §2.

¹¹⁹ See S.C.C.E., *Lay Catholics in Schools*, no. 45, p. 647.

the statutes might expressly state that the school is to present itself as offering a “classical Catholic formation” or some such phrase, without going so far as to request the title “Catholic.” Depending on the aims of the school, particular values or objectives may be enunciated, such as social justice or ecumenism, or a particular pedagogical method embraced. As regards the teaching of Catholic religion, the statutes must respect the duty of vigilance which the bishop is to exercise.¹²⁰ The statutes must also provide some mechanism to conform to the bishop’s canonical right to appoint or approve religion teachers,¹²¹ and his right to remove them or have them removed in conformity with law.¹²² It might be desirable, while not required by law, to include an article in the statutes regarding the bishop’s role in ensuring that the social teaching of the Church is followed in the school. The most direct impact would be on teachers’ salaries. While independent Catholic schools rely very greatly on volunteers and an apostolic spirit of sacrifice on the part of their teachers and staff, nevertheless, the Church’s teaching regarding living wages should seek to be applied. On the question of employees and salaries, the norms of civil law should also be incorporated.

As regards the chaplaincy¹²³ of the school, there are several considerations. Often the foundation of an independent school is done with the assistance of a priest who acts

¹²⁰ See can. 804, §1.

¹²¹ See can. 804, §2.

¹²² See can. 805.

¹²³ “A chaplain is a priest to whom is entrusted in a stable manner the pastoral care, at least in part, of some community or special group of Christ’s faithful, to be exercised in accordance with universal law” (can. 564). Catholic universities are required to have priests appointed with a stable assignment to see to the

as chaplain during an initial period, but it frequently happens that finding willing priests with the time and qualities to devote to school chaplaincy is very difficult. Even in the case where the school is founded under the auspices of a particular ecclesial movement or group that already has a chaplain or at least priests associated with it, it is not uncommon that the priests are moved or given other duties. Consequently there is a great deal of instability in the appointment.

The chaplain can play a key role in the spiritual care of the entire school community. Too often the role of chaplain is limited to the spiritual care of students, with little emphasis on the rest of the school community. Given the need for the spiritual formation of board members in the lay sponsorship model examined, this particular task should be stated in the statutes and confided to the chaplain. There is also room for the chaplain to be the delegate for exercising at least some of the bishop's responsibilities within the school.

The appointment of the chaplain should be specified in the statutes of the private juridical person:

Can. 565 — Unless the law provides otherwise or unless special rights lawfully belong to someone, a chaplain is appointed by the local Ordinary, to whom also it belongs to appoint one who has been presented or to confirm one elected.

The statutes may provide, for example, that the chaplain is appointed by a particular religious community associated in some way with the school, or that the school's board or administration present a list of one or more willing candidates, the appointment itself

pastoral care of students (see can. 813). On the other hand, Catholic schools are not required to have chaplains, *a fortiori* a school which is not Catholic within the meaning of the Code.

to be made by the bishop. But given the importance of the chaplain's role in the formation of lay leadership, and potentially as the link with the bishop, the choice is a significant one and ought to be made with care. In principle, the local Ordinary has the right to remove a chaplain.¹²⁴

Finally, parents will wish to give careful consideration to providing some mechanism by which the diocesan bishop may undertake a visitation of the school. The visitation may be considered a means by which he exercises his responsibilities over all schools within his diocese. Obviously, it need not be as extensive as that provided for in a canonically defined Catholic school (can. 803, §1), but it should be understood as a vital link with the bishop that also, in some way, favours and protects Catholic identity.

As a practical way to summarise all that has been discovered regarding the parental vocation and participation in the Church's mission, having due consideration of the very complex social, political, financial and ecclesial context in North America, and having drawn from the experience of Catholic universities and health care institutes, one can propose a series of articles that could be used and adapted in the statutes of a private juridical person proposed for approval by the competent authority. A proposal of relevant draft articles for the statutes of the juridical person is included in the Appendix. A complete set of such norms, however, cannot be provided for the purposes of this thesis, since in many aspects the norms must conform to applicable civil legislation regarding

¹²⁴ See cann. 672 and 573.

corporations and charitable purposes: the number of directors, the manner of elections,¹²⁵ norms regarding meetings and resolutions, taxation reporting, the disposition of assets upon winding up and so on. It is hoped that the following sample articles may provide a useful guide in the drafting of a complete set of statutes to be submitted for the *probatio* of the bishop.

Conclusion

The experience of preserving and fostering Catholic identity in Catholic health care and university institutions during the last forty years has brought to the forefront the vocation of lay persons in apostolic works. Models of “permeation” by members of religious institutes were replaced by “partnership” models involving, in some cases, the alienation of Church property to civil corporations and the development of multi-tiered governance structures. The notion of “sponsorship” replaced that of “ownership” as a vehicle of control by religious institutions of their institutional apostolates. Sponsorship itself, a non-canonical term, proved to be an elastic concept that permitted the evolution of relationships which were then given canonical form through various vehicles, notably associations of the faithful and juridical persons. Further, the concrete experience of

¹²⁵ One thing to note here, at least for the Canadian context, is the change regarding *ex officio* board members, a popular provision in schools whereby, for example, a pastor is appointed without specific election. The new *Canada Not-For-Profit Corporations Act* no longer allows this arrangement; it is possible to appoint a director of the board, but that person only holds office until the end of the next annual general meeting. See *Canada Not-For-Profit Corporations Act*, S.C. 2009, ch. 23, art. 128. The *Act* came into effect on 17 October 2011. New provincial legislation in Ontario permits *ex officio* members (see *Not-for-Profit Corporations Act* (Ontario), S.O. 2010, ch. 15, s. 23.4. The Bill received royal assent on 25 October 2010 but at the time of writing had not yet been proclaimed in force).

apostolic works has highlighted the need for an institutional commitment in addition to the personal commitment of individual members.

The experience of Catholic health care and universities in North America furnishes an interesting and useful background to another developing phenomenon: parents wishing to opt out of established Catholic schools and initiate their own endeavours to provide for the Catholic education of their children. These are typically small works with access to very limited financial and personnel resources, but with a strong core faith commitment by those who initiate them. They suffer, nevertheless, from problems with maintaining continuity and from lack of a clear institutional commitment.

The developing notion of lay sponsorship, while not yet directly applicable, nevertheless highlights some important factors to take into account when considering these parent initiatives. The canonical institution of private juridical persons provides a promising response to this challenge, provided that the shortcomings arising from previous attempts in health care are kept in mind. In particular, a clear link with ecclesiastical authority must be set out in the statutes, and lay formation of governing board members fostered. This requires vigilance both on the part of the school as an institution and on the bishop, to whom certain prerogatives over Catholic education in general and not just Catholic schools is confided.

GENERAL CONCLUSION

Parents wishing to found their own schools for the Catholic education of their children engage in an activity proper to their vocation as parents. As shown, the Church, in its codification of laws, has drawn upon the development of rights legislation in civil law but rooted it in new soil. Civil legislation regarding rights is often set in a context of the conflict of powers and it is expressed frequently in the opposition of the weak against the strong, the minority against the majority. In the Church, rights legislation is rooted in the common vocation of all the baptised, which confers an equal dignity and a common share in the mission of the Church. This does not preclude a jurisdiction reserved to hierarchical authority to regulate activities flowing from that common vocation and to favour ecclesiastical initiatives in certain types of apostolic actions.

The right of parents to see to the education of their children is a primary, inviolable and inalienable right. While parents may fail in their task, this does not mean that any other authority can usurp this right. Civil and ecclesiastical authority is conceived as suppletory to the rights of parents, entailing a duty to help parents fulfill their own responsibilities towards their offspring.

Since the 1840s, the state has claimed ever greater jurisdiction over education, which, previously in western culture, had been the prerogative of the parents who could afford it, and, often, of the various Christian denominations for those who could not. In European states, governments began to promote “common” schools, a movement away from governance of schools by religious authorities and, in most instances, towards also a secular model of curriculum. Attempts were made in Canada along the same lines. In the

United States, Catholic immigrants sought to protect their children from the predominant Protestant influence in American schools. In these circumstances, the Catholic Church sought to claim its own jurisdiction over schools, and, more broadly, over the formation of youth and religious instruction in general. Parents were enjoined to collaborate with initiatives of the Church hierarchy. The assertion of ecclesiastical jurisdiction in the late 1800s came through various encyclical letters, particularly from Leo XIII, and from instructions issued by the Sacred Congregation for the Propagation of the Faith. This struggle to reclaim jurisdiction over education influenced the drafting of the 1917 Code of Canon Law, where parents are presented rather as passive bearers of duties, receiving their mandate from the Church through the Church's exclusive domain over sacramental law and under the guidance of the Church's teaching office. Positive rights of parents were rooted in the generative principle. However, the rise of totalitarian regimes after the First World War continued to challenge the Church's claims. Pius XI's encyclical on education, *Divini illius Magistri*, provided a systematic exposition of the Church's rights in these difficult inter-war years. Throughout this time, the Church sought to make its voice known in the public domain by appealing to social theories that applied equally to the state and to the Church. In particular, the theory of the perfect society was used to subordinate both parental and state rights to those of the Church as regards the formation of youth. But this theory, originating in the middle ages, found little influence in the public square.

The second half of the twentieth century brought about a preoccupation with individual rights but also enormous social change in North America: suburbanisation of cities, waves of new Hispanic immigrants in the United States and the entry of Catholics

into mainstream American society. Pluralism in its various forms gained favour as a principle of social organisation and as a value underlying legal discourse. The development of civil human rights legislation nationally, and internationally in the United Nations, influenced the Church's legal system. Furthermore, the theological elaboration of the notion of *communio* spurred, amongst other things, a re-evaluation of the role of the laity in the Church's mission. Rights theory has had concrete effects on the exercise of parental rights over education within the Church. Two of the most striking are, first, that parents are given the right to decide for themselves what form of education is best for their children (can. 798), and second, that the entire Catholic community is exhorted to assert their right to demand from the civil state support for their schooling choices, including financial assistance (cann. 797 and 799). Parents are no longer more or less passive recipients of duties towards their children, but actors enjoined to promote their own rights in the public domain.

While the rights of parents over the education of their children has been asserted in the canonical domain as a consequence of their particular ecclesial vocation and mission, an examination of the current North American context has shown that local circumstances can impose limits on the effective exercise of rights. Six pertinent ecclesial and social factors had been found to have enormous impact on Catholic schools: financial constraints, secularisation, state control of curriculum, the increased popularity of home-schooling, access to the experience of religious institutes dedicated to the education of youth, and initiatives by parents to opt out of current schooling systems by founding their own schools. The trend is clearly away from the high levels of parish and diocesan subsidies that Catholic schools enjoyed in the 1960s, and existing Catholic schools are

being encouraged to find new sources of income to supplement tuition. The state intrusion in curriculum is a growing phenomenon as well, especially in Canada. Whereas previously Catholic schools appealed to pluralism to assert their distinct value within a broad range of schooling options, it seems now that the trend by ministries of education is to demand that each school be a sort of microcosm of the pluralism found generally throughout society. Catholic schools have difficulty meeting this demand for several reasons: they must charge tuition, and so leave themselves open to the charge of elitism, they enjoy fewer resources than state-run schools, they are limited in the type of support they can provide for children with disabilities, and their insistence on forming students within the values of the social teachings of the Church precludes a completely neutral stance on many controversial issues in North American society. There is stiff competition in the North American schooling environment, and established Catholic schools have undertaken tremendous efforts to adapt to new trends and constraints. This is the strength of Catholic schools: their ability to adapt relatively quickly to changed circumstances and pressures. In particular, localised decision-making means they are not overly burdened by a large centralised administration. Parent-founded schools will join this long tradition of responsive governance and, since they will be operating from within the same social, economic, ecclesial and political environment, they need to learn from the experience of established Catholic schools in adapting to external and internal pressures.

Furthermore, any type of Catholic school must present itself as a distinctive and attractive alternative in the increasingly crowded educational landscape. A survey of attempts to retain and assert a Catholic identity has disclosed both a strength in inculcating a general Catholic culture, and a weakness in conveying the content of the

faith. There is a clear struggle to find new organisational structures that can convey effectively that identity. Because there is no single model for a Catholic school, there is ample room for creative adaptation. The “one parish, one school” model mandated by the Third Council of Baltimore is effectively abandoned in the United States as intra-parish schools are formed. The challenges of presenting a Catholic identity in inner-city American schools where most students are no longer Catholic, and where funding the schools raises particular issues, has led to forming school networks and collaborating with Catholic universities for teaching and support services. In Canada, it has been increasingly difficult to rely on the historical compromise by which the country was formed and which gave particular constitutional protections to Catholic schools. Moreover, religious institutes are withdrawing from the active field of teaching and school administration. Various organisational links between those institutes and schools have been attempted, based on sponsorship models worked out more thoroughly in the field of Catholic health-care. In some cases, such as schools linked with Opus Dei, no organisational link is created, but members teach, sit on the administration and provide spiritual care to students and parents.

Parent-founded schools require an organisational structure that, while it may differ from canonically defined Catholic schools, still lends itself to transmission of a Catholic identity. Too often such schools are formed according to the organisational principles of not-for-profit institutions in the civil law field, but with very little regard to ecclesial organisational structures. The expression of a Catholic identity needs to be rooted in a canonical structure in order to safeguard its authenticity. The exercise of

parental rights must take into account the duties of parents to see that this identity is promoted and communicated.

Catholic health care and higher educational institutions provide a precious wealth of experience for parents founding their own schools. The developing field of lay sponsorship, while not yet directly applicable to schools, nevertheless indicates a positive path for the lay apostolate. In particular, the experience of Catholic health care with lay sponsorship points to some weaknesses that should be avoided. Governance documents need to clearly set out the line of responsibility for parents in determining the precise character of their school, but also their accountability to ecclesiastical hierarchy for all things touching on their Catholic identity. Moreover, the same documents need to draw upon the experience of Catholic higher education to ensure that there is a strong institutional identity beyond the personal apostolic commitment of the various members of the educating community. Related to this is the precise relationship with the local bishop. Governance documents need, therefore, to describe the ambit of involvement of the local bishop in such a way that he can adequately fulfill his canonical duties over education in general, and religious education in particular. At the same time, a delicate balance must be maintained not to draw in ecclesiastical authority in internal disciplinary and governance decisions so as to respect the due initiative of parents in their school. The experience of Catholic higher education shows the care which needs to be taken to assure an institutional Catholic identity. The permeation model, by which the majority of staff, administration and students shared a common Catholic vision of the world, and which worked until the 1960s is, by and large, no longer feasible. Consequently, identity needs

to be defined, promoted and communicated and governance documents need to “embed” this mission of the institution.

The considerations of the current state of the question point to a canonical solution. Parent-founded schools can be established as private juridical persons. Careful drafting of the statutes will achieve the desired balance referred to above so as to favour the proper right of the lay faithful to engage in the apostolate and the safeguarding of the prerogatives of ecclesiastical hierarchy over matters touching on the education of youth. Moreover, since a juridical person is by its nature perpetual, the canonical structure will assist one of the significant weaknesses of small parent-founded schools, namely, their long-term stability.

In general, private juridical persons have not been used frequently since their appearance in the 1983 Code. The Eastern Code, for its part, makes no provision for them. Further canonical reflection on their usefulness would be helpful. Part of the difficulty of using them may be that, since they are very flexible instruments, the canons give little guidance on their internal ordering. Their use, one might suggest, requires a certain level of legal “culture” and this may be one reason why they are not often used. Any eventual revision of the Code should re-examine the place of private juridical persons in the life of the Church.

The statutes also need to draw upon the stream of studies undertaken in the civil domain regarding the governance of not-for-profit activities. These entities have certain inherent weaknesses in their policy development and implementation structures. A heavy reliance on a volunteer corps of workers presents significant challenges both to the type and level of commitment by leaders, and to the stability and coherence of initiatives. A

private juridical person should not ignore the fruitful work that has been done with regard to organisational structures suitable to charitable endeavours.

It remains to be seen where lay sponsorship will develop. It has provided a useful framework for the restructuring of health care apostolates, but so far it is not directly applicable to parent-founded schools. There is the risk that lay sponsorship may eventually blur the line that is drawn between what are called, on the one hand, Catholic works, and on the other, works carried out by Catholics, and canonical science may need to re-examine the usefulness of this distinction in the future. Canonists working with institutional apostolates will continue to draw upon the experience of Catholic health care and higher education. The path out of the past is not clear and continues to provide challenges to all those involved in assuring the future of these apostolates, including canon lawyers. Solutions should not be viewed as rigid structures that will necessarily perdure for several generations, but as creative adaptations to a practical context that is constantly shifting due to the rapidly developing social, political, ecclesial and even technological context. The draft statutes in the Appendix, therefore, are guides for further practical reflections on a challenging but exciting dynamic in which parents decide to bear the initiative for founding a school for the Catholic education of their children.

Any human endeavour entails the risk of failure, but contains also within itself the seeds of hope. An adequate canonical structure cannot assure the success of a school founded by the collaboration of parents for the education of their children. It cannot overcome personality clashes very often found in modest and difficult works. But it can provide a framework to work out differences, promote and safeguard institutional identity, authenticate the apostolic nature of the work, and provide some means of

stability into the future. Private juridical persons are a novel, but seemingly rarely used canonical institution. Parent-founded schools for the Catholic education of their children might profitably make use of them.

APPENDIX: DRAFT STATUTES

1. Draft Decree of Incorporation

WHEREAS parents, and those who take their place, have a primary and inalienable right and a most serious obligation to see to the Christian education of their children in accordance with the teaching of the Church (can. 226, §2);

WHEREAS parents have also the right choose those means and institutes which, in the local circumstances can best promote the Catholic education of their children (can. 793, §1);

WHEREAS the Church has in a special way the duty and the right of educating since it has a divine mission to help all arrive at the fullness of Christian life (can.794, §1);

WHEREAS education must seek to form the whole person in his or her physical, moral, intellectual and spiritual dimensions, so that they may attain their eternal destiny and at the same time promote the common good of society (can. 795);

WHEREAS a number of Catholic parents have joined their efforts to found a school for the Catholic education of children, called X School, and this foundation is judged to aim at a genuinely useful purpose in Y diocese and has shown sufficient means to achieve its purpose (can. 114, §3);

WHEREAS the proposed statutes of X School are in conformity with the directives issued by the Z Conference of Catholic Bishops under canon 806, §1,

WHEREAS it is desirable that X School be erected as a private juridical person according to the norms of canon law (can. 116);

HAVING duly reviewed the statutes proposed for X School;

I, by the grace of God, bishop of Y hereby approve the enclosed statutes of X School, dated yyyy and erect X School as a private juridical person.

2. Selected Draft articles for Statutes of a Private Juridical Person

2.1. Provisions regarding the Catholic identity of the School

- 2.1.1. It is the responsibility of all members of the educating community to see that X School favours and promotes an integral Catholic formation of its students. The educating community includes parents, directors of the board, administrative and teaching staff, volunteers and students.
- 2.1.2. The members of the Board of Directors are to see their role of governance as a participation in the larger mission of the Church, which mission is always under the general direction of the local Bishop. They are to undertake their duties in a spirit of apostolic sacrifice.
- 2.1.3. In particular, the members of the Board of Directors shall take to heart their duty to form themselves and to exercise their governance in a true Christian spirit, with a religious respect for Catholic doctrine. The Board may organise retreats, as well as hold workshops and conferences that favour the religious formation of the various members of the educating community of X School.
- 2.1.4. Formation and education is to be based on principles which are in conformity with the teaching of the Church [if there is a particular pedagogical approach, it should be stated] and must favour the development of the whole person so that he or she may attain his or her eternal destiny and also promote the common good of society. In particular, the harmonious development of the physical, moral,

intellectual and spiritual dimensions of the student's life are to be cared for in such manner that he or she attains a greater sense of responsibility and right use of freedom suitable to his or her age, and be formed to take an active part in society.

- 2.1.5. The Board of Directors shall publish a mission statement that clearly identifies itself within the ambit of Catholic education. The local Bishop shall have the opportunity to review this statement before it is published.
- 2.1.6. X School shall not bear the title "Catholic" but may present itself in its promotional material as a school offering an education and formation in keeping with Catholic principles.
- 2.1.7. X School shall foster contacts with the local Bishop in keeping with its status as an independent school, and shall cooperate with the local Bishop in exercising his responsibilities in section 2.3 below.

2.2. Provisions regarding parental rights and duties

- 2.2.1. X School shall cooperate with parents, recognising that parents and those who legally take their place enjoy a primary and inalienable right to educate their offspring.
- 2.2.2. The X School Parent Advisory Council (PAC) shall be established and its terms of reference defined by the Board of Directors with the cooperation of parents. The PAC shall serve generally for mutual support of parents, a conduit of communication between parents on the one hand, and the Board of Directors and the School administration on the other,

and as support for the aims and activities of the School. Amongst its terms or reference, exercised through duly appointed individuals or committees, shall be the following:

- drafting its own constitution and bylaws, which shall be submitted to the Board of Directors for review and approval
- proposing potential members for the Board of Directors
- cooperation in school policy development (e.g. school safety, discipline, etc.)
- cooperation in strategic planning and budgeting
- cooperation in curriculum development and university preparedness
- cooperation in planning and executing school programmes and special events
- assisting with communications, including newsletter, announcements, website, and phoning
- graduation planning and activities
- hospitality, open house, and other activities intended to reach out to the wider community
- fundraising
- parental formation

2.2.3. The chaplain, in cooperation with School authorities, shall take to heart the spiritual formation of parents in order that they may faithfully discharge their duties and responsibilities over the education of their children and that all work harmoniously together for the integral formation of the students.

2.3. Provisions regarding the diocesan bishop, the School chaplain, religion courses and religion teachers

2.3.1. Catholic education and formation in the school is subject to the authority of the Church.

2.3.2. The general norms issued by the Conference of Bishops regarding Catholic education and formation shall be applied in the School. The

chaplain shall exercise vigilance regarding these norms. In the absence of a chaplain, the Bishop shall delegate this responsibility to another person.

- 2.3.3. The chaplain or other delegate of the Bishop shall be provided with a report every x years regarding the application of the general norms mentioned in art. 2.3.2.
- 2.3.4. The pastoral care of the students and of the entire school community is exercised through an appointed chaplain or other person designated by the Bishop.
- 2.3.5. The School principal is to establish, foster and maintain a school ministry programme to assist the chaplain in his pastoral duties.
- 2.3.6. The School Board shall present to the Bishop the name of a priest who they esteem is suitable and willing to be appointed chaplain of the School. It is for the Bishop to appoint the chaplain.
- 2.3.7. The chaplain shall see to obtaining the faculties necessary for the pastoral care of the school community, including the faculty to hear the confessions of the members of the school community, to preach to them the Word of God, and other faculties granted by virtue of the Church's law.
- 2.3.8. The chaplain is to organise liturgical celebrations for the School and to prepare the school community for participation.
- 2.3.9. The chaplain is to have a particular concern for the Catholic formation of the lay members of the Board of Directors and all those involved in the

governance and administration of the School. Nevertheless, the chaplain is not to involve himself in the internal governance of the School.

- 2.3.10. For a just reason, the local Ordinary may in accordance with his prudent judgement remove the chaplain of the School without prior notice being given to the School authorities. The consent of the School authorities is not required for this removal.
- 2.3.11. The local Ordinary is to be careful that those who are appointed teachers of religion in the School are outstanding in true doctrine, in the witness of their Christian life, and in their teaching ability.
- 2.3.12. It is for the local Ordinary to approve each teacher of religion. The local Ordinary can delegate this function to the School chaplain or other person.
- 2.3.13. The School's chaplain, or in the absence of a chaplain the School's principal, shall submit in writing to the local Ordinary, before the beginning of each academic year, a list of those who are proposed to teach religion, together with a short summary of their qualifications and experience.
- 2.3.14. The local Ordinary may, if religious or moral considerations require it, demand that a teacher of religion be removed. This demand is to be made in writing, giving the considerations which motivate the demand. Confidentiality and the good name of the teacher removed shall be

respected during the process of removal. The process of removal shall follow all applicable civil laws.

2.3.15. The Board of Directors shall submit the religion curriculum and the list of textbooks to the Bishop or his delegate for approval.

2.3.16. While respecting the independence of X School in its governance and administration, the diocesan Bishop or his delegate has the right to visit X School to ensure the integrity of faith and morals, and that applicable particular law issued by the diocese as well as the norms of the Conference of Bishops, are observed. The visitation shall be coordinated in advance with the Board of Directors. This right of visitation in no way implies responsibility by the Bishop or his delegate for any financial, administrative, disciplinary or other practices in the School.

2.4. Review of amendments to statutes by the local Bishop.

Amendments to these statutes are to be submitted in writing to the local Bishop by the Board of Directors, who is to review them before they become effective.

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BIOGRAPHY

Philip Creurer was born in 1962 in Melfort, Saskatchewan, Canada. He attended both Catholic and public elementary schools from Quebec to British Columbia, and non-Catholic secondary school in Saskatoon, Saskatchewan. He obtained a Bachelor of Arts in history and political science as well as a Bachelor of Laws from the University of Saskatchewan, during which time he also studied for one semester at the Université de Grenoble, France. He was called to the Bar in the Canadian province of British Columbia. After working several years for an insurance company, in 1992 he entered the house of formation for the Priestly Fraternity of St. Peter (FSSP) in Bavaria, Germany. He was ordained a priest in 1998. In 2000 he completed his J.C.L. from St. Paul University, after which he was appointed General Secretary of the FSSP, then Rector of the Priesterseminar Sankt Petrus in Germany. In 2006 Philip Creurer returned to Canada to become parish priest of St. Clement Parish. In 2008 he began his doctoral studies at St. Paul University while maintaining his appointment as pastor.

ABSTRACT

Philip A. Creurer

Parent-Founded Schools for the Catholic Education of Children: Considerations for Canonical Recognition in the North American Context

The issue of schools founded at the initiative of Catholic parents for the Catholic formation of their children has not been analysed from the canonical perspective. The thesis supplies this need and concludes with practical applications to assist both parents wishing or already engaged in founding a school, and pastors who are faced with such a foundation in their parish or diocese.

The first chapter roots the parents' initiative in their particular ecclesial vocation and mission, tracing the line of development of their vocation in papal and conciliar documents to its concrete application in apostolic works. The normative value of this vocation and mission is analysed by a consideration of the canons regarding parental rights and duties and those regarding Catholic education and schools. Finally, the jurisdiction of the local bishop over education and schools is considered.

The second chapter takes an interdisciplinary approach to analyse the current context of Catholic education in North America. The pressures faced by Catholic schools arising from social, political and ecclesial changes in recent decades provide the framework within which the parental rights outlined in the first chapter are actually exercised. These same pressures are relevant to parental initiatives to found schools: financial constraints, secularisation, state control of curriculum including religious education, the dwindling numbers of members from religious institutes actively involved in schooling, and growing educational trends outside the mainstream, such as home-schooling.

The third chapter focuses on the adaptive organisational structures Catholic schools have undertaken to meet the pressures analysed in the second chapter. In particular, with an increasingly crowded field of education options open to parents, Catholic schools have sought to expressly embed their distinctive contribution, namely their Catholic identity, through modifications to governance bodies and documents. Canonical structures, such as juridical persons, are available to help in this process of adaptation, but so far have been little used.

The fourth chapter turns to an analysis of Catholic health care institutions and institutions of higher education to draw out some useful developments as they faced similar challenges to those confronting Catholic schools. In particular, the emergence of lay sponsorship models and the insistence on institutional or corporate identity provide a rich experience from which parents wishing to found their own schools can draw. The chapter concludes that the canonical structure of the private juridical person provides a hopeful canonical solution to assist both parents and pastors address the many issues and pressures faced by parental initiatives to found schools for the Catholic education of their children. Draft articles for the statutes of such a juridical person are proposed in an appendix.